Principles of Public Law

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THE NEW CONSTITUTIONAL SETTLEMENT

2.1 Introduction

The previous chapter explained, in a fairly abstract way, the principles of liberal democracy underpinning public law. Before going further, we need to consider in outline the practical constitutional arrangements of the UK. So many changes have been made to the structures of law making and government in the past few years that it is no exaggeration to say that there has been a new constitutional 'settlement'. Many of them have come about as the direct result of a programme of constitutional reform implemented by the Labour Government since the 1997 general election. Other changes stem from broader and deeper transformations that are taking place in the way governments operate – many of them associated with the processes of globalisation and the creation of the 'new world order' (see below, 2.12). Some of the most significant developments include the following:

(a) the continuing evolution of the European Union, most recently with the revisions made by the Treaty of Amsterdam which came into force in May 1999;

(b) new devolved legislative and executive institutions have been established in the three smaller parts of the UK (Scotland, Wales and Northern Ireland) and this will have an impact on the whole of the UK, including England;

(c) the Human Rights Act 1998 incorporates the European Convention on Human Rights into the legal systems of the UK. This will affect not only the constitutional relationship between individuals and the State, but also between the judiciary, legislatures and executive bodies of the UK.

2.2 Allocating decision making powers

One of the main practical functions of a constitution is to define the powers of decision making of the State's office holders and institutions (see above, 1.7). The term 'competences' may be used to describe these powers. A public authority may have competence to carry out a specific kind of constitutional function. Theorists identify a principle called the 'separation of powers', in which three main kinds of constitutional function are distinguished:

(a) the legislative (broadly, making legally binding rules of general application);

(b) the executive (broadly, governmental powers to initiate and implement policy choices); and

(c) the judicial function (broadly, adjudicating on disputes according to legal rules and principles).

Some theorists argue that it is important for each function to be allocated to a separate institution. If they are combined, the fear is that a public authority may have too much power and abuse it. The UK Constitution does not take this view. It has a system of parliamentary, rather than presidential, government which *requires* members of the executive branch (ministers) to be members of the legislative branch (Parliament). Another illustration of the UK's relaxed attitude towards the separation of powers is that the Lord Chancellor is a member of all three branches of government: he is the presiding officer of the upper chamber of Parliament; he sits as a judge in the Appellate Committee of the House of Lords; and he is a member of the Cabinet (see below, 2.4.3). What the UK does attach great importance to, however, is the general independence of the judiciary from the executive (see below, 2.10).

Apart from allocating functional competences, in the ways just described, a constitution needs to allocate competences to deal with particular areas of public policy. We may say that an institution, or set of institutions, has the legal capacity to deal with (say) agriculture or health care – and this may include making legislation about the topic, taking executive action and adjudicating on disputes about it. Many large liberal democracies, such as the US and Germany, allocate policy competences according to a federal system. This means that the constitution recognises two autonomous levels of government, neither subordinate to the other. The UK does not have a federal system, though the trend may be towards something resembling federalism with the creation of devolved legislative and executive institutions in Scotland, Northern Ireland and Wales.

Any description of the allocation of competences now has to be quite technical. A person wanting to know whether public authority has the power to do something needs to understand the content and status of a range of legal instruments, as we shall see. These include the Treaty Establishing the European Communities and the Treaty on European Union (see below, 7.2). Numerous Acts of the UK Parliament deal with the powers, limits on powers, and duties of public authorities. These include the Scotland Act 1998, the Northern Ireland Act 1998, the Government of Wales Act 1998, the Local Government Act 1972, the European Communities Act 1972, the Public Order Act 1986, the Parliament Acts of 1911 and 1947, the Representation of the People Act 1983, the Act of Settlement 1700, the Bill of Rights 1688, Magna Carta 1215 ... the list could go on. Some of these statutes allocate competences, or place restrictions on competence, according to elaborate schemes. Some public authorities also acquire powers, and have restrictions place upon them, by the prerogative (see below, 2.4.3).

Constitutional conventions

In addition, there are constitutional conventions. (The term 'convention' is also used to describe some international treaties, such as the European Convention on Human Rights, but here, the word is used in an entirely different sense.) Some of the features of the constitution described in this chapter – including the existence of a cabinet and the fact that ministers are members of, and make themselves answerable to, the UK Parliament – are not stipulated by statute or the common law. Many institutions exist, and procedures are followed, just because there is widespread agreement that they should. There is academic debate about the nature of conventions and the extent to which their characteristics differ from 'laws' (see below, 5.4). One constitutional authority suggests a practical test for establishing whether a particular convention exists (see Jennings, I (Sir), *The Law and the Constitution*, 1952, London: London UP):

(a) Are there any precedents?

(b) Did the actors in the precedents believe that they were bound by a rule?

(c) Is there a reason for the rule?

In many situations, this test clearly determines that a convention exists. For instance, it is a convention that the monarch does not refuse to give royal assent to a bill passed by Parliament (see below, 2.11). There are many precedents, and the monarch apparently believes that she is bound by this rule – not since Queen Anne attempted to withhold assent in the 18th century has a monarch seriously sought to question its existence. There are also good democratic reasons for the convention. In other cases, the existence of a convention may be less certain. For instance, is it a convention that a minister who has engaged in a discreditable sexual relationship should resign from government?

Lack of a codified constitution

Occasionally, it is suggested that the UK would benefit from a written constitution – that is, a codified legal instrument setting out the principal powers, limits on powers and duties of the main public authorities. The UK remains one of a tiny number of countries without such a document. The flurry of constitutional reform over the past few years has rather diverted attention from the fact that it is often difficult to know what public authorities do and how they relate to each other.

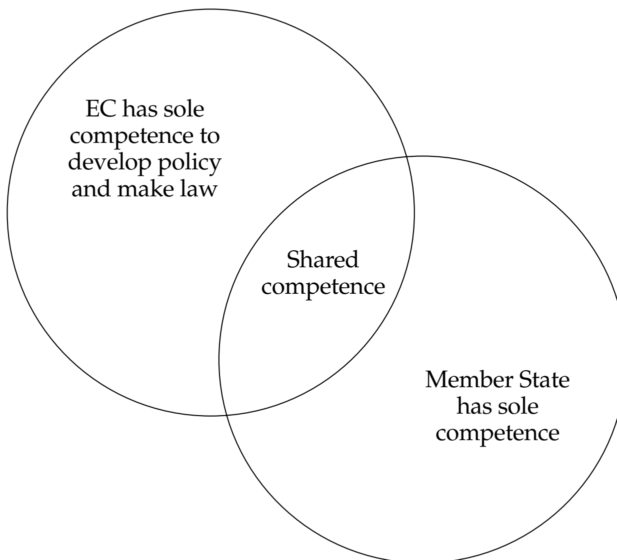
2.3 Allocation of competences between the EC and the UK

Describing the competences of public authorities in the UK is, then, not straightforward – not least because, since 1973, the UK has been a Member State of what is now called the European Union. The most developed part of

the European Union is the European Community (see below, 7.2.1); Member States also work together on a common foreign and security policy (see 7.2.2) and there is police and judicial co-operation on criminal matters (see 7.2.3). For simplicity's sake, we focus, for the time being, just on the European Community.

