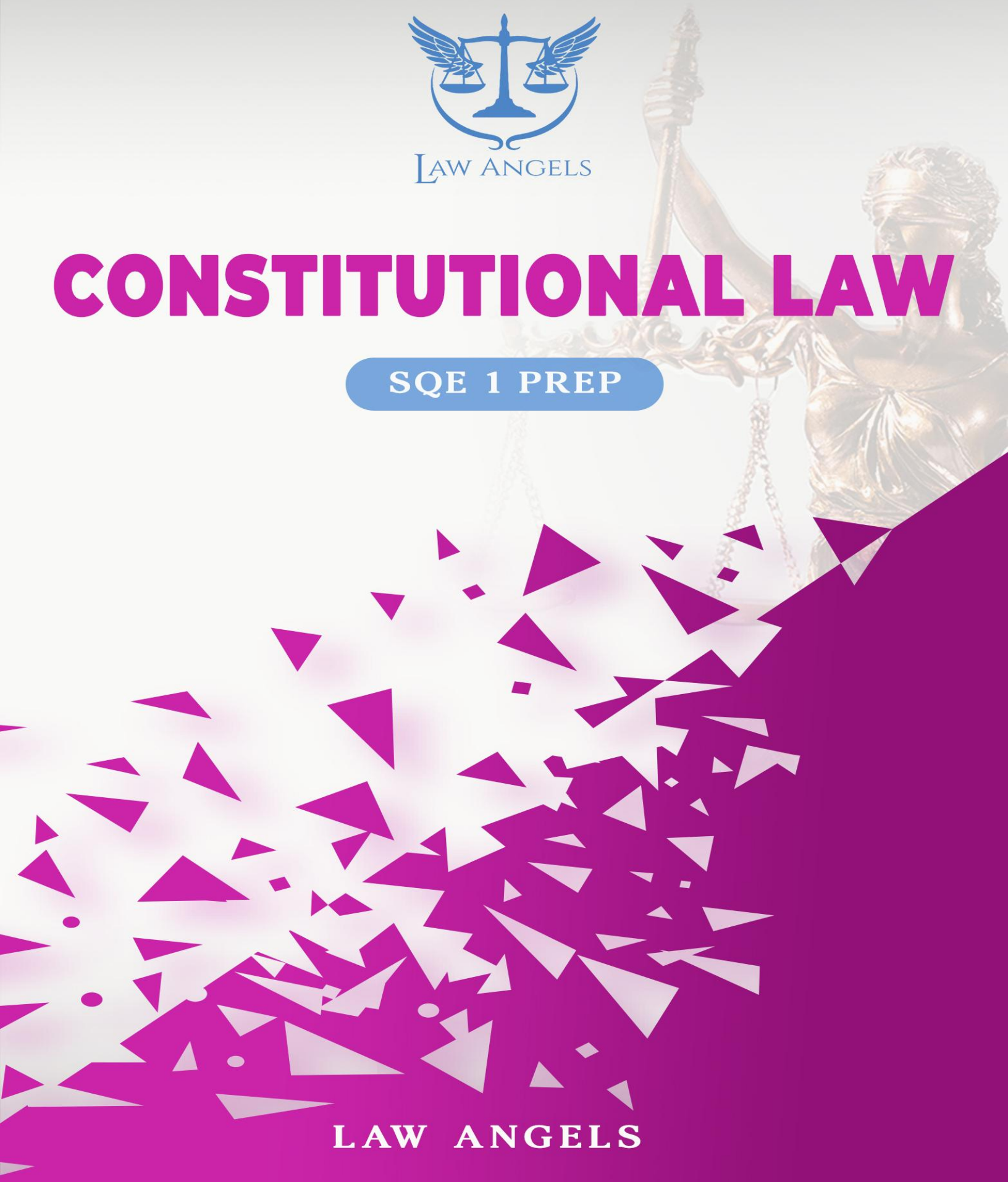
LAW ANGELS

CONSTITUTIONAL LAW

SQE 1 PREP



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CONSTITUTIONAL LAW

First Edition

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PREFACE

Constitutional and Administrative law is the foundation of the state, governing the relationship between the individual, the executive, and the institutions of power. It is a discipline where historic conventions, fundamental rights, and the rule of law intersect with the modern challenges of governance and public accountability. This textbook is designed to be your comprehensive guide through this foundational area of law, providing a clear and analytical pathway from the doctrines of parliamentary sovereignty to the grounds for judicial review.

Our approach is built on a simple belief: to master constitutional and administrative law, you must understand not just the legal principles and case law, but how they operate to control power, protect citizens, and maintain a democratic balance. We have therefore structured this text to do more than present legal theory. It deconstructs the UK's uncodified constitution, breaking down its core components, from the sources of the constitution and the role of constitutional statutes to the separation of powers and the protection of human rights, and illustrating how they operate in real-world political and legal scenarios. You will find a consistent focus on the principles of judicial review, the practical impact of the *Human Rights Act 1998*, and the evolving relationship between the UK and devolved legislatures.

The SQE1 assessment requires a deep and application-based knowledge. This book is tailored to that challenge. We integrate pivotal cases and constitutional statutes, such as the *Human Rights Act 1998* and the *Constitutional Reform Act 2005*, not as isolated facts, but as the essential tools for constructing and analysing legal arguments about state power. Clear examples, flowcharts tracing the path of judicial review, and scenario-based problems are woven throughout to transform your understanding from passive reception to active application.

Our goal is to equip you with a formidable and practical command of public law. Whether you are assessing the legality of a government decision, advising on a human rights claim, or understanding the limits of parliamentary competence, the following pages will provide the clarity, conceptual rigour, and analytical depth you need to succeed.

Welcome to the study of constitutional and administrative law. The principles are foundational, and their mastery is indispensable for any aspiring solicitor.

Law Angels

ACKNOWLEDGEMENTS

The development of this textbook was a significant endeavor, and we extend our sincere gratitude to the collective efforts that made this publication possible.

At Law Angels, we are fortunate to be supported by a dedicated team whose commitment to legal education and excellence is the cornerstone of our work. The collaborative spirit, legal expertise, and tireless effort of our entire organization were instrumental in shaping this text from concept to completion.

We also extend our appreciation to the broader legal community. The insightful feedback from our academic and practitioner reviewers greatly enhanced the accuracy and clarity of the material. Their contributions, offered in a spirit of scholarly collaboration, have been invaluable in ensuring this resource meets the rigorous demands of the SQE curriculum.

We are also thankful for the unwavering support from our personal networks, whose understanding provided the foundation that allowed this project to thrive.

It is our privilege at Law Angels to contribute to the education of future solicitors, and we hope this text serves as a reliable guide for the next generation of legal professionals.

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GLOSSARY OF KEY TERMS

A

Accountability: The principle that public officials must be answerable for their actions and decisions to Parliament, the courts, and the public.

A.V. Dicey: A constitutional scholar whose writings defined the doctrines of Parliamentary Sovereignty and the Rule of Law in the UK.

Administrative Law: The branch of public law that governs the actions of public authorities and provides remedies for unlawful, irrational, or procedurally unfair decisions.

Appropriation: The process by which Parliament authorises the allocation and expenditure of public money by the government.

B

Bill of Rights (1689): A foundational statute limiting monarchical power, guaranteeing parliamentary supremacy, and establishing key civil liberties such as free speech in Parliament.

By-laws: Local regulations made by public bodies or local authorities under powers delegated by Parliament.

C

Cabinet: The central decision-making body of government, composed of senior ministers led by the Prime Minister, operating under collective responsibility.

Case Law (Common Law): Law developed by judicial decisions, particularly significant in defining limits of government power and upholding constitutional principles.

Codified Constitution: A single written document that sets out the structure of the state, its institutions, and the fundamental rights of citizens (unlike the UK's uncodified system).

Collective Responsibility: A constitutional convention requiring all ministers to publicly support Cabinet decisions or resign.

Constitutional Convention: An unwritten rule of political practice regarded as binding on constitutional actors though not legally enforceable.

Constitutional Reform Act 2005: Statute that restructured the judiciary, created the UK Supreme Court, and clarified the separation between executive, legislative, and judicial powers.

D

Devolution: The statutory transfer of powers from Westminster to devolved governments in Scotland, Wales, and Northern Ireland.

Delegated Legislation: Laws made by bodies other than Parliament under authority delegated by an Act of Parliament.

Democratic Mandate: The legitimacy conferred upon a government by its electoral victory and its manifesto commitments.

Doctrine of Parliamentary Sovereignty: Principle that Parliament is the supreme law-making authority and cannot be overridden by any other body.

E

European Communities Act 1972: The statute that gave effect to European Union law in the UK, creating a temporary limitation on parliamentary sovereignty.

European Union (Withdrawal) Act 2018: The Act that repealed the 1972 Act and restored full parliamentary sovereignty after Brexit.

Executive: The branch of government responsible for implementing laws and managing public administration (Prime Minister, Cabinet, civil service).

F

Fixed-term Parliaments Act 2011: Statute (now repealed) that removed the Prime Minister's prerogative to call early general elections, setting a five-year cycle for Parliaments.

Fusion of Powers: The UK system's overlap between the executive and legislature, as ministers are drawn from Parliament.

H

Human Rights Act 1998 (HRA): Incorporates the European Convention on Human Rights into domestic law, allowing UK courts to review legislation for compatibility and issue declarations of incompatibility.

House of Lords: The upper chamber of Parliament, primarily a revising chamber that scrutinises legislation and may delay but not ultimately block bills.

J

Judicial Review: The process by which courts review the lawfulness of actions or decisions made by public authorities, ensuring they act within their powers (*ultra vires* control).

Judicial Independence: The principle that judges must be free from political influence or interference in performing their duties.

L

Legal Authority: The requirement that every government action must be authorised by law, either by statute or prerogative power.

Legitimacy: The accepted right of a government or authority to rule, derived from democratic consent, legality, and adherence to convention.

Lord Chancellor: A senior ministerial office historically combining judicial, legislative, and executive roles, separated by the *Constitutional Reform Act 2005*.

M

Magna Carta (1215): An early constitutional document establishing that the King is subject to the law and protecting the right to due process.

Ministerial Responsibility: The convention that ministers are answerable to Parliament for their conduct and that of their departments.

Monarch (The Crown): The ceremonial head of state whose powers (the Royal Prerogative) are exercised by government ministers in the Monarch's name.

P

Parliamentary Privilege: The legal immunity protecting freedom of speech and proceedings within Parliament from interference by the courts.

Parliamentary Sovereignty: The doctrine that Parliament can make or unmake any law and that no person or body can override its legislation.

Prerogative Powers: Ancient powers of the Crown exercised by ministers, including treaty-making, defence, and appointments, now subject to judicial review (*GCHQ case*).

Public Order Act 1986: Key statute regulating assemblies, protests, and public conduct in the interest of maintaining order.

R

Rule of Law: A constitutional principle articulated by *A.V. Dicey* asserting that (1) no one is punishable except for a breach of law, (2) all are equal before the law, and (3) constitutional principles arise from the ordinary law.

Royal Assent: The formal approval by the Monarch required for a bill passed by Parliament to become law, always granted by convention.

S

Salisbury-Addison Convention: The convention that the House of Lords will not reject government bills implementing manifesto commitments.

Separation of Powers: The division of governmental functions among the legislative, executive, and judicial branches to prevent concentration of power.

Sewel Convention: The convention that Westminster will "not normally" legislate on devolved matters without the consent of the devolved legislature.

Statute Law: Written laws enacted by Parliament; the highest form of law in the UK's constitutional hierarchy.

Supreme Court of the United Kingdom: The highest appellate court established by the *Constitutional Reform Act 2005*, replacing the Appellate Committee of the House of Lords.

U

Ultra Vires: Latin for "beyond the powers"; describes acts by a public authority that exceed its legal authority and are therefore void.

Uncodified Constitution: A constitution not contained in a single document but made up of statutes, conventions, common law, and authoritative texts.

W

Westminster System: The UK's model of parliamentary democracy characterised by a fusion of powers, collective cabinet responsibility, and a constitutional monarchy.

1

THE UK CONSTITUTION: FOUNDATIONS AND FUNDAMENTAL PRINCIPLES

Imagine a school without any rules. There would be no one to decide what subjects are taught, no one to organise the sports day, and no fair way to resolve a disagreement in the playground. It would be chaotic. A country is much larger and more complex than a school, and to avoid chaos, it needs a set of fundamental rules that establish how it is governed. This set of rules is called a constitution.

In simple terms, a constitution is the rulebook for a nation. It does three key things:

1. It creates the players and the pitch: It establishes the main institutions of the state; the Parliament that makes the laws, the Government that runs the country day-to-day, and the Courts that interpret the laws and settle disputes.

2. It sets the rules of the game: It outlines the powers and duties of these institutions and the rules for how they must interact with each other and with the citizens.

3. It protects the players: It often includes a list of the fundamental rights and freedoms of the people, such as the right to a fair trial or freedom of speech, which the state must respect.

Most countries, like the United States or Germany, have a single, authoritative document that contains this entire rulebook. This is known as a codified or written constitution. The United Kingdom is different. It is one of the very few countries in the world that does not have a single,

written constitutional document. So, how does the UK function? The answer lies in its unique and ancient constitutional arrangements, which we will explore in this chapter.

1.1 The Nature of the UK Constitution: Uncodified, Unitary, and Flexible

The UK constitution is best understood by three key characteristics: it is uncodified, unitary, and flexible.

Uncodified

This does not mean the UK has no constitution. It means the rules are not gathered into one single, supreme document labelled "The Constitution". Instead, the British constitution is found in a variety of sources. It is like having the rules of a game scattered across a series of different rulebooks, old tradition, and understood practices, rather than in one master manual. We will look at these sources in detail in section 1.4.

Unitary

A unitary state is one where ultimate political power is held by a single, central authority. In the UK, the UK Parliament in Westminster is this sovereign central authority. While Scotland, Wales, and Northern Ireland have their own devolved governments (like the Scottish Parliament), these institutions were created by, and can have their powers altered by, the UK Parliament. Power flows from the centre outwards. This contrasts with a federal state, like the USA or Germany, where power is shared between a central government and individual states, each with their own protected areas of authority that the central government cannot easily take away.

Flexible

Because the UK constitution is not set in one supreme document, it can be changed relatively easily. In many countries with a written constitution, changing it requires a special, difficult process like a super-majority vote or a referendum. In the UK, a constitutional law (like the *Human Rights Act 1998*) is passed in exactly the same way as a normal law (like a law regulating street parking); by a simple majority vote in Parliament. This makes the

constitution highly adaptable. However, critics argue it is also too easily changed, risking the erosion of important protections.

1.2 The Pillars of the Constitution: Parliamentary Sovereignty, The Rule of Law, and the Separation of Powers

The UK constitution is built upon three fundamental principles, or pillars, which hold the entire system up. If any one of these pillars were to collapse, the system would fail.

1. **Parliamentary Sovereignty**

   This is often called the dominant characteristic of the UK constitution. It means that Parliament is the supreme legal authority in the UK. It can make or unmake any law it wishes on any subject. No person or body, not a King, a Prime Minister, or a court, can override or set aside an Act of Parliament.

   Example: Imagine Parliament passed an Act stating "All citizens named David must wear a green hat on Tuesdays." As silly as this law might seem, under the principle of Parliamentary Sovereignty, it would be the law of the land. The courts would have to enforce it. Conversely, no previous Parliament can bind a future one. If a new Parliament decided the next day to repeal the "Green Hat Act," it could do so. No law is immune from being changed or scrapped.

2. **The Rule of Law**

   This principle ensures that the government is not above the law. It means that everyone, from the Prime Minister to a regular citizen like a student named Sarah, is subject to the same law and the same courts. The legal philosopher *A.V. Dicey* explained the Rule of Law as having three key elements:

   - **No sanction without breach**: A person can only be punished if they have broken a law, and not just because the government dislikes them.
   - **Equality before the law**: Everyone is equal under the law, regardless of their wealth, status, or power.

- **The constitution is the result of the ordinary law**: Our rights are protected not by a single bill of rights, but by the decisions of judges in common law cases and by Acts of Parliament.

Example: If a government minister, let's call him Mr. Jones, orders a new road to be built through a public park without the legal authority to do so, the Rule of Law means that Sarah, who uses the park, can take Mr. Jones to court. The court can rule that his action was unlawful and stop it, even though he is a powerful minister.

3. **The Separation of Powers**

This principle suggests that for a state to be free and prevent tyranny, the three primary functions of the state should be carried out by different, independent bodies. These are:

- The Legislature (Parliament); makes the laws.
- The Executive (The Government); implements and enforces the laws.
- The Judiciary (The Courts); interprets the laws and settles disputes.

In the UK, the separation is not as strict as in the USA. For instance, the Prime Minister and government ministers are also members of the Legislature (Parliament). This is known as a fusion of powers between the executive and the legislature. However, the independence of the judiciary is now strongly protected. Since the *Constitutional Reform Act 2005*, the UK's highest court is no longer the House of Lords but a separate Supreme Court, ensuring a clearer separation between judges and the other branches of government.

1.3 The Principle of Legitimacy in Government Action

For any government to be stable and effective, its citizens must generally accept its right to rule and its power to make decisions on their behalf. This acceptance is what we mean by legitimacy. A legitimate government is one that is seen as having both the legal and the moral authority to govern. Without legitimacy, a government must rely on force and fear, which is unsustainable in the long term. In the UK, the legitimacy of government action is derived from a powerful combination of three key sources.

1.3.1 Democratic Mandate: The Voice of the People

The most powerful source of legitimacy in a modern democracy is the consent of the governed. In the UK, this is achieved through the general election.

The UK is divided into 650 constituencies. In each one, voters elect a Member of Parliament (MP) to represent them in the House of Commons. The political party that wins the most seats across the country is invited by the Monarch to form the government. Its leader becomes the Prime Minister.

Why it Creates Legitimacy.

This process provides the government with a democratic mandate. This is the idea that the government has been chosen by the people and therefore has the legitimate authority to implement the policies it set out in its election manifesto. When the government, led by a Prime Minister like David, introduces a new policy, he can claim, "I have a mandate from the people to do this, as they voted for my party knowing this was our plan."

The "First-Past-the-Post" System

It is crucial to understand that a party can form a government without winning a majority of the national popular vote. It only needs to win more *seats* than any other single party. This means a government can have a strong mandate in terms of parliamentary seats, even if more people voted for other parties. This can sometimes lead to debates about the strength of its legitimacy for particularly controversial policies.

Example: Imagine a government proposes a major new high-speed railway. It argues that this policy was a key pledge in its election manifesto. This appeal to its democratic mandate is a primary tool for justifying the action and convincing the public and Parliament that the decision is legitimate.

1.3.2 Legal Authority: The Rule of Law in Action

A democratic mandate alone is not enough. A government must also act within the law. This is the principle of legal authority, which is a core component of the Rule of Law.

The principle is that every single action taken by the government, a minister, or a public official must be authorised by law. This authority can come from two main places:

- **Statutory authority**: An Act of Parliament explicitly grants the power. For example, the *Health and Safety at Work etc. Act 1974* gives ministers the power to make regulations about workplace safety.
- **Prerogative authority**: The action is taken using a residual, common law power of the Crown, known as the Royal Prerogative (discussed in detail in section 1.4).

The Consequences of Illegality

If the government acts without legal authority, its actions are considered *ultra vires* (a Latin term meaning "beyond the powers") and are therefore unlawful. The courts have the power to step in and strike down such actions through the process of judicial review.

Example: Let's say a Minister, named Sarah, is deeply concerned about litter in parks. She uses her position to order local councils to imprison anyone caught dropping litter. This action would be illegitimate and unlawful. Why? Because there is no Act of Parliament that gives Minister Sarah the power to create new criminal offences or order imprisonments on a whim. She is acting without legal authority. A citizen, let's call him Tom, could challenge this decision in court, and the judge would quash it because it lacks legal foundation.

1.3.3 Constitutional Convention: The Unwritten Rules of Good Behaviour

The third source of legitimacy comes from adhering to the UK's unwritten rules of constitutional conduct, known as constitutional conventions.

Bridging the Gaps

Conventions provide legitimacy by ensuring that the exercise of power is not just technically legal, but also constitutionally proper. They fill the gaps left by the law and ensure that the system operates in a way that is considered fair and acceptable.

Legitimacy through Tradition

When a government follows these long-standing conventions, it signals respect for the system and its history, which reinforces its legitimacy. Conversely, breaking a major convention can cause a constitutional crisis and severely damage a government's perceived legitimacy, even if its action was technically legal.

Example: By law, the Queen must give her Royal Assent to any bill passed by Parliament for it to become law. There is no law, however, that forces her to do so. It is a very strong convention that she always gives it. If a Prime Minister, David, advised the Queen to refuse assent for a bill he disliked, and she followed his advice, this would be a catastrophic breach of convention. Even though the Queen technically has the legal power, the action would be seen as utterly illegitimate, undemocratic, and would trigger a massive political and public outcry, likely forcing the Prime Minister to resign.

In summary, a government's action is most secure when it is supported by a trifecta of legitimacy: it was promised to the electorate (Democratic Mandate), it is permitted by law (Legal Authority), and it is conducted according to the accepted rules of the game (Constitutional Convention).

1.4 Sources of the Constitution

Because the UK lacks a single constitutional document, its constitution is a tapestry woven from several distinct sources. Understanding these sources is key to understanding how the British constitution works in practice. They can be thought of as different chapters in a scattered, but functional, rulebook.

1.4.1 Statute Law: The Written Rules from Parliament

Statute law refers to Acts of Parliament. In a constitution based on Parliamentary Sovereignty, these are the most important source. While no law is formally labelled "constitutional," many statutes have a profound effect on the system of government and the rights of citizens. These are often referred to as "constitutional statutes."

Key Characteristics

1. They are written and authoritative. Once an Act is passed, it is the highest form of law.
2. They can create, abolish, or reform major institutions of the state.
3. As with any other Act, they can be amended or repealed by a simple majority in a future Parliament.

Foundational Statutes

1. ***Magna Carta (1215)***: While most of its clauses have been repealed, its legendary status stems from *Chapter 39*, which established the principle that the king was not above the law. It declared that no free man could be punished "except by the lawful judgement of his equals or by the law of the land." This was a seed from which the Rule of Law grew.
2. ***The Bill of Rights (1689)***: This followed the *Glorious Revolution of 1688* and was a decisive shift of power from the Monarch to Parliament. It made it illegal for the Crown to suspend laws, levy taxes, or maintain a standing army without Parliament's consent. It also established key freedoms, such as freedom of speech in Parliament (known as Parliamentary Privilege).
3. ***The Human Rights Act (1998)***: This was a revolutionary statute that incorporated the rights from the *European Convention on Human Rights* (ECHR) directly into UK law. This meant that for the first time, individuals could argue their Convention rights (like the right to a fair trial or freedom of expression) in UK courts, without having to go to the European Court of Human Rights in Strasbourg.
4. ***The Constitutional Reform Act (2005)***: This Act dramatically reshaped the UK's constitutional architecture. Its most visible change was the creation of the Supreme Court, which took over the judicial role previously performed by the Law Lords in the House of Lords. This strengthened the separation of powers by making the judiciary visibly separate from the legislature. It also reformed the role of the Lord Chancellor, who was previously the head of the judiciary, a speaker of the House of Lords, and a government minister; a clear fusion of powers.

1.4.2 Case Law (Common Law): The Rules from the Judges

Case law, also known as common law, is the body of law created by judges in their decisions in court cases. Over centuries, judges have developed principles that form a crucial part of the UK's constitutional fabric.

Key Characteristics

1. It is judge-made law, built case-by-case on the principle of *stare decisis* (standing by previous decisions).
2. It is particularly important for defining the limits of governmental power and protecting individual rights.
3. While statute can always override common law, judges interpret statutes and can develop common law principles unless Parliament explicitly stops them.

Crucial Common Law Doctrines

1. **Judicial review**: This is the most significant common law contribution. It is the process by which the courts supervise the exercise of public power. If a government minister or a public body acts illegally, irrationally, or unfairly, the High Court can issue a remedy, such as quashing the decision. For example, in the landmark case of ***Council of Civil Service Unions v Minister for the Civil Service*** [1985] AC 374 (the "GCHQ case"), the courts established that even the use of prerogative powers (see below) was subject to judicial review.
2. **The principle of legality**: This is a powerful rule of statutory interpretation. It means that if Parliament intends to pass a law that infringes on a fundamental right (like the right of access to a court), it must do so in clear, unambiguous language. The courts will not assume that Parliament intended to override such rights unless it expressly says so.
3. **Development of rights**: Before the *Human Rights Act 1998*, many of our basic freedoms, such as the right to personal liberty, were protected primarily by the common law through the writ of *habeas corpus* (a legal action requiring a person under arrest to be brought before a judge).

1.4.3 The Royal Prerogative: The Historical Powers of the Crown

The Royal Prerogative is a set of residual powers and privileges that historically belonged to the Monarch. In today's constitutional monarchy, almost all of these powers are exercised not by the King or Queen personally, but by government ministers in his or her name.

Key Characteristics

1. They are non-statutory powers, meaning they are not granted by an Act of Parliament; they are ancient and inherent to the Crown.
2. They are residual, meaning that Parliament can abolish or restrict them by passing a statute. Over time, many prerogative powers have been replaced by statutory schemes.
3. They are subject to judicial review, as confirmed in the *GCHQ case*.

