The rule of law and separation of powers

Introduction

An umbrella term; a moral construct; what ‘government’ can do – and how ‘government’ can do it

1. The Diceyan orthodoxy(ies)

A strong – dominant - understanding by late 1800s

Suffer in body or goods > distinct law > ordinary courts > no arbitrary power > ‘equality’

1.1 Entick v Carrington (1765)

Trespass > general warrants > no statutory power > no common law power

Camden’s methodology – “it will be found in our books” >>> legal certainty

Executive has no inherent lawmaking power

An ‘independent’ judiciary – Act of Settlement 1701
Judges appointed by crown; dismissible by Commons and Lords

2. Modern reformulations

Harlow/Rawlings (1984) Law and administration

Hayek (1944) Road to serfdom

Jones (1958) Welfare state and rule of law

3. Judicial review as a common law construct

Baggs Case (1615) Coke CJ; courts can review all government behaviour
Judicial review principles
Control of the executive – not of Parliament
An inherent common law jurisdiction
Presumption always available, unless parliament excludes

3.1 The traditional grounds – *Wednesbury* (1948)

<table>
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<tr>
<th>Grounds</th>
<th>Description</th>
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<tr>
<td>Illegality</td>
<td>four corners; excess of jurisdiction</td>
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<td>Irrationality</td>
<td>so absurd no sensible person could dream; <em>(GCHQ</em> - so outrageous in defiance of logic or accepted moral standards)</td>
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<td>Procedural unfairness</td>
<td>right to be heard                  bias</td>
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Parliament can create new statutory grounds of review; alter or abolish common law grounds

4. Principles of statutory interpretation

Most governmental powers are statutory. Courts must identify the limits of those powers. Principles of statutory interpretation traditionally left to courts as part of the common law

4.1 *Magor and St Mellons RDC* (1950)

- **Court of Appeal** (Denning) courts can fill in gaps to make sense of legislation and give effect to intentions of Ministers
- **House of Lords** (Symonds) “naked usurpation of the legislative function….”

4.2 *Liversidge v Anderson* (1942)

- **The majority** Home Secretary’s decision; no review; teleology (war)
- **Atkin in dissent** star chamber; humpty-dumpty; conservative literalism

The text of reg 18b “reasonable cause to believe… hostile origins or association”
Divergent analyses

4.3 Rossminster v IRC (1980)

- Court of Appeal (Denning) spanish inquisition; judicial duty to interpret statute so that interferes as little as possible with liberties; teleology
- House of Lords (Wilberforce) Parliament may choose to curtail liberties; court must not impede working of legislation; literalism

5. Legal certainty

- USA constitution Art 1.s.10 – no ex post facto law – why?

5.1 Retrospective legislation not what law is; or will be; but was

- Burmah Oil (1964) 3-2 majority; destruction in anticipation of battle; right to, not ex gratia, compensation; announces law in 1942 and since 1942
- War Damage Act 1965 changes law in 1942 – and in future; no old claims; no new claims; £000 millions; what ‘price’ legal certainty

5.2 Retrospectivity at common law?

- London Tramways (1898) rigid precedent: certainty > substantive justice
- 1966 Practice Statement firm precedent; certainty not always > substantive justice
- R v R (marital rape) (1991) Hale’s 18th century maxim common law is elastic; responds to changing moral values

Is common law innovation declaratory or transformative?
The traditional view  
*DPP v Shaw* (1961) – conspiracy to corrupt public morals

**Majority:** residual power; supreme purpose; conserve moral welfare against novel attacks

**Reid’s dissent:** need certainty, especially in criminal law; too vague

The ‘modern’ view  
*Reid* (1970 *SPTL*) fairy tales; judges do make law

### 6. Ouster clauses

Parliament restricts/redefines traditional rule of law by ousting court jurisdiction

**Gilmore** (1957)  
MAT decisions ‘shall be final’

**Denning**  
final means without appeal, not without review  
distorts literalism to preserve Diceyan rule of law

**Anisminic** (1968)  
*Foreign Compensation Act 1950* s.4(4)  
FCC’s determinations ‘shall not be called in question in any court..’

**Reid**  
unlawful decision is only a ‘purported determination’  
distorts literalism to preserve Diceyan rule of law

**Wade** (1969) *LQR*  
Criticises Parliament’s disregard for the rule of law

**Griffiths (Politics..)**  
Criticises judicial disregard for parliament’s sovereignty

### 7. Conclusion

**Contrast**  
Reid in *Madzimbamuto*  
parliamentary sovereignty > rule of law

Reid in *Anisminic*  
rule of law > parliamentary sovereignty?

**Last word?**  
*Bishop Hoadley* in 1701 – interpreter truly the lawgiver