In relation to some fields of government action, the institutions of the European Community have sole competence to develop policy. In relation to other areas of policy, the European Community shares competence to do things with each of the 15 Member States. In yet other categories, Member States remain free to develop policy without any formal co-operation with the European Community. This can be represented in a diagram.

Figure 1



The extent of the European Community's sole or shared competences in policy areas can be seen from Art 3 of the Treaty Establishing the European Communities (see below, 7.2), which states:

> ... the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
>
> (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
>
> (b) a common commercial policy;

(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

(d) measures concerning the entry and movement of persons ...;

(e) a common policy in the sphere of agriculture and fisheries;

(f) a common policy in the sphere of transport;

(g) a system ensuring that competition in the internal market is not distorted;

(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;

(i) the promotion of co-ordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;

(j) a policy in the social sphere comprising a European Social Fund;

(k) the strengthening of economic and social cohesion;

(l) a policy in the sphere of the environment;

(m) the strengthening of the competitiveness of Community industry;

(n) the promotion of research and technological development;

(o) encouragement for the establishment and development of trans-European networks;

(p) a contribution to the attainment of a high level of health protection;

(q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;

(r) a policy in the sphere of development co-operation;

(s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;

(t) a contribution to the strengthening of consumer protection;

(u) measures in the spheres of energy, civil protection and tourism.

These, then, are the policy competences allocated in whole or in part to the European Community. Chapter 7 examines in more detail how the European Community exercises its functions in relation to these areas of policy. It carries out legislative functions through a network of institutions (the Council, the Commission and the European Parliament), which create directives and regulations. It has an executive function (mainly carried out by the Commission (see below, 7.5.1, and 8.2.5)), but public authorities in the Member States have most of the responsibility for the day to day implementation of Community policy. The European Community also has a judicial function, exercised through the Court of Justice and Court of First Instance in Luxembourg; but national courts and tribunals are responsible for adjudicating on the bulk Community law issues (see Chapter 18). From time to time, disputes arise about whether it is the Community or a Member State which has the competence to do something (see below, 5.2.4). On the other hand, the European Community has, on occasion, mistakenly thought it had

competence, when it did not. It is Community law, not national law, which determines where competence lies.

2.4 Allocation of competences within the UK

In relation to some areas of policy, Member States of the European Union retain sole competence to decide what government ought to do (see Figure 1). The Treaty establishing the European Communities does not spell out what these areas are: they are, therefore, any field of policy which does not fall within the competence of the European Community. Policy in relation to families and divorce, constitutional reform, criminal justice and income tax are examples of areas in which each Member State has competence – although, even here, national governments may be constrained to some extent by Community law.

Our focus in this book will be on the arrangements within the United Kingdom of Great Britain and Northern Ireland (as a member of the European Union). The UK, like most other States, has chosen to create smaller units of governance within its territory. The UK is a union of four parts: England, Wales and Scotland (which together form 'Great Britain') and Northern Ireland. Within each part of the UK, government is also organised in still smaller units – local authorities (sometimes called 'counties' and 'boroughs'). Throughout the UK, there are over 600 such units (see below, 2.9.1).

Jersey, Guernsey (Channel Island 'Crown dependencies') and the Isle of Man are not parts of the UK, nor are they members of the European Union. The UK Government is, however, responsible for the defence and external relations of these self-governing islands. The same is true of a number of small dependent overseas territories, which include Gibraltar, the Cayman Islands and the Falkland Islands.

2.4.1 Difficulties in mapping out competences within the UK

For a beginner, understanding the allocation of competences within the UK is made difficult for several reasons. As we have just seen, competences in relation to some fields of government action are shared with the European Community. Careful legal analysis of relevant legislation may be needed in order to work out, for example, whether a particular policy initiative on (say) environmental protection is a matter for the Community, for the UK, for a devolved institution in Scotland, Northern Ireland or Wales, or for a local authority. Another difficulty is that devolution, under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998, has resulted in an asymmetrical arrangement. England, which has 80% of the UK's population and its largest land area, does not have its own Parliament or

government separate from that of the UK as a whole: 'England' has no constitutional status. Moreover, there is no common pattern to the schemes for allocating functional and policy competences (see above, 2.2) to the new institutions in Scotland, Wales and Northern Ireland. To explain who has competence to do what, when and how within the UK, we begin with the UK as a whole (and England), and then move on to examine the powers of the devolved institutions.

2.4.2 The UK Parliament

The 659 Members of the UK Parliament (which is also the Parliament for England) are elected to serve for terms of up to five years (the minimum length of a Parliament is not set by law) by a plurality (or 'first past the post') electoral system. The role of Parliament in the constitutional system is considered in more detail in Chapter 6. Here, our concern is to outline its constitutional competence. Much theory and political rhetoric has been spent claiming that the UK Parliament is omnicompetent – that it has power to make and unmake laws on any subject (see below, 5.2). In formal legal terms, this is true; in practical terms, it is misleading.

It is true because, in the absence of a written constitutional code (see above, 2.2), Acts of the UK Parliament are still generally regarded as the highest form of law in the constitutional system. What has happened is that, for the time being, the UK Parliament has delegated law making powers to the institutions of the European Union (see below, 7.6), including the capacity to make rules which override Acts of Parliament. The UK Parliament could, however, at any time reclaim those law making powers. Similarly, in relation to the UK Parliament's relationship with the Scottish Parliament (see below, 2.5.1) and the Northern Ireland Assembly (see below, 2.6.1): the UK has conferred power on those devolved institutions to make legislation, but it could, at any time, take them away. Indeed, the Scotland Act 1998 and the Northern Ireland Act 1998 expressly preserve a residual power for the Parliament of the UK to enact primary legislation for those parts of the UK on any matter, including those envisaged normally to be within the competence of the devolved legislatures (s 28(7) of the Scotland Act; s 5 of the Northern Ireland Act).

This view may, however, be misleading – or at least overly formal. Certainly, it does not capture the day to day constraints that apply to the UK Parliament. Its competence to enact legislation is limited. In summary, the position is that it may enact statutes in relation to the following matters:

(a) any matter relating to England which does not breach a rule of European Community law (see below, 7.9.1);

(b) any matter relating to Wales which does not breach European Community law;

(c) in relation to Scotland, those matters which have been 'reserved' to the UK by Sched 5 of the Scotland Act 1998 (see below, 2.5.1). Again, statutes on these issues may not be enacted in breach of European Community law;

(d) in relation to Northern Ireland, those matters which are 'excepted' or 'reserved' to the UK by Scheds 2 and 3 of the Northern Ireland Act 1998 (see below, 2.6.1).