Examples of Prerogative Powers

1. **Appointing and dismissing ministers**: The Prime Minister is appointed by the Monarch. The PM then "advises" the Monarch on who should be appointed to other ministerial roles. In reality, the Monarch always follows this advice.
2. **Making war and deploying the armed forces**: The power to declare war and deploy troops overseas is a prerogative power, exercised by the Prime Minister and the Defence Secretary. This has been a source of controversy, leading to calls for it to be put on a statutory footing to require parliamentary approval.
3. **Conducting foreign affairs**: The power to make treaties, recognise foreign states, and accredit diplomats is a prerogative power. However, a significant convention (the "Ponsonby Rule") now requires that most treaties be laid before Parliament for 21 sitting days before they are ratified.
4. **Giving royal assent to bills**: As discussed, this is a legal power of the Monarch, but its use is governed entirely by convention.

1.4.4 Constitutional Conventions: The Binding Habits

We now return to the fascinating and peculiar world of constitutional conventions. These are the unwritten rules of constitutional behaviour that are considered binding by and upon those who operate the constitution, but which are not legally enforced by the courts.

Definition and Test

The constitutional scholar *Sir Ivor Jennings* provided the classic three-part test for identifying a convention:

1. What are the precedents? Have people in the past consistently acted in this way?
2. Did the actors in the precedents believe they were bound by a rule? Did they feel they had to act that way because it was the right and proper thing to do?
3. Is there a good reason for the rule? Does the rule serve a constitutional principle, such as enforcing accountability or ensuring democratic behaviour?

Why Do Conventions Matter?

Conventions are the oil in the engine of the UK constitution. They make the outdated legal machinery work in a modern, democratic way. They translate legal powers into constitutional practice.

Detailed Examples of Key Conventions

1. **The Monarch's appointments**: By law, the Monarch can appoint anyone she wishes to be Prime Minister. By convention, she must appoint the person who can command the confidence of the House of Commons (almost always the leader of the largest party).
2. **The Monarch assents to bills**: By law, the Queen must give her Royal Assent to a bill for it to become an Act. By convention, she always gives it. She has no real choice.
3. **The Prime Minister must be an MP:** There is no law stating this. It is a firm convention that the Prime Minister must be a member of the House of Commons, accountable to Parliament.
4. **Ministerial responsibility**: This is a cornerstone of accountability. It has two parts:

- **Collective responsibility**: Ministers must publicly support all government decisions, or resign. This presents a united front to the public and Parliament. If a minister, let's call her Emily, strongly disagrees with a new government policy, she cannot publicly criticise it. She must either stay silent and support it, or resign from her post.
- **Individual responsibility**: Ministers are responsible for the conduct of their departments. If a serious failure occurs within their department, the convention is that they should resign. This was seen in 1982 when *Lord Carrington* resigned as Foreign Secretary after the Falklands invasion, accepting responsibility for a failure in his department, even though he was not personally at fault.

5. **The *Salisbury-Addison Convention***: This convention states that the House of Lords will not block or wreck government bills that implement manifesto commitments from the elected government. This respects the democratic mandate of the House of Commons.

Enforcement of Conventions

So, what happens if a convention is broken? The key point is that they are not enforced by courts of law. A judge will not send a Prime Minister to prison for calling an early election without following the *Fixed-term Parliaments Act* (as was a convention before its repeal). Instead, enforcement is political. The penalty is political outrage, loss of credibility, accusations of acting unconstitutionally, and, in extreme cases, resignation. For example, if a Prime Minister refused to resign after losing a general election, the resulting political and public pressure would be immense, making their position untenable. The force of convention is the force of political morality and the desire of political actors to maintain the stability and integrity of the system.

1.6 Conclusion

In conclusion, the United Kingdom’s constitution stands out for its uncodified and flexible nature, relying on statutes, case law, royal prerogatives, and conventions rather than a single written document. Its strength lies in the balance between legal authority and political practice, anchored by the principles of parliamentary sovereignty, the rule of law, and the

separation of powers. Together, these elements create a dynamic system that allows for adaptation through ordinary Acts of Parliament while maintaining legitimacy through democracy, legality, and convention. Conventions, though unenforceable by courts, remain essential to ensuring the smooth and accountable operation of government within this constitutional framework.

2

THE CORE INSTITUTIONS OF A STATE AND THEIR INTERRELATIONSHIP

This chapter explores the core institutions that form the foundation of the United Kingdom's constitutional system and the intricate relationships between them. It examines how power is distributed and exercised among the Monarch, the Government, Parliament, the Devolved Administrations, and the Judiciary. While the Monarch serves as a symbolic head of state, real political authority lies with the Government, which operates under the scrutiny and ultimate sovereignty of Parliament.

The chapter also considers how this balance is maintained through conventions, accountability mechanisms, and judicial oversight, and how evolving developments such as devolution and human rights law continue to shape and challenge the traditional framework of the British constitution.

2.1 The Monarch and the Crown: Historical and Modern Roles

Imagine a game of chess. The King is the most important piece on the board—the entire game revolves around its protection. However, the King itself cannot move very far. Its power is realised through the other pieces. This is a useful way to understand the role of the British Monarch in the modern constitution.

It is crucial to distinguish between two concepts: The Monarch (the individual, currently King Charles III) and The Crown (the institution of the state, representing the government and its power). Historically, the Monarch was the state. The famous phrase, "The King can do no wrong," meant that all sovereign power was vested in him. Today, that phrase has been reinterpreted to mean that the institution of the Crown is sovereign, but the person of the Monarch is above politics and not personally responsible for government decisions.

The King's role is now almost entirely ceremonial and symbolic. His powers, known as the Royal Prerogative, are almost all exercised on his behalf by elected politicians. For example:

- **Appointing the Prime Minister**: By convention, the King must appoint the person who can command the confidence of the House of Commons (almost always the leader of the largest party). He has no personal choice in the matter.
- **Royal assent**: A bill must receive Royal Assent to become law. By convention, the King always gives it. The last monarch to refuse was Queen Anne in 1708.
- **The King's speech**: At the State Opening of Parliament, the King reads the speech outlining the government's plans for the coming year. Crucially, he is reading a speech written entirely by the government.

So, what is the Monarch's real job? It is to be a symbol of national unity, a figurehead above the political fray, and a source of stability and continuity as governments change. The power of the Crown is real, but it is exercised by others in the Monarch's name.

2.2 Central Government: The Prime Minister, Cabinet, and Ministerial Responsibility

If the Monarch is the symbolic head of state, Central Government is the engine room. It is the branch that runs the country day-to-day. It is led by the Prime Minister and consists of the Cabinet and other ministers, all of whom are usually Members of Parliament.

The Prime Minister (PM)

The PM is the head of the government. Think of the PM, let's call her Sarah, as the captain of a ship. She sets the overall direction, chooses her crew (the ministers), and is ultimately in charge. Her key powers include:

- Appointing, reshuffling, and dismissing ministers.
- Chairing the Cabinet and setting its agenda.
- Being the main government spokesperson, both at home and abroad.
- Advising the Monarch on the use of prerogative powers.

The Cabinet

The Cabinet is a committee of the most senior ministers (e.g., Chancellor, Foreign Secretary, Home Secretary). They are chosen by the PM. The Cabinet operates on two key constitutional principles:

1. **Collective responsibility**: This is a crucial convention. It means that once a decision is made by the Cabinet, all ministers must support it publicly, or resign. Imagine Sarah's Cabinet decides to build a new airport. Even if the Transport Minister, David, argued against it in private, he must publicly support it. If he goes on television to criticise it, he will be expected to resign. This presents a united front to the public and Parliament.

2. **Individual responsibility**: This convention holds that ministers are responsible for the actions of their government departments. If a serious mistake is made in their department, they are expected to take the blame. For instance, if the Department for Health, led by Minister Emily, makes a catastrophic error in a new computer system that costs the taxpayer millions, the convention is that Emily should resign to take responsibility, even if she didn't personally make the error.

2.3 Parliamentary Sovereignty: The Diceyan Doctrine, Its Meaning and Modern Challenges

2.3.1 The Foundation: *A.V. Dicey's* Three Pillars

Imagine a game where one player is the ultimate rule-maker. This player can create any rule, change any rule, and no other player can ever overrule them. In the British constitution, that ultimate rule-maker is the Queen in Parliament, and this supreme power is known as Parliamentary Sovereignty. It is the most important principle in the UK's uncodified constitution.

The most famous explanation of this principle comes from the 19th-century jurist, *Professor A.V. Dicey*. He argued that Parliamentary Sovereignty consisted of three core ideas:

1. **The Positive Aspect**

   Parliament can make or unmake any law whatsoever. This means there is no subject, no matter how fundamental, that Parliament cannot legislate on. It could, in theory, pass an Act to extend its own life indefinitely, to alter the succession to the throne, or to abolish the Scottish Parliament. There are no legal limits to its law-making power.

   Example: Imagine a public health crisis. Parliament could pass an Act, let's call it the "Emergency Health Act," which gives the government, led by a Prime Minister named Sarah, the power to restrict movement, close businesses, and mandate vaccinations. However controversial, this Act would be the supreme law because Parliament has the sovereign right to make it.

2. **The Negative Aspect**

   No Parliament can bind its successors. Because every Parliament is sovereign, it is impossible for one Parliament to pass a law that a future Parliament cannot change or repeal. A law passed today is not set in stone forever. A new Parliament, with a new majority, can always come along and undo it.

   Example: Suppose one Parliament, concerned with the environment, passes the "Clean Air Act," which bans all petrol cars from 2035 onwards. Ten years later, a new government

under a Prime Minister named David is elected, arguing this policy is damaging the economy. That new Parliament can simply pass another Act, the "Clean Air (Repeal) Act," which scraps the ban entirely. The first Parliament could not legally prevent this from happening.

3. The Exclusionary Aspect

No other body can override or set aside an Act of Parliament. This means that the courts do not have the power to strike down an Act of Parliament as "unconstitutional." The role of the judges is to apply and interpret the laws that Parliament makes, not to question their validity. If an Act of Parliament is clear, the judges must follow it, even if they think it is unjust or unwise.

Example: Let's go back to the silly "Green Hat Act" from our introduction, which requires anyone named Thomas to wear a green hat on Tuesdays. If a man named Tom is taken to court for not wearing his hat, the judge might personally think the law is ridiculous. But if the Act of Parliament is clear, the judge has no choice. She cannot say, "This law is stupid, so I declare it invalid." She must find Tom guilty because her job is to apply the law as written by the sovereign Parliament.

The Legal Source of Sovereignty

But where does this immense power come from? Unlike in countries with a written constitution, there is no single document that grants Parliament its authority. Instead, the principle is a common law reality; it is a rule recognised and enforced by the judges themselves. The judges, over centuries, have accepted that the highest source of law is an Act of the Queen in Parliament. This is a profound point: the ultimate power of Parliament is ultimately policed and upheld by the judiciary.

2.3.2 Modern Challenges to the Classic Doctrine

While Dicey's view remains the legal starting point, the practical, real-world application of Parliamentary Sovereignty has been significantly challenged and nuanced in the modern era. The pure, unfettered power he described now operates in a more complex constitutional environment.

1. The Challenge from Europe: EU Membership and Supremacy

The most significant legal challenge to Parliamentary Sovereignty came from the UK's membership of the European Union (EU). When the UK joined the European Communities in 1973, it passed the *European Communities Act 1972*. This Act did something unprecedented: it provided that EU law should have direct effect and supremacy within the UK legal system.

This created a conflict: Dicey said UK Parliament was supreme, but EU law claimed supremacy. How could this be? The answer, developed by the courts, was ingenious.

In the famous case of ***The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*****,** [1990] ECR I-2433, Spanish fishing companies challenged a UK law that, under EU rules, was discriminatory. The House of Lords (then the UK's top court) suspended the operation of the UK Act to give effect to EU law. This was a seismic moment. For the first time, a UK court had effectively disapplied an Act of Parliament.

How was this possible under sovereignty? The courts reasoned that the *European Communities Act 1972* was a constitutional statute that Parliament had passed, and in doing so, it had voluntarily limited its own sovereignty for as long as that Act was in force. It was not that EU law was inherently superior; it was that the UK's own sovereign Parliament had instructed the courts to give priority to EU law. This was known as the "voluntary suspension" theory.

The Brexit reversal: The decision to leave the EU (Brexit) was a massive reassertion of the classic Diceyan view. The UK Parliament passed the *European Union (Withdrawal) Act 2018*, which repealed the *European Communities Act 1972*. This demonstrated the truth of Dicey's second principle: no Parliament can bind its successors. The Parliament of 2018 undid the work of the Parliament of 1972, proving that ultimate sovereignty had always resided in Westminster.

2. The Challenge from Human Rights: The *Human Rights Act 1998*

Another major development was the *Human Rights Act 1998* (HRA), which incorporated the European Convention on Human Rights into UK law. The HRA created a new dynamic between Parliament and the judges.

Under *s.3* of the *HRA*, judges have a duty to read and give effect to all legislation, as far as possible, in a way which is compatible with Convention rights (like the right to a fair trial or freedom of speech). This gives judges a powerful interpretative tool. If a law is ambiguous, they must interpret it to protect human rights.

But what if a law is crystal clear and fundamentally incompatible with a Convention right? Here, the HRA carefully preserves Parliamentary Sovereignty. Under *s.4*, the senior courts can make a "declaration of incompatibility." This is a formal statement that a particular law is incompatible with the Convention rights. Crucially, this declaration:

- Does not invalidate the Act of Parliament.
- Does not make the Act unlawful.
- Does not allow judges to strike it down.

The Act remains in full force. The declaration is a powerful political message to Parliament, saying, "You have passed a law that breaches fundamental rights. We expect you to change it." The final decision to amend the law or to let it stand remains with the sovereign Parliament.

Example: Imagine Parliament passes the "Tough on Crime Act," which states that anyone accused of a certain crime is not allowed to see a lawyer. A defendant, named Lisa, challenges this. The court finds that this breaches her right to a fair trial under the HRA. The court cannot tear up the "Tough on Crime Act." But it can issue a declaration of incompatibility, putting immense pressure on the government, led by Prime Minister Sarah, to ask Parliament to amend the law to allow access to lawyers.

3. The Challenge from Devolution: Political Reality vs. Legal Theory

As we discussed in section 2.5, the creation of devolved parliaments in Scotland, Wales, and Northern Ireland has created a major political challenge to sovereignty, even if the legal position remains intact.

Legally, the UK Parliament remains sovereign. It could, tomorrow, pass an Act abolishing the Scottish Parliament. However, politically, this is now almost unthinkable. The *Sewel Convention* (that Westminster will not normally legislate on devolved matters without consent) recognises this new political reality. While a convention is not legally enforceable in the same way as a statute, a government that repeatedly ignored it would face a severe constitutional crisis and likely the break-up of the Union.

4. The Challenge from the Courts: A Shifting Perception?

In recent years, some senior judges have made comments suggesting that there might be fundamental, common law principles that even a sovereign Parliament cannot violate. In the Jackson case, concerning the *Hunting Act 2004*, some Law Lords hinted that if Parliament passed an outrageous law; for example, one that abolished judicial review or destroyed the democratic basis of the state, the courts might have to consider whether they could refuse to apply it.

This is a radical departure from *Dicey* and remains a minority view. But it shows that the doctrine of Parliamentary Sovereignty is not a static fossil; it is a living principle that continues to evolve through the interaction of Parliament, the government, and the courts.

In conclusion, the classic Diceyan doctrine of unfettered Parliamentary Sovereignty remains the official legal rule. However, it now operates in a constitutional context where its power is voluntarily shared (as with the EU, historically), politically constrained (by devolution), and subject to powerful moral pressure (from the *Human Rights Act*). The UK Parliament is still the supreme *legal* authority, but it must now exercise that authority with a greater awareness of external legal standards, internal political settlements, and fundamental rights.

2.4 The Relationship between Parliament and Central Government

If Parliamentary Sovereignty is the theory, the relationship between Parliament and the Government is the messy, dynamic, and often tense reality. This relationship is the engine of the UK's system of government, defined by a fundamental connection and a constant tension.

2.4.1 The Fusion of Powers: The Government is Part of Parliament

The first thing to understand is that the UK does not have a strict separation of powers between the executive (government) and the legislature (Parliament). Instead, it has a fusion of powers.

This means that the people who run the government are also members of Parliament. The Prime Minister, the Chancellor of the Exchequer, the Home Secretary, and all other senior ministers are almost always elected Members of the House of Commons, or sometimes members of the House of Lords. They sit in Parliament, they debate in Parliament, and they vote in Parliament.

This is very different from a system like the United States, where the President and his Cabinet are legally barred from being members of Congress. In the UK, the government is physically and politically embedded within Parliament.

Why does this matter? This fusion is designed to ensure that the government is accountable to Parliament. The government must come to the Commons to explain itself, defend its policies, and seek approval for its laws. It cannot hide away in a separate building; it must face its colleagues and opponents daily.

2.4.2 The Tension: The Government Governs, Parliament Scrutinises

Despite this fusion, the two institutions have very different jobs. This is where the tension arises.

The Government's job is to govern. This means proposing new laws (legislation), setting taxes, running public services like the NHS and schools, and conducting foreign policy. The government is the "doer." The Parliament's job is to represent the people and to scrutinise the

government. This means debating the government's proposals, challenging its decisions, approving its spending, and holding it to account. Parliament is the "questioner."

This creates a constant push-and-pull. The government, particularly if it has a majority of MPs in the House of Commons, wants to use its power to implement its manifesto quickly. Parliament, including the government's own backbench MPs, the opposition parties, and the House of Lords, is there to slow things down, ask difficult questions, and force the government to justify its actions.

2.4.3 How the Government Controls Parliament

In most circumstances, the government gets its way. This is because of the power of the whip system and party discipline.

The Whips: These are government ministers whose job is to ensure that MPs from the governing party vote the way the government wants. They "whip" them into line.

Party discipline: An MP who consistently votes against their own party can be punished by the whips. They might be demoted, lose the chance to sit on important committees, or even be expelled from the party, making it very difficult for them to be re-elected.

Because the government usually has a majority of MPs, and because those MPs are expected to vote with the government, most government bills will ultimately pass. This can make it seem like Parliament is just a "rubber stamp" for the government's wishes.

Example: Prime Minister Sarah wants to pass her "New Schools Bill." Her whips will work tirelessly to ensure every one of her party's MPs is present for the key vote and understands the importance of supporting the government. Unless there is a major rebellion within her own party, the bill will pass because her party has the most seats.

2.4.4 How Parliament Holds the Government to Account

Despite the government's power, Parliament is far from powerless. It has a formidable toolbox of procedures to scrutinise and challenge the government.

1. Parliamentary Questions

Prime Minister's Questions (PMQs): Every Wednesday, the Prime Minister must appear in the House of Commons for 30 minutes and answer questions from MPs. This is a theatrical and often noisy affair where the Leader of the Opposition and other MPs can directly challenge the PM on any topic.

Departmental Question Time: Each government department, like the Home Office or the Department of Health, has its own scheduled time where its ministers must answer questions from MPs about their work.

2. Select Committees: The Power of Investigation

This is one of the most effective scrutiny tools. The House of Commons has a series of Select Committees that shadow each major government department (e.g., the Health and Social Care Committee, the Home Affairs Committee).

- They are cross-party, and their chairs are often elected by all MPs, giving them independence.
- They carry out in-depth inquiries into government policy and administration.
- They have the power to call for "persons, papers, and records." This means they can summon ministers, civil servants, and experts to give evidence under oath.
- They publish reports with recommendations, which often force the government to explain or even change its policy.

Example: The government, under Chancellor David, introduces a new digital services tax. The Treasury Select Committee, chaired by an experienced MP named Michael, decides to investigate. It calls tax experts, business leaders, and the Chancellor himself to give evidence. After a months-long inquiry, it publishes a report saying the tax is poorly designed and will harm small businesses. This creates negative headlines and puts immense pressure on Chancellor David to rethink his policy.

3. Debates

Parliament holds debates on government policy, both on the floor of the House of Commons and in Westminster Hall. These debates allow MPs to voice the concerns of their constituents and to criticise or support government action. While they don't often change votes, they shape public and political opinion.

4. The Legislative Process: Amending Government Bills

As a bill goes through its various stages in Parliament, MPs and Lords can propose amendments. The government must often accept amendments, either from its own backbenchers or from the Lords, to get its bill through. This is a direct way for Parliament to shape and improve legislation.

5. The Ultimate Sanction: A Vote of No Confidence

The most powerful weapon in Parliament's arsenal is a vote of no confidence. If the government loses such a vote in the House of Commons (meaning a majority of MPs say they have no confidence in the government), the convention is that the government must resign, triggering a general election. This is the nuclear option, and it is rare, but it hangs over every government as the ultimate check on its power.

2.4.5 The House of Lords: A Revising Chamber

The relationship is further complicated by the House of Lords. As an unelected chamber, it cannot permanently block legislation passed by the Commons (due to the Parliament Acts). However, it plays a vital "revising" role. It uses its expertise to scrutinise bills in detail, propose amendments, and ask the Commons to think again. The government often has to negotiate with the Lords, and the Lords' amendments frequently improve legislation.

The relationship between Parliament and Government is not a static one of master and servant. It is a dynamic, often uneasy partnership. The government, with its majority and control of the political agenda, is the dominant partner. But Parliament, through its ancient and procedures of scrutiny, investigation, and debate, acts as a crucial check and balance. It is the arena where the government's power is tested, its policies are examined, and its

ministers are held to account for their actions. This constant tension is not a sign of a broken system; it is the very essence of a living, breathing parliamentary democracy.

2.5 The Status of the Devolved Institutions and their Relationship with Westminster

The UK is not a single, homogenous country. It is a union of four nations: England, Scotland, Wales, and Northern Ireland. For a long time, it was a highly centralised state, but from the late 1990s, power has been devolved to Scotland, Wales, and Northern Ireland.

What is Devolution?

Devolution is the transfer of power from a central government to regional governments. It is not a federal system like in the USA. In a federal system, the powers of the states are guaranteed by the constitution and cannot be taken away easily. In the UK, power is delegated from the UK Parliament in Westminster. This means that, legally, Westminster remains sovereign and could, in theory, take back those powers.

The Devolved Institutions

1. **Scotland**: Has a powerful Scottish Parliament in Edinburgh. It can pass primary legislation (its own laws) in many areas, including health, education, and justice. It also has limited tax-varying powers.
2. **Wales**: The Senedd Cymru (Welsh Parliament) in Cardiff started with less power but can now pass primary legislation in its devolved areas. Its powers have been gradually increased.
3. **Northern Ireland**: The Northern Ireland Assembly in Belfast can pass primary legislation. Its government must be a power-sharing executive between unionist and nationalist parties, reflecting the community's divisions.

The Relationship with Westminster: The *Sewel Convention*

A major convention governs this relationship: the *Sewel Convention*. It states that the UK Parliament will "not normally" legislate on a matter that has been devolved to Scotland, Wales,

or Northern Ireland without the consent of the relevant devolved legislature. This is a political restriction on the legal power of Westminster. It recognises the political reality that devolution has created, even if it does not change the legal principle of Parliamentary Sovereignty.

2.6 The Judiciary: Its Constitutional Role and Independence

If Parliament makes the laws and the government implements them, the Judiciary (the judges and the courts) interprets them and settles disputes. Its role is to be the independent referee of the constitution.

2.6.1 The Core Role: Adjudication and Judicial Review

The main job of the judges is to hear cases and apply the law. In constitutional law, their most important function is Judicial Review. This is the process by which the courts scrutinise the actions of public bodies (including government ministers) to ensure they are legal, rational, and fair. They do not decide if a government policy is a good idea, only if it is lawful.

Example: Let's say a Minister, David, decides to close all the libraries in a particular county without consulting the public. A citizen, named Lisa, who uses her local library, could bring a judicial review claim. She would argue that the minister acted unlawfully because a statute requires him to consult the public before making such a decision. The judge's role is not to decide if closing libraries is good or bad, but to decide if Minister David broke the law. If the judge agrees with Lisa, she will quash the decision, forcing the minister to go back and do it properly.

2.6.2 Judicial Independence: The Bedrock of Justice

For this system to work, judges must be independent. This means they must be free from pressure from the government or from public opinion. Several things guarantee this:

Security of tenure: Once appointed, senior judges cannot be easily sacked. They can only be removed by an address from both Houses of Parliament, which has never happened in the modern era. This means a Prime Minister like Sarah cannot fire a judge who rules against her government.

The *Constitutional Reform Act 2005*: This Act strengthened judicial independence by creating the Supreme Court as the highest court in the UK, physically and institutionally separate from the House of Lords. It also reformed the appointment process to make it more transparent.

The judiciary, therefore, is the guardian of the Rule of Law, ensuring that the government, just like the ordinary citizen, is subject to the law of the land.

2.7 Conclusion

In conclusion, the UK's constitutional framework is built on a delicate balance between its key institutions; the Monarch, Parliament, Government, and Judiciary. Each performs distinct yet interconnected functions that sustain democracy, accountability, and the rule of law. The Monarch is the symbolic head of state, while real executive power lies with Central Government (the PM and Cabinet). The government is accountable to Parliament through a fused but tense relationship. Though rooted in centuries of tradition, these institutions continue to adapt to modern political realities.

The system's resilience lies in its flexibility and reliance on both law and convention. As devolution, judicial independence, and global influences reshape the constitutional landscape, the enduring interaction among these institutions ensures that power remains both effective and accountable, preserving the stability of the British state.

