

Detailed Contents

<i>Table of Legislation</i>	xxi
<i>Table of International Treaties and Conventions</i>	xxix
<i>Table of Cases</i>	xxxix

Part One Theoretical Principles

1 Defining the Constitution?	3
I. The meaning(s) of 'democracy'?	4
What is democratic governance? Some hypothetical examples	5
A constitution as a social and political contract?	7
II. The first 'modern' constitution?	9
The problem—majoritarianism	9
The solutions—representative government, federalism, a separation of powers, and supra-legislative 'fundamental' rights	10
Conclusion	17
Suggested further reading	18
Academic and political commentary	18
Case law and legislation	18
2 Parliamentary Sovereignty	19
Pre-1688—natural or divine law	19
The Diceyan (or orthodox) theory	20
The positive and negative limbs of Dicey's theory	21
The political source of parliamentary sovereignty—the 'glorious revolution'	21
I. Legal authority for the principle of parliamentary sovereignty	26
Substance or procedure? The enrolled Bill rule	27
The doctrine of implied repeal	27
Inconsistency with international law	28
II. Entrenching legislation—challenges to the orthodox position	30
Jennings' critique and the 'rule of recognition'	31
Is parliamentary sovereignty a British or English concept?	37
Women's enfranchisement	40
Conclusion	41
Suggested further reading	42
Academic and political commentary	42
Case law and legislation	42
3 The Rule of Law and the Separation of Powers	43
I. The Diceyan perspective: the rule of law in the pre-welfare state	43
<i>Entick v Carrington</i> (1765)	45
Dicey's rule of law—process or substance?	46
The 'independence of the judiciary'	47

II. The rule of law in the welfare state	49
<i>Hayek</i> —the road to serfdom	49
<i>Jones</i> —the rule of law in the welfare state	50
‘Red light’ and ‘green light’ theories	51
III. Judicial regulation of government behaviour: the constitutional rationale	51
IV. Principles of statutory interpretation	54
The literal rule	54
The golden rule	57
The mischief rule	59
Purposive (or ‘teleological’) interpretation	59
<i>Liversidge v Anderson</i> (1942)	60
<i>R v IRC, ex p Rossminster Ltd</i> (1980)	62
Conclusion	64
V. <i>Stare decisis</i>	65
The <i>London Tramways</i> judgment (1898)	65
The 1966 Practice Statement	65
VI. Parliamentary sovereignty v the rule of law	66
Ouster clauses— <i>Gilmore</i> (1957) and <i>Anisminic</i> (1969)	67
VII. ‘Retrospective’ law-making	69
Retrospectivity in legislation—the War Damage Act 1965	69
‘Retrospectivity at common law’? Rape within marriage and conspiracy to corrupt public morals	70
‘Retrospective’ or ‘prospective’ overruling?	73
Conclusion	74
Suggested further reading	75
Academic and political commentary	75
Case law and legislation	75
 4 The Royal Prerogative	 76
The source of prerogative powers	76
Post-1688—the revolutionary settlement	80
I. The relationship between statute, the prerogative, and the rule of law	82
<i>Re Petition of Right</i> (1915)	82
<i>The Zamora</i> (1916)	83
The superiority of statute over prerogative: <i>A-G v De Keyser’s</i> <i>Royal Hotel Ltd</i> (1920)	83
Extending <i>De Keyser</i> : <i>Laker Airways Ltd v Department of Trade</i> (1977)	86
Extending <i>Laker</i> : <i>R v Secretary of State for the Home Department, ex p Fire</i> <i>Brigades Union</i> (1995)	87
II. The traditional perspective on judicial review of prerogative powers: and its erosion	89
‘Limited’ rather than ‘full’ review of prerogative powers	89
Developments in the 1960s and 1970s	91
Conclusion—the ‘constitutionality’ of reform	92
III. Full reviewability—the <i>GCHQ</i> case (1983)	93
The ‘nature’ not the ‘source’ of power as the determinant of reviewability	94
IV. Post- <i>GCHQ</i> developments	95
<i>R v Secretary of State for the Home Department, ex p Northumbria</i> <i>Police Authority</i> (1988)	95

Foreign affairs?	97
Excluded categories: a shrinking list?	97
V. 'Justiciability' revisited—are all statutory powers subject to full review?	98
Conclusion	99
Suggested further reading	102
Academic and political commentary	102
Case law and legislation	102