As a matter of domestic law, the UK Parliament may pass statutes which breach the human rights set out in the European Convention on Human Rights – as it has done on several occasions (see below, 19.6). Following the enactment of the Human Rights Act 1998, however, courts in the UK may grant a declaration that a provision in an Act of Parliament is incompatible with the Convention. This will not affect the legal validity of the enactment.

As a matter of international law, the UK may not enact legislation contrary to the Convention. The European Court of Human Rights in Strasbourg has, in international law, power to make a declaration that a breach has occurred (see below, 19.7). Such a declaration would not affect the validity of the provision at issue so far as UK law is concerned.

2.4.3 Government of the UK

The Government of the UK, which is also the Government of England, is drawn from the UK Parliament. After a general election, the leader of the largest political party becomes the Prime Minister (see below, 2.11) and chooses a number of other MPs and peers (usually about 90) from his or her party to become ministers. It has become practice for the Prime Minister to have an annual cabinet reshuffle in which some ministerial posts are reallocated. Twenty or so senior ministers (mostly styled 'Secretary of State') are the political heads of the main central government departments (such as the Home Office, the Foreign and Commonwealth Office, Department of Trade and Industry and the Department for Education and Employment). The portfolios of some ministers, such as the Foreign Secretary, include responsibilities for the UK as a whole. After devolution in 1999, the responsibility of some ministers in the UK Government (for instance, in the Ministry of Agriculture, Fisheries and Food) is largely confined to government within England.

The interests of Scotland, Wales and Northern Ireland in the Government of the UK are represented, respectively, by the Secretary of State for Scotland, the Secretary of State for Wales and the Secretary of State for Northern Ireland. (These posts are not to be confused with those of leaders of the devolved executives, namely the First Minister of Scotland, the First Secretary of Wales and the First Minister of Northern Ireland.)

Senior ministers of the UK Government join the Prime Minister in the Cabinet, which meets once a week at 10 Downing Street, normally for no more

than an hour. What is discussed is a secret, though journalists are normally briefed on some of the issues discussed by the Prime Minister's Press Secretary. There are numerous Cabinet committees of senior and junior (non-Cabinet) ministers, and sometimes senior civil servants, which decide government policy on different issues. It is in these committees that major government policy initiatives are often finalised.

Ministers in the UK Government obtain powers and duties to take action from several different sources. Acts of the UK Parliament may confer powers or impose duties on them (see above, 1.7.4). Such powers often include the capacity to make subordinate legislation (also known as 'delegated' or 'secondary' legislation). Most subordinate legislation is in the form of statutory instruments. These are rules drafted within a minister's department and put before Parliament for approval. In most cases, the scrutiny which Parliament subjects them to is – to say the least – cursory. It is rare for a statutory instrument to be debated (see below, 6.5.2). They are published by Her Majesty's Stationery Office <www.hmso.gov.uk/stat.htm>. Occasionally, the validity of a statutory instrument is challenged by judicial review.

In some situations, ministers may obtain their legal powers, or have duties imposed upon them, by the royal prerogative. In essence, these are powers recognised by the courts as attributes of the Crown. Academic lawyers have disagreed over the exact definition of prerogative powers. For some, they are the legal powers, unique to the Crown, to alter a person's rights, duties or status (Wade, HWR, *Constitutional Fundamentals*, 1989, London: Stevens, p 46). The courts, however, have tended to adopt a broader definition: all the non-statutory powers of the Crown, even if they are not unique to the Crown (for instance, giving money away) and even if they do not alter people's rights. Falling within this definition, for example, would be making ex gratia payments to victims of violent crime under the Criminal Injuries Compensation Scheme (*R v Criminal Injuries Compensation Board ex p Lain* (1967); but note that the scheme has now been made into a statutory one). In the distant past, prerogative powers were exercised personally by the monarch. With the rise of Cabinet government and the coming of democracy (see Chapter 3), decisions about how to exercise most prerogatives came to rest in the hands of ministers. There is no formal, comprehensive list of prerogative powers. They include: entering into treaties with other countries; the disposition of the armed forces; the appointment of judges; and the organisation of the civil service. Ministers cannot create new prerogatives. Nor is there a general prerogative 'to act in the public good' (Vincenzi, C, *Crown Powers, Subjects and Citizens*, 1998, London: Pinter). The Queen still personally exercises some prerogative powers, including the grant of royal assent to bills passed by Parliament and the appointment of the Prime Minister. Mostly, there are well established conventions dictating how such prerogative powers are to be used, and so their exercise is uncontroversial.

When a minister claims to be acting under the legal authority of one of the prerogative powers, the courts may adjudicate on whether that power actually does exist. The courts will not permit the use of a prerogative power where it has been replaced by a statutory power (*AG v de Kaiser's Royal Hotel* (1920), though the fact that an Act of Parliament deals with the same general field as a prerogative will not prevent a minister from using the prerogative (*R v Secretary of State for the Home Department ex p Northumbria Police Authority* (1989); the Home Secretary had prerogative power 'to maintain the peace of the realm' and set up a store of plastic bullets and CS gas for police forces to use). If a prerogative power is held to exist, it must normally be exercised in accordance with the principles of judicial review (*Council of Civil Service Unions v Minister for the Civil Service* (1985)) (see Chapter 11).

2.5 Scotland

The Scotland Act 1998 created the Scottish Parliament, the Scottish Executive and the Scottish Administration.

2.5.1 The competence of the Scottish Parliament

The 129 Members of the Scottish Parliament (MSPs) are elected for fixed terms of four years using the additional member voting system (see below, 6.4.1). In the first election in May 1999, Labour had the most seats, though not an overall majority over all other parties. The Scottish Parliament has limited tax varying powers: MSPs may pass a resolution that the basic rate of income tax for Scottish taxpayers is increased or decreased by not more than 3% of the tax rate set by the UK Parliament. Given this limited power, the Scottish Executive is largely dependent on grants of funds authorised by the UK Parliament.

The limits of the legislative competence of the Scottish Parliament to pass Acts of the Scottish Parliament are set out in s 29 of the Scotland Act 1998:

> 29 (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
>
> (2) A provision is outside that competence so far as any of the following paragraphs apply –
>
> (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
>
> (b) it relates to reserved matters,
>
> (c) it is in breach of the restrictions in Sched 4,
>
> (d) it is incompatible with any of the Convention rights or with Community law,
>
> (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

The Scottish Parliament is therefore told what it cannot do, rather than what it can do. This is similar to the Northern Ireland Assembly (see below, 2.6.1), but the opposite of the arrangement for the National Assembly of Wales (see below, 2.7). Looking at s 29, we see that the Scottish Parliament cannot enact legislation for anywhere outside Scotland (s 29(2)(a)).

Acts of the Scottish Parliament cannot 'relate to' a 'reserved matter'. These are defined in Sched 5 to the Act. These include some general reservations: the constitution of the UK; registration and funding of political parties; foreign affairs; the Civil Service; defence; and treason. Schedule 5 also sets out a long list of specific reservations, grouped under a number of heads. In some, a description of the nature of the reservation is given; in others, particular Acts of the UK Parliament are set down. The heads, in outline, are:

A – Financial and Economic Matters

B – Home Affairs

C – Trade and Industry

D – Energy

E – Transport

F – Social Security

G – Regulation of the Professions

H – Employment

(There is no letter I; parliamentary drafters avoid it, lest it might be mistaken for the Roman numeral I.)