3

EXECUTIVE POWER: PREROGATIVE AND ACCOUTABILITY

This chapter examines the power of the executive branch of government; the Prime Minister, the Cabinet, and other ministers, and the mechanisms by which it is held to account. In the UK, the executive derives its legal authority from two main sources: Acts of Parliament and the royal prerogative. We will explore the ancient, often mysterious, source of power known as the prerogative, understand how the courts and Parliament have sought to control it, and analyse the various ways the government is held responsible for its actions. Understanding this balance of power and accountability is fundamental to grasping how the UK's constitutional democracy functions in practice.

3.1 Prerogative Power: Definition, Historical Source and Examples

The royal prerogative is a body of non-statutory, common law powers and immunities, recognized by the courts, as belonging to the Crown. Historically, these were the personal powers of the monarch. Think of a medieval king like *Henry VIII*, who had the personal authority to declare war, make peace, and appoint officials. These were his prerogative powers.

Over centuries, as the UK evolved into a constitutional monarchy, these powers transferred from the monarch personally to the government of the day; the Prime Minister and ministers, who exercise them 'on behalf of the Crown'. The monarch's role is now almost entirely ceremonial in this context.

In simple terms, prerogative powers are the leftover powers from a time when kings and queens ruled directly. They are a source of authority that does not come from an Act of Parliament.

Key examples of prerogative powers include:

1. **The conduct of foreign affairs**: The power to make treaties, recognise foreign states, and conduct diplomatic relations.
2. **The deployment of the armed forces**: The power to send troops overseas, declare war, and use force to maintain peace.
3. **The governance of the Civil Service**: The power to manage and organise the civil service (though this is now largely governed by convention and statute).
4. **The granting of honours**: The power to confer peerages, knighthoods, and other awards.
5. **The prerogative of mercy**: The power to pardon a convicted person or remit a sentence.
6. **The summoning and dissolution of Parliament**: Historically, this was a key prerogative power, but it has now been largely superseded by statute, namely the *Fixed-term Parliaments Act 2011* and its subsequent repeal.

Example: The Prime Minister, David, decides to deploy the British Army to assist a friendly nation. He does this using the royal prerogative. He does not need to ask Parliament for a specific law to allow this deployment. However, as we will see, conventions now require him to consult Parliament.

3.2 The Relationship between Prerogative Power and Legislation

The relationship between prerogative power and statute is a dynamic and crucial area of the UK's constitutional law, fundamentally governed by the principle of Parliamentary Sovereignty. This relationship can be broken down into three key principles: Abrogation, Suspension, and The Ram Doctrine.

1. Abrogation: Statute Overrides Prerogative

The most important rule is that where an Act of Parliament legislates on a matter previously governed by the prerogative, the statute takes precedence. The prerogative power is effectively abolished, or abrogated, to the extent of the statutory coverage. The government can no longer rely on the old prerogative power in that area; it must follow the new statutory rules.

This principle dates back to the ***Case of Proclamations*** [1610] EWHC KB J22, where *Chief Justice Coke* stated that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm." This established that the monarch could not use the prerogative to create new law.

A classic modern example is the *Fixed-term Parliaments Act 2011*. The power to dissolve Parliament was a significant prerogative power exercised by the monarch on the advice of the Prime Minister. The *2011 Act* removed this prerogative power and replaced it with a strict statutory process for holding general elections. For a decade, the Prime Minister could no longer simply ask the monarch to dissolve Parliament at a politically advantageous time; they were bound by the Act's rules. The subsequent *Dissolution and Calling of Parliament Act 2022* then repealed the *2011 Act* and expressly revived the prerogative power, demonstrating Parliament's ultimate authority to both remove and restore prerogative powers.

Example: Imagine the government has an ancient prerogative power to control all exports of wool. Parliament, concerned about modern trade, passes the 'Export Control Act 2024', which sets up a new licensing system for all exports. The government can no longer use the old prerogative power to bypass the new licensing system. The statute has abrogated the prerogative in this field.

2. Suspension: The Prerogative in Abeyance

Even where a statute regulates an area, the prerogative power may not be fully abolished but merely placed in abeyance (suspended). It remains in the background, but it cannot

be used in a way that contradicts the statute. If the statute were repealed, the prerogative power would spring back to life.

This was illustrated in ***R v Secretary of State for the Home Department, ex parte Fire Brigades Union*** [1995] 2 AC 513. The Home Secretary tried to use the prerogative power to set up a new criminal injuries compensation scheme, even though a statutory scheme existed in an Act that was not yet in force. The House of Lords held that this was an unlawful abuse of power. By implementing his own scheme via the prerogative, the minister was frustrating the will of Parliament as expressed in the uncommenced statute. The prerogative power was effectively suspended by the existence of the statutory framework.

3. The "Ram Doctrine" and Legislative Authority

A more subtle interaction occurs when the government uses the prerogative to do something that it could also arguably do under a statute. This is sometimes referred to by the "Ram Doctrine" (named after a Treasury Solicitor, Sir Granville Ram). The principle is that the existence of a statutory power does not automatically remove a pre-existing prerogative power to do the same thing, unless the statute expressly says so.

However, the courts have limited this principle. In ***R (Miller) v Secretary of State for Exiting the European Union*** [2017] UKSC 5 (*Miller No. 1*), the government argued it could use the prerogative to trigger *Article 50* and leave the EU. The Supreme Court soundly rejected this. It held that using the prerogative to withdraw from the EU treaties would inevitably destroy rights that Parliament had created for UK citizens through the *European Communities Act 1972*. A core principle of the constitution is that the government cannot use the prerogative to alter domestic law or frustrate the purpose of a statute. This case is the ultimate demonstration of parliamentary sovereignty over executive prerogative.

3.3 Judicial Review of Prerogative Power

For centuries, the courts took a "hands-off" approach to the royal prerogative, considering its exercise a matter of "high policy" unfit for judicial scrutiny. This changed dramatically in the

modern era, establishing that the executive is not above the law, regardless of the source of its power.

3.3.1 The Historical Position: A "No-Go" Zone for the Courts

The traditional view was summed up in the 19th-century case of ***Burmah Oil Co v Lord Advocate*** [1965] AC 75, where *Lord Reid* stated that the courts could define the existence and extent of a prerogative power, but not the manner of its exercise. This meant the courts would decide whether a prerogative power existed (e.g., does the Crown have a power to do X?), but once it was established, they would not review whether the government had used it wisely, fairly, or rationally.

3.3.2 The Modern Revolution: The GCHQ Case (1985)

The watershed moment was ***Council of Civil Service Unions v Minister for the Civil Service*** [1985] AC 374 (the "GCHQ case"). The Prime Minister, Margaret Thatcher, using a prerogative power to manage the civil service, banned staff at the GCHQ intelligence centre from belonging to trade unions. The unions challenged this, arguing they had a legitimate expectation to be consulted.

The House of Lords made a fundamental breakthrough. *Lord Diplock* stated that the question was not the source of the power (prerogative), but its subject matter. The key distinction was between justiciable and non-justiciable matters.

Justiciable matters: These are decisions that involve legal rights, legitimate expectations, or are of a judicial character. They are suitable for the courts to review.

Non-justiciable matters: These are decisions involving "high policy" or political judgment, such as matters of national security, treaty-making, or the dissolution of Parliament. The courts lack the expertise and democratic legitimacy to second-guess these.

In the *GCHQ case*, the Lords held that the employment rights of civil servants were justiciable. Therefore, the decision was reviewable on the grounds of procedural impropriety (the failure to consult). The government ultimately won the case only because it successfully argued that

national security concerns outweighed the duty to consult, but the crucial legal door was opened: prerogative power was now subject to judicial review.

The Grounds for Reviewing Prerogative Power

Since GCHQ, the courts can review the exercise of a justiciable prerogative power on the same three grounds as any other executive action (the "Wednesbury" grounds, detailed in Chapter 7):

1. **Illegality**: Did the decision-maker act *ultra vires* (beyond their power)? This includes misdirecting themselves in law, acting for an improper purpose, or fettering their discretion.
   Example from GCHQ*:* The government argued its purpose was national security, which was a proper purpose for the prerogative. Had the ban been imposed for a purely political reason unrelated to the effective running of GCHQ, it might have been illegal.

2. **Irrationality (Wednesbury Unreasonableness)**: Was the decision so unreasonable that no reasonable authority could ever have come to it?

   Example*:* If the Prime Minister, using the prerogative to appoint bishops, appointed a well-known atheist because he was an old school friend, this decision could be challenged as irrational.

3. **Procedural impropriety**: Did the decision-maker fail to follow a fair procedure? This includes breaching the rules of natural justice (e.g., bias, or the right to a fair hearing) or failing to honour a legitimate expectation.

   Example from GCHQ*:* The civil servants had a legitimate expectation of being consulted before their terms of employment were radically changed. The failure to consult was a procedural impropriety.

The Limits: What the Courts Still Won't Touch

The GCHQ principle has its limits. The courts remain cautious and will not review the merits of decisions in areas of high policy. In ***R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)*** [2008] UKHL 61, the House of Lords held that the

use of the prerogative to legislate for a British Overseas Territory was, in principle, reviewable. However, the specific decision to not allow the Chagossians to return to their islands was a matter of policy and executive judgment relating to security and diplomatic relations, and was therefore non-justiciable. The courts will not become arbiters on matters of defence or foreign policy.

In summar, the landscape after *GCHQ* and *Miller* is clear:

- The source of power is irrelevant. The courts will scrutinise the *exercise* of power, whether it comes from a statute or the prerogative.
- The subject matter is key. The courts distinguish between justiciable issues (individual rights, fairness) and non-justiciable ones (high policy, national security).
- The grounds are the same. Review is available on the grounds of illegality, irrationality, and procedural impropriety.
- Parliament is sovereign. The courts will robustly prevent the government from using the prerogative to undermine or circumvent the will of Parliament.

This evolution represents a triumph for the Rule of Law, ensuring that all branches of government, including the powerful executive, are subject to the law as administered by the independent judiciary.

3.4 Central Government Accountability: Mechanisms to the Crown, Parliament, and the Public

For a democracy to function, the immense power of the executive must be checked. The government is accountable through several key mechanisms:

1. **Accountability to the Crown**

   This is a formal, legal accountability. Ministers are appointed by the Crown and hold office ‘during His Majesty’s pleasure’. In reality, this is a formality, as the monarch always acts on the advice of the Prime Minister.

2. **Accountability to Parliament**

This is the primary day-to-day mechanism of political accountability. It operates through:

- **Ministerial question time**: Where ministers must answer questions from MPs and Members of the Lords about their departments.
- **Select committees**: These cross-party groups of MPs scrutinise the work of government departments. They can call ministers and officials to give evidence.
- **Debates and motions**: Parliament can hold debates on government policy and pass motions of no confidence, which can force a government to resign.
- **Financial scrutiny**: Parliament must authorise taxation and public spending.

3. **Accountability to the Public**

Ultimately, the government is accountable to the electorate in general elections. If the public is dissatisfied with the government's performance, it can vote it out of office.

3.4.1 The Constitutional Convention of Individual Ministerial Responsibility

This is a crucial, non-legal rule underpinning accountability. It has two main aspects:

1. **Responsibility for departmental conduct**: Ministers are responsible for the policies and actions of their departments. If a serious error occurs, the minister is expected to take responsibility and may be required to resign (a convention, not a law).

2. **Duty to account to parliament**: Ministers have a duty to come to Parliament to explain and justify their own and their department's actions.

Example: The Home Office, led by Minister Chloe, loses a laptop containing sensitive public data. Under the convention of ministerial responsibility, Chloe is expected to inform Parliament of the error, explain how it happened, and outline steps to prevent a recurrence. If the error is deemed sufficiently serious, there may be public and political pressure for Chloe to resign, even if she was not personally at fault.

3.5 Parliamentary Privilege: Freedom of Speech and its Limits, Exclusive Cognisance

For Parliament to perform its core function of holding the government to account, its members must be able to speak, debate, and investigate without fear of intimidation, legal action, or interference from the very executive they are meant to scrutinise. This essential freedom is protected by a set of special rights and immunities known as Parliamentary Privilege. These are not personal privileges for the benefit of individual MPs, but rather the rights of the House itself, necessary for it to function effectively and independently as a pillar of the state.

The most significant privileges are codified in the *Bill of Rights 1689*, a foundational statute that settled the struggle for power between the Crown and Parliament. Its provisions, particularly *Article 9*, remain the bedrock of modern parliamentary democracy.

3.5.1 Freedom of Speech in Parliament: The Cornerstone of Accountability

Article 9 of the *Bill of Rights 1689* states: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

This deceptively simple statement provides an absolute legal shield for anything said or done during the course of 'proceedings in Parliament'. Its practical effects are profound:

- **Immunity from defamation actions**: An MP cannot be sued for libel or slander for statements made in the Chamber, in committees, or in official papers. This allows them to raise matters of public concern, even if based on unproven allegations, without the threat of ruinous litigation.
- **Immunity from legal evidence**: Statements made in Parliament cannot be used as evidence in a court of law to found a cause of action. A prosecutor cannot use an MP's admission in a debate as evidence of a crime, nor can a plaintiff use a critical comment as the basis for a defamation suit.

Example: MP Ben is contacted by a whistleblower from a large company, "SafeHomes Plc," which is a major government contractor. The whistleblower provides documents suggesting widespread safety cover-ups. In the House of Commons, Ben names the CEO, Mr. Smith, and accuses him of "corrupt practices and a conscious disregard for public safety." Mr. Smith is furious and his reputation is damaged.

Scenario A (Protected): Mr. Smith cannot sue Ben for defamation. Ben's speech is protected by *Article 9*. This allows Ben to perform his democratic duty of exposing potential wrongdoing that affects the public, based on information he reasonably believes to be true, without personal legal risk.

Scenario B (Unprotected): Later that evening, Ben goes on a national television news programme and repeats the exact same allegations. This broadcast is not a "proceeding in Parliament." Mr. Smith can now sue Ben for defamation, and Ben would have to defend his comments in court, proving they are true.

What are "Proceedings in Parliament"?

This term has been widely interpreted to include:

- Debates and speeches in the Chamber of the Commons or Lords.
- Questions to Ministers (Oral and Written).
- Evidence given before, and reports published by, parliamentary select committees.
- Tabling motions and presenting petitions.
- Internal parliamentary business, such as meetings of all-party groups on parliamentary premises.

3.5.2 Exclusive Cognisance: The Right to Self-Governance

Also known as exclusive jurisdiction, this is the right of each House to manage its own internal affairs, completely free from interference by the courts or the executive. It is the principle of self-regulation. The courts have consistently acknowledged that they have no authority to intervene in the internal procedures of Parliament.

The scope of exclusive cognisance includes:

- **Regulating its own procedures**: Deciding its own standing orders, the order of business, and how debates are conducted.
- **Controlling its own composition**: Deciding on matters like the disqualification of members (though now heavily regulated by statute).
- **Disciplining its own members**: The House has the power to sanction, suspend, or even expel members for misconduct. A famous example is the suspension of MPs for their involvement in the 2009 expenses scandal.
- **Controlling its own premises**: The Serjeant at Arms has authority over security within the Palace of Westminster.

Example: If a court were to receive a case where a pressure group tried to sue the government for scheduling a debate too late, the court would throw the case out. The scheduling of debates is a matter for Parliament alone, under its exclusive cognisance.

3.5.3 The Limits and Modern Tensions of Privilege

While absolute within its proper sphere, parliamentary privilege is not an unqualified licence. Its boundaries are defined by both practice and legal interpretation.

The Limits of Article 9: What the Courts Can Do

While the courts cannot "question" proceedings in Parliament, they are not entirely blind to them. The key distinction is that they can observe proceedings for the purpose of interpreting the law, but not impeach them (hold them to account). The landmark case of ***Pepper v Hart*** [1993] AC 593 established that, under certain conditions, judges can look at *Hansard* (the official transcript of parliamentary debates) to ascertain the intention of Parliament when a piece of legislation is ambiguous. This is not to question what an MP said, but to understand the will of the legislature as a whole.

Criminal Law and Privilege

Privilege does not provide immunity from the criminal law. While an MP cannot be sued for defamation for a statement in the House, there is an unresolved question as to whether a speech could constitute a criminal offence (e.g., incitement to racial hatred). The House

retains the ultimate power to waive its own privilege, and it is likely that in such a serious scenario, the House would cooperate with a criminal investigation.

Privilege vs. The Public Interest; The Case of *R v Chaytor* [2010] UKSC 52

The limits of "proceedings in Parliament" were tested in the MPs' expenses scandal. Several MPs, including David Chaytor, argued that their submission of expense claims was a "proceeding in Parliament" and therefore they could not be prosecuted for fraud. The Supreme Court unanimously rejected this argument. It held that while the core or essential business of Parliament is protected, administrative and financial transactions like expenses, while connected to their role, are not themselves "proceedings." This was a vital judgment, confirming that privilege is a shield for free speech and debate, not a sword to be used for impunity from the ordinary criminal law.

The Enforcement of Privilege: Contempt of Parliament

Any action that obstructs or impedes Parliament in performing its functions; such as intimidating an MP, bribing a member, or refusing to attend a select committee, can be treated as a contempt of Parliament. The House has the power to summon individuals, admonish them, and in extreme cases, imprison them (though this power has not been used since the 19th century). A modern example is the 2010 case where the House of Commons found two MPs and a peer guilty of contempt for agreeing to lobby for payment.

3.6 Conclusion

In conclusion, the royal prerogative remains a vital yet limited element of executive power, now exercised by ministers within the boundaries set by Parliament and the courts. While these powers enable the government to act decisively in areas such as foreign affairs and defence, their use is no longer beyond scrutiny. Judicial review ensures that prerogative powers are exercised lawfully and fairly, while Parliament upholds political accountability through ministerial responsibility, committee oversight, and electoral judgment. Parliamentary privilege, particularly the freedom of speech guaranteed by the *Bill of Rights 1689*, reinforces this system by allowing open and fearless debate, ensuring that executive power remains transparent, responsible, and ultimately answerable to the people.

4

THE LEGISLATIVE PROCESS AND THE HIERARCHY OF LAW

This chapter examines how law is made and unmade in the UK constitution. We will explore the journey of a Bill through Parliament to become an Act, a process central to the doctrine of Parliamentary Sovereignty. We will then analyse the vast and often contentious world of delegated legislation, where law-making power is transferred by Parliament to the executive.

The chapter also introduces the modern, complex reality of the UK's territorial constitution, focusing on the legislative powers of the Senedd Cymru (Welsh Parliament) and the critical role of the UK Supreme Court in policing the boundaries of these powers. Finally, we consider how laws are repealed, completing their lifecycle. Understanding this hierarchy and process is essential for any solicitor navigating the UK's legal system.

4.1 The Powers and Procedures for the Enactment of Primary Legislation by Westminster

The enactment of primary legislation is the quintessential function of a sovereign Parliament. It is a process steeped in tradition, yet constantly evolving through constitutional conventions and statutory reform. Understanding this process is to understand the practical application of Parliamentary Sovereignty.

4.1.1 The Foundation: What is an Act of Parliament?

An Act of Parliament is the highest form of law within the UK constitutional order. It is the product of a specific, formal procedure involving the Commons, the Lords, and the Monarch. Once enacted, the courts cannot strike it down for being unjust or unwise (though they can interpret it and, since the *Human Rights Act 1998*, issue a declaration of incompatibility). The Enrolled Act Rule, established in ***The Prince's Case*** [1606] 8 Co Rep 1a and reaffirmed in ***Edinburgh & Dalkeith Railway v Wauchope*** [1842] 8 E.R. 279, dictates that the courts will not look behind the official record (the "enrolled Act") to inquire into the internal procedures of Parliament. This gives effect to the principle of exclusive cognisance and ensures judicial non-interference in the legislative process.

4.1.2 The Types of Bills

Not all bills are the same. Their type determines their parliamentary pathway and prospects for success.

Public bills: These are the most common and impactful. They apply to the general public and alter the general law.

- **Government bills**: Introduced by a government minister, these form the core of the government's legislative programme, as announced in the King's Speech. They have a very high success rate because the government, by convention, commands the confidence of the House of Commons and can usually control its timetable and secure a majority.
- **Private members' bills** (PMBs): Introduced by backbench MPs or Lords who are not government ministers. They are a vital mechanism for raising issues outside the government's immediate priorities. However, their success is limited due to a severe lack of parliamentary time. Only a handful, often those with cross-party support or government backing, become law. Procedures for introducing PMBs include:
    - **The ballot**: The main route. At the start of each session, a ballot is held and the top 20 MPs win the right to introduce a Bill on a specific Friday. The top seven have a realistic chance.

- **The ten minute rule**: An MP makes a brief speech to introduce their Bill. This is often used to publicise an issue rather than with a genuine expectation of the Bill becoming law.
- **Presentation**: An MP simply presents the title of a Bill without a speech.

Private bills: These are designed to affect a particular individual, organisation, or locality. They are often promoted by local authorities or companies seeking specific powers (e.g., to compulsorily purchase land for a new road). Their procedure is different, involving a quasi-judicial process where a committee of MPs hears evidence for and against the Bill from the affected parties.

Hybrid bills: These are government-initiated Public Bills that have characteristics of a Private Bill, affecting specific private interests. A recent example is the *High Speed Rail (London - West Midlands) Act 2017*. The hybrid process allows for those directly affected to petition against it, combining elements of both public and private Bill procedures.

4.1.3 The Detailed Journey of a Government Bill

The following chart illustrates the standard path for a Government Bill, highlighting the potential for "ping-pong" between the two Houses.

The process is one of gradual refinement and increasing commitment. Let's examine each stage in the House of Commons in more detail.

1. **First Reading**

   This is a purely formal stage that serves to introduce the Bill to Parliament. The title of the Bill is read out by the Clerk, and it is ordered to be printed. No debate or vote occurs.

2. **Second Reading**

   This is the first substantive stage and is arguably the most important. It is the principal debate on the general principles and policy of the Bill. The sponsoring minister opens the debate, explaining the Bill's purpose and benefits. The shadow minister and backbenchers from all sides then respond.

- **The vote**: At the end of the debate, a vote is usually held. Defeat for a government Bill at this stage is very rare but would be a major political event, potentially constituting a vote of no confidence in the government. The *Parliamentary Voting System and Constituencies Act 2011* was notably defeated at Second Reading in the House of Lords.
- **Carry-over**: If a Bill is not passed by the end of a parliamentary session, it would normally lapse. However, a motion can be passed to "carry over" the Bill into the next session, preventing the loss of parliamentary time.

3. Committee Stage

Following a successful Second Reading, the House resolves itself into a committee to examine the Bill in minute, clause-by-clause detail. The type of committee depends on the Bill's importance and nature.

- **Public Bill Committee** (PBC): The standard committee for most Government Bills in the Commons. These are ad-hoc committees created for a specific Bill. Their membership reflects the party balance in the Commons, ensuring the government has a majority. PBCs have the power to take written and oral evidence from experts, stakeholders, and ministers, allowing for informed scrutiny and proposed amendments.
- **Committee of the whole house**: Reserved for Bills of major constitutional importance (e.g., the Armed Forces Bill) or those requiring urgent passage. The entire House of Commons sits as a committee, chaired by the Deputy Speaker. This allows all MPs, not just a select committee, to participate in the line-by-line scrutiny.

4. Report Stage

The Bill, as amended in committee, returns to the full House. This stage gives all MPs, not just committee members, an opportunity to consider the amendments and propose further changes. It is a key opportunity for the government to reverse amendments made against its will in committee and for opposition parties to re-table amendments that were previously defeated.

5. Third Reading

This is the final debate on the Bill in its amended form. Only minor, technical amendments are permissible. The debate is typically brief, focusing on the overall merits of the Bill as it now stands. A final vote is taken.

4.1.4 The Role of the House of Lords and "Ping-Pong"

Once a Bill has passed all stages in the Commons, it is sent to the House of Lords, where it undergoes an almost identical process. The Lords' key strengths are its power of revision and deliberation. As an unelected chamber containing many experts (like former ministers, scientists, and lawyers), it is often less partisan and can provide highly detailed scrutiny.

The relationship between the two Houses is governed by the *Parliament Acts 1911 and 1947*.

The Salisbury Convention

A key constitutional convention that the House of Lords will not block a Bill that was promised in the governing party's most recent election manifesto. This respects the democratic mandate of the elected government.

Parliament Acts

These Acts limit the power of the Lords to veto legislation.

- **Money bills** (certified by the Speaker as concerning only national taxation or public funds): The Lords can only delay for one month.
- **Other public bills**: If the Lords reject a Bill passed by the Commons in two successive sessions, and at least one year has elapsed between the Second Reading in the first session and the final passage in the second, the Commons can present the Bill for Royal Assent without the Lords' consent.

This process leads to "Parliamentary Ping-Pong," where a Bill is shuttled back and forth between the two Houses until they agree on identical text. Each House can amend the Bill, and the other can choose to accept, reject, or amend those amendments further. In practice,

a compromise is usually reached, but the threat of the Parliament Acts hangs over the proceedings, encouraging the Lords to concede.

Example: The *Hunting Act 2004*

The Labour government's Bill to ban fox hunting was repeatedly rejected by the House of Lords. After satisfying the requirements of the Parliament Acts, the Speaker of the Commons certified that the procedure has been complied with, and the Bill received Royal Assent without the consent of the Lords. This is a rare but potent demonstration of the primacy of the elected House.

4.1.5 Royal Assent

This is the final stage where the Monarch formally assents to the Bill. The last refusal was by Queen Anne in 1708. By convention, it is now a constitutional formality. The *Royal Assent Act 1961* provides for it to be notified to each House by their Speaker, without the monarch needing to be physically present. Once Royal Assent is given, the Bill becomes an Act of Parliament and enters the statute book.