Part Two The Institutions and Operation of National Government

5 The House of Commons	105
Crown and commons –the original intent and the subsequent rise of 'party' politics	105
<i>The fusion of powers, the rise of the party system, and cabinet dominance of the Commons</i>	106
I. Setting the context	109
The sources of the Commons' procedural rules	110
The Speaker	111
Resources	111
II. The passage of legislation	113
Second reading	114
Standing committees	115
Report and third reading	116
Conclusion	116
Private members' Bills	117
Private Bills	118
Delegated legislation	119
'Henry VIII clauses'	121
Conclusion	122
III. Controlling the executive	123
Motions on the floor of the house	123
Questions to Ministers	123
Prime Ministerial accountability on the floor of the house	125
Questions for written answer	126
Informal processes	126
The departmental select committee system	126
Conclusion	131
A more assertive and independent house?	132
Suggested further reading	134
Academic and political commentary	134
6 The House of Lords	135
Bicameral legislatures: a functionalist justification	135
I. The historical background	136
Co-equality to complementarity: a conventional change	137
Lloyd George and the 'people's budget'	139
The Parliament Act 1911	142
The Salisbury Doctrine and the Parliament Act 1949	145

II. The House of Lords in the modern era	146
Life peerages	146
The 1968 reforms	148
The 1974–1979 parliament	148
The House of Lords and the Thatcher governments	150
III. The work of the House of Lords today	152
Deliberation	153
Revision of legislation	154
Control of delegated legislation	155
Scrutiny of the executive	156
IV. The 1999 reforms	156
The 'reformed' House of Lords	158
The recommendations of the Wakeham Commission	159
The 2001 White Paper	161
One parliament or three? <i>Jackson v Attorney-General</i>	162
Conclusion	165
Suggested further reading	167
Academic and political commentary	167
Case law and legislation	167
7 The Electoral System	168
I. The evolution of a 'democratic' electoral system?	168
The Great Reform Act 1832	169
The 1867–1884 reforms: towards a universal 'right' to vote and a 'fair' electoral contest	173
II. The contemporary electoral process	175
Apportionment—drawing constituency boundaries	176
The contents and conduct of election campaigns	178
Counting the vote	188
The 2010 election: a hung Parliament and a coalition government	191
Alternative voting systems	192
Conclusion	195
Suggested further reading	196
Academic and political commentary	196
Case law and legislation	196
8 Parliamentary Privilege	197
The <i>Case of the Five Members</i> (1641)	198
Article 9 of the Bill of Rights 1689	198
I. The admission, retention, and expulsion of members	199
<i>Ashby v White</i>	200
<i>Paty's case</i>	200
John Wilkes	201
Charles Bradlaugh	202
Freedom from imprisonment, arrest, and molestation	204
II. The justiciability of 'proceedings in Parliament'	206
What are 'proceedings in parliament'?	206
'Redefining parliament'— <i>Pepper v Hart</i> (1993)	209

III. Regulating MPs' ethical standards	213
The register of members' interests	213
'Cash for questions' and the report of the Nolan Commission	215
The report of the Nicholls Committee	217
Parliamentary privilege and the expenses scandal	217
The Bribery Act 2010	218
Conclusion	220
Suggested further reading	220
Academic and political commentary	220
Case law and legislation	220
9 Constitutional Conventions	221
The Diceyan perspective—laws and conventions distinguished	222
The functions and sources of conventions	222
I. Collective ministerial responsibility	223
Confidence	224
Unanimity	225
Confidentiality	228
II. The Monarch	229
'On the advice of her Ministers'? The conventional 'democratisation' of the personal prerogatives	230
Refusing the Royal Assent	231
Choosing a Prime Minister in a hung Parliament	232
III. Collective ministerial responsibility revisited: from Cabinet to Prime Ministerial government . . . ?	233
. . . And back again?	235
IV. Individual ministerial responsibility	237
Issues of competence	237
Errors of judgement	239
Issues of morality	240
V. Can conventions become laws? 2: Patriating the Canadian constitution	242
Patriating the Canadian constitution	242
VI. Turning convention into law: the 'Ponsonby rule' and the Constitutional Reform and Governance Act 2010	245
Conclusion—the conventional basis of parliamentary sovereignty?	246
Suggested further reading	248
Academic and political commentary	248
Case law and legislation	248