J – Health and Medicines

K – Media and Culture

L – Miscellaneous.

The contents of these heads vary in their scope. Under J, for instance, there are five subheads reserved to the UK Parliament: abortion; xenotransplantation; embryology, surrogacy and genetics; the licensing of medicines, medical supplies and poisons; and schemes for the distribution of welfare foods.

Section 29(2)(c) denies competence to enact Acts of the Scottish Parliament which are 'in breach of the restrictions in Sched 4'. This Schedule sets out the Acts of the UK Parliament which cannot be modified by the passing of a Scottish Act. These include the Human Rights Act 1998, provisions of the European Communities Act 1972, and most of the provisions of the Scotland Act 1998 itself.

Under s 29(2)(d), enactments of the Scottish Parliament cannot contravene either the Human Rights Act 1998 (see below, 19.10) or any rule of European Community law (see 7.9.1).

Finally, in s 29(2)(e), the Scottish Parliament is prohibited from altering certain of the powers of the Lord Advocate, who is one of the two Law Officers in the Scottish Executive (the other is the Scottish Solicitor General). It

is the Lord Advocate who decides whether or not to bring some prosecutions of serious offences, and it was thought desirable to protect his independence in this way.

Section 28(7) states that the arrangement just described 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'. This both preserves parliamentary sovereignty (see below, 5.2) and makes it clear that the new devolved settlement does not amount to a federal system. In other words, as a matter of last resort, the UK could legislate for Scotland on a non-reserved matter – or, indeed, repeal the Scotland Act.

2.5.2 The Scottish Administration

As well as the new Scottish Parliament, the Scotland Act creates a new set of government institutions. The Scottish Parliament chooses one of its MSPs to be appointed as First Minister by the Queen (ss 45–46). In practice, that person is likely to be the leader of the largest political party in Parliament. After the first elections to the Parliament in May 1999, Donald Dewar became First Minster. He then selected other MSPs to be appointed ministers by the Queen (s 47). Ten senior ministers, along with the two Law Officers and the First Minister, form a Cabinet. Collectively, the ministers and Law Officers are called 'the Scottish Executive' or 'the Scottish Ministers' (s 44). The other part of the Scottish Administration, in addition to the Scottish Ministers, are the several thousand professional civil servants appointed under s 51.

Scottish Ministers may be conferred with powers by Acts of the Scottish Parliament. Section 53 of the Scotland Act also makes a 'general transfer of functions' to the Scottish Ministers, by which some powers which were formerly exercised by ministers in the UK Government were shifted on a prescribed day. These powers came either from an Act of the UK Parliament or from the royal prerogative (see above, 2.4.3). The Scotland Act sets out a framework for the competences of Scottish Ministers. If a function has been transferred under s 53, then the exercise of that function becomes a matter for the appropriate Scottish Minister. There is, however, also provision for some functions to be 'shared powers' to be exercised jointly by a Scottish Minister and a minister of the UK Government (ss 56–57). Two examples of shared powers are ministerial action on road safety and steps taken under the European Communities Act 1972 to implement obligations under Community law. A Scottish Minister exercises a function 'outside devolved competence' if he or she makes subordinate legislation which is outside the competence of the Scottish Parliament (s 54), and is also prohibited from breaching Community law or the Human Rights Act 1998 (s 57(3)(b)).

If the Secretary of State for Scotland, or any other Secretary of State in the UK Government, has reasonable grounds to believe that action proposed to be taken by a Scottish Minister is incompatible with the UK's international obligations, he or she may direct that the action not be taken. Similarly, the

Secretary of State may require action to be taken, including that a Scottish Minister revoke subordinate legislation which adversely affects a reserved matter (s 58).

2.6 Northern Ireland

Between 1801 and 1922, when the island was partitioned after a civil war (see below, 3.9.2), the whole of the island of Ireland was part of the UK. Six counties in the north east were retained by the UK; the rest of the island became an independent State, which ultimately became the Republic of Ireland. The border between north and south was drawn in such a way that the majority of the population in Northern Ireland wished to be part of the UK; but a large minority of the province's population identify themselves as Irish nationalists, with cultural, religious and political affiliations to the Republic. Between 1922 and 1972, Northern Ireland had its own bicameral Parliament and a government headed by a Prime Minister. Then, the system of devolved parliamentary government broke down amidst mounting civil unrest. The Northern Ireland Parliament was suspended by the UK Government and the province was put under direct rule, with all important governmental powers being exercised by the Secretary of State for Northern Ireland (a member of the UK Government). A turning point came in 1994, when terrorist groups, which had been committing violent crimes to campaign for and against the union with the UK, declared ceasefires. Multi-party talks were set up, and in April 1998, agreement on a new constitutional settlement was reached (the Belfast Agreement). In a referendum the following month, over 70% of people voting in Northern Ireland supported the proposed arrangements; and, in the Republic, over 94% supported the proposed change to the Irish Constitution removing that country's claim to sovereignty over Northern Ireland. The Northern Ireland Act 1998 sets out the legal framework for the new settlement, providing for an assembly, an executive and other institutions.

2.6.1 The Northern Ireland Assembly

Under the Northern Ireland Act 1998, 108 members are elected to the Northern Ireland Assembly for a fixed term of four years by the single transferable vote electoral method. The Assembly is empowered to make 'Acts of the Northern Ireland Assembly' (s 5). The Northern Ireland Act provides a framework for allocating legislative competence to the assembly. A provision of a Northern Ireland Act is outside the Assembly's competence if:

(a) it purports to apply outside the province;

(b) it deals with an 'excepted' or 'reserved' matter;

(c) it is contrary to the Human Rights Act 1998;

(d) it is incompatible with European Community law;

(e) it discriminates against any person or class of person on the ground of religious belief or political opinion; or

(f) it seeks to modify the Human Rights Act 1998, certain provisions of the Northern Ireland Act itself or certain sections of the European Communities Act 1972.

This scheme is different from that for Scotland in several ways. First, the Scotland Act contains no express prohibition on legislating for religious or political discrimination. Secondly, the Scotland Act creates two general categories: matters 'reserved' to the UK Parliament and those that are not (and therefore within the competence of the Scottish Parliament). In the Northern Ireland Act, there are three categories: 'excepted matters', 'reserved matters' and 'transferred matters'.

Excepted matters are defined by Sched 2 and include matters relating to the Crown, international relations, defence, nationality and immigration, the appointment of judges and elections in the province. These are intended always to remain matters for the UK.

Reserved matters are defined in Sched 3; they include navigation, civil aviation, domicile, postal services, disqualification from the assembly, criminal law, public order and prisons, the organisation of the police force, firearms and explosives, civil defence, the courts, many aspects of import and export controls and trade with places outside the UK, and business competition. It is envisaged that these areas of policy will remain within the competence of the UK Parliament until such time as they are transferred to the Assembly.