4.2 Delegated Legislation: Creation, Implementation, and Scrutiny

Also known as secondary or subordinate legislation, delegated legislation is law made by a person or body (like a government minister or a local authority) to whom Parliament has delegated law-making power through an enabling or parent Act.

Why is Delegated Legislation Necessary?

- **Lack of parliamentary time**: Parliament does not have time to debate every minute technical detail of complex regulatory schemes (e.g., health and safety regulations).
- **Expertise**: Technical matters are better handled by experts in the relevant government department than by the whole Parliament.
- **Flexibility**: Delegated legislation can be amended or updated quickly without having to pass a new Act of Parliament. This was crucial during the COVID-19 pandemic, where rules on lockdowns needed to change rapidly.

Common Types of Delegated Legislation

- **Statutory Instruments** (SIs): The most common type, made by a government minister.
- **By-laws**: Made by local authorities or public corporations (e.g., a ban on drinking alcohol in public parks).
- **Orders in Council**: Made by the King on the advice of the Privy Council, often used for constitutional matters or to bring Acts of Parliament into force.

4.2.1 The Constitutional Problem and Scrutiny Mechanisms

The extensive use of delegated legislation raises a constitutional concern: it transfers law-making power from the democratically elected legislature to the executive, potentially undermining parliamentary sovereignty and the separation of powers. To control this, several scrutiny mechanisms exist:

1. **The Parent Act**

   The Act itself sets the boundaries for the delegated power. Any delegated legislation that goes beyond these boundaries is *ultra vires* (beyond its power) and can be struck down by the courts (see Judicial Review in Chapter 7).

2. **Parliamentary Scrutiny**

   - **Negative resolution procedure**: The SI becomes law immediately but can be annulled if either House passes a motion against it within 40 days. This is the most common procedure but is weak, as it relies on MPs finding time to object.
   - **Affirmative resolution procedure**: The SI must be approved by both Houses to become law. This provides stronger scrutiny but is used for more politically sensitive SIs.

3. **The Joint Committee on Statutory Instruments (JCSI)**

   A cross-party committee of MPs and Lords that examines all SIs for technical defects, such as being *ultra vires*, unclear, or imposing unexpected taxes. It is a technical, not political, check.

Example: The "*Health and Safety at Work Act 2024*" (the parent Act) gives the Minister, Chloe, the power to make regulations about "workplace furniture." Using this power, Chloe creates "The Workplace Chairs (Safety) Regulations 2025" (a Statutory Instrument). This is lawful. However, if Chloe uses the same power to create "The Workplace Cafeteria (Healthy Menus) Regulations 2025," this would likely be *ultra vires*, as it goes beyond the scope of "furniture" granted by Parliament. The JCSI might flag this, and a court could strike it down.

4.3 The Powers and Procedures for Legislation by Senedd Cymru and Welsh Ministers

The UK is a unitary state, but it has developed a system of devolution, where certain law-making powers have been transferred from the UK Parliament in Westminster to elected bodies in Scotland, Wales, and Northern Ireland. This creates a quasi-federal dynamic within the UK.

The Devolution Settlement for Wales

The *Government of Wales Act 2006* (as significantly amended by the *Wales Act 2017*) established the current framework. It moved Wales from a model where specific powers were conferred to one where all powers are reserved to the UK Parliament unless expressly stated otherwise.

Key Institutions

- Senedd Cymru (Welsh Parliament): The devolved, democratically elected legislature for Wales.
- Welsh Government: The devolved executive, led by the First Minister.

The Legislative Competence of the Senedd

The Senedd can legislate on any matter that is not a reserved power. The *Wales Act 2017* sets out a list of reserved matters that are kept for Westminster. These include:

- The Constitution (including the monarchy and the UK Parliament).

- Defence and national security.
- Foreign affairs.
- Fiscal, economic, and monetary policy.
- Benefits and social security.
- Most aspects of criminal law and policing.

This means the Senedd has primary law-making power over devolved matters such as:

- Health and social services.
- Education and training.
- Local government.
- Housing.
- Welsh language, culture, and tourism.
- Agriculture, fisheries, forestry, and rural development.
- The environment (e.g., recycling targets).

Legislative Procedures in the Senedd

The process for passing a Welsh Act (known as an Act of Senedd Cymru) is similar to that in Westminster:

1. **Introduction**: A Bill is introduced by the Welsh Government, an individual Member of the Senedd, or a committee.
2. **Stages**: It goes through similar stages: general debate (Stage 1), detailed committee scrutiny (Stage 2), amending and reporting (Stage 3), and a final vote (Stage 4).
3. **Royal assent**: Once passed by the Senedd, the Bill requires Royal Assent to become law.

Example: The Welsh Government, led by First Minister Mark, is concerned about the impact of holiday homes on Welsh-speaking communities. It can introduce a "Housing and Planning (Wales) Bill" in the Senedd to give local authorities the power to raise council tax on second homes. This is a devolved matter. However, if the Senedd tried to pass an "Armed Forces

(Wales) Bill" to create a Welsh army, this would be invalid as defence is a reserved matter for the UK Parliament.

4.4 Legislative Competence and the Role of the UK Supreme Court

The devolution settlements established a new constitutional reality for the UK: a quasi-federal state where legislative power is divided between the UK Parliament and the devolved legislatures in Scotland, Wales, and Northern Ireland. This structure necessitates an impartial arbiter to police the boundaries of power. The UK Supreme Court (UKSC) fulfils this role, acting as the ultimate umpire in disputes over legislative competence.

4.4.1 The Concept of a "Reserved Powers" Model

The *Scotland Act 1998* and the *Government of Wales Act 2006* (as amended by the *Wales Act 2017*) fundamentally restructured the UK's territorial constitution. While the *Scotland Act* was always based on a reserved powers model, the *Wales Act 2017* moved Wales from a "conferred powers" model (where the Senedd could only legislate on matters specifically listed) to a reserved powers model.

This is a critical distinction.

- **Reserved powers model** (Scotland, Wales): The devolved legislature has general competence to legislate on any matter that is not explicitly reserved to the UK Parliament.
- (Former) **Conferred powers model** (Wales pre-2017): The devolved legislature could only legislate on matters specifically conferred upon it.

This shift aligns the Welsh model more closely with the Scottish one and reinforces the autonomy of the Senedd.

4.4.2 Defining the Boundaries: Reserved vs. Devolved Matters

The *Scotland Act 1998* and the *Government of Wales Act 2006* contain extensive schedules that list the matters reserved to the UK Parliament. Everything else is, by default, devolved.

Key Reserved Matters (across both Acts) include:

- The Constitution: Including the Crown, the Union of England and Scotland, and the UK Parliament.
- International Relations: Treaties, diplomatic relations.
- Defence & National Security: The armed forces, treason, terrorism.
- Fiscal & Economic Policy: Monetary policy, currency, most forms of taxation (income tax, corporation tax, VAT), borrowing.
- Social Security: The overarching welfare and pension system.
- Criminal Law & Police: Key aspects of the criminal justice system, though note that justice and policing are devolved to Scotland and Northern Ireland.

Key Devolved Matters (to the Senedd Cymru, for example) include:

- Health & Social Care: The NHS in Wales, public health.
- Education: Schools, universities, lifelong learning.
- Local Government: Structure, funding, and functions of councils.
- Housing: Social housing, homelessness, rent control.
- Agriculture, Forestry & Fisheries.
- The Environment: Environmental protection, flood defence, planning.
- Welsh Language.
- Tourism, Culture & Sport.

4.4.3 The Role of the UK Supreme Court as the Umpire

When a dispute arises over whether a law passed by a devolved legislature is within its competence, the UKSC is the final court of appeal. Its role is not to judge the political wisdom of the law, but to interpret the relevant devolution statute and determine the law's validity as a pure question of law.

The Central Question: *Ultra Vires* or *Intra Vires?*

An Act of a devolved legislature is not law if it is outside its legislative competence, i.e., if it is *ultra vires*. The court's task is to determine whether the law is *intra vires* (within power) or *ultra vires* (beyond power).

The Legal Tests Applied by the Supreme Court

The Court has developed a sophisticated analytical framework to determine legislative competence.

1. **The "Pith and Substance" Test**

   This is the cornerstone of the Court's analysis. Instead of looking at the law's incidental or minor effects, the Court identifies the law's "pith and substance"; its true character, essential matter, or main purpose.

   If the "pith and substance" relates to a devolved matter, the law is *intra vires*, even if it has a minor, incidental effect on a reserved matter.

   If the "pith and substance" relates to a reserved matter, the law is *ultra vires*.

2. **The "Modifying" Test**

   Section 108A(2)(e) of the *Government of Wales Act 2006* (and its Scottish equivalent) states that a provision is outside competence if it "modifies" the law on a reserved matter, unless the modification is merely incidental and does not have a greater effect on the reserved matter than is necessary for the devolved purpose. This is a complex legal test that prevents the devolved legislatures from making significant changes to the law on reserved matters through the back door.

In ***Scotch Whisky Association v Lord Advocate*** [2017] UKSC 76, the Scottish Parliament passed a Bill to incorporate the *UN Convention on the Rights of the Child* (UNCRC) into Scots law. The UK law officers referred it to the UKSC.

The UKSC upheld the Act as within competence. It found the "pith and substance" of the law was the protection of public health (a devolved matter) by reducing alcohol consumption. Its

effects on the market and trade between Scotland and England were incidental. This case demonstrates the Court's willingness to respect the policy choices of devolved legislatures when the core purpose is devolved.

The case of ***Reference by the Attorney General for Northern Ireland*** [2022] UKSC 32, examined the constitutional tension between UK parliamentary sovereignty, devolved competence, and the UK's international obligations under the Northern Ireland Protocol. The issue arose from provisions in the *United Kingdom Internal Market Act 2020*, which empowered UK ministers to make regulations that could, in effect, disapply elements of the Protocol, an international treaty.

The Supreme Court upheld the Act, but the reference itself illustrates the complex legal interactions post-Brexit and the Court's role in determining the boundaries of power in a multi-layered constitution.

4.4.4 Modes of Challenge: How a Law is Challenged

There are two primary avenues for challenging the competence of a devolved law.

1. **Pre-Assent Scrutiny: *s.112* Reference (Wales) / *s.33* Reference (Scotland)**

   This is a pre-emptive mechanism. The UK government's law officers (the Attorney General for England and Wales or the Advocate General for Scotland) can refer a Bill that has been passed by a devolved legislature but has not yet received Royal Assent to the UKSC for a ruling on its competence. This allows for a definitive legal ruling before the Bill becomes law, providing constitutional certainty.

2. **Post-Assent Challenge: Judicial Review**

   After a law has received Royal Assent, its validity can be challenged through ordinary judicial review proceedings. Any person with sufficient interest (locus standi) can bring a claim, arguing that the Act is *ultra vires*. Such cases will work their way up the court system, with the UKSC as the final court of appeal.

In ***Reference by the Attorney General and Advocate General for Scotland regarding the UNCRC (Incorporation) (Scotland) Bill*** [2021] UKSC 42, the Scottish

Parliament passed a Bill to incorporate the UN Convention on the Rights of the Child (UNCRC) into Scots law. The UK law officers referred it to the UKSC.

The Court held that several parts of the Bill were outside competence. The Bill gave the Scottish courts the power to scrutinise and interpret Acts of the UK Parliament for compatibility with the UNCRC. The Court held this modified the *Scotland Act 1998* itself (a reserved matter) and constrained the UK Parliament's sovereignty, which was beyond the Scottish Parliament's powers. This case highlights the fundamental constitutional limit: the devolved legislatures cannot pass laws that undermine the ultimate sovereignty of the UK Parliament.

4.4.5 The Consequences of an *Ultra Vires* Ruling

If the UKSC rules that a provision of a devolved Act is outside competence, that provision is not law. It has no legal effect. The court can make an order specifying the extent of the invalidity. The devolved legislature may then choose to amend the law to bring it within competence, or the UK Parliament may, if it wishes, legislate to confer the necessary power.

The interplay between the UK Parliament's sovereignty and the legislative competence of the devolved institutions creates a dynamic and sometimes tense constitutional space. The UK Supreme Court, through its rigorous application of the "pith and substance" test and its interpretation of the devolution statutes, plays an indispensable role in maintaining the stability and integrity of the UK's territorial constitution. It ensures that all legislatures remain within the legal boundaries set for them by the ultimate sovereign: the UK Parliament.

4.5 Processes for the Repeal of Legislation

Laws are not permanent. The process of removing a law from the statute book is known as repeal. Repeal is a key aspect of Parliamentary Sovereignty, as it demonstrates that no Parliament can bind its successors.

1. Express Repeal

This is the most straightforward method. A new Act of Parliament is passed that explicitly states that a previous Act (or part of it) is repealed. The new Act will contain a repeal schedule listing the legislation it is abolishing.

Example: The "Identity Cards Act 2006" introduced compulsory ID cards. A subsequent government, opposed to the policy, passed the "Identity Documents Act 2010". Section 1 of the 2010 Act stated: "The Identity Cards Act 2006 is repealed." This was an express repeal.

2. Implied Repeal

This is a common law doctrine which states that if a later Act of Parliament is inconsistent with an earlier Act, the later Act impliedly repeals the earlier one to the extent of the inconsistency. The courts will give effect to the most recent expression of Parliament's will.

However, the doctrine has been weakened in the modern era, especially regarding constitutional statutes (see Chapter 2). The courts now presume that Parliament does not intend to repeal fundamental rights or constitutional principles unless it does so expressly.

3. Repeal through Desuetude

Desuetude is a rare concept in UK law where a law falls into disuse and is considered obsolete. Unlike in some other legal systems, in the UK, an Act does not automatically cease to be law simply because it is not enforced. It remains law until it is formally repealed by Parliament.

4. The Role of Delegated Legislation

Sometimes, a parent Act will give a government minister a power to repeal secondary legislation. For example, a "Regulatory Reform Order" can be used to repeal outdated regulatory burdens without needing a full Act of Parliament.

The Importance of Repeal

The ability to repeal laws is fundamental to a living legal system. It allows for:

- **Legal modernisation**: Removing outdated or redundant laws (e.g., laws about horse-drawn carriages).
- **Policy change**: Overturning policies of previous governments (as with the ID Cards Act).
- **Constitutional change**: Repealing statutes that are no longer fit for purpose (e.g., the *Fixed-term Parliaments Act 2011*).

4.6 Conclusion

In conclusion, the UK's legislative framework reflects a balance between democratic authority, administrative efficiency, and constitutional oversight. Primary legislation, passed through rigorous parliamentary procedure and sanctioned by Royal Assent, remains the highest source of law. Delegated legislation, though vital for practical governance, operates under strict scrutiny to prevent misuse of executive power.

Devolution adds a further dimension to this system, allowing legislatures such as the Senedd Cymru to make primary laws within their areas of competence, while the UK Parliament retains authority over reserved matters. The Supreme Court safeguards this balance by ensuring each body acts within its legal limits. Together, these mechanisms maintain the integrity, flexibility, and coherence of the UK's legislative process.

5

PUBLIC ORDER LAW

Imagine a busy public park. One weekend, a large group of people, led by a woman named Sarah, want to gather there to protest against climate change. They plan to wave banners and give speeches. On the same day, another group, led by a man named David, wants to hold a march through the town centre to celebrate a historical event, with drums and flags.

These activities; protests, marches, celebrations, are vital to a healthy democracy. They are how people express their views, share their beliefs, and try to bring about change. In the UK, the right to gather peacefully is a fundamental freedom, protected by both the common law and the *Human Rights Act 1998*, which guarantees freedom of assembly.

However, imagine the scene if both events happened at once. The march might block ambulances. The protest might become noisy and disrupt local residents. There could be a risk of arguments or even fights between different groups. This is the central problem of public order law: how do we balance the right of people like Sarah and David to protest and assemble, with the right of other people to go about their lives safely and peacefully?

Public order law is the set of rules that manages this balance. It gives the police powers to impose conditions on protests and marches, or even to stop them, if they believe there is a serious risk of public disorder, damage, or disruption. The goal is not to stop people from protesting, but to ensure that protests happen in a way that minimizes harm to everyone else. This chapter will explore the key laws that give the police these powers.

5.1 Processions: Advance Notice, Conditions, and Prohibitions

A public procession is defined as a movement of people; a march, a parade, or any similar event, that is public in nature and moves along a route. Think of a demonstration marching from a town hall to a park, or a community parade winding through the streets. Because a moving group of people inherently has a greater potential to disrupt public life by blocking roads, straining police resources, and creating dynamic situations, the law subjects processions to a specific regulatory framework, primarily under *the Public Order Act 1986*.

5.1.1 The Fundamental Requirement: Advance Notice

The cornerstone of regulating processions is the legal requirement for advance notice. *Section 11* of the *Public Order Act 1986* states that organisers must provide written notice to the police of any proposal to hold a public procession. This is not about asking for permission but about providing information so the police can prepare.

- Who is responsible? The "organiser" of the procession. This is the person or people who are genuinely involved in planning and orchestrating the event.
- What are the specifics? The notice must be delivered to a police station in the relevant police area. It must be delivered at least 6 clear days before the date the procession is intended to be held. This means if a march is planned for a Saturday, the notice must arrive by the previous Sunday at the latest.
- What must the notice contain? The law requires specific details to be included:
    - The date and proposed start time of the procession.
    - Its proposed route.
    - The name and address of the person (or at least one of the people) organising it.

Example: David is organising a march to celebrate his town's history. He plans for it to start at the town hall at 2 pm next Saturday, proceed down High Street, and end at the war memorial. David must write a letter or fill out a form and deliver it to the local police station by the Sunday before. The letter must state the date, the 2 pm start time, the route (Town Hall -> High Street -> War Memorial), and his name and address: "David, 1 Main Street." If he does this, he has complied with the law.

Consequences of Failing to Give Notice

If no notice is given, or if the notice contains knowingly false information, the organiser is guilty of a criminal offence. Furthermore, the procession itself becomes unlawful from the moment it begins. This means that from the outset, the police have clear grounds to intervene, and participants could be liable to arrest.

Exemptions to the Notice Requirement

The law recognises that a strict requirement for notice is not always practical or fair. There are two main exceptions:

1. **Customary processions**: Processions that are "commonly or customarily held" in the police area are exempt. This covers long-standing traditional events, like an annual Remembrance Day parade or a town's annual carnival. The police are already expected to be aware of these.
2. **Spontaneous processions**: Where it was "not reasonably practicable" to give advance notice. This is a crucial exception for democratic expression. It protects processions that are a genuine immediate response to a sudden event.

Example: Imagine a sudden, major government announcement is made on a Tuesday that causes public outrage. A group of citizens, led by Sarah, decides immediately to organise a protest march for that Wednesday afternoon. It would be impossible for Sarah to give 6 days' notice. In this case, the procession would likely fall under the "spontaneous" exception, and Sarah would not commit an offence by organising it without notice. However, she should still inform the police as soon as she practically can.

5.1.2 The Power to Impose Conditions

Providing notice does not guarantee the procession can proceed exactly as planned. The police have the power to impose conditions on the procession. This is a preventative power, designed to manage risks before they materialise. The law grants this power to three ranks of police officers, depending on the situation:

- The Chief Officer of Police (the top police officer for the area) can impose conditions in advance.
- The Assistant Chief Constable (or equivalent) can also impose conditions in advance.
- The Most Senior Police Officer Present at the scene can impose conditions on the day.

The officer can only impose conditions if they reasonably believe that one of the following may occur without them:

1. **Serious public disorder**: The officer must have a genuine and reasonable belief that the procession may lead to serious violence, rioting, or major unrest. This is a high threshold.

2. **Serious damage to property**: The officer must reasonably believe there is a real risk of significant property damage.

3. **Serious disruption to the life of the community**: This is a broader concept. It could mean the procession would bring the entire commercial centre of a city to a grinding halt, preventing emergency services from operating or causing massive traffic gridlock.

4. **The purpose of the organisers is intimidation**: This is not about causing fear through the strength of one's argument, but about using the procession as a tool of threat and coercion against a particular person or group.

What Can Conditions Involve?

The conditions must be related to the risks the police have identified. They can include:

- **Controlling the route**: Changing the route to avoid a sensitive location (like an embassy) or a planned counter-protest.
- **Restricting the duration**: Limiting how long the procession can last.
- **Controlling the numbers**: Placing a maximum limit on participants (though this is rare and must be justifiable).
- **Controlling the conduct**: For example, prohibiting the use of loudspeakers or masks.

Example: David has given notice for his historical march. The police receive intelligence that a rival political group, which strongly objects to the event, is planning to hold a large counter-demonstration at the planned end point, the war memorial. The senior police officer reasonably believes that bringing these two groups together will result in serious public disorder (fights and violence). Instead of banning David's lawful march, the officer imposes conditions. He changes the end point to a different park away from the city centre and requires the march to conclude by 3:30 pm. David is legally obliged to communicate these conditions to the marchers and to comply with them. If he deliberately leads the march to the war memorial, he commits an offence.

5.1.3 The Power to Prohibit Processions

In the most extreme circumstances, the law provides for a complete prohibition on public processions. This is a power of last resort. The power does not lie with the police alone. The local authority (the council) must apply to the Home Secretary for an order prohibiting all processions, or certain types of processions, in a specified area for up to three months.

The legal test is strict: the council must be satisfied that because of *special circumstances*, the power to impose conditions will not be sufficient to prevent the risk of serious public disorder.

Example: Imagine a city has a history of violent clashes between two rival groups, and a major anniversary is approaching. The police have tried managing their processions with conditions in previous years, but each time, serious riots have broken out. The local council, in consultation with the police, could apply to the Home Secretary for a prohibition order. If granted, this would ban all marches in the city centre for the entire month of the anniversary. This is a draconian measure and is used very infrequently, as it effectively suspends the right to march for everyone in that area.

5.2 Assemblies: The Power to Impose Conditions

A public assembly is defined in the *Public Order Act 1986* as an assembly of 20 or more people in a public place which is wholly or partly open to the air. This includes static protests, rallies in a square, picket lines outside a factory, vigils, and political rallies in parks. The key distinction from a procession is that an assembly is stationary.

The legal regime for assemblies is deliberately different from that for processions. The law recognises that static gatherings are often more spontaneous and are generally less disruptive than moving marches, which inherently interfere with traffic flow. Therefore, the rules are less pre-emptive and give slightly more leeway to organisers, at least in theory.

5.2.1 No General Advance Notice Requirement

A critical difference is that there is no general legal requirement to notify the police in advance of a static public assembly. Organisers like Sarah can simply show up with their group at a public square without having to fill out any forms beforehand. This reflects the value placed on freedom of assembly and the need to allow for spontaneous public expression.

However, in practice, responsible organisers often do engage with the police voluntarily. This is seen as good practice, as it allows for discussion about public safety and can help prevent misunderstandings on the day.

5.2.2 The Power to Impose Conditions

Despite the lack of a notice requirement, the police have significant powers to control public assemblies. Under *s.14* of the *Public Order Act 1986*, the most senior police officer present at the scene can impose conditions on a public assembly if they reasonably believe:

1. That it may result in serious public disorder, serious damage to property, or serious disruption to the life of the community; OR
2. That the purpose of the persons organising it is the intimidation of others.

This is the same four-part test used for processions. The key for assemblies is how the courts and police interpret "serious disruption to the life of the community."

What Can Conditions on an Assembly Involve?

The conditions must be necessary to prevent the identified harm. For an assembly, they can typically involve:

- **Location**: Specifying where the assembly must be held, or moving it to a different, less disruptive location.

- **Duration**: Limiting how long the assembly can last.
- **Size**: Placing a maximum limit on the number of people allowed to attend (though this is a serious incursion on the right to assemble and must be strictly justified).

Example (Traditional Interpretation): Sarah organises a climate protest of 100 people in a city square. The square is pedestrianised, but the main roads around it are critical for traffic and bus routes. The police learn that a splinter group plans to break away and block a major road junction. The senior officer reasonably believes this will cause serious disruption to the life of the community (gridlocking the city's transport network). He imposes a condition on the entire assembly: "This protest must remain within the paved area of the square and must not spill onto any surrounding roads." This condition is specific, targeted, and designed to prevent the serious disruption. If Sarah or any of the protesters knowingly step onto the road to block it, they commit an offence.

5.2.3 The Evolution of "Serious Disruption": The *PCSCA 2022*

The concept of "serious disruption" has long been the central battleground in protest law. Historically, it was interpreted by the courts as involving *major* disruption. However, the *Police, Crime, Sentencing and Courts Act 2022* (PCSCA) dramatically expanded the police's powers in relation to assemblies, primarily by broadening what can be considered "disruption."

Key Changes Introduced By the PCSCA for Assemblies

1. **Lowering the Threshold for "Serious Disruption**"

   The Act itself defines "serious disruption" to include disruption that is "more than minor." This is a significantly lower threshold than the previous understanding of "serious." Furthermore, it explicitly states that disruption can include:

   - **Noise**: The Act allows the police to consider the noise generated by an assembly. If the noise causes, or is likely to cause, "serious disruption to the activities of an organisation" or has a "significant relevant impact on people in the vicinity," it can be grounds for imposing conditions.

- **Prolonged disruption**: A prolonged period of disruption, even if the disruption at any single moment is not huge, can now be considered serious in its totality.

2. The Power to Impose Conditions based on a Single Person's Actions

The police can now impose conditions on an entire assembly if they reasonably believe that the noise or disruption caused by a single person in the assembly is, or may be, serious. This makes it much easier for the police to intervene.