Part Three The Geographical Separation of Powers

10 Local Government	251
I. Localism, tradition, and the 'modernisation' of local government	252
The Municipal Corporations Act 1835	253
II. Local government's constitutional status in the early-twentieth-century—law and convention	255
The physical boundaries of local authorities	257

III. Taxation and representation: the fiscal autonomy of local government	258
IV. The role of the judiciary	260
The 'fiduciary duty' doctrine revisited (and subverted?)	261
Conclusion	261
V. Council housing	262
The Housing Finance Act 1972	263
VI. From 'ambivalence' to 'authoritarianism'	264
VII. Financial 'reform' 1: grant penalties and ratecapping	266
Ratecapping	266
VIII. Collective politics and individual rights: the judicial role	268
'Fares fair': <i>Bromley London Borough Council v Greater London Council</i>	268
IX. Institutional 'reform': the abolition of the GLC and metropolitan counties	270
X. Privatising local government	271
Housing—individuated and collective privatisation	271
XI. Financial 'reform' 2: the community charge	273
A step too far? The demise of the poll tax	274
Conclusion	275
XII. The Blair government's reforms	276
The Local Government Acts 1999 and 2000	277
The governance of London	277
Conclusion	279
Suggested further reading	280
Academic and political commentary	280
Case law and legislation	280
11 Parliamentary Sovereignty within the European Union	281
I. The Treaty of Rome 1: founding principles	281
The types of EEC law and law-making processes	282
The status of EC law within the legal systems of the Member States	285
Questions of accessibility: the 'direct effect' of treaty articles	287
Questions of hierarchy: the 'precedence' of treaty articles over domestic legislation	289
II. United Kingdom accession	293
EEC membership and parliamentary sovereignty: the legislators' views—and their votes	294
The European Communities Act 1972—the passage	295
The European Communities Act 1972—the terms	295
Parliamentary sovereignty: a non-justiciable concept?	296
The 1975 referendum	297
III. EEC law, parliamentary sovereignty, and the UK courts: phase one	298
The end of the doctrine of implied repeal? <i>Macarthys v Smith</i> (1979)	299
A matter of interpretation? <i>Garland v British Rail</i> (1983)	300
IV. Political development in the 1980s	301
V. The end of parliamentary sovereignty? Or its reappearance?	302
The demise of the legal doctrine? <i>Factortame</i>	302
The reappearance of the political doctrine? Monetary union, collective ministerial responsibility, and the fall of Margaret Thatcher	308

VI. Maastricht and Amsterdam	310
The terms of the Maastricht Treaty	311
The ratification and incorporation of the Maastricht Treaty	312
The Treaty of Amsterdam	313
Conclusion—Nice and Lisbon	314
Suggested further reading	317
Academic and political commentary	317
Case law and legislation	317
 12 The Governance of Scotland and Wales	318
The Scotland Act 1978 and the Wales Act 1978	319
I. The Scotland Act 1998	320
The terms of the Act	323
The first Scottish parliament and government	328
The 2003 and 2007 elections	329
The 2011 election and the independence referendum	330
The 2015 electoral landslide, the Smith Commission, and the Scotland Act 2016	332
Judicial evaluation of the autonomy of the Scots Parliament	334
II. Devolved government in Wales after 1998	337
The Government of Wales Act 1998	337
The Government of Wales Act 2006	340
The Wales Act 2014	341
Conclusion	342
Suggested further reading	343
Academic and political commentary	343
Case law and legislation	343

Part Four Administrative Law

13 Substantive Grounds of Judicial Review	347
I. Illegality	348
Excess of powers	348
Unlawful delegation of powers	355
Fettering of discretion	358
Estoppel	360
II. Irrationality	363
Irrationality as a 'substantive' concept: assessing 'the merits' of a governmental decision	363
Irrationality as a procedural concept: the relevant and irrelevant considerations principles	368
III. Proportionality—a new ground of review?	369
Bringing the courts closer to the 'merits' of a decision	370
Conclusion	373
Suggested further reading	373
Academic and political commentary	373
Case law and legislation	373