The third category is 'transferred matters'. These are those areas of policy which are neither 'excepted' nor 'reserved' (s 4(1)). They are not listed in the Act. The Secretary of State for Northern Ireland, the member of the UK Government responsible for the province, will, from time to time, decide what areas of policy in the 'reserved' list should be transferred. Once transferred, they may be 'recalled' into the competence of the UK Parliament.

The Northern Ireland Assembly is required to make standing orders setting up committees of Assembly members 'to advise and assist each Northern Ireland Minister in the formulation of policy' (s 29). These are likely to operate in similar ways to the departmental select committees of the UK Parliament (see below, 6.8).

2.6.2 Northern Ireland executive bodies

After a general election to the assembly, members elect a First Minister and Deputy First Minister (s 16). To ensure that there is a broad consensus on these leaders – in a province which is strongly divided into two communities – special voting arrangements have been devised. Candidates for the posts of First Minister and Deputy have to stand jointly and to win must have the

'support of the majority of the members voting in the election, a majority of the designated Nationalists voting and a majority of the designated Unionists voting' (s 16(3)). Acting jointly, the First Minister and the Deputy appoint ministers to head departments responsible for areas of policy (such as agriculture, health and so on). The First Minster, Deputy and senior ministers form an executive committee or 'Cabinet' (s 20). Northern Ireland ministers are conferred with powers by Acts of the UK Parliament, Acts of the Northern Ireland Assembly and also the prerogative (s 23). The first elections to the Assembly were held in June 1999, but the formation of the executive was delayed owing to disputes over the decommissioning of weapons by paramilitary groups.

2.6.3 The North-South Ministerial Council

The 1998 Belfast Agreement requires several new institutions to be created. One is the North-South Ministerial Council. An agreement was concluded between the UK and Ireland in March 1999 establishing the Council <www.nio.gov.uk>. The body will consist of ministers from the Northern Ireland executive and of the Irish government. The body will be conferred with its powers by an Act of the UK Parliament and similar legislation passed by the Irish Parliament. Its function will be to exchange information, discuss, consult and reach agreement on the adoption of common policies 'in areas where there is a mutual cross-border and all-island benefit'. Such areas include agriculture, teacher qualifications and exchanges, strategic transport planning, environmental protection and inland waterways. Agreements reached by the North-South Ministerial Council will be implemented north of the border by the Northern Ireland executive and Assembly, and in the south by the Irish government and parliament. The work of the North-South Ministerial Council is supported by a secretariat staffed by members of the Northern Ireland Civil Service and the Irish Civil Service. The Belfast Agreement also contained provisions for setting up the British-Irish Council (see below, 2.12).

2.7 Wales

Devolution from the UK Parliament and Government to new institutions in Wales took effect under the Government of Wales Act 1998. Elections for 60 seats in the National Assembly for Wales take place every four years under an 'additional member' electoral system (see below, 6.4.1). The Secretary of State for Wales – the minister in the UK Government responsible for Wales – is entitled to attend and participate in the proceedings of the Assembly, but not to vote (s 76). The official languages of the assembly are English and Welsh; simultaneous translation is provided.

Unlike the Scottish Parliament and the Northern Ireland Assembly, the Welsh Assembly has no power to make primary legislation; Acts applicable to Wales continue to be made by the UK Parliament (see above, 2.4.2). The Welsh Assembly's legislative competence is confined to making subordinate legislation about the areas of policy which have been transferred to it (ss 58, 64–67). What is envisaged is that whereas, in the past, Acts of the UK Parliament conferred rule making powers on to the Secretary of State for Wales (see 2.4.3 and 6.5.2), in future, such rule making powers will be exercised by the Assembly. The Assembly cannot make subordinate legislation which is contrary to European Community law or the Human Rights Act 1998 (s 107).

The Government of Wales Act requires the Welsh Assembly to set up several committees. 'Subject committees' (s 57) participate in making policy and include as a member the relevant Assembly secretary (see below). A subordinate legislation scrutiny committee (s 58) examines legislation proposed by the Assembly. Regional committees (s 61) responsible for different parts of Wales also have to be established.

The Welsh Assembly elects one of its members to the post of First Secretary – the leader of the executive branch of government (s 53). Alun Michael, who was also a Member of the UK Parliament, became the First Secretary in May 1999. The First Secretary appoints a number of Assembly secretaries (in effect, 'ministers') with responsibility for areas of policy such as education and agriculture and the rural economy. Together they form the executive committee (s 56), in effect, a 'Cabinet'.

Functions have been transferred to the Welsh Assembly in accordance with Sched 2 of the Government of Wales Act. These include the fields of: agriculture, fisheries and food; education and training; health and social services; highways; housing; and social services. Future Acts of the UK Parliament may also confer functions on the Assembly. The Welsh Assembly differs from the devolved institutions in Scotland and Northern Ireland because its areas of competence are defined by reference to what is specifically transferred to it (rather than by what competences are retained by the UK). As well as responsibility for these fields of policy, the Government of Wales Act confers other functions on the Assembly – notably, the reform of the Welsh health service (s 27) and reform of other Welsh public bodies (s 28).

2.8 'Intergovernmental relations' within the UK

The process of devolution has created a new area of constitutional law: the framework of rules and understandings governing the relationships between the UK Government (and Parliament) and the new executive bodies (and legislatures) of Scotland, Northern Ireland and Wales. In simple terms, devolution has meant sharing out powers for making law and policy between

the UK tier and the new devolved institutions. In reality, this is likely to be a continuing, complex and sometimes contentious process. Several elements have been put into place to stave off disputes about the competence of the devolved institutions, or to deal with disputes when they arise.

2.8.1 Self-scrutiny of Bills before introduction

In Scotland (s 31 of the Scotland Act) and Northern Ireland (s 9 of the Northern Ireland Act) a member of the executive must make a formal statement that that the proposed legislation is within the Scottish Parliament's or Northern Ireland Assembly's competence.

2.8.2 The roles of the Secretaries of State for Scotland, Northern Ireland and Wales

Under the Scotland Act (ss 35, 58), the Northern Ireland Act (ss 15, 26) and the Government of Wales Act (s 108), ministers of the UK Government may intervene to prevent legislation or government action being taken which is outside the competence of the devolved institutions. The minister must have reasonable grounds to believe that a Bill or subordinate legislation contains provisions incompatible with the UK's international obligations, with the interests of defence or national security, or would have an adverse affect on the operation of law as it applies to reserved matters. The minister may issue an order prohibiting the Bill from being submitted to the Queen for royal assent or revoking subordinate legislation.