Example: Sarah's climate group holds a vigil outside a government building. They are using loudspeakers and drums, and the noise is so loud that the civil servants inside the building cannot hear each other speak or concentrate on their work. Under the traditional interpretation, this might not have been considered "serious disruption." However, under the PCSCA, the senior police officer can reasonably believe the noise is causing "more than minor" disruption to the organisation inside the building. He can therefore impose conditions: "You must stop using the loudspeakers and drums, and the noise levels must not exceed X decibels." If the protesters refuse, they are breaking the law.

5.2.4 The "One-Person Protest" Loophole and its Closure

It is important to note that the legal definition of a "public assembly" requires 20 or more people. For years, this created a loophole: a protest by 19 people or fewer was not technically a "public assembly" and was therefore not subject to *s.14* conditions. This allowed for small but highly disruptive protests, such as a single person locking themselves to a government gate.

The *PCSCA* closed this loophole. It introduced a new power for the police to impose conditions on a protest of even a single person if the officer reasonably believes it may cause, among other things, "serious disruption to the activities of an organisation" or have a "significant impact on people in the vicinity." This fundamentally alters the landscape, bringing virtually any form of protest, no matter how small, within the potential scope of police conditions.

The Ongoing Tension

The expansion of police powers under the *PCSCA* is the subject of significant legal and political debate. Supporters argue it is necessary to protect the public and businesses from the selfish actions of a minority of protesters who deploy "guerrilla" tactics. Critics argue it gives the state excessive power to shut down peaceful protest and that the terms "more than minor" and "significant impact" are dangerously vague, risking the criminalisation of ordinary, noisy dissent.

The courts will ultimately be the arena where the balance is struck, as they hear challenges to the use of these new powers and decide whether they are a proportionate interference with the right to freedom of assembly under the *Human Rights Act 1998*.

5.3 The Common Law Power and the Scope of Breach of the Peace

Beyond the powers in Acts of Parliament, the police have an ancient, common law power to prevent a breach of the peace. This is a very important and flexible power that operates as a safety net for the police.

What is a Breach of the Peace?

A breach of the peace is not a criminal offence in itself, but it is a legal wrong. It occurs when harm is done, or is likely to be done, to a person, or to their property in their presence, or when a person is in fear of being harmed through an assault, affray, riot, or other disturbance.

The key points are:

- It must involve violence or the threat of violence.
- The violence can be against a person or their property.
- It can be something that has already happened, or something that the police reasonably believe is about to happen.

The Power to Prevent a Breach of the Peace

Because a breach of the peace is so serious, the police have the power to take reasonable steps to prevent one from occurring. This power is very broad. It can include:

- Giving directions to people to stop what they are doing.

- Arresting a person without a warrant to prevent an imminent breach.
- Entering private property to stop a breach from happening.

Example: A police officer is on patrol when he sees a man named Tom standing outside a pub, shouting threats at another man, Mark, inside. Tom is waving his fists and looks like he is about to charge in and start a fight. The officer reasonably believes a breach of the peace, a violent fight, is about to happen. The officer can arrest Tom there and then, even though Tom hasn't actually thrown a punch yet. The arrest is lawful to prevent the imminent violence.

Breach of the Peace and Protests

This power is frequently used in protest situations. If a peaceful protest is happening, but a counter-protester starts screaming in a protester's face in a way that is likely to provoke immediate violence, the police can step in and remove the counter-protester to prevent the breach of the peace. The power is neutral; it can be used against anyone whose actions are likely to cause immediate violence, whether they are a protester, a counter-protester, or just a bystander.

5.4 Key Statutes: The *Public Order Act 1986* and the *Police, Crime, Sentencing and Courts Act 2022*

Public order law is largely governed by two key pieces of legislation: the foundational *Public Order Act 1986* and the much newer and highly significant *Police, Crime, Sentencing and Courts Act 2022*.

The Public Order Act 1986 (POA 1986)

This is the cornerstone of modern public order law. We have already discussed its main provisions regarding processions and assemblies. It also created several key public order offences:

- **Violent disorder** (*s.2*): Where three or more people use or threaten unlawful violence, and their conduct (taken together) would cause a person of reasonable firmness to fear for their safety.

- **Affray** (*s.3*): Where a person uses or threatens unlawful violence towards another, and their conduct would cause a person of reasonable firmness to fear for their safety. (This can be committed by a single person).
- **Fear or provocation of violence** (*s.4*): Using threatening, abusive, or insulting words or behaviour towards another person with the intent to make that person believe immediate violence will be used against them, or to provoke violence.

The Police, Crime, Sentencing and Courts Act 2022 (PCSCA)

This Act made the most significant changes to protest law in a generation. It was introduced in response to protests by groups who used tactics like blocking major roads and bridges, causing widespread disruption. The government argued that the police needed more powers to deal with highly disruptive tactics.

Key Changes Introduced by the PCSCA

1. Expanded Definition of "Serious Disruption"

The Act gave the Home Secretary the power to define "serious disruption" in law. New regulations now define it to include disruption that is "more than minor." This is a much lower threshold than the previous "serious" standard. This means the police can now impose conditions on assemblies much more easily if they cause, or are likely to cause, noise that disrupts an organisation's activities, or block the entrance to a building like Parliament.

2. New Offence of "Intentionally or Recklessly Causing Public Nuisance"

This criminalises acts that cause, or risk causing, "serious annoyance" or "serious inconvenience" to the public. This could cover activities like "locking-on" (where protesters glue or lock themselves to things) or blocking major transport networks.

3. New Powers over "Noisy" Protests

The Act allows the police to impose conditions on protests that are too noisy. If the noise from a protest could cause "serious disruption to the activities of an organisation" or have

a "significant relevant impact on people in the vicinity," the police can set limits on the noise levels.

Example: Sarah's climate group holds a vigil outside a company's headquarters, using loudspeakers that are so loud the employees inside cannot hold meetings. Under the old law, this might not have been "serious disruption." Under the *PCSCA*, the police could decide the noise is causing "more than minor" disruption to the organisation. They could then impose conditions, such as requiring the protesters to turn off the loudspeakers. If the protesters refuse, they would be breaking the law.

Debate and Controversy

The PCSCA is highly controversial. Supporters argue it is necessary to protect the public from the selfish actions of a minority of protesters who cause massive disruption to ordinary people's lives. Critics argue it gives the state too much power to shut down peaceful protest and tilts the balance too far away from the fundamental right to freedom of assembly. The courts will ultimately have to decide whether these new powers are compatible with the Human Rights Act.

5.5 Conclusion

Public order law in the UK is a complex and evolving field. It is a constant balancing act between two essential public goods: the right to protest and the need for public safety and order. The common law power of breach of the peace, the detailed rules of the *Public Order Act 1986*, and the new, expansive powers in the *PCSCA 2022*, together form a legal framework that gives the police significant tools to manage protests. How these tools are used, and whether the balance they strike is a fair one, remains a central question in the UK's democratic life.

6

JUDICIAL REVIEW: NATURE, PROCESS AND ACCESS

Imagine a town where the mayor, who is in charge of the parks, suddenly decides to close the only public playground and build a private car park for himself. The townspeople are upset, but the mayor didn't break any specific law. What can they do? In the UK constitution, the answer lies in Judicial Review. This is the process by which the courts supervise the actions of public bodies, like the government, local councils, and other officials, to ensure they act fairly, reasonably, and within their legal powers.

This chapter explores the fundamental principles of judicial review. We will learn what it is, how it works, who can use it, and the crucial rules that must be followed to bring a claim. It is not an appeal about the merits of a decision, but a review of the legality of the decision-making process itself, a vital check on executive power that upholds the Rule of Law.

6.1 The Nature of Judicial Review: Supervisory Jurisdiction over Public Bodies

Judicial review is a special type of court proceeding. It is the primary mechanism through which the courts exercise their constitutional role under the separation of powers. Its core purpose is to ensure that public bodies do not abuse their power and act within the law.

Supervisory, Not Appellate Jurisdiction

This is the most important concept to grasp. Judicial review is not an appeal.

An appeal asks the question: "Was this the right decision?" The appellate court can substitute its own decision for the original one. Judicial review, on the other hand, asks the question: "Was this decision made lawfully?" The reviewing court looks at the process of decision-making, not the outcome itself.

The court, in a judicial review, acts as a supervisor, not a manager. It ensures the decision-maker followed the rules but does not step into their shoes to make the decision again.

Example: Sarah applies for a permit to build a house extension. The local council, following all the correct procedures, considers her application but decides to refuse it because they believe it would block a neighbour's light. Sarah is unhappy. She cannot use judicial review to argue that the council made the wrong choice. However, if she discovered that the councilor who made the decision was Sarah's next-door neighbour, who had a personal grudge against her, then she could use judicial review. The problem is not the decision itself, but the unfair process (bias). The court would quash the decision and tell the council to make it again, fairly.

The Foundation in the Rule of Law

The entire system of judicial review is built upon the principle of the Rule of Law (see Chapter 1). This principle states that everyone, including the government, is subject to the law. As the eminent judge *Lord Bingham* stated, "The conduct of public authorities... must be governed by law." Judicial review is the practical tool that gives effect to this principle. It holds the executive accountable to the laws created by Parliament.

The Source of the Power: The Common Law

The power of the courts to conduct judicial review is not granted by a single Act of Parliament. It is an inherent power derived from the common law. Over centuries, the judges have built up this supervisory jurisdiction to control inferior bodies and ensure they do not exceed their legal authority. This was famously confirmed in the ***GCHQ case***, where the House of Lords held that the courts have the power to review the exercise of prerogative power. This demonstrates that the source of the power being reviewed (statute or prerogative) is less important than the need for the body to act legally.

6.2 The Process and Limits of Judicial Review

The process of judicial review is a carefully designed procedural framework intended to balance two crucial constitutional principles: the need for effective access to justice to hold the executive to account, and the need to protect public bodies from frivolous and disruptive litigation. The entire process is governed by *Civil Procedure Rules* (CPR) *Part 54*, which creates a specialised "fast-track" for public law challenges.

6.2.1 The Two-Stage Process: A Filter for Meritorious Claims

The journey of a judicial review claim is not a straight line to a full trial. It is a two-stage process, with the first stage acting as a critical filter.

Stage 1: The Application for Permission

This is the gateway through which every claimant must pass. It is designed to weed out claims that are unarguable, frivolous, or an abuse of the court's process at the earliest possible opportunity.

The Claim Form (Form N461)

The process begins when the claimant files a Claim Form, which must include:

1. **A detailed statement of grounds**: A legal document explaining precisely why the decision is alleged to be unlawful, referencing the grounds for review (Illegality, Irrationality, Procedural Impropriety).
2. **A statement of facts**: A clear narrative of what happened.
3. **Any written evidence**: Supporting documents, such as the decision letter, relevant correspondence, and witness statements.

The Acknowledgment of Service

The defendant public body, upon receiving the claim, must file an Acknowledgment of Service (Form N462) within 21 days. This document sets out a summary of its grounds for resisting the claim.

The Paper Consideration

A judge then considers the claim based on the papers alone, without a hearing. The sole question at this stage is: "Does the claim disclose an arguable case?"

An "arguable case" means there is a point of substance that deserves a full hearing. It is a low threshold, but a vital one. The claim does not have to be strong or likely to succeed, but it must be more than merely speculative.

Possible Outcomes

- **Permission granted**: The case proceeds to a substantive hearing.
- **Permission refused**: The claim goes no further. The claimant's only option is to...
- **Renew the oral hearing**: If permission is refused on the papers, the claimant has the right to renew the application at an oral hearing before a different judge. This is a short hearing where the claimant's lawyer can argue why the case is arguable.

Example: Sarah's local council rejects her planning application with a one-sentence letter: "Application refused." Sarah's lawyer files for judicial review, arguing the council failed to give adequate reasons (a form of Procedural Impropriety). At the permission stage, the judge looks at the papers and thinks, "This is an arguable point. The council should explain its decision. This deserves a full hearing." Permission is granted. If Sarah's claim was that she simply didn't like the decision, with no legal error, the judge would refuse permission as disclosing no arguable case.

Stage 2: The Substantive Hearing

If permission is granted, the case moves to a full hearing. This is not a trial with witnesses and cross-examination in the usual sense. Judicial review is primarily about the legality of the decision-making process, not disputing the underlying facts.

The Focus

The hearing centres on legal submissions from both sides' barristers. The court examines the documents that were before the original decision-maker to see if the decision was legally sound.

The Outcome

The judge will then give a judgment. If the claim is successful, the court will grant one or more remedies (e.g., quashing the decision).

6.2.2 The Limits of Judicial Review: Why the Court's Power is Not Absolute

Judicial review is a powerful tool, but the courts are acutely aware of its constitutional limits. It is not a universal appeal mechanism, and judges exercise self-restraint for several key reasons:

1. **The merits/procedural divide**: The court consistently reaffirms that it is concerned with the legality of the process, not the merits of the outcome. A decision can be foolish but legal; it can be wise but illegal. The court only intervenes in the latter case.

2. **The exclusivity principle (The *O'Reilly v Mackman* rule)**: The landmark case of ***O'Reilly v Mackman*** [1983] 2 AC 237 established a fundamental rule: as a general principle, if a claimant has a public law right to enforce, they must use the judicial review procedure and cannot seek to enforce it by an ordinary private law claim (e.g., a claim for negligence or breach of contract). This protects the special safeguards of judicial review (like the permission stage and short time limits) from being bypassed.

3. **Deference on specialist or political matters (The "Forbidden Areas")**: The courts often show deference, meaning they consciously restrain themselves from intervening in certain areas where the decision-maker has greater democratic legitimacy or expertise. These include:

    - National Security & Defence Policy: The courts are very reluctant to second-guess government assessments of threats to national security.
    - High-Level Government Policy: Decisions on matters like economic policy or treaty negotiations are often considered non-justiciable.
    - Specialist Expertise: Where a decision is made by a body with deep technical expertise (e.g., a medical regulator or an economic competition authority), the

court will be slow to impose its own view, focusing only on clear illegality or unfairness.

This self-restraint is not a sign of weakness, but of constitutional maturity. It respects the separation of powers and ensures that judicial review remains a check on power, not a takeover of power.

6.3 Decisions Which May Be Challenged: Public Law vs. Private Law

The boundary between public and private law is the jurisdictional frontier of judicial review. A claimant must correctly identify that their grievance lies in the realm of public law; if it is a private law matter, judicial review is the wrong path.

6.3.1 The Core Test: A Public Body Exercising a Public Function

For a decision to be subject to judicial review, two elements must be present:

1. The decision-maker must be a public body (or a body exercising public functions).
2. The decision must involve the exercise of a public law function.

What is a "Public Body"?

This includes bodies whose power is derived from statute or the royal prerogative. Classic examples are unambiguous:

- Central Government Departments (e.g., Home Office, Ministry of Justice).
- Local Authorities.
- Police Commissioners and Chief Constables.
- Statutory Regulators (e.g., Ofcom, the General Medical Council).
- Prison and Probation Services.
- Executive Agencies (e.g., the DVLA, UK Visas and Immigration).

6.3.2 The Grey Area: Hybrid Bodies and the "Public Function" Test

The modern state often contracts out public services to private companies. This creates a "grey area." Is a private company running a prison or a care home subject to judicial review? The courts answer this by applying a functional test: is the body performing a public function?

The leading case is ***R v Panel on Take-overs and Mergers, ex parte Datafin*** [1987] 1 All ER 564. The Take-over Panel was a self-regulatory body with no direct statutory power. However, it operated with government approval and performed a vital public role in regulating the financial markets. The Court of Appeal held it was subject to judicial review. *Sir John Donaldson MR* stated that the source of power (statute or prerogative) was not the only test; the nature of the power was decisive. If the body exercised power "in the public sphere, with public consequences," it could be subject to judicial review.

This functional test was refined by the House of Lords in ***R (on the application of Beer) v Hampshire Farmers Market Ltd*** [2004] 1 WLR 233. The court set out a list of factors to consider, including:

- Whether the body is established by statute.
- Whether it is underpinned by statutory powers or duties.
- Whether it is taking the place of central or local government.
- Whether it is providing a public service.

Example (Public Function): A company, "UK Detention Services Ltd," is contracted by the government to manage a prison. A prisoner, Mark, claims his rights have been violated by the company's actions. The court would find that running a prison is a core state function, a public function. Therefore, the private company is subject to judicial review in its management of the prison.

Example (Private Function): The same company, "UK Detention Services Ltd," enters into a contract with a stationery supplier. It breaches the contract. The stationery supplier cannot bring judicial review. In this context, the company is acting as a private commercial entity, not performing a public function. The supplier's remedy is a private law claim for breach of contract.

6.3.3 The Distinction Between Public and Private Law Acts

Even a public body is not always acting under its public law powers. It can wear a "private hat." The key is to look at the source of the power being exercised.

Public Law Power is derived from statute or prerogative. E.g., a council's power to grant a licence, levy a tax, or compulsorily purchase land. While Private Law Power is derived from the general law applicable to everyone, such as the power to enter into a contract or employ staff.

Example: The local council, as a public body, decides to hire a new Chief Executive, Chloe. After the interviews, they do not offer her the job. Chloe cannot bring a judicial review claim for this decision. The council is acting under its private law power as an employer. Her claim, if any, would be for discrimination or breach of contract in the ordinary employment tribunal or county court. However, if the same council used its statutory power to revoke a market trader's licence, that would be a public law act, subject to judicial review.

6.3.4 The Consequences of Getting it Wrong: The Exclusivity Principle

The importance of correctly distinguishing between public and private law is underscored by the exclusivity principle from ***O'Reilly v Mackman*** [1983] 2 AC 237. The general rule is that it is an abuse of process to use a private law claim to challenge a public law decision, as this would circumvent the protective procedures of judicial review (like the need for permission and the short time limits).

There are exceptions, such as where the public law issue is a collateral issue in a private law claim, or where both parties agree. However, for a claimant with a clear public law grievance, the judicial review procedure is the "designated pathway" they must take.

6.4 The Requirement to Exhaust Alternative Remedies

Before rushing to court, a claimant is generally expected to have used any other available and effective ways of challenging the decision. This is known as the requirement to exhaust alternative remedies.

What are Alternative Remedies?

These are other complaint or appeal mechanisms that may be faster, cheaper, or more specialist than judicial review. Examples include:

- A statutory right of appeal to a tribunal (e.g., the First-tier Tribunal for immigration or social security).
- An internal complaints procedure (e.g., complaining to the local council's complaints officer).
- An ombudsman (e.g., the Local Government and Social Care Ombudsman).

Why is this Required?

- **Efficiency**: Tribunals and ombudsmen are often better suited to handle certain technical disputes.
- **Respect for statutory schemes**: If Parliament has set up a specific appeals process, the courts expect it to be used first.
- **Avoiding overload**: It prevents the judicial review court from being swamped with cases that could be resolved elsewhere.

The court has a discretion and may allow a judicial review to proceed if the alternative remedy is not adequate or effective. For example, if an appeal tribunal does not have the power to deal with the specific legal argument the claimant wants to raise, judicial review may be the only suitable path.

Example: Mark's local council decides he is not entitled to housing benefit. The law provides a statutory right of appeal to a specialist tribunal. Mark must use this appeal process first. If he loses at the tribunal and believes the tribunal itself made a legal error, *then* he could potentially use judicial review to challenge the tribunal's decision. He cannot skip the tribunal and go straight to the High Court.

6.5 Standing (*Locus Standi*): Who Can Bring a Claim?

The legal term for the right to bring a case is standing or *locus standi*. Not just anyone can bring a judicial review claim; they must have a sufficient interest in the matter.

The Test: A "Sufficient Interest"

The test for standing is found in *s.31(3)* of the *Senior Courts Act 1981*, which requires the claimant to have a "sufficient interest" in the matter to which the application relates.

The courts interpret this flexibly. Whether a claimant has a "sufficient interest" depends on the context of the case, including:

- The nature of the claimant.
- The extent of the claimant's interest.
- The character of the legal challenge.

Categories of Claimants

1. **Directly affected individuals**: This is the clearest category. A person directly and adversely affected by a decision will almost always have standing.
   Example: Sarah's business licence is revoked by the council. She is directly affected and has a clear sufficient interest to challenge the revocation.

2. **Representative groups**: Pressure groups, charities, or associations can have standing if they represent people who would have standing, and if the issue is within their area of expertise and concern.

   In ***R v Secretary of State for Foreign Affairs, ex parte World Development Movement*** [1995] 1 All ER 611, the WDM (a pressure group) was granted standing to challenge the government's funding of a dam in Malaysia. The court held that the WDM had expertise, the issue was of public importance, and there was no other challenger. This showed a very liberal approach to standing.

3. **"Public-spirited taxpayers":** A mere member of the public with no special personal interest will generally not have standing. However, in cases of significant public importance where no one else is likely to challenge the decision, the courts may be more lenient.

The trend over recent decades has been towards a more generous and inclusive approach to standing. The courts ask: "Is this claimant a suitable person to bring this issue before the

court?" This ensures that public wrongs do not go unchallenged simply because no single individual is affected more than anyone else.

6.6 Time Limits: The Importance of Promptness and the 3-Month Rule

Judicial review claims must be brought quickly. This is essential for good public administration. Public bodies need certainty so they can implement decisions without the constant threat of old decisions being suddenly overturned.

The Rule: "Promptly and in Any Event Within 3 Months"

CPR Part 54.5 sets out the strict time limit for filing a claim form. The claimant must apply for permission "promptly and in any event not later than 3 months after the grounds to make the claim first arose."

This is a two-part test:

1. **Promptness**: The claim must be brought as soon as reasonably possible, which could be within the 3-month period.
2. **The 3-month long-stop**: The absolute latest a claim can be filed is 3 months from the date of the decision being challenged.

The courts are very strict about this. Even if a claim is filed within 3 months, it can be rejected for lack of promptness if the claimant has delayed without a good reason.

Why are the Time Limits so Strict?

- **Legal certainty**: Public bodies need to be able to rely on their decisions.
- **Prejudice to third parties**: Overturning a decision long after it was made could negatively affect people who have relied on it.
- **Administrative efficiency**: It is disruptive to reopen old decisions.

The Court's Discretion to Extend Time

The court does have a discretion to extend the time limit, but it will only do so in exceptional circumstances. The claimant would need to provide a very good reason for the delay, and the court would consider the potential prejudice to both sides and the public interest.

Example: The council grants a planning permit to Ben to build a factory on 1st January. A local resident, Chloe, who will be affected by the noise, learns about the decision on 1st February. She waits until 1st April to file her claim (2 months after she found out, but still within the 3-month long-stop from January). The court may refuse her claim for lack of promptness. She knew about the decision in February and had no good reason to wait until April. Good administration requires her to act quickly.

6.7 Conclusion

In conclusion, judicial review serves as one of the most important safeguards of the rule of law, allowing courts to ensure that public bodies act within the limits of their legal authority. It does not question the wisdom or merits of decisions but focuses strictly on their legality, fairness, and rationality. Through its structured process; beginning with permission and culminating in a substantive hearing, the system filters out weak claims while allowing genuine grievances to be heard.

The procedural safeguards surrounding judicial review, including the requirements of standing, prompt filing, and exhaustion of alternative remedies, strike a balance between protecting citizens' rights and maintaining administrative efficiency. Ultimately, judicial review reinforces accountability in public decision-making, ensuring that the exercise of governmental power remains lawful, reasonable, and procedurally fair.

7

THE GROUNDS AND REMEDIES IN JUDICIAL REVIEW

Judicial review is the constitutional safety net that keeps public authorities within the bounds of law. It is not about whether a decision is popular, efficient, or even wise, it is about whether it is lawful, fair, and reasonable. When Parliament grants power to ministers, councils, or agencies, it expects them to play by the rules. Judicial review is the referee that blows the whistle when they step outside those rules, ensuring that power is exercised according to law, not whim. It embodies the principle that no one, not even the government, is above the law.

This chapter explores the grounds and remedies of judicial review; the precise tools judges use to keep public authorities accountable. From Illegality (acting beyond one's powers), to Irrationality (decisions so unreasonable they defy logic), to Procedural Impropriety (unfair processes), and Legitimate Expectation (promises that must be kept), each ground captures a different way public power can go wrong. The chapter also unpacks the remedies; the "legal toolkit" judges use to quash, compel, or restrain unlawful acts. Together, these principles ensure that administrative power in the UK operates under the steady watch of legality, fairness, and reason.

7.1 Illegality: Acting *Ultra Vires*, Error of Law, Fettering of Discretion

Imagine a football referee. Their job is to ensure the game is played according to the rules. They can penalise a player for handling the ball, but they can't send a player off for having untidy hair because that's not a rule. Similarly, in public law, every government body has a set

of rules it must follow. These rules are set out in Acts of Parliament, or in its own internal policies. The ground of Illegality is about ensuring that public bodies stick to their own rulebook.

The core idea of illegality is that a public body must not act *ultra vires*. This is a Latin term meaning "beyond the powers." If a body acts *ultra vires*, its decision is unlawful. Illegality can take several forms.

1. **Simple *Ultra Vires*: Acting Without Power**

   This is the most straightforward form of illegality. It occurs when a minister or a public body does something it has no legal power to do at all.

   Example: A local council has the power to build and maintain parks for the enjoyment of residents. The lead councillor, David, decides the town needs more parking, so he uses the parks budget to build a new multi-storey car park. This is illegal. The council's legal power is to create parks, not car parks. David has acted *ultra vires*, he has stepped outside the legal powers given to him by Parliament. A resident, Sarah, could challenge this decision in judicial review.