14 Procedural Grounds of Judicial Review	374
I. <i>Audi alterem partem</i> —the right to a fair hearing	375
The initial rise, dilution, and fall of the <i>audi alterem partem</i> principle	376
The re-emergence of the principle? <i>Ridge v Baldwin</i>	380
The emergence of the procedural fairness doctrine and the appearance of the legitimate expectation	382
Legitimate expectation—an entitlement to a procedural benefit or a substantive benefit?	385
The content of procedural fairness—legal representation and an obligation to give reasons for decisions	395
Conclusion	397
II. The rule against bias	398
Direct financial interests	398
Indirect financial interests—a mere suspicion or a real likelihood	399
Clarifying the law? The <i>Gough</i> formulae	400
Ideological bias in ‘judicial’ decisions	401
Further clarifying the law? The <i>Porter v Magill</i> formula	402
Bias in non-judicial proceedings	403
Conclusion	404
Suggested further reading	404
Academic and political commentary	404
Case law and legislation	404
15 Challenging Governmental Decisions: The Process	405
The turning point? <i>Barnard v National Dock Labour Board</i>	408
The Order 53 reforms	409
The initial Order 53 case law	410
I. <i>O’Reilly v Mackman</i> (1982)	412
Exceptions to the general principle?	414
II. The post- <i>O’Reilly</i> case law	415
The flip side of the <i>O’Reilly</i> coin	417
A ‘nature’ not ‘source’ of power test—the <i>Datafin</i> (1987), <i>Aga Khan</i> (1993), <i>Servite Houses</i> (1999), and <i>Wachmann</i> (1993) decisions	418
The relevance of justiciability	421
III. Retreating from <i>O’Reilly</i> ? The <i>Roy</i> case	421
IV. Public law principle as a defence in criminal proceedings	423
Conclusion	426
Suggested further reading	427
Academic and political commentary	427
Case law and legislation	427
16 Locus Standi	428
I. The ‘old’ case law	429
Declaration and injunction—a restrictive test?	430
Certiorari and prohibition—an expansive test?	433
Mandamus—a broad or narrow test?	435
II. Section 31(3) of the Supreme Court (now Senior Courts) Act 1981 and the <i>Inland Revenue Commissioners</i> case	436

Should standing be a threshold issue?	437
Standing in the private law stream	438
III. Post-IRC developments	439
A 'citizen's action' test for standing under s 31(3)?	440
'Representative standing'	441
Conclusion	444
Suggested further reading	446
Academic and political commentary	446
Case law and legislation	446

Part Five Human Rights

17 Human Rights I: Traditional Perspectives	449
I. Privacy	450
Speech and communication	451
Sado-masochistic sexual behaviour	452
II. Freedom of speech	454
Official secrecy	455
The Official Secrets Act 1989	459
Blasphemy	460
Contempt of court	462
Political libels	464
Conclusion	467
Suggested further reading	468
Academic and political commentary	468
Case law and legislation	468
18 Human Rights II: Emergent Principles	469
I. The European Convention on Human Rights—introductory principles	469
Institutional and jurisdictional issues	470
The jurisprudential methodology of the Convention	471
II. The initial status of the ECHR in domestic law	474
Political responses—why did Parliament not 'incorporate' the ECHR?	475
Legal responses—the ECHR as a source of principle at common law	476
III. The impact of the ECHR on domestic law 1: privacy and freedom of expression	479
Privacy—speech and communication	479
Privacy—sado-masochistic sexual behaviour	480
Freedom of expression—official secrecy	480
Official secrecy	480
Freedom of expression—political libels	481
Freedom of expression—contempt of court	484
Blasphemy	486
Freedom of expression—conclusion	488
IV. The (re-)emergence and consolidation of fundamental human rights as an indigenous principle of common law	491
<i>Derbyshire County Council v Times Newspapers Ltd</i> in the House of Lords	492
<i>R v Secretary of State for the Home Department, ex p Leech</i> (No 2)	493