2.8.3 Concordats

The UK Government has established non-statutory 'concordats' with the devolved executives as a mechanism for regulating intergovernmental relations about some areas on which the devolution legislation does not provide firm rules. These include, for example, how Scotland, Wales and Northern Ireland will participate in deciding the UK's stance within the Council of the European Union (see below, 7.5.3), regulating regional incentives promoting inward investment, and the provision of resources to the devolved legislatures. The concordats do not create legally binding obligations. It is envisaged that they will be signed by senior officials, though on politically sensitive matters they may be signed by UK ministers and their counterparts in the devolved institutions. Critics have argued that important measures such as those envisaged to be dealt with by concordats should be implemented through primary or secondary legislation and subjected to parliamentary scrutiny – rather than 'shadowy and sinister backroom deals' (see Ancram, M, 'Dictatorship of the concordat' (1998) *The Times*, 4 March). Attempts to amend the devolution Acts to require concordats to be placed on

a public register, and for them to be subject to approval by the respective Parliaments/Assemblies, were defeated.

2.8.4 Adjudication by the Privy Council and other courts

The Devolution Acts recognise that doubts about the competence of a devolved institution to legislate in a particular manner may arise during the passage of the legislation. Therefore, a Law Officer (the Attorney General of Northern Ireland, the Lord Advocate, or the Attorney General) may refer a question of whether a Bill is within the legislative competence to the Judicial Committee of the Privy Council immediately after its passing. Disputes about 'devolution issues' may also be raised by individuals in ordinary civil and criminal proceedings in any part of the UK (Sched 11 of the Northern Ireland Act; Sched 6 of the Scotland Act; Sched 7 of the Government of Wales Act). Devolution issues include questions about the competence of the Scottish Parliament and Northern Ireland Assembly to pass an Act on a particular issue, competence of any of the devolved legislatures to make secondary legislation, and disputes as to whether an exercise of a function by a member of a devolved executive is compatible with European Community law and the European Convention on Human Rights.

When, in ordinary civil proceedings or a criminal prosecution, a litigant raises a devolution issue before a court or tribunal, that body must give notice of the fact to the relevant Law Officer (the Attorney General of Northern Ireland, the Attorney General of England and Wales or the Lord Advocate). The court of first instance or tribunal may, and sometimes must, refer the case to a higher court. The higher court may, in turn, refer the issue to the Judicial Committee of the Privy Council. Where a devolution issue arises in judicial proceedings in the House of Lords, the issue will be referred to the Judicial Committee unless the House of Lords considers that it would be more appropriate in the circumstances for it to determine the issue. The Appellate Committee of the House of Lords was thought not to be appropriate, as it is, technically, a committee of the UK Parliament and might therefore not appear to be impartial.

The courts are to construe legislation made by a devolved legislature so far as possible as to be within its legislative competence; so, in cases of doubt, where a court is faced with more than one plausible interpretation of an Act and one of these would render the Act *ultra vires*, it will endeavour to avoid the problems that might arise from the latter conclusion being arrived at and steer towards a construction that will keep the Act within the legislative competence of the Assembly.

2.9 Local governance

So far, this chapter has described government at the level of the European Union, the UK and the devolved institutions in Scotland, Northern Ireland and Wales. Beneath all these is a system of local governance. Two institutions are of particular importance: local authorities and police constabularies.

2.9.1 Local authorities

Throughout the UK, there are over 600 elected local authorities, some covering quite small geographical areas. Within the very strict confines set by Acts of Parliament, elected councillors have powers and duties to make decisions on specified issues like town and country planning, ways of collecting and disposing of refuse, schools and social services (such as the provision of home helps for disabled people and the care of neglected children). As in the UK Parliament and devolved institutions, most councillors represent one of the main political parties. During the 1980s and early 1990s, there were tensions between the many local authorities run by Labour Party members and the Conservative central government. This resulted in a great deal of complex legislation (through which central government attempted to control the activities of local authorities), and also numerous judicial review challenges brought by the two tiers of government against each other, questioning the legal validity of the new rules (Loughlin, M, *Legality and Locality*, 1996, Oxford: Clarendon; Cooper, D, 'Institutional illegality and disobedience – local government narratives' (1996) 16 OJLS 255). The first past the post electoral system means that many local authorities have been run by members of the same political party for decades.

Elected councillors work with politically neutral local government officers (the local equivalent of civil servants) to formulate policies and make particular decisions. Policy is made by councillors sitting in committees with responsibility for a particular subject matter, such as leisure facilities and planning. Practical delivery of local authority functions is sometimes done by council employees (such as social workers), but, since the mid-1980s, most service delivery tasks (such as refuse collection) have had to be put out to competitive tender, with the result that they are 'contracted out' to private businesses.

Local government is in a state of malaise. Financial corruption is rife in a few councils. Throughout the UK, the democratic authority of local government has declined as only a relatively small proportion of the electorate bothers to vote in elections. In July 1998, the government published a White Paper aimed at revitalising local authorities (*Modernising Local Government: In Touch with the People*, Cm 4014, 1998). The proposals include directly elected mayors, annual elections for councillors, increased powers to raise local

taxation (but only for the most efficient councils), referendums on local issues, and a new independent inspectorate to monitor how councils fulfil their statutory duties.

2.9.2 The police

Police officers possess some of the most direct powers to intervene in people's lives – to stop, search, arrest, detain, to confiscate literature, to prohibit meetings and demonstrations. There are 43 separate police forces (or 'constabularies') in the UK, each under the control of a Chief Constable, or, in the case of the Metropolitan Police, a Commissioner, appointed by the Home Secretary. Every police constable is an independent office holder, not a government or local authority employee (Marshall, G, 'The police: independence and accountability', in Jowell, J and Oliver, D (eds), *The Changing Constitution*, 3rd edn, 1994, Oxford: OUP, Chapter 11). A constable's powers come from the common law, though these are now heavily circumscribed by legislation such as the Police and Criminal Evidence Act 1984 (Chapter 21) and the Public Order Act 1986 (Chapter 25). For each constabulary, there is a police authority – a committee consisting of local councillors, magistrates and people nominated by the Home Secretary – which is responsible for securing 'the maintenance of an adequate and efficient police force' in their area (Police Act 1964). Police authorities cannot intervene in particular cases or give directions to police constables. Complaints against police officers are handled by the Police Complaints Authority.

2.10 The judiciary

In liberal democracies, a high value is placed on compliance with the law. As we have already noted, legal rights are used to demarcate areas of personal autonomy into which public authorities must not step, unless there is some compelling reason for them to do so (see above, 1.7.1). Laws also establish the procedures and institutions through which collective decisions are made (see above, 1.7.2), and laws place duties and confer powers on public authorities to provide for our safety and security (see above, 1.7.3). On top of this, laws provide for orderly interactions between people.

In the UK, there are three distinct legal systems. England and Wales share a common civil and criminal court system, legal profession and almost all Acts of Parliament (see above, 2.4.2) which apply in England also apply in Wales. From the lower courts, appeals lie to the Court of Appeal and the House of Lords. Law in Northern Ireland is similar, but not identical, to that in England and Wales, but it has its own court system and a Court of Appeal of Northern Ireland, from which an appeal lies to the Appellate Committee of the House of Lords in both civil and criminal matters. Scotland's legal system is different.