2. **Error of Law: Getting the Rules Wrong**

   A public body must correctly understand and interpret the law that gives it power. If it misinterprets the law, its decision is illegal. The courts are the ultimate interpreters of law, so they can step in if a public body gets it wrong.

   Example: A law states that a person is entitled to a disability benefit if they have "a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities." A government official, Emily, rejects Tom's application because she decides his condition, while long-term, is not "substantial." However, Tom's doctor provides clear evidence that it is substantial. If the court finds that Emily misinterpreted the word "substantial" or made a decision that no reasonable official could have made on the evidence, it will find an error of law. Emily acted illegally by misunderstanding her own legal instructions.

3. Fettering of Discretion: Tying One's Own Hands

Public bodies are often given discretion; the freedom to make judgement calls based on the facts of each case. Illegality occurs if a body refuses to use its discretion. This is called fettering of discretion. It can happen in two ways:

- **By a rigid policy**: A body can have a policy to guide its decisions, but it must be willing to make exceptions if a case has special circumstances. If it applies a policy so rigidly that it doesn't listen to individual arguments, it fetters its discretion.
- **By abdicating responsibility**: A body cannot pass its decision-making power to someone else unless the law allows it.

Example: The law gives a minister, Michael, the power to grant licenses to skilled artists to perform in the UK. Michael creates a strict policy: "I will never grant a license to any musician who plays jazz music." An incredibly talented jazz pianist named Lisa applies. The official reviewing her application rejects it immediately because of the "no jazz" policy, without even listening to her music or considering her unique talent. This is fettering of discretion. Michael has illegally tied his own hands with a rigid rule, refusing to consider the merits of Lisa's individual case. His decision is unlawful.

7.2 Irrationality (*Wednesbury* Unreasonableness), Proportionality, and the *Human Rights Act*

This ground of judicial review deals with the substance or merits of a decision. It asks the question: "Was this decision so unreasonable that it should be struck down?" It is crucial to understand that judges are not meant to act as a "super-appeal" body, simply substituting their own opinion for that of a minister or a local council. The courts recognise that elected and expert bodies are often in a better position to make difficult choices. Therefore, the threshold for proving irrationality is intentionally set very high. We will explore the traditional, very strict test and the more modern, stricter test that applies in human rights cases.

7.2.1 The Traditional Test: *Wednesbury* Unreasonableness

The classic and most famous test for irrationality comes from the 1948 case of ***Associated Provincial Picture Houses v Wednesbury Corporation*** [1948] 1 KB 223. The court stated that a decision would be unlawful if it was "so unreasonable that no reasonable authority could ever have come to it." This has become known as Wednesbury unreasonableness.

Think of it as a "shock the conscience" test. It's not enough that the judge thinks the decision is unwise, foolish, or even just plain wrong. It must be utterly indefensible, completely illogical, or absurd to the point of being outrageous.

Example: A local council has a broad power to award "Community Grants" to local groups it deems deserving. The council decides to give its entire annual grant of £100,000 to a man named Tom. The stated reason in the council's minutes is: "We are awarding the grant to Tom because he can recite the entire alphabet backwards while standing on one leg."

Analysis: This decision is likely *Wednesbury* unreasonable. While the council has broad discretion, this reason is so illogical and disconnected from the purpose of a "Community Grant" (which is presumably to benefit the community) that no reasonable council, properly directing itself, could have made it. The decision is irrational. A local community group, led by Sarah, could successfully challenge it.

Key Characteristics of the *Wednesbury* Test

1. **Extreme deference**: The court shows great respect (deference) to the decision-maker. The question is not "Was this the right decision?" but "Was this a decision a reasonable body could have made?" There is a wide range of possible decisions that could be considered reasonable.
2. **Focus on the reasoning process**: The court looks at whether the decision-maker has taken into account relevant factors and ignored irrelevant ones. If a decision is based entirely on an irrelevant factor (like the alphabet trick), it becomes irrational.

3. **A very high bar**: It is deliberately difficult to meet this standard. This preserves the separation of powers, ensuring judges do not overstep into the realm of executive decision-making.

7.2.2 The Modern Challenge: The Principle of Proportionality

The ***Wednesbury*** test has been criticised for being too weak, especially in cases where fundamental human rights are at stake. A decision could be outrageous but not quite "outrageous enough" to meet the high ***Wednesbury*** bar. In response, UK courts have adopted a stricter, more structured test from European human rights law: the principle of proportionality.

Proportionality is used when a public body's decision interferes with a Convention Right under the *Human Rights Act 1998* (such as the right to freedom of expression, assembly, or respect for private life). When such a right is engaged, the court does not just ask if the decision was reasonable. It conducts a much deeper, more intensive review.

The Proportionality Test involves four key questions:

1. **Legitimate aim**: Did the decision pursue a sufficiently important objective? (e.g., national security, public safety, the prevention of disorder or crime).
2. **Rational connection**: Was the decision rationally connected to that aim? (i.e., will it actually achieve the stated goal?).
3. **Necessity** (Least Restrictive Means): Was the decision the *least restrictive* way of achieving that aim? Could the objective have been achieved in a way that interfered less with the individual's rights?
4. **Overall balance** (Fair Balance): Did the decision strike a fair balance between the needs of the community and the rights of the individual? Or did it impose an excessive burden on the individual?

Example: A local council imposes a complete ban on all protests in a main public square because it says that protests sometimes lead to litter and require extra police resources.

Sarah wants to hold a small, peaceful, 30-minute vigil with 20 people to protest against a new law. She provides a plan showing they will clean up all litter and the protest is unlikely to need any police presence. The council still applies the total ban.

Analysis using Proportionality

- Legitimate aim? Yes, preventing litter and managing police resources are legitimate.
- Rational connection? Yes, a total ban would stop protests and thus prevent the associated litter and policing needs.
- Necessity? No. A total ban is not the least restrictive means. The council could achieve its aims through a less drastic measure, such as requiring organisers to clean up or imposing conditions on the number of people or the duration. A blanket ban is a sledgehammer to crack a nut.
- Fair balance? Likely not. The severe restriction on Sarah's right to freedom of assembly is disproportionate to the minor issues of litter and resource allocation in this specific case.

The court would likely find the ban disproportionate and therefore unlawful. Notice how this analysis is much more searching and protective of the individual than the *Wednesbury* test.

7.2.3 The Two Tests Side-by-Side: A Changing Landscape

The UK now operates a "dual standard" of review.

The ***Wednesbury*** unreasonableness is used for challenges to decisions that do not engage human rights. The court's intervention is limited and deferential. Proportionality is used for decisions that do engage human rights under the *HRA 1998*. Here, the court's scrutiny is intense and rigorous.

There is an ongoing debate about whether the proportionality test should eventually replace ***Wednesbury*** across the board. For now, aspiring solicitors must understand the crucial difference: Proportionality requires the government to justify its actions as necessary, while ***Wednesbury*** requires the claimant to prove the government's actions were insane.

7.3 Procedural Impropriety: The Rules of Natural Justice and Statutory Procedural Requirements

This ground of review is fundamentally about fairness. It is not concerned with whether the final decision was right or wrong, but with the *process* or *procedure* that was used to reach it. The principle is that justice must not only be done, but must also be seen to be done. A decision reached by an unfair process is legally flawed, regardless of its outcome. Procedural impropriety has two main sources: the common law rules of "natural justice" and specific duties set out in statute.

7.3.1 The Rules of Natural Justice

These are ancient, unwritten principles of fairness that are implied into every public decision-making process. They are the bedrock of administrative justice. There are two core rules.

1. **The Rule Against Bias (*Nemo iudex in causa sua*)**

   This Latin maxim means "no one should be a judge in their own cause." The decision-maker must be, and must be seen to be, impartial. Bias can be actual or apparent.

- **Actual bias**: This is rare and difficult to prove, as it requires evidence that the decision-maker was actually prejudiced.
- **Apparent bias** (The Appearance of Bias): This is much more common. The test is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. It doesn't matter if the decision-maker was actually impartial in their own mind; if the situation looks biased, the decision is unlawful.

Example; Financial Interest: A local council's planning committee is deciding whether to grant permission for a new supermarket. The chair of the committee, Councillor David, owns a significant amount of land next to the proposed site, the value of which would skyrocket if the supermarket is built.

Analysis: A fair-minded observer would see a clear financial interest and conclude there is a real possibility of bias. Councillor David should have recused himself (stepped aside).

His failure to do so makes the planning decision procedurally improper and liable to be quashed, even if David genuinely believed he could be fair.

Example; Personal Connection: A university disciplinary panel is hearing a case against a student, Lisa, accused of cheating. The head of the panel, Professor Jones, is the PhD supervisor of the student who reported Lisa, and he has previously expressed strong negative views about "academic dishonesty."

Analysis: The close personal and professional connection, combined with his prior stated views, would lead a fair-minded observer to perceive a real possibility of bias. Professor Jones should not sit on the panel.

2. The Right to a Fair Hearing (*Audi alteram partem*)

This Latin maxim means "hear the other side." It is the principle that a person who may be adversely affected by a decision has a right to know the case against them and a right to present their own case in response. This rule breaks down into several specific rights:

- **The right to notice**: The person must be told that a decision is being made that could affect them and what the allegations or issues are.
- **The right to know the evidence against them**: They must be allowed to see the key evidence that the decision-maker is relying on.
- **The right to present one's own case and answer the case against them**: They must be given a fair opportunity to state their side of the story, give their own evidence, and challenge the evidence against them. This often, but not always, involves an oral hearing.
- **The right to reasons**: While there is no general common law duty to give reasons, such a duty will often be implied by the courts to make the right to a fair hearing meaningful. If a decision is particularly severe (e.g., expelling a student or revoking a license), fairness usually requires that reasons be given.

Example; Dismissal from Employment: Tom is a care worker for a local authority. He is summarily dismissed for alleged "gross misconduct." He is called into a meeting on a Friday and handed a letter of dismissal. The letter states the reason is "gross misconduct"

but gives no details, evidence, or specific incidents. He is not shown any witness statements or reports, and he is not given any chance to explain his version of events.

Analysis: This is a clear breach of the right to a fair hearing. Tom was given no real notice of the specific case against him, no access to the evidence, and no opportunity to be heard. The dismissal decision is procedurally improper and unlawful. It would be quashed by a court, which would order the authority to hold a fair disciplinary process.

Example; Licensing: A local council is revoking a pub owner's license, claiming there have been numerous noise complaints. The right to a fair hearing means the council must provide the pub owner, Sarah, with details of the complaints (dates, times, nature of the noise) and give her a hearing where she can present evidence to rebut the complaints, for instance, by providing her own noise logs or witness statements from neighbours.

7.3.2 Statutory Procedural Requirements

Beyond the unwritten rules of natural justice, an Act of Parliament may lay down specific, written procedures that a public body must follow. A failure to follow these statutory requirements will also render a decision unlawful. This is a form of illegality as well as procedural impropriety.

Example; Duty to Consult: A government minister, Michael, is given the power to close a network of local libraries by an Act of Parliament. The Act states: "The Minister must conduct a public consultation for a period of no less than 12 weeks before making a closure order."

If Minister Michael, under pressure, publishes a notice online and only allows 4 weeks for responses, he has breached a statutory duty. He has not followed the specific procedure Parliament commanded him to follow. His subsequent decision to close the libraries is unlawful, regardless of its merits, because the proper procedure was not followed. A library user, David, could challenge the decision successfully.

7.3.3 The Interaction of the Grounds

It is common for a claimant to argue several grounds of review together. A decision based on bias (procedural impropriety) might also be irrational. A failure to consult (a statutory duty)

is also a procedural flaw. Understanding how these grounds; Illegality, Irrationality, and Procedural Impropriety, interweave is key to building a strong case in judicial review.

7.4 The Doctrine of Legitimate Expectation

This is a fascinating ground that blends fairness, promises, and consistency. The doctrine of legitimate expectation means that if a public body leads someone to believe that they will be treated in a certain way, the body should generally keep its promise.

A legitimate expectation can be about a procedure (how a decision will be made) or a substance (what the outcome will be).

Procedural Legitimate Expectation

A promise of a fair procedure.

Example: A government agency has a published policy stating, "We will always give students a personal interview before rejecting their funding application." Tom, a student, applies for funding. Relying on this policy, he expects an interview. The agency rejects his application without an interview. Tom has a legitimate expectation of an interview. The agency's failure to follow its own promised procedure is unfair and unlawful.

Substantive Legitimate Expectation

A promise of a specific outcome. This is harder to establish, but it can succeed if it would be especially unfair to go back on the promise.

Example: A council tells a community group, led by Sarah, that it can use a vacant building as a youth centre permanently. Relying on this promise, Sarah's group raises £50,000 to refurbish the building. A year later, a new council leader, David, decides to sell the building to a developer. The court may well rule that Sarah's group had a legitimate expectation that they could use the building permanently. For the council to go back on its promise now, after the group spent so much money relying on it, would be so unfair as to be an abuse of power. The court could stop the sale.

7.5 Remedies: The Judge's Toolkit

If a claimant wins a judicial review case, what can the judge actually do? The judge has a toolkit of legal orders called remedies. These are designed to fix the legal wrong that has occurred.

7.5.1 Prerogative Orders (The Main Three)

These are the most specific and powerful remedies in judicial review.

1. **Quashing Order (formerly *Certiorari*)**

   This is the most common remedy. It is like a giant "UNDO" button. The judge quashes (cancels) the unlawful decision, wiping it off the legal record. The public body is then usually required to go back and make the decision again, but this time lawfully. It is used for all grounds of review; illegality, irrationality, and procedural impropriety.

2. **Mandatory Order (formerly *Mandamus*)**

   This is a command from the court, ordering a public body to perform a legal duty that it has failed to perform. It tells the body: "You must do your job." If a council has a legal duty to provide school places for all children and refuses to do so for a child named Tom, the court can issue a mandatory order forcing the council to offer Tom a place.

3. **Prohibiting Order (formerly *Prohibition*)**

   This is a "STOP" sign. It orders a public body to stop from doing something that it is about to do, but has not yet done, which would be unlawful. If a biased tribunal is about to hear a case, the court can issue a prohibiting order to prevent the hearing from going ahead until a fair tribunal is appointed.

7.5.2 Other Important Remedies

1. **Declaration**: A formal statement from the court declaring what the legal position is. It doesn't order anyone to do anything, but it clarifies the law. For example, a court might issue a declaration that a government policy is incompatible with the *Human Rights Ac*t.

2. **Injunction**: A court order that either forces someone to do something (a mandatory injunction) or stops them from doing something (a prohibitory injunction). They are similar to mandatory and prohibiting orders but are more flexible.

3. **Damages** (Financial Compensation): This is a rare remedy in judicial review. The court can only award damages if the claimant can show that the unlawful action also amounted to a private law wrong, like a breach of contract or a tort (e.g., negligence). You cannot get damages just because a decision was *ultra vires*.

7.6 Conclusion

The grounds for judicial review; Illegality, Irrationality, Procedural Impropriety, and the doctrine of Legitimate Expectation, are the legal tools the courts use to uphold the Rule of Law. They ensure that public power is exercised legally, rationally, and fairly. The remedies are the practical outcomes that correct abuses of power, keeping the government and all public bodies within the boundaries set by Parliament and the principles of justice.

8

THE HUMAN RIGHTS ACT 1998 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This chapter explains how the *Human Rights Act 1998* "brings rights home" by making the *European Convention on Human Rights* enforceable in UK courts. It begins with the ECHR's post-war origins and its structure, then outlines the Convention rights incorporated by the HRA, including absolute, limited, and qualified rights. We show how these rights shape day-to-day decisions in criminal justice, welfare, housing, protest, and free speech.

We then map the Act's core machinery. *Section 2* requires courts to take Strasbourg case law into account. *Section 3* obliges judges to read legislation compatibly with rights where possible, while *Section 4* allows a declaration of incompatibility if that cannot be done. *Section 6* makes it unlawful for public authorities to act contrary to rights, with *Sections 7 and 8* setting standing, timing, and remedies, and Section 10 providing a fast route to correct incompatible statutes. Throughout, we highlight the constitutional dialogue the HRA creates between courts and Parliament.

8.1 The European Convention on Human Rights (ECHR): History and Structure

Before we can understand the *Human Rights Act*, we must first understand the document it brings to life in the UK: the *European Convention on Human Rights* (ECHR). It is crucial not to confuse this with the European Union. The ECHR is a completely separate international

treaty, created by the Council of Europe, an organisation founded after the Second World War to protect human rights, democracy, and the rule of law across the continent.

The horrors of the war convinced European leaders that they needed a shared, written code to protect people from the power of their own governments. The UK was one of the very first countries to help draft and sign the *ECHR* in 1950, showing its deep commitment to these ideals.

Think of the *ECHR* as a rulebook for governments. It sets out a list of basic rights and freedoms that every member country must promise to give to everyone within their borders. To make sure countries kept their promises, the Convention set up a court called the European Court of Human Rights (ECtHR) in Strasbourg, France. For many years, if a person in the UK felt their government had violated their Convention rights, they had to take their case all the way to this court in Strasbourg; a process that was long, expensive, and difficult.

The *Human Rights Act 1998* (HRA) was a revolutionary change. It aimed to "bring rights home." Instead of forcing people to go to Strasbourg, the HRA allowed people to argue for their Convention rights in UK courts, in their local crown court, or the High Court, or the Supreme Court. It made international human rights a direct part of UK domestic law.

8.2 *Schedule 1 HRA 1998*: The "Convention Rights"

The heart of the *Human Rights Act 1998* is *Schedule 1*. This is where the Act sets out the specific articles from the European Convention on Human Rights (ECHR) that are now part of UK law. These are the "Convention Rights" that everyone in the UK can enforce against public authorities.

Understanding these rights is like learning a toolkit. Each right has its own purpose, its own strength, and its own rules for how it can be used. It is crucial to understand that these rights are not all the same. They fall into different categories, which determine how they can be restricted by the state. We will group them and explore each one in detail.

The Four Categories of Rights

1. **Absolute rights**: These rights can never be interfered with by the state, no matter what. There are no exceptions. The most important examples are *Article 3 (*prohibition of torture) and *Article 4* (prohibition of slavery).
2. **Limited rights**: These rights have specific, built-in limitations defined within the article itself. The main example is *Article 5* (right to liberty).
3. **Qualified rights**: These are the most common. The state can interfere with these rights, but only if it can show that the interference is:
    - Prescribed by law (based on an existing, accessible law).
    - In pursuit of a legitimate aim (e.g., national security, public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others).
    - Necessary in a democratic society (this means the interference must be proportionate; it must be the least restrictive way to achieve the aim).

Let's now explore the key rights that form the core of human rights law in the UK.

Article 2: The Right to Life

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 2 is one of the most fundamental rights. It imposes both negative and positive obligations on the state.

The negative obligation: The state must not kill you, except in very narrow circumstances like where absolutely necessary to defend someone from unlawful violence.

The positive obligation: The state must take active steps to protect your life. This means having effective laws against murder and manslaughter. It also means that in certain

situations, public authorities must take practical steps to protect individuals whose lives are at known risk.

When does it apply?

- It applies where a person dies at the hands of a state agent (e.g., a police shooting).
- It applies where the state has failed to protect a person from a known threat (e.g., failing to protect someone from a violent partner whom the police knew was a serious danger).
- It can also impose a duty to properly investigate any death where the state is potentially involved.

Example; The Positive Duty: A woman named Sarah repeatedly reports her ex-partner, David, to the police, providing evidence that he has threatened to kill her. The police do not take the threats seriously and take no action. One week later, David kills Sarah. Sarah's family could argue that the state violated its positive duty under Article 2 to protect her life, given the known and immediate risk.

Example; The Procedural Duty: A man named Tom dies in prison. The circumstances are unclear. Article 2 requires that the state conduct an effective official investigation into the death. This investigation must be independent, public, and involve Tom's family. A simple, private internal inquiry would not be sufficient.

Article 3: Prohibition of Torture

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

This is an absolute right. There are no exceptions and no justification for torture, no matter how dangerous the individual or how great the emergency. The treatment prohibited has three levels of severity:

- **Torture**: The most severe, involving deliberate, aggravated, and cruel treatment.
- **Inhuman treatment**: Causes intense physical and/or mental suffering.
- **Degrading treatment**: Arouses in the victim a feeling of fear, anguish, and inferiority capable of humiliating and debasing them.

When does it apply?

- To the direct use of torture or severe mistreatment by state agents.
- To conditions of detention (e.g., if a prisoner is held in a filthy, overcrowded, or violently abusive prison).
- To deportation and extradition. This is a critical application. The UK cannot send a person to another country if there is a real risk that they will face treatment contrary to *Article 3* there.

Example; Deportation: A man named Michael is a political activist from a country known for torturing its opponents. The UK government wishes to deport him. Even if Michael has committed crimes in the UK, the government cannot deport him if he can provide evidence that there is a "real risk" he will be tortured upon return. To do so would make the UK government complicit in the torture and would be a clear breach of *Article 3*. This right is absolute and trumps all other considerations, including national security.

Example; Detention Conditions: A young man, Mark, is arrested and held in a police cell for 24 hours. The cell is filthy, with no mattress or blanket, the toilet is blocked, and he is given no food or water. This treatment could be considered degrading and a breach *of Article 3*.

Article 5: Right to Liberty and Security

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law..."

This is a limited right. It protects your freedom from arbitrary detention by the state. It doesn't mean you can never be detained; it means you can only be detained in specific situations listed in the article itself, and the detention must follow a proper legal procedure. The list of permitted detentions includes:

- Detention after conviction by a criminal court.
- Arrest for suspicion of having committed an offence.
- Detention of a person of unsound mind.
- Detention to prevent the spread of infectious diseases.

When does it apply?

It applies whenever a person is deprived of their physical liberty by the state. The key is that the detention must be lawful (authorised by law) and must not be arbitrary (it must be necessary and proportionate).

Key Procedural Safeguards

Article 5 also provides crucial safeguards for anyone who is detained:

- The right to be informed of the reasons for your arrest.
- The right to be brought promptly before a judge.
- The right to have the lawfulness of your detention reviewed by a court.

Example; Lawful Detention: A woman named Lisa is arrested by the police on reasonable suspicion of having committed a robbery. She is taken to a police station, questioned, and then held in a cell before being brought before a magistrate the next day. This is a lawful deprivation of liberty under *Article 5(1)(c)*.

Example; Unlawful Detention: The government, fearing a terrorist attack, passes a law allowing it to imprison any person it "suspects of being a threat to national security" indefinitely, without charge or trial. A man named David is imprisoned under this law for two years without ever being charged or seeing a judge. This is a clear breach of *Article 5*. The detention is arbitrary and fails to provide the basic procedural safeguards the article requires.

Article 6: Right to a Fair Trial

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

This is a foundational right for the justice system. It applies to both criminal and civil cases. Its purpose is to ensure that legal proceedings are fair. It is a detailed right with several key components.

Key Components in Criminal Cases

- **Presumption of innocence**: You are innocent until proven guilty.
- **Right to be informed**: You must be told, in a language you understand, what you are accused of.
- **Adequate time and facilities**: You must have enough time and the resources (like access to documents) to prepare your defence.
- **Right to defend yourself / legal assistance**: You have the right to a lawyer, and if you cannot afford one, one must be provided for free if the interests of justice require it.
- **Right to examine witnesses**: You can question the witnesses against you and call your own witnesses.
- **Right to an interpreter**: If you don't understand the language of the court, you must be provided with an interpreter for free.

Key components in civil cases: The focus is on equality of arms and a hearing by an independent and impartial judge.

When does it apply?

It applies to all stages of the criminal process, from charge to appeal. To disputes over your "civil rights," which can include things like disputes with a public authority over welfare benefits, property rights, or professional disciplinary hearings.

Example; criminal case: A man named Tom is accused of fraud. The prosecution has a key piece of evidence, an email, that proves he is innocent. They do not show this email to Tom or his lawyer. At his trial, Tom is found guilty. This is a clear breach of *Article 6*. Tom did not have a fair chance to defend himself because he was denied access to crucial evidence.

Example; civil case: A doctor named Emily faces a hearing before a medical tribunal that could strip her of her license to practice. The tribunal is made up of three people, two of whom are senior officials from the government department that is bringing the case against her. Emily could argue that this tribunal is not "independent and impartial" as required by A*rticle 6*, as the judges are also her accusers.

Article 8: Right to Respect for Private and Family Life, Home and Correspondence

"1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society..."

This is a very broad and flexible qualified right. It is perhaps the most frequently used article in human rights litigation. It has two parts:

1. *Article 8(1)*: Sets out the right itself—the state must *respect* your private and family life, your home, and your communications.
2. *Article 8(2)*: Sets out the conditions under which the state can *interfere* with this right.

The Scope of "Private and Family Life"

This has been interpreted very widely by the courts and can include:

1. Your personal identity (e.g., your name, gender, sexuality).
2. Your physical and psychological integrity.
3. Your right to form relationships and live with your family.
4. Your personal data and how it is stored and used by the state.
5. Your right to personal development.

The Three-Part Test for Justified Interference (*Article 8(2)*)

For the state to lawfully interfere with your *Article 8* rights, it must show:

- The interference is 'in accordance with the law': It must have a clear legal basis.
- It pursues a legitimate aim: e.g., national security, public safety, the economic well-being of the country, the prevention of disorder or crime, or the protection of health or morals, or the rights and freedoms of others.
- It is 'necessary in a democratic society': This is the proportionality test. The interference must be proportionate to the aim being pursued.

