

CAL – SOP AND ROL (lectures 2 & 3)

SOP: Separate Personnel and Functions: executive, legislature, judiciary. Political theory: Aristotle, Montesquieu, declaration of the rights of man 1789. Strict model of SOP – total separation? See Munro

ROL: Theory/aspiration; Constitutional principle (Constitutional Reform Act 2005 s1); Context? JR = rule of law in operation? Powers exercised by politicians must have a legitimate foundation based on authority conferred by law – *Corner House Research*

EXECUTIVE/LEGISLATURE

- *Barendt - “there is no effective separation of power between the legislature and executive in the UK in the system of checks and balances”
- *Lord Hailsham – “elective dictatorship”?
- *Bagehot – “the efficient secret” of the constitution”?

Causes for concern? (SOP)

- *Parallel membership
- *95 on ministerial team
- *PPSs
- *Delegated legislation – SI
- *True bicameral system? - Parliament Acts

PARLIAMENT CHECKS ON EXECUTIVE?

- *Parliamentary majority?
- *HC Disqualification Act 1975
- *Accountability? Debates, (PM) Question Time, Select Committees, Ministerial responsibility

“It cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based on the separation of powers; Parliament makes the laws, the judiciary interpret them”.
Lord Diplock, *Duport Steels v Sirs*

JUDICIARY/LEGISLATURE

- *Statute superior to common law - War Damages Act 1965
- *Statutory interpretation – Purposive - See s 3 HRA - EC law
- Judicial activism - “filling in the gaps” - Lord Denning, *Magor and St Mellons v Newport* (1950, CA)

Judicial law-making?

- **McGonnell v UK* – no sop
- **Shaw v DPP* – prostitution & rectory – no sop
- **Gillick v West Norfolk HA* – no sop – bad law making
- **Airedale NHS Trust v Bland* – no sop, but have to make decisions
- **R v R* – no sop – good law making
- **Burmah Oil v Lord Advocate* - sop
- *Refusal to create law/ deference to Parliament - *Malone v MPC*

JUDICIARY/EXECUTIVE

- *Institutional separation
- *Act of Settlement (1701) – “good behaviour”; senior courts act 1981 s11, constitutional reform act 2005 s33
- *Immunity from suit - *Sirros v Moore*
- *Open Courts
- *Consolidated fund
- *HRA 1998 - Public authorities (section 6)
- *Political independence – conventions
- *Judicial Appointments – Constitutional Reform Act 2005 s6.
- *Head of the Judiciary - LCJ
- *Rule of law?
- *Judicial review - grounds of challenge/ GCHQ/ *M v Home Office*/ Lord Mustill ‘judges are distinct and largely exclusive domain’ (Fire Bridges Union)
- *Recent trends? Constitutional Reform Act 2005 (Judicial independence, s 3/reformed office of Lord Chancellor’s role); Judicial Appointments –improved independence; Supreme Court (2009) – geographical separation; Further reforms - Attorney-General ?; Judicial self-confidence
- *SOP – statutes/law; PA 1911/49; HC (Disqualification Act 1975); HRA 98; JR; Conventions; ministerial responsibility; Question time and debates.
- *Further cases: *Rossminster*; *Duport Steel v Sirs*; *R(A) v SSHD*

IS IT A FORMAL OR SUBSTANTIVE CONCEPT?

*Formal ROL: courts, officials, structures BUT their existence may not guarantee. Substantive ROL: fairness, justice.

*Formal requirements PLUS good law? clarity/certainty, proper authority for actions, stable, consistency, moral neutrality, protection of human rights, guarantee judicial independence.

DICEY’S THEORY - Law of the Constitution (1885)

LORD BINGHAM 2010 – 8 sub rules: accessible, clear, predictable; apply equally; protection for HR; access to justice

1. Supremacy of regular law

Authorization for power? Legal justification. *Entick v Carrington*; Lord Camden: Every invasion of private property is a trespass. *Kelly v Faulkner*; *Malone v MPC*;

Ex p Fewings – “action to be taken must be justified by *positive law*” (Laws LJ)

Clarity of rules

- *Accessible - *Sunday Times v UK*; *Shaw v DPP*
- *Non-retrospective - *R v R*; *Burmah Oil v Lord Advocate* - War Damages Act 1965

Discretionary power? Tendency to abuse of power in modern complexity of government; State interventionism; Von Kasek – Road to Serfdom; Red light v green light. *IRC v Rossminster* – Lennart Wilberforce re narrow or widen interpretation of statutes?

BUT DISCRETION & TIMES OF THREAT (war, terrorist threat)-
JUDICIAL DEFERENCE/INDEPENDENCE – Independence of judiciary (SOP). Judicial deference? *Liversidge v Anderson* (evidence was not needed to detain German fleeing Nazi Germany); *Ex p Hosenball* (charged with not much evidence *Ex p Cheblak*. Human rights? – *R(A) & Others v SSHD*. The state has to react in vulnerable times, but how far is too far?

2. Equality before the law – Some groups/people are ‘above the law’ eg Partial Crown immunity; MPs’ privileges (*Stourton v Stourton*); Judges – immunity from suit; Diplomatic immunity; *M v Home Office* (couldn’t put home secretary in prison). Does this negate equality above the law? Probably not as, justified and courts would treat them equally if it came down to it. It is a small list. Evidence for equality before the law is neither clear nor uncontentious, but there is enough evidence to suggest that Dicey approach remains fruitful for inquiry and exploration. Fenwick also stated that it is an essential element of ROL.

3. No higher law

*Common law constitutional rules – no written code - “the consequence of the rights of the individual as defined in the courts of law.” Dicey. Other states with codified constitutions? Results from no written constitution: corner house research. Does not work internationally. Challenge to this: EU law; HRA 1998.

*ROL – international conceptions – Universal Declaration of HR 48 – It is essential, if a man is not compelled to have recourse as a last result to rebellion against tyranny and oppression, that HR should be protected by ROL. Declaration of Delhi 1959 – 3rd rule of Dicey’s theory does not work. They declared that the purpose of all law should be respect for the supreme value of human personality.

***APPLICATION OF ROL** - Judicial review. Grounds? Illegality (*ultra vires*), duty to act fairly (procedural impropriety), unreasonableness - *Wheeler v Leicester City Council*

***CURRENT STATUS OF ROL** - Behind parliamentary sovereignty? *Exp Simms*; *Jackson*; SOP – *Re M.* majoritarianism ?or (substantive) ROL values? Corner House Research (2008) Binyam Mohamed (2010). Recent developments: ECA 72; Lisbon 2009; HR 98.

***Jeffrey Jowell**- 20c tyrannies were marked by their failure to observe ROL. Many of them claimed legitimacy for their oppressive actions from the fact of majority support. “Britain is moving steadily to a model of democracy that limits governmental power in certain areas, even where the majority may prefer otherwise. The Rule of Law supplies the foundations of that new model”.