Its case law owes as much to Roman law traditions as to English common law, and there are often substantial differences in legal rules north and south of the border. Its criminal law and court system is also different. The House of Lords is Scotland's final court of appeal in civil litigation, but not for criminal appeals.

Only one court may properly be said to be a court of the UK, in the sense that all parts of the union relate to it in identical ways. This is the Judicial Committee of the Privy Council. The importance of this court in the past was that it heard appeals from many parts of the British Empire, and later the Commonwealth. As countries gained independence or asserted rights to self-determination, they by and large ceased to use the court as their final court of appeal. The importance of the Judicial Committee was revived in 1998, when it was conferred with powers to hear final appeals on 'devolution issues' when disputes arise about the relative powers of the UK Parliament and Government and the new devolved institutions in Northern Ireland, Scotland and Wales (see above, 2.8.4).

In the UK, there is no single court which specialises in adjudicating on constitutional questions; these issues may arise in any branch of law. They may, for example, be present in tort cases (*Malone v Commissioner of the Metropolitan Police* (1979)); in criminal prosecutions (*R v Brown* (1994)); and even in claims for restitution of money (*Woolwich Building Society v Inland Revenue Comrs (No 2)* (1993)). Most obviously, however, constitutional law issues are dealt with in the High Court, and on appeal, in applications for judicial review. Approximately 4,000 people each year, and the number is growing, use this procedure to challenge the legality of the decisions, actions and omissions of public authorities (see Chapters 11–17). In years to come, the work of the Judicial Committee of the Privy Council may well become dominated by devolution issues.

In the UK Constitution, it is regarded as important that the judiciary be independent of government. Independence is achieved, in part, by the arrangements for their appointment and removal from office. Judges of the higher courts are appointed on the recommendation of the Prime Minister. Criticisms are often made of the secrecy surrounding nomination of candidates. Though the process is not open to public scrutiny, we do know that the Lord Chancellor's Department takes soundings about the abilities of experienced practising lawyers, with a view to proposing names to the Prime Minister, and in 1998, for the first time, applications for the post of High Court judge were invited by advertisements in newspapers. One reform sometimes advocated is for the appointment of judges to be subject to scrutiny by Parliament. Since the Act of Settlement 1700, judges of the higher courts cannot be removed from office by government, only by resolution of both Houses of Parliament. Only two judges have ever been dismissed in this manner.

The concept of judicial independence goes deeper, however, than just to the appointment and removal of judges. It means also that the judiciary have a distinctive contribution to make to the principles and rights which are embedded in the constitution. Some commentators have argued that, in carrying out their tasks, the judges choose to be other than independent of government. In 1977, JAG Griffith wrote a controversial book in which he advanced the following thesis:

> *Judges in the UK cannot be politically neutral because they are placed in positions where they are required to make political choices which are sometimes presented to them, and often presented by them, as determinations of where the public interest lies; that in their interpretation of what is in the public interest and therefore politically desirable is determined by the kind of people they are and the position they hold in our society; that this position is part of established authority and so is necessarily conservative, not liberal. From all this flows that view of the public interest which is shown in judicial attitudes such as tenderness towards private property and dislike of trade unions, strong adherence to the maintenance of order, distaste for minority opinions, demonstrations and protests, support of governmental secrecy, concern for the preservation of the moral and social behaviour to which it is accustomed, and the rest* [*The Politics of the Judiciary*, 5th edn, 1997, London: Fontana, p 336 (original italics)].

This argument seems, at least at first sight, to be challenged by more recent developments. During the early 1990s, when the Conservative government was in power, there was great tension between the judges and ministers (particularly Michael Howard MP, the Home Secretary). An editorial in *The Times* stated that 'it is tempting to observe a pattern emerging, a potentially alarming hostility between an over mighty executive and an ambitious judiciary' (1995) *The Times*, 3 November). Tabloid newspapers also began to take an interest in the matter. *The Daily Mail* accused judges of giving 'the impression – perhaps a false impression, but nevertheless a real one – of acting on a political agenda of their own' (see Le Sueur, AP, 'The judicial review debate: from partnership to friction' (1996) 31 Government and Opposition 8). With the formation of a new government after the May 1997 general election, the tensions between judiciary and executive seem to have subsided.

In such conflicts – or assertions of judicial independence – the courts found that the decisions of ministers were unlawful. Until recently, the constitutional system prevented judges questioning the validity of Acts of Parliament. As we have already noted, the principle of parliamentary sovereignty means that judges lack the power to control Parliament's ability to pass statute law. In this respect, judges in the UK can be said to play a less prominent role in the constitutional system than do the judges in many other countries (such as the US). In recent years, however, British judges have gained more power to consider the legal validity of legislation. Courts may judicially review subordinate legislation (see above, 2.4.3). They may also 'disapply' provisions of Acts of Parliament which are inconsistent with European Community law –

as happened with the Merchant Shipping Act 1988 (see below, 5.2.4 and 7.9.1). Another significant alteration to the principle of parliamentary sovereignty is the Human Rights Act 1998, under which courts may now make a declaration of incompatibility, formally holding that part of an Act of Parliament without justification infringes a right guaranteed by the European Convention on Human Rights (see Chapter 19).

Two other courts outside the UK also play an important role in the modern constitution. The European Court of Justice in Luxembourg, established under the EC Treaty, is the highest court on matters of Community law (see below, 7.5.5). Most disputes about rights and obligations under Community law are determined by national courts and tribunals, but on difficult points of law they may seek guidance ('make a reference for a preliminary ruling') from the Court of Justice (see 18.2.1). The Court of Justice also has power to deal with some types of legal proceedings directly, but these are mostly brought by the institutions of the Community against Member States (and vice versa). Also of importance is the European Court of Human Rights in Strasbourg, which adjudicates on complaints that public bodies have failed to comply with the European Convention on Human Rights (see 19.6). Since the Human Rights Act 1998, the case law of the Strasbourg Court has become persuasive authority in the UK's legal systems (see below, 19.10).

2.11 Constitutional monarchy

One feature of the UK Constitution remains largely untouched by recent reforms. The Head of State in the UK is a hereditary monarch. It is important to appreciate, however, that the monarch occupies the throne because Acts of Parliament – in particular, the Bill of Rights 1688, the Act of Settlement 1700 and His Majesty's Declaration of Abdication Act 1936 – specify that this be so. The Queen performs ceremonial functions both in public (such as the annual State Opening of Parliament) and in private (for instance, when she formally present seals of office and kisses the hands of MPs chosen by the Prime Minister to be senior government ministers). As we have seen, the Crown exercises a prerogative power to give royal assent to Bills passed by Parliament (see above, 2.4.3). Note the opening words of all statutes of the UK Parliament:

> Be it enacted by the Queen's Most Excellent Majesty, and by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, as follows ...