Example; Interference with the Home: A local council decides to evict a tenant, Margaret, from her council flat because her adult son, who lives with her, was caught selling drugs from the property. Margaret, who is 75 and has lived there for 40 years, had no knowledge of her son's activities. An automatic eviction without considering Margaret's personal circumstances; her age, her long connection to the home, her lack of blame, is likely a disproportionate interference with her *Article 8* right to respect for her home.

Example; Surveillance: The police secretly place a listening device in the home of a person named David, whom they suspect of being part of a criminal gang. This is a clear interference with his *Article 8* rights. However, if the police have obtained a warrant from a judge based on good evidence, and the surveillance is a targeted, proportionate way of investigating serious crime, the interference is likely justified under *Article 8(2)*.

Article 10: Freedom of Expression

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority... 2. The exercise of these freedoms... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society..."

This is a qualified right that is essential for democracy. It protects not just popular speech, but also speech that is offensive, shocking, or disturbing to the state or to any section of the population. It covers all forms of expression: speech, writing, art, film, and protest.

The Two-Part Structure

- *Article 10(1)* sets out the right.
- *Article 10(2)* sets out the conditions for lawful restrictions (identical in structure to *Article 8(2)*: it must be prescribed by law, for a legitimate aim, and necessary in a democratic society).

When does it apply?

- It protects journalists investigating corruption.
- It protects artists creating controversial works.

- It protects individuals posting their opinions on social media.
- It protects the right to receive information (e.g., allowing the public access to government information).

Example: A newspaper publishes a story accusing a local businessman, Mr. Jones, of corruption. The story is based on credible sources, but it turns out some of the details are wrong. Mr. Jones sues the newspaper for libel. In defending itself, the newspaper can rely on *Article 10*. The court will have to balance Mr. Jones's right to his reputation (part of his *Article 8* rights) against the newspaper's *Article 10* right to freedom of expression and the public's right to know about potential corruption. The court will ask whether holding the newspaper liable is a proportionate restriction on free speech.

Article 11: Freedom of Assembly and Association

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others… 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society…"

This is a qualified right that is the legal foundation for the Public Order Law we studied in Chapter 5.

Freedom of Assembly entails the right to protest, to hold meetings, and to gather peacefully. Freedom of Association is the right to form and join trade unions, political parties, and other clubs and societies.

Like *Articles 8 and 10*, it sets out the right in the first paragraph and the possible restrictions in the second.

Example: A group of environmental activists, led by Sarah, plan a peaceful protest in a public square. The police, fearing traffic disruption, impose a condition that the protest can only last for 15 minutes and must be completely silent. Sarah could argue that these conditions are a disproportionate interference with her *Article 11* rights. While some regulation is permitted, reducing a protest to a short, silent gathering may destroy its very essence and not be "necessary in a democratic society."

Protocol 1, Article 1: Protection of Property

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law..."

This right, known as *P1A1*, protects your property from arbitrary interference by the state. It is a qualified right. It covers three distinct rules:

- The right to the peaceful enjoyment of property.
- Protection from deprivation of possessions (the state taking your property).
- Protection from control of the use of property (the state regulating how you can use your property).

When does it apply?

- It applies when the state compulsorily purchases your house to build a new road.
- It applies when the state imposes planning controls that prevent you from building on your land.
- It applies when the state seizes your assets as part of a criminal investigation.

The key requirement is that any interference must be in the "public interest" and must strike a "fair balance" between the demands of the general community and the individual's fundamental rights. Crucially, a deprivation of property normally requires the payment of compensation.

Example: The government passes a law to build a new high-speed railway. To do this, it compulsorily purchases the home of a farmer named David. This is a deprivation of property. However, if the government pays David the full market value for his land, and the railway is clearly in the public interest, this interference with his *P1A1* rights is likely justified. If, however, the government offered him only 10% of the market value, it would likely be a disproportionate interference and a breach of his rights, as it fails to strike a fair balance.

The Convention Rights in *Schedule 1* of the *HRA* are not abstract ideals. They are practical, legally enforceable standards that govern the relationship between the individual and the

state. By understanding the nature of each right; whether absolute, limited, or qualified, you can begin to build powerful legal arguments. This toolkit empowers citizens to hold power to account and ensures that core human dignity is protected within the UK's legal system.

8.3 Section 2 HRA: The Duty to "Take into Account" Strasbourg Jurisprudence

Now that we know the rights, how do UK judges interpret them? *Section 2* of the *HRA* provides the answer. It states that when a UK court is deciding a question about a Convention right, it must take into account the judgments and decisions of the European Court of Human Rights in Strasbourg.

This is a very carefully chosen phrase. It does *not* say UK courts must always follow Strasbourg rulings. It says they must "take into account." This means the judges in London must listen very carefully to what the judges in Strasbourg have said, and they must have a very good reason if they decide to do something different.

Think of it like this: The Strasbourg court is the expert on the rulebook. A UK judge is like a local referee. The local referee must pay close attention to how the head referee has interpreted the rules in the past, but sometimes, knowing the local context, the local referee might apply the rule in a slightly different way, as long as the core principle is respected. This gives UK courts some flexibility while ensuring a consistent understanding of human rights across Europe.

8.4 *Section 3 HRA*: The Interpretive Obligation to Read Legislation Compatibly with Convention Rights

Section 3 of the *Human Rights Act 1998* is one of the most powerful and constitutionally significant tools in the UK legal system. It represents a radical shift in how judges are required to read Acts of Parliament. To understand its impact, we must first appreciate the traditional approach.

8.4.1 The Traditional Approach to Statutory Interpretation

Before the *Human Rights Act* came into force, the role of a judge when reading an Act of Parliament was to discover the intention of Parliament as expressed in the words of the statute. They used various rules:

- **The literal rule**: to give words their plain, ordinary meaning.
- **The golden rule**: used to modify the literal meaning to avoid an absurd result.
- **The mischief rule**: used in interpreting the Act to suppress the "mischief" it was designed to address.

Crucially, if the words of an Act were clear, even if they led to an unfair or unjust outcome, the judge had to apply them. It was not the court's job to fix Parliament's mistakes. The ultimate authority was the clear, express will of Parliament. This was a cornerstone of Parliamentary Sovereignty.

Section 3 changed this dynamic profoundly. It created a new, supreme rule of interpretation.

8.4.2 The New Legal Duty: A Strong Interpretive Obligation

Section 3(1) of the *Human Rights Act 1998* states:

"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."

This is not a suggestion. It is a command. The word "must" imposes a mandatory duty on all courts and tribunals. This duty has several key features:

1. **It is the prime rule of interpretation**: The House of Lords made it clear in the leading case of ***Ghaidan v Godin-Mendoza*** [2004] UKHL 30 that *s.3* is "the prime remedial measure" in the HRA. It is not a last resort; it is the first tool a judge must reach for when faced with a potential human rights issue in legislation.
2. **It is a radical tool**: It requires judges to depart from the traditional, literal meaning of words. They are now obliged to strain the meaning of language, to read in implied provisions, and to reinterpret phrases to achieve compatibility with human rights.

3. **It is proactive and creative**: Judges are not just looking for ambiguity. Even if a statute seems clear, they must test it against Convention rights and, if there is a clash, see if it is "possible" to read it differently.

What does "Read and Given Effect" mean in Practice?

The courts have developed a range of techniques to fulfil their duty under *s.3*. These techniques allow them to bend the meaning of words without breaking the overall structure of the Act.

Reading down: This means giving a broad or ambiguous word a narrower meaning to make it compatible. For example, a word like "family" might be read down to exclude certain situations where its application would breach *Article 8*.

Reading in: This involves implying words into the statute that are not actually there. This is used to add crucial safeguards. The most common phrase read in is "so long as it is proportionate to do so," which turns an absolute power into a qualified one.

Reading out (or Severance): This involves treating certain words as if they are not there, effectively deleting them from the statute for the purposes of the specific case. This is used for words that are particularly problematic and cannot be softened by reading down.

Examples of *Section 3* in Action

Scenario: An old Act of Parliament states: "A local authority tenant may be evicted if a person living in or visiting the property has been convicted of a criminal offence." David is a quiet, responsible tenant. His 19-year-old nephew, Tom, who is visiting for the weekend, gets into a fight outside a pub and is convicted of a minor public order offence. The local authority, applying the Act literally, issues David an eviction notice. David and his family will be made homeless.

The Human Rights issue: David claims that this eviction violates his right to respect for his home and family life under *Article 8* of the *ECHR*. The eviction is an automatic, blanket policy with no consideration of his personal circumstances. Is it proportionate to make an entire family homeless for the minor, one-off offence of a visitor?

Applying *Section 3*: The judge agrees that a literal application of the Act would likely lead to a breach of *Article 8* in this case. The judge now has a duty under *s.3* to see if it is "possible" to read the Act compatibly. The judge cannot simply ignore the Act. But she can interpret it.

She might reason as follows: "The Act gives the local authority the power to evict. However, to make this compatible with *Article 8*, I must read the Act as implying that the authority must only exercise this power after conducting an assessment of proportionality. This means the authority must consider: Was David personally at fault? How serious was the offence? Is eviction a proportionate response?"

By reading in a requirement for a proportionality assessment, the judge has changed how the law operates in practice. David gets to make his case, and the eviction is halted unless the authority can show it is proportionate. The words of the Act are still there, but their legal effect has been transformed by *s.3*.

8.4.3 The Limits of *Section 3*: The Meaning of "Possible"

The power under *s.3* is not unlimited. The key constraint is the word "possible." The courts have stated that they cannot use *s.3* to cross the line from interpreting statutes to legislating. They cannot invent a new scheme that Parliament clearly did not intend.

In the case of ***Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan)*** [2002] UKHL 10 the House of Lords set out important boundaries. They stated that using *s.3* is not possible if it would involve:

1. **Contradicting a clear statutory provision**: If the words of the Act are unequivocal and mandate an action that breaches human rights, section 3 cannot be used to create a meaning that is the direct opposite of what Parliament said.
2. **Adopting a meaning that is inconsistent with a fundamental feature of the legislation**: If the reinterpretation would change the core purpose or the essential principles of the Act, it goes beyond interpretation.

3. **Making a decision that involves important policy choices**: If fixing the incompatibility requires making complex political, social, or economic choices, this is a job for Parliament, not the courts.

A Contrasting Example Showing the Limit

Scenario: An Act of Parliament states: "Any person convicted of a terrorist offence shall be imprisoned for a mandatory minimum term of 40 years. The court shall have no power to reduce this sentence for any reason."

A young woman named Lisa is convicted of a terrorist offence. The judge hears powerful mitigating evidence: she was coerced, she has a severe mental illness, and she played a very minor role. The judge believes a 5-year sentence would be proportionate, but the law clearly demands 40 years.

Applying *s.3*: Lisa argues that a mandatory sentence that allows for no exceptions, regardless of the circumstances, is a disproportionate interference with her right not to be subjected to inhuman or degrading punishment (under *Article 3*) and her right to liberty (*Article 5*).

The judge would likely find that it is not possible to use *s.3* here. Why? Because reading the Act to say "the court may impose a sentence of up to 40 years" would be to directly contradict the clear, emphatic words of Parliament: "shall be imprisoned for a mandatory minimum term of 40 years" and "shall have no power to reduce this sentence." This is not a matter of interpretation; it is the wholesale rewriting of a fundamental part of the sentencing scheme, which involves major policy decisions about punishing terrorism.

In this situation, the judge's only recourse would be to issue a declaration of incompatibility under *s.4* (which we will discuss next), leaving it to Parliament to change the law.

8.4.4 The Dialogue Between *ss.3 and 4*

This creates a clear process for the courts:

1. **First, try s.3**: When a law appears to breach human rights, the court's first task is to see if it can "rescue" it using the interpretive obligation. Can the words be strained, read down, or added to in order to make the law work fairly?
2. **If not, use *s.4***: If the incompatibility is so deep that no interpretive solution is "possible" without crossing the line into law-making, the court must admit defeat and issue a declaration of incompatibility.

This process fosters a constitutional dialogue between the courts and Parliament. The courts do their utmost to make Parliament's laws work compatibly with human rights, but they respect Parliament's ultimate sovereignty by stepping back when the legislative change required is too fundamental.

8.5 *Section 4 HRA*: The Power to Issue a "Declaration of Incompatibility"

What happens if a judge finds that it is impossible to read an Act of Parliament to be compatible with a Convention right? The words are just too clear and cannot be stretched any further. This is where *s.4* comes in.

It gives the higher courts (like the High Court, Court of Appeal, and Supreme Court) the power to issue a "declaration of incompatibility." This is a formal statement that says: "We have found that this particular Act of Parliament is incompatible with a Convention right."

This is a very clever constitutional tool. Let's be clear about what it does NOT do:

- It does NOT strike down the Act.
- It does NOT make the Act invalid.
- It does NOT allow the judge to change the law.

The Act continues in full force. The declaration is a massive political signal. It puts a bright spotlight on the problem and puts immense pressure on the government and Parliament to change the law. It says, "Parliament, you have passed a law that breaches fundamental human rights. We expect you to fix it."

In ***R (T) v Secretary of State for the Home Department & Ors*** [2014] UKSC 35, the courts found that a law preventing a man from disclosing the fact that he had a criminal conviction, even long after he had been rehabilitated, was incompatible with his *Article 8* right to a private life. The Supreme Court issued a declaration of incompatibility. This did not immediately change the law for the man, but it created huge pressure. Soon after, the government asked Parliament to change the law to make it more flexible and fair, which it did.

This power perfectly respects Parliamentary Sovereignty. The final word on the law remains with Parliament. But it creates a powerful dialogue between the judges and the politicians about human rights.

8.6 *Section 6 HRA*: Unlawful Acts by Public Authorities

Sections 3 and 4 are about making sure laws are rights-compliant. *Section 6* is about making sure public bodies act in a rights-compliant way. It makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.

This is the engine of the *Human Rights Act*. It applies to a very broad range of "public authorities," including:

- Central government (ministers, departments).
- Local councils.
- The police.
- Prisons.
- Courts and tribunals.
- NHS hospitals and trusts.

Example 1: A local council decides to evict an elderly woman, Margaret, from her home of 40 years because she has fallen behind on her rent due to illness. If the council does this without considering her personal circumstances, her deep connection to the home, and whether eviction is a proportionate response, it likely violates her *Article 8* right to respect for her home. *Section 6* makes this action unlawful.

Example 2: The police arrest a protester, Sarah, at a demonstration. If they keep her in a police cell for 24 hours without any access to a lawyer, this is likely a breach of her *Article 6* right to a fair trial. *Section 6* makes this detention unlawful.

Exception

There is one big exception: *Section 6(2)* says a public authority is not acting unlawfully if it was acting to give effect to primary legislation (an Act of Parliament) that itself is incompatible with Convention rights. This loops back to *s.4*, if the problem is the Act itself, the remedy is a declaration of incompatibility, not a case against the official who was just following the law.

8.7 *Sections 7 & 8 HRA*: Bringing a Claim and Available Remedies

So, how does a person actually use the HRA? *Sections 7 and 8* set out the practical rules for bringing a claim and what you can get if you win.

Section 7: Who Can Bring a Claim and Time Limits

Standing: A person can bring a claim if they are a "victim" of the unlawful act. This means they must be directly affected by it. You can't generally bring a case just because you think something is wrong in principle; you have to show how it harms you.

Time limit: A claim for judicial review must be brought quickly, and in any event within one year. However, in practice, the courts require claims to be made within three months. This ensures that public authorities are not left in limbo for long periods.

Section 8: Remedies

If a court finds that a public authority has acted unlawfully under *s.6*, what can it do? *Section 8* gives the court a range of options. It can grant any remedy within its powers that it considers just and appropriate. This includes:

1. The judicial review remedies we saw in Chapter 7; quashing orders, mandatory orders, etc.

2. **Damages (financial compensation)**: However, the HRA is very cautious about damages. A court can only award damages if it is satisfied that they are necessary to provide "just satisfaction," taking into account all the circumstances. Damages are not awarded automatically, and are often quite small. The main goal is usually to get the unlawful decision overturned.

8.8 *Section 10 HRA*: The Power to Remediate Incompatible Legislation

We have seen that a declaration of incompatibility (*s.4*) doesn't change the law. So, how is the law actually fixed? *Section 10* provides a fast-track procedure for the government to amend legislation that has been declared incompatible.

Normally, changing an Act of Parliament is a slow process that must go through the full legislative process in both Houses. *Section 10* allows a government minister to make the necessary changes using a remedial order, which is a type of secondary legislation. This is much quicker.

Process

1. A court (usually the Supreme Court) issues a declaration of incompatibility.
2. The government agrees that the law should be changed.
3. The relevant minister can then lay a draft remedial order before Parliament to amend the offending Act.
4. Parliament then has a limited time to approve it.

This creates a complete circuit; the court identifies the problem, and Parliament, prompted by the government, provides the solution. It respects parliamentary sovereignty while ensuring that human rights breaches are remedied efficiently.

8.9 Conclusion

The *Human Rights Act 1998* is not just a list of rights. It is a sophisticated constitutional framework that has fundamentally changed the relationship between the citizen and the state in the UK. It creates a "dialogue" between judges, who interpret rights and highlight incompatibilities, and Parliament, which remains the supreme lawmaker. By giving individuals the power to enforce their Convention rights directly in UK courts, it has brought the protection of fundamental freedoms to the heart of the British legal system.

9

THE PLACE OF EU LAW IN THE UK CONSTITUTION

For nearly 50 years, the United Kingdom was a member of the European Union (EU) and its predecessors. This membership created a constitutional revolution, fundamentally challenging the UK's most sacred principle: Parliamentary Sovereignty. This chapter explains how EU law was integrated into the UK legal system, how it achieved supremacy over Acts of Parliament, and how individuals could often rely on it directly in UK courts.

We will then navigate the complex new constitutional settlement established after the 2016 referendum and the UK's subsequent departure from the EU on 31 January 2020 ("Brexit"). Understanding this journey is essential for any modern solicitor, as the legacy of EU law continues to shape the UK's legal landscape.

9.1 The Historical Foundation: The *European Communities Act 1972*

The door through which EU law entered the UK constitution was the *European Communities Act 1972* (*ECA 1972*). This single, powerful Act of Parliament was the legal mechanism that made the UK's membership of the European Economic Community (EEC) effective in domestic law.

The *ECA 1972* did two revolutionary things:

1. ***Section 2(1)*: The "Dynamic Pipe"**

This subsection created a "dynamic pipe" or a "conduit" between UK law and EU law. It provided that all existing and future EU law would automatically "flow" into UK law and become part of it, without needing a new Act of Parliament for each new EU rule. This included:

- **Treaties**: The foundational agreements.
- **Regulations**: EU laws that applied directly in all member states.
- **Directives**: EU laws that set goals for member states to achieve through their own laws.
- **Decisions**: Specific rulings applicable to particular individuals or states.

2. ***Section 2(4)*: The "Interpretive Instruction"**

This was the subsection that created the potential for conflict with Parliamentary Sovereignty. It stated that any UK Act of Parliament, past or future, had to be "construed and have effect subject to" the directly effective EU law flowing in through *s.2(1)*.

In simple terms, the *ECA 1972* was like a rulebook for a club the UK decided to join. The rulebook said: "From now on, all our own rules must be read to fit in with the club's rules. And whenever the club makes a new rule, it automatically becomes one of our rules too."

Imagine the UK Parliament passes a law, the "British Apples Act 1975," saying, "It is legal to sell any size of apple in the UK." Then, the EU passes a regulation under the *ECA 1972* pipe, saying, "All apples sold in the EU must be at least 10cm in diameter." Thanks to *s.2(1)* and *2(4)* of the *ECA 1972*, the EU rule automatically becomes UK law, and the "British Apples Act" must be read as if it says, "It is legal to sell any size of apple, as long as they are at least 10cm wide." The EU rule modifies the UK Act.

9.2 The Doctrine of Supremacy of EU Law and its Relationship with Parliamentary Sovereignty

The relationship between the doctrine of the supremacy of EU law and the UK's foundational principle of Parliamentary Sovereignty represents the most significant constitutional clash in

modern British history. It forced UK courts, for the first time, to choose between giving effect to a subsequent Act of Parliament and giving effect to a higher-order legal norm. The resolution of this clash, primarily through the landmark ***Factortame*** litigation, did not simply see one principle vanquish the other. Instead, it resulted in a sophisticated and unique British constitutional settlement; a voluntary and contingent form of legal supremacy that existed only for as long as Parliament willed it.

9.2.1 The Inevitable Collision: Two Irreconcilable Doctrines?

To understand the clash, one must first appreciate the absolute nature of both competing principles.

The Traditional Diceyan View of Parliamentary Sovereignty

As explored in Chapter 2, A.V. Dicey's classic formulation of Parliamentary Sovereignty held that:

1. Parliament is the supreme law-making authority and can make or unmake any law whatsoever.
2. No person or body, including a court, can question the validity of an Act of Parliament.
3. No Parliament can bind its successors.

This created a legal universe with Parliament at its centre. The role of the judiciary was to apply Acts of Parliament, not to question them. The idea of a judge disregarding an explicit statutory provision was anathema.

The Foundational Principle of EU Law Supremacy

Conversely, the European Court of Justice (ECJ) in Luxembourg, from its earliest days, constructed a new legal order that was supreme over the national laws of member states. This was not a negotiable point; it was the very foundation of a unified European legal area.

In the seminal case of ***Costa v ENEL*** [1964] ECR 585, the ECJ declared that by creating a Community of unlimited duration, with its own institutions and legal personality, the member states had limited their sovereign rights. The Court held: "The transfer by the States from their

domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."

In simpler terms, the ECJ stated that EU law was a superior legal source. If a national law conflicted with EU law, the national law must give way. This was essential to ensure that EU law had the same effect in Rome as it did in Rotterdam or Reading; a principle known as uniform application.

9.2.2 The Bridge: The *European Communities Act 1972*

The UK's entry into this legal order was facilitated by the *European Communities Act 1972* (*ECA 1972*). This Act did not explicitly state "EU law is supreme." Instead, it used ingenious constitutional drafting to achieve the same effect.

As previously discussed, *s.2(1)* created the "conduit pipe" for EU law to flow into the UK system. The critical provision was *s.2(4),* which stated:

"Any enactment passed or to be passed… shall be construed and have effect subject to the foregoing provisions of this section."

The "foregoing provisions" referred to the directly effective EU rights and obligations brought in by *s.2(1)*. This was a powerful interpretive instruction to UK judges. It meant that every single UK statute, even one passed after the ECA 1972, had to be read and applied as if it contained an invisible clause: "This Act is subject to directly effective EU law."

For many years, this interpretive approach was sufficient. When faced with an apparent conflict, the courts would use the "magic" of *s.2(4)* to "interpret" the UK statute to conform with EU law, even if this meant distorting the words.

Example (The Pre-***Factortame*** Approach): In ***Macarthys Ltd v Smith*** [1980] EWCA Civ 7, the Court of Appeal was faced with the UK Equal Pay Act 1970 and an EU Treaty article on equal pay. The UK Act seemed to allow a woman to claim equal pay only if she was compared to a man working in the same employment at the same time. Ms. Smith was compared to a man who had previously done her job. The Court of Appeal, using what would

later become *s.2(4)*, held that the UK Act should be construed to comply with the broader EU right, allowing her claim. They "interpreted" the statute to fit EU law, avoiding a direct clash.

9.2.3 The Clash: R v Secretary of State for Transport, ex parte Factortame

The polite fiction of always being able to "interpret away" a conflict was shattered by the case of ***The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*****,** [1990] ECR I-2433. This case presented a conflict so stark that no amount of interpretive creativity could resolve it.

The Facts and the Legal Impasse

The UK Parliament passed the *Merchant Shipping Act 1988*, which required fishing vessels to be British-owned and crewed to be registered in the UK. This was designed to prevent "quota hopping" by Spanish-owned vessels. The company Factortame, which was largely Spanish-owned, found its vessels excluded from the UK register.

Factortame argued that the *1988 Act* violated EU rules on non-discrimination and the right of establishment. They sought an interim injunction from the UK courts to disapply the relevant parts of the *1988 Act* while the main question of its compatibility with EU law was being referred to the ECJ.

This created a direct constitutional crisis for the UK judge, *Sir John Donaldson MR*:

- The UK's *Supreme Court Act 1981* seemed to allow injunctions against ministers.
- However, a fundamental constitutional principle, the doctrine of parliamentary privilege, held that no court could issue an order that interfered with the operation of an Act of Parliament. To grant an injunction against the minister would be to stop him from implementing a statute, something unheard of in British constitutional history.

The Court of Appeal refused the injunction, stating that UK courts had no such power. The case was appealed to the House of Lords.

The House of Lords' Dilemma and the Referral to the ECJ

The House of Lords faced the core of the constitutional dilemma. Did the UK court have the power to suspend an Act of Parliament? They identified that the answer depended on a point of EU law: was a national court required, under the EU principle of effectiveness, to provide interim relief to protect EU rights?

They therefore suspended the UK proceedings and made an *Article 177* reference (now *Art 267 TFEU*) to the ECJ, asking whether EU law obliged a national court to grant interim relief against the application of a national law pending a final decision.

The ECJ's Ruling: The Primacy of Effective Judicial Protection

The ECJ's response was uncompromising. It ruled that a national court, seized of a claim concerning EU rights, must set aside any rule of national law that prevented it from granting interim relief. The obligation to ensure the effectiveness of EU rights overrode domestic procedural rules, even fundamental constitutional ones.

The ECJ stated: “Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent… Community rules from having full force and effect are incompatible with those requirements.”