<i>R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants</i>	494
V. The 'judicial supremacism' controversy	495
ECJ and ECtHR judgments	495
Judgments in domestic courts on immigration policies	498
A judicial response	501
Lord Mustill's analysis	503
Conclusion	504
Suggested further reading	504
Academic commentary	504
Case law and legislation	505
19 Human Rights III: The Human Rights Act 1998	506
I. The terms of the Act	507
An 'incorporation' of 'fundamental' rights?	507
Sections 1 and 2: 'Convention Rights' under the HRA and Convention articles under the ECHR	509
Section 3—new rules of statutory interpretation?	509
Section 4—the 'declaration of incompatibility'	512
The inter-relationship between s 3 and s 4	512
Sections 3 and 4 create consequential or secondary jurisdictions	513
Convention Rights and the common law	513
Section 6—the reach of the act: vertical (and horizontal?) effect	513
Convention Rights and the common law ... again ...	515
A special status for churches and the press?	520
Questions of procedure	520
On the separation of powers	523
Political entrenchment? A new 'rights' culture within government and parliament	524
Conclusion	524
Suggested further reading	527
Academic commentary	527
Case law and legislation	527
20 Human Rights IV: The Impact of the Human Rights Act 1998	528
I. Convention Rights and Convention articles under s 2, statutory interpretation under s 3, and the use of declarations of incompatibility under s 4	528
The initial judicial reaction	529
A more structured approach to the meaning of 'possible' in s 3? A distinction between 'systemic' and 'individuated' consequences	532
'Deference' to legislative judgment	539
And deference to the ECtHR?	542
The question of precedent	544
II. 'Horizontality'	545
The meaning of 'public authorities'	546
An early analytical principle: the 'close assimilation' test	546
A more refined analytical principle? 'Core' and 'hybrid' or 'functional' public authorities	547
<i>R (Beer) v Hampshire Farmers Market Ltd</i> (2004)	548

<i>YL v Birmingham and Others</i> (2007)	549
<i>Weaver v London and Quadrant Housing</i> (2008)	551
Imposing Convention Rights on private individuals and organisations	552
III. Proportionality as a ground of review of executive action	558
The initial judicial response: the <i>Daly</i> and <i>Alconbury</i> cases	558
A more elaborate approach: the <i>Denbigh High School</i> and <i>Miss Behavin</i> cases	559
Blurring the issue? <i>Doherty</i> (2008), <i>Pinnock</i> (2009), and <i>Powell</i> (2010)	563
‘Un-blurring’ the issue? <i>Quila</i> (2012), <i>Pham</i> (2015), and <i>Keyu</i> (2016)	565
Conclusion	569
IV. Judicial supremacism revisited?	569
The Nationality, Immigration and Asylum Act 2002 s 55	570
The ouster clause provisions in the Immigration and Asylum Bill 2003	571
Conclusion	573
Suggested further reading	577
Academic commentary	577
Case law and legislation	578
21 Human Rights V: Governmental Powers of Arrest and Detention	579
‘Liberty’ under Art 5 ECHR	580
The Police and Criminal Evidence Act 1984	581
I. Deprivation of liberty for ‘ordinary’ offences	582
Powers of arrest	582
Powers of detention after arrest	591
Powers of detention without arrest	592
II. Deprivation of liberty for ‘terrorist’ offences	597
Powers of arrest and detention in the 1945–1977 era	598
Powers of arrest and detention in the post-1977 era	603
Conclusion	608
Suggested further reading	609
Academic commentary	609
Case law and legislation	609

Part Six Conclusions

22 A Revolution by Due Process of Law? Leaving the European Union	613
I. The 2016 referendum	614
The referendum legislation	615
The campaign	619
The result	621
II. The <i>Miller</i> (No 1) Litigation	623
In the High Court	624
A unanimous court	624
Reaction(s) to the judgment	625
In the Supreme Court	627
Prerogative powers could not be used to override or compromise statutory provisions	627
What is the domestic status of EU law?	628
The significance of the referendum	629

The voice of the devolved legislatures	630
The dissenting judgments	631
Reaction(s) to the judgment	632
III. Negotiating the terms of departure or not	633
The 2017 general election	634
The May government's policy objectives	635
The European Union (Withdrawal) Act 2018	635
IV. The <i>Miller (No 2)</i> and the <i>Cherry</i> Litigation	637
<i>Miller (No 2)</i> in the High Court and <i>Cherry</i> in the Scots courts	637
In the Supreme Court	640
The political aftermath	646
Suggested further reading	648
Academic commentary	648
Case law and legislation	648
23 Conclusion	649
I. Entrenchment of fundamental law revisited	650
Issues of legality and legitimacy	650
'Constitutional statutes'?	654
Questions of legitimacy	657
Conclusion	659
Suggested further reading	660
Academic commentary	660
Case law and legislation	660
Appendix: Constitutional Implications of the Coronavirus Pandemic	661
The Original regulations	662
The statutory basis for the regulations	663
The Coronavirus Act 2020	664
Conclusion	666
Bibliography	669
Index	693