In essence, the ECJ told the UK judge: "Your domestic rule, no matter how sacred, must be set aside to protect the EU right."

The Final Judgment: The House of Lords Applies the ECJ Ruling

The ball was now back in the House of Lords' court. In ***R v Secretary of State for Transport, ex parte Factortame (No. 2)*** [1991] 1 AC 603, they applied the ECJ's ruling. *Lord Bridge* delivered the landmark judgment.

He acknowledged the constitutional gravity of the step, but located the source of the court's new power squarely in the will of Parliament as expressed in the *ECA 1972*. He stated that

under the *ECA 1972*, it was the duty of a UK court to override any rule of national law found to be in conflict with an enforceable EU law right.

The House of Lords therefore granted the interim injunction, disapplying the *Merchant Shipping Act 1988* and allowing Factortame's vessels to be registered pending the final outcome.

This was the moment of constitutional revolution. For the first time, a UK court had formally disapplied, not just interpreted, a provision of a sovereign Act of Parliament because it conflicted with a higher legal order.

9.2.4 The British Solution: A Voluntary and Contingent Supremacy

The genius of the British constitutional settlement, as articulated by the courts and academics, was that it reconciled this apparent revolution with the traditional theory of Parliamentary Sovereignty. It did so by framing EU law's supremacy as a voluntary and contingent surrender of power by Parliament itself.

The "Voluntary" Nature: Parliament's Self-Limitation

The courts reasoned that Parliament, in its sovereign wisdom, had chosen to pass the *ECA 1972*. By doing so, it had voluntarily incorporated the EU legal system, including its principle of supremacy, into UK law. The judges in ***Factortame*** were not acting against the will of Parliament; they were giving effect to Parliament's earlier, and more general, will (in the *ECA 1972*) over its later, and more specific, will (in the *Merchant Shipping Act 1988*).

As *Lord Bridge* put it: "Under the terms of the *Act of 1972* it has always been clear that it was the duty of a United Kingdom court… to override any rule of national law found to be in conflict with any directly enforceable rule of Community law."

The "Contingent" Nature: The Ultimate Sovereignty of Repeal

The contingency of this arrangement was its most crucial aspect. The entire edifice of EU law's supremacy rested on the continuing existence of the *ECA 1972*. Because of the doctrine that Parliament cannot bind its successors, any Parliament could, at any time, pass an Act expressly repealing the *ECA 1972*. Upon repeal, the conduit pipe would be shut off, the

interpretive instruction in *s.2(4)* would vanish, and the UK courts would instantly revert to their traditional role, with no higher law than an Act of Parliament.

This was elegantly explained by *Sir William Wade* as a shift in the UK's "rule of recognition"—the fundamental rule that officials accept as identifying what counts as law. The rule had changed from "whatever the Queen-in-Parliament enacts is law" to "whatever the Queen-in-Parliament enacts is law, subject to the exception that if it conflicts with EU law, the latter prevails." This new rule of recognition was itself rooted in the initial sovereign act of Parliament in passing the *ECA 1972*.

The "Door" Metaphor: Imagine Parliamentary Sovereignty as a homeowner who owns their house absolutely. Joining the EU was like the homeowner choosing to install a new, sophisticated front door (the *ECA 1972*). This new door had a special rule: "Anyone carrying an EU rulebook must be let in, and their rulebook overrides any of the homeowner's own house rules." The homeowner accepted this for years.

Factortame was the moment a visitor with an EU rulebook (Factortame) was challenged by someone citing a new house rule (the *Merchant Shipping Act*). The butler (the court), checking the specifications of the front door, decided the door's special rule required him to let the visitor in and disregard the new house rule. Crucially, the homeowner always retained the power to rip out the special door and put a normal one back in, at which point the special rule would cease to exist. This is what ultimately happened with the *EU (Withdrawal) Act 2018*.

9.2.5 Aftermath and Acceptance: The New Constitutional Norm

Following ***Factortame***, the supremacy of EU law became a settled feature of the UK constitution. In ***Thoburn v Sunderland City Council ("The Metric Martyrs Case")*** [2002] EWHC 195, Lord Justice Laws sought to rationalise the position further. He classified the *ECA 1972* as a "constitutional statute" which could not be impliedly repealed. He argued that the only way to override the *ECA 1972* was by express words in a subsequent statute.

This reinforced the ***Factortame*** settlement: while Parliament remained sovereign in theory, in practice, any intention to legislate contrary to EU law had to be stated with crystal clarity. The ordinary operation of implied repeal was suspended in this context.

9.2.6 A Unique Constitutional Settlement

The doctrine of supremacy, as it operated in the UK, was a uniquely British creation. It was not the pure, foundational supremacy proclaimed by the ECJ, which saw EU law as a quasi-federal supreme law. Nor was it the unalloyed, absolute sovereignty of Dicey.

It was, instead, a pragmatic and statutory adaptation. Supremacy flowed from a UK statute, was mediated by UK judges, and could be revoked by a UK statute. For nearly five decades, this delicate balance allowed the UK to participate fully in the European project while maintaining, in theory, the ultimate sovereignty of its Parliament. The *2016 referendum* and the subsequent passage of the *European Union (Withdrawal) Act 2018* were the ultimate demonstration of that theory becoming reality: the sovereign Parliament, in one final, decisive act, repealed the bridge and reclaimed its untrammelled authority.

9.3 Direct Effect and the Role of National Courts

The doctrine of direct effect was the engine that drove EU law into the daily lives of individuals and businesses. It is the principle that certain provisions of EU law are capable of creating rights for individuals that they can enforce directly in their national courts, without the need for the national government to pass any implementing legislation.

There are two types of direct effect:

1. **Vertical direct effect**: An individual can enforce their EU law rights against the state (or a public body).
2. **Horizontal direct effect**: An individual can enforce their EU law rights against another individual or private company.

The rules on which EU laws have direct effect are technical, but the key principles are:

- **EU Regulations**: They are typically directly effective (both vertically and horizontally) because they are designed to be law as they are.
- **EU Treaty Articles**: They can be directly effective if they are clear, precise, and unconditional.
- **EU Directives**: They can only have vertical direct effect against the state, and only if the government has failed to implement them correctly or on time. They cannot be used in horizontal disputes between private parties.

Example (Vertical Direct Effect): The EU passes a directive requiring all government officials to work a maximum of 40 hours per week. The UK government fails to pass a law to implement this. Sarah, a civil servant, is forced to work 50 hours. She can sue her government employer in a UK court, relying directly on the EU directive to enforce her right to a 40-hour week.

Example (Horizontal Direct Effect): An EU regulation states that all mobile phone chargers must use a universal plug. A private company, "PhoneCo," sells phones with a proprietary charger. Tom, a customer, cannot sue PhoneCo under the EU regulation for the incompatible charger if the regulation is only vertically effective. His rights are against the state for failing to enforce the rule, not directly against the private company.

The combination of supremacy and direct effect transformed the role of UK judges. They became "EU judges," required to set aside domestic law and provide remedies to individuals based on rights granted by a legal order above Westminster.

9.4 The Post Brexit Position: The *European Union (Withdrawal) Act 2018*

The result of the *2016 referendum* on the United Kingdom's membership of the European Union set in motion a constitutional process of unprecedented complexity. The task was to disentangle nearly five decades of deeply integrated legal systems without creating a legislative abyss or profound legal uncertainty. The central legislative instrument designed to achieve this was the *European Union (Withdrawal) Act 2018*. This Act was not merely another statute; it was a piece of constitutional architecture that sought to manage a controlled demolition of the existing legal order and construct a new, stable foundation for

UK law after Brexit. Its passage represented the ultimate exercise of Parliamentary Sovereignty, formally reclaiming the legislative supremacy that had been voluntarily limited since 1973.

9.4.1 The Constitutional Objective of the *EUWA 2018*

The primary purpose of the *European Union (Withdrawal) Act 2018* was to provide for a legally orderly and predictable exit from the European Union. This required solving a fundamental problem: on the moment of exit, the *European Communities Act 1972*, the conduit pipe for all EU law, would be switched off. If nothing else were done, this would create a "legal black hole," where vast areas of law, from environmental protection to employment rights, would simply vanish from the UK statute book overnight. This would lead to chaos and instability.

Therefore, the *EUWA 2018* had three core constitutional objectives:

1. To end the supremacy of EU law in the United Kingdom by repealing the *European Communities Act 1972*.
2. To prevent a legal cliff edge by preserving the existing body of EU derived law and converting it into a new category of domestic law known as "retained EU law."
3. To provide the legal tools and powers necessary to correct the statute book and ensure it functions coherently after exit, a process often termed "domestication."

This was an exercise in legal transplantation. The goal was to carefully remove the body of EU law from the EU legal order and graft it onto the UK statute book, keeping it alive and operative while severing its constitutional connection to the European Union.

9.4.2 The Core Mechanics of the EUWA 2018

The Act achieved its objectives through a series of meticulously drafted provisions, primarily located in *ss.1 to 7*. The following flowchart visualises this core process of repeal, preservation, and correction.

Section 1: The Repeal of the *European Communities Act 1972*

Section 1 of the *EUWA 2018* was the symbolic and legal heart of the Brexit process. It simply stated: "The *European Communities Act 1972* is repealed on exit day."

This single sentence had profound constitutional significance:

- It terminated the "dynamic pipe" created by *s.2(1)* of the *ECA 1972*. No new EU regulations, directives, or decisions made after exit day would automatically become part of UK law.
- It abolished the interpretive instruction in *s.2(4)* of the *ECA 1972*. The UK courts were no longer under a duty to read all UK legislation in conformity with EU law. The doctrine of supremacy of EU law was extinguished in the UK legal order.

The repeal of the *ECA 1972* was the ultimate demonstration of the voluntary and contingent nature of the UK's acceptance of EU legal supremacy. The Parliament that had limited its own sovereignty in 1972 was the same Parliament, in a continuous line of sovereignty, that now chose to remove that limitation.

Sections 2, 3 and 4: The Preservation of EU Law as "Retained EU Law"

To avert the legal black hole, the *EUWA 2018* performed a remarkable feat of legal preservation. It "cut and pasted" the entire body of EU law that was operative in the UK immediately before exit day and created a new, freestanding category of domestic law: "retained EU law." This was done through three key sections:

Section 2: Retention of existing EU law. This section preserved EU-derived domestic legislation. This refers to UK statutory instruments and regulations that were passed to implement EU obligations, primarily directives. For example, the *Working Time Regulations 1998*, which implemented the *EU Working Time Directive*, were converted into retained EU law.

Section 3: Incorporation of direct EU legislation. This section directly incorporated into UK law all EU regulations, decisions and other directly applicable EU legislation that were operative immediately before exit day. These laws were effectively "lifted" from the EU legal

order and "pasted" into the UK statute book. For example, the *General Data Protection Regulation* (GDPR), an EU regulation, became part of UK law as "retained EU law."

Section 4: Saving for rights etc. under *s.2(1)* of the *ECA*. This was a "sweeping up" provision designed to capture any directly effective EU rights and principles that were not covered by *ss.2 or 3*. It ensured that the rights individuals could enforce in UK courts under the *ECA 1972*, such as certain treaty provisions, would continue to exist as free standing rights in domestic law.

***Section 5*: The "Frozen Snapshot" and the End of Dynamic Alignment**

A critical feature of the new system was established by *s.5*. It provided that, after exit day, the principle of supremacy of EU law would not apply to any enactment or rule of law passed or made after exit day. Furthermore, the charter of fundamental rights of the European Union would not be part of domestic law after exit.

More importantly, *s.5* effectively "froze" retained EU law as it stood on exit day. This created a legal "snapshot." The body of retained EU law would not update dynamically with new laws emanating from Brussels. The UK would no longer be subject to the principle of "dynamic alignment" that was inherent in its EU membership. This meant that from exit day onwards, the UK and EU legal systems could begin to diverge.

9.4.3 The Status and Interpretation of Retained EU Law

The *EUWA 2018* created a complex new hierarchy of legal sources. Retained EU law was not given the same supreme status it enjoyed under the *ECA 1972*. Instead, its status was deliberately downgraded to that of a subordinate category of law within the UK's domestic constitutional order.

Status Relative to Acts of Parliament

Retained EU law is not supreme over new Acts of Parliament. If a new Act of Parliament conflicts with a piece of retained EU law, the new Act prevails. The doctrine of implied repeal also applies to retained EU law. This marked a decisive return to traditional Parliamentary Sovereignty.

Role of the Judiciary and Pre-exit Day Case Law

The Act provided that UK courts were no longer bound by the principles laid down, or any decisions made, by the Court of Justice of the European Union (CJEU) after exit day. However, they could have regard to them so far as they were relevant. For pre exit day CJEU case law, the UK Supreme Court and the High Court of Justiciary in Scotland were given the power to depart from these decisions, applying the same test as it uses for departing from its own previous decisions. Lower courts generally remained bound by pre exit CJEU jurisprudence. This created a unique body of precedent, frozen in time but subject to gradual evolution by the UK's own supreme appellate court.

9.4.4 Correction Powers: The "Henry VIII" Clauses

A significant and constitutionally contentious aspect of the *EUWA 2018* was the extensive delegated powers it granted to ministers to amend both primary and secondary legislation. These are known as "Henry VIII powers," allowing the executive to use secondary legislation (Statutory Instruments) to amend or repeal primary legislation (Acts of Parliament).

Schedules 1 to 9 of the *EUWA 2018* contained extensive powers for ministers to make regulations to "prevent, remedy or mitigate" any failure of retained EU law to operate effectively, or any other deficiency in it, arising from the UK's withdrawal from the EU. For example, a minister could be empowered to amend a piece of retained EU law that referenced an EU institution which no longer had a role in the UK.

While these powers were necessary to fix hundreds of technical flaws in the statute book efficiently and quickly, they raised serious concerns about the balance of power between Parliament and the executive. They allowed ministers to make significant legal changes with limited parliamentary scrutiny, a process that contrasts sharply with the full legislative debate of a Public Bill.

9.4.5 Constitutional Significance and the Miller Case

The *European Union (Withdrawal) Act 2018* was the ultimate affirmation of Parliamentary Sovereignty. The UK Supreme Court case of ***R (Miller) v The Prime Minister*** [2019] UKSC 41, while primarily about the prorogation of Parliament, implicitly confirmed this. The

court treated the *EUWA 2018* as a valid and supreme exercise of Parliament's will, demonstrating that the ultimate source of constitutional authority in the UK remained the Queen in Parliament.

The Act successfully averted a legal catastrophe by ensuring continuity and legal certainty. However, it also created a complex and somewhat unwieldy new category of law. Retained EU law is an anomalous body of law, possessing a different genealogical origin and a different set of interpretive principles from the rest of the statute book. Its creation was a pragmatic solution to an extraordinary constitutional challenge, but it left a legacy of complexity that the UK legal system will grapple with for years to come.

The subsequent *Retained EU Law (Revocation and Reform) Act 2023*, which provided a mechanism for the systematic review and repeal of retained EU law, is a testament to the ongoing process of fully digesting this transplanted body of law into the UK's domestic constitutional system.

9.5 Retained EU Law: Concept, Status, and Future Amendment

The *European Union (Withdrawal) Act 2018* (*EUWA 2018*) performed a monumental act of legal preservation by creating the category of "Retained EU Law" (REUL). This was the mechanism designed to prevent a regulatory cliff edge and maintain legal continuity after Brexit. However, REUL is not a static relic; it is a dynamic and constitutionally unique category of law whose status and very existence are subject to ongoing political and legal scrutiny. Understanding REUL; what it is, where it sits in the constitutional hierarchy, and how it can be changed, is essential to comprehending the practical reality of the UK's post-Brexit legal order.

9.5.1 The Concept and Composition of Retained EU Law

Retained EU Law is the body of law that was "cut and pasted" from the EU legal order onto the UK statute book on "exit day" (31 January 2020). It is a "snapshot" of the EU law that was operative in the UK immediately before that moment. The *EUWA 2018* created REUL through three principal channels, which together form its composite parts.

Section 2: EU-Derived Domestic Legislation

This category consists of UK domestic legislation that was originally created to implement EU obligations. The most common examples are Statutory Instruments (SIs) passed by ministers using powers in the *European Communities Act 1972* to transpose EU Directives into UK law.

Example: The *Working Time Regulations 1998* is a UK Statutory Instrument that was enacted to implement the *EU Working Time Directive*. On exit day, these regulations, which grant rights to rest breaks and paid annual leave, were converted into Retained EU Law under *s.2* of the *EUWA 2018*. They were originally "EU-derived," but are now a freestanding part of the UK statute book.

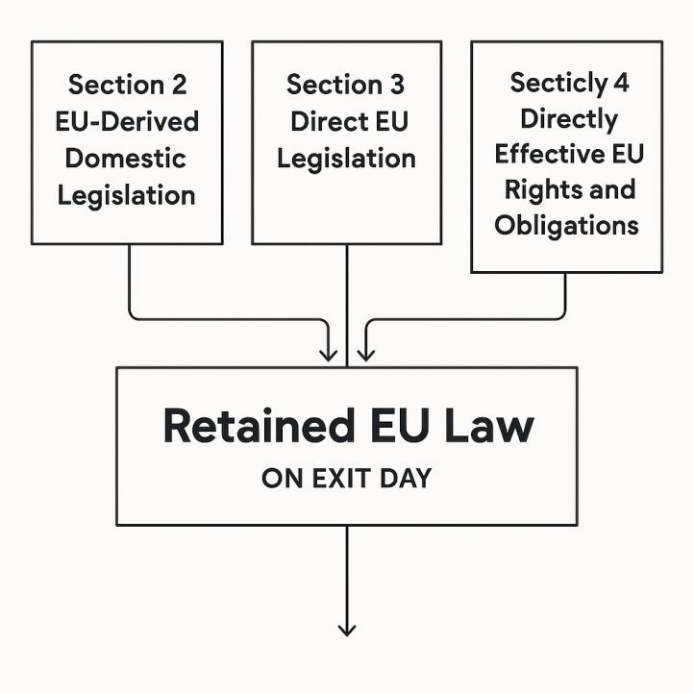
Section 3: Direct EU Legislation

This category includes EU laws that were directly applicable in the UK without the need for domestic implementing legislation. The most significant examples are EU Regulations, which have general application and are binding in their entirety.

Example: The EU General Data Protection Regulation (GDPR) was a directly applicable EU Regulation. On exit day, it was converted into UK law as "Retained EU Law." It is now known as "UK GDPR" and continues to regulate data protection, but it is no longer updated by the EU institutions.

Section 4: Directly Effective EU Rights and Obligations

This is a "safety-net" provision designed to capture any freestanding rights that were directly effective under *s.2(1)* of the *European Communities Act 1972* but were not incorporated via *ss.2 or 3*. This ensures that rights individuals could rely on directly against the state, such as certain Treaty provisions, were not lost.



9.5.2 The Constitutional Status of Retained EU Law

The status of REUL within the UK's constitutional hierarchy is deliberately distinct from the former status of EU law. It is not supreme, but it was initially granted a special, protected status that has since been significantly altered.

Relationship with Acts of Parliament: The End of Supremacy

The most fundamental change is that REUL is not supreme over Acts of Parliament.

- Any new Act of Parliament passed after exit day that explicitly contradicts a piece of REUL will prevail. The doctrine of express repeal applies fully.
- The UK courts no longer have the power, or the duty, to "disapply" an Act of Parliament because it conflicts with REUL. The ***Factortame*** principle is extinguished.

Furthermore, the *EUWA 2018* initially provided that the principle of supremacy of EU law would continue to apply, but only for the purpose of interpreting any conflicts between REUL and pre-exit domestic legislation. This ensured that pre-existing case law resolving such conflicts remained valid. However, this special status was time-limited and complex.

The Evolution of Status: From Special Status to Ordinary Law

The initial settlement under the *EUWA 2018* created a somewhat anomalous situation where REUL was a privileged body of law. The *Retained EU Law (Revocation and Reform) Act 2023* (*REUL Act 2023*) dramatically changed this.

The *REUL Act 2023* abolished the special status of REUL and provided for its "assimilation" into the domestic legal system. From 1 January 2024, the following key changes took effect:

1. The principle of supremacy of EU law was ended for all purposes.
2. The special interpretive obligations on courts regarding REUL were removed.
3. REUL was placed on the same footing as any other domestic secondary legislation, making it easier for courts to depart from it and for ministers to amend it.

The Role of the Judiciary and Precedent

The relationship between UK courts and the jurisprudence of the Court of Justice of the European Union (CJEU) has been fundamentally restructured.

Pre-exit day CJEU case law: UK courts may still have regard to pre-exit CJEU case law that is relevant to interpreting REUL. However, higher UK courts (the Supreme Court and the Court of Appeal) are now more freely able to depart from this jurisprudence than they were under the original *EUWA 2018*.

Post-exit day CJEU case law: UK courts are not bound by any decisions of the CJEU made after exit day. They may consider them, but they are merely persuasive, similar to a judgment from a senior court in another commonwealth country.

This gives the UK judiciary the final say on the development of REUL, allowing it to evolve independently from the EU legal order, a process known as "divergence."

9.5.3 The Future Amendment of Retained EU Law

The UK Parliament, having reclaimed its sovereignty, now has full power to shape, amend, or repeal any piece of REUL. The mechanisms for doing so, however, have been a focal point of constitutional debate, centring on the balance of power between Parliament and the executive.

Amendment by Primary Legislation

The most constitutionally straightforward method is for Parliament to pass a new Act of Parliament that expressly amends or repeals a piece of REUL.

Example: If Parliament wishes to change the rules on working time derived from the *Working Time Regulations 1998*, it can pass a new "Employment Rights Act" that explicitly sets out new rules, thereby repealing the relevant parts of the old regulations.

Amendment by Delegated Legislation: The "Henry VIII" Powers

A more contentious and widely used method is the amendment of REUL by government ministers using delegated legislation, or Statutory Instruments (SIs). These are often called "Henry VIII powers" because they allow the executive to amend primary legislation.

The *EUWA 2018* itself contained extensive powers for ministers to make SIs to correct deficiencies in REUL arising from Brexit. The *REUL Act 2023* significantly expanded these powers.

The *REUL Act 2023* gave ministers broad powers to restate, revoke or replace REUL more easily. The government initially published a schedule of over 1,400 pieces of REUL and proposed a "sunset clause" by which all REUL would automatically expire at the end of 2023 unless expressly saved. Although this blanket sunset clause was abandoned in favour of a specific list of laws to be revoked, the Act still grants ministers extensive authority to amend REUL using SIs.

This approach is constitutionally significant for two reasons:

1. **Executive power**: It shifts law-making power from the legislature (Parliament) to the executive (government ministers).

2. **Scrutiny**: Statutory Instruments receive less parliamentary scrutiny than full Acts of Parliament. They are often subject to the negative resolution procedure (they become law unless Parliament objects), which provides a much weaker check than the detailed line-by-line scrutiny of a Public Bill.

Example: A Minister, David, wishes to change the UK's REUL on chemical safety, which originates from an EU regulation. Using powers under the *REUL Act 2023*, he can lay a Statutory Instrument before Parliament to amend the rules. This SI might be subject to only a few hours of debate, or even no debate at all (under the negative procedure), compared to the weeks or months of scrutiny a new "Chemical Safety Act" would receive. This allows for rapid regulatory change but at the cost of democratic depth.

9.6 The New Constitutional Settlement: The UK-EU Trade and Cooperation Agreement

The *UK-EU Trade and Cooperation Agreement* (TCA), which came into force on 1 January 2021, is the treaty governing the new relationship between the UK and the EU. It is a complex agreement covering trade, security, and governance.

From a constitutional perspective, its key features are:

1. **It is an international treaty, not a supra-national law**: The TCA is a classic international agreement. It is not like the *ECA 1972*. Its rules do not automatically become part of UK law. If the TCA requires changes to UK law, Parliament must pass a statute to implement them.

2. **No role for the CJEU**: The TCA establishes a new governance structure involving joint UK-EU committees. The Court of Justice of the European Union (CJEU) has no direct legal role in interpreting or enforcing the agreement in the UK.

3. **The "level playing field" and dynamic alignment**: The TCA contains "level playing field" rules designed to prevent either side from gaining a competitive advantage by lowering environmental or labour standards. If the EU changes its standards, the UK does not have to automatically follow ("dynamically align").

However, if the UK's standards diverge too far and impact trade, the EU can take "rebalancing" measures, such as imposing tariffs. This creates a political and economic pressure to align, but not a legal requirement as existed before.

9.7 Conclusion

The UK has unquestionably reclaimed and transformed its parliamentary sovereignty. The repeal of the *European Communities Act 1972*, the end of EU law's supremacy, and the withdrawal from the CJEU's jurisdiction reaffirm Parliament's ultimate authority. Yet, the constitution has been permanently altered. The vast body of Retained EU Law and the wide powers given to ministers to amend it signal a lasting shift in power. At the same time, the UK's close economic and geographic ties to the EU mean that European law and policy will continue to influence domestic affairs through practicality rather than legal force.

The UK's relationship with EU law has therefore evolved from integration to cooperation. The *ECA 1972* and cases like ***Factortame*** symbolised a period when EU law reigned supreme in UK courts. That phase ended with the *European Union (Withdrawal) Act 2018*, which preserved legal stability through Retained EU Law while restoring sovereignty to Westminster. Under the *Trade and Cooperation Agreement*, the UK now engages with the EU as an independent partner, guided by collaboration instead of hierarchy. The mark of EU membership, however, remains deeply embedded in the UK's constitutional DNA.

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