It is now a well established constitutional convention that the monarch always assents to Bills which have been passed by Parliament. Most decisions and actions taken by the Crown under the prerogative are made only on the advice

of government ministers (who, in effect, really make the decisions) or a formal body known as the Privy Council (consisting, in this context, of ministers, not the judges who sit in its Judicial Committee). Examples of prerogative powers include the making of international treaties, declarations of war, the appointment of judges and the regulation of the civil service (see above, 2.4.3). There are, conceivably, some circumstances in which the monarch personally might have to take a decision required by the prerogative when advice from ministers will not be available. For instance, the Queen has a duty formally to appoint an MP to the office of Prime Minister. In recent times, there has been no doubt about the person the Queen should invite to take up the post: following a general election, one or other of the main political parties has won a majority of seats in the House of Commons and it is clear who is the leader of that party. If, however, there was to be a 'hung' Parliament (in which no single party could regularly rely upon a majority of MPs to support its legislative programme), the monarch might have to make a difficult choice as to which party leader to approach.

2.12 Globalisation: the world outside the UK

So far, this chapter has described how competences to carry out constitutional functions and responsibilities for fields of policy are allocated to different institutions and office holders at the levels of: the European Community; the UK; devolved legislative and executive bodies in Scotland, Northern Ireland and Wales; and local government. The activities of public authorities in each of these spheres are both facilitated and constrained by laws enforceable in national courts and the European Community's court in Luxembourg. Taken together, these public authorities form the main institutions of our constitutional system. What happens within constitutional systems is becoming increasingly influenced and constrained by transnational institutions and agreements between countries.

The term 'globalisation' is used to describe the momentous and complex changes in the way we live. One strand in the phenomenon is technology: electronic communications and air travel have transformed the ability of people and business enterprises to reach each other. A second strand is the development of a single global market. Goods and services are increasingly traded across national frontiers. The World Trade Organisation (WTO) was established in 1993 to enforce a system of free trade agreed between the majority of the world's countries (see <www.wto.org>; and, for a blistering critique, see Gray, J, *False Dawn: Delusions of Global Capitalism*, 1998, London: Granta). A third thread is the rise and acceptance of the notion of universal human rights and the establishment of international judicial bodies to protect them. The treatment of people by national governments is no longer regarded

as a purely domestic matter. Instead, people are viewed as universally having 'rights' by virtue of being human, and these rights cannot be withdrawn by the national laws of any State (see below, 19.1).

Finally, globalisation describes the fact that multinational organisations are more and more determining the collective policies to be followed within Nation States, especially in defence and security matters though bodies such as the United Nations, the North Atlantic Treaty Organisation (NATO) and the Western European Union (WEU). This is a recognition that, in a world where nuclear and biological weapons exist, no single Nation State is any longer capable of fulfilling the most fundamental need of its citizens for physical protection. Policing citizens too, is becoming a matter for international co-operation and collective decision making through bodies such as Interpol: no Nation State in isolation is now capable of dealing with drug smuggling, money laundering, terrorism or international fraud.

In short, it has to be recognised that our constitutional system, and the citizens within it, are not hermetically sealed off from the rest of the world.

2.12.1 Treaties and international organisations

Until recently, many books and courses on public law were able to avoid discussing international treaties – except perhaps to note that, as a matter of national law in the UK, it is the prerogative which enables a minister to make a formal agreement between the UK and another Nation State (see above, 2.4.3). The legal study of treaties and other aspects of international relations has traditionally been hived off to the separate subject of public international law (for an excellent introduction, see Higgins, R, *Problems and Processes: International Law and How We Use it*, 1994, Oxford: Clarendon). To an ever increasing extent, however, treaties are becoming bound up with ways in which governments of Nation States carry out their day to day functions. Legal systems vary as to how they recognise treaties. Broadly, there are two possible arrangements. In monist legal systems, a treaty entered into by a government becomes a source of law in that country. In dualist legal systems (such as the UK), treaties only become a source of national law if and when they are specifically incorporated into the legal system by Act of Parliament. Thus, for example, the Treaty agreed in Ottawa in December 1997 under which many countries undertook to ban the use and trade of anti-personnel landmines was given effect in the UK by the enactment of the Landmines Act 1998. This does not mean that non-incorporated treaties are entirely ignored by British judges. Where a court is called upon to interpret an ambiguous statute (*R v Secretary of State for the Home Department ex p Brind* (1991)) or there is uncertainty as to how a rule of common law should be developed (*Derbyshire County Council v Times Newspapers Ltd* (1993) – see below, 24.4), reference may be made to the UK's treaty obligations. The court will construe the law in a manner that is not incompatible with those obligations. It has also

been held that the fact that the government has entered into a treaty obligation may give a person a 'legitimate expectation' that the government will comply with its obligations, even if the treaty has not been incorporated into national law (*R v Secretary of State for the Home Department ex p Ahmed (Mohammed Hussain)* (1998), and see below, 14.2).

International organisations

In terms of the broad constitutional system, treaties exert several significant influences. First, treaties establish multi-national institutions through which the governments of Nation States co-operate with each other. As we have seen, the European Community is an international organisation of profound significance to the way in which the UK is governed (see above, 2.3). The European Community is a new type of international organisation through which its Member States now make policies and laws – particularly in relation to a single market and economic and monetary union – which are directly binding and enforceable in each other's countries (see Chapter 7). Its methods of decision making are unique.

Another international treaty organisation of great importance to the UK is the Council of Europe – a body entirely different from the European Community/European Union (though sometimes journalists and even politicians confuse them!). Whereas the European Community/European Union has 15 Member States, the Council of Europe has 41 members stretching from Iceland to Turkey, to the Russian Federation and France. The Council of Europe was established in 1949 to promote democracy, the rule of law and human rights in Europe in the wake of the Second World War. It is under the auspices of the Council of Europe that the European Convention on Human Rights operates (see below, 19.5). Apart from the Convention, most people are unaware of the Council of Europe's role. One other rights instrument which falls within its remit is the European Social Charter, a statement of 19 economic and social rights. The Council of Europe also issues recommendations and passes resolutions on matters such as administrative justice, 'cyber crime', corruption and the cloning of human beings.

One other regional body which may, in the future, have an important influence on the UK's constitutional system is the British-Irish Council (BIC). This was outlined in the April 1998 Belfast Agreement (see above, 2.6) and established by an agreement between the government of the UK and the government of Ireland signed in March 1999. Members of the BIC will be drawn from the UK and Irish governments, the devolved executive bodies of Northern Ireland, Scotland and Wales and also from Jersey, Guernsey and the Isle of Man. 'England', not being recognised in the UK's new devolved structure, is not represented. The function of the BIC will be to 'exchange information, discuss, consult and use best endeavours to reach agreement' on common policy issues such as transport links, agriculture, the environment,

culture, health, education and approaches to European Union matters. Senior representatives of the governments will meet at summit level at least twice and year, with more regular meetings to discuss specific policies (see, further, Bogdanor, V, 'The British-Irish Council and devolution' (1999) 34 Government and Opposition 287).

Individuals and treaties

A second reason why some treaties and treaty organisations have come important for national constitutions is that they deal ever more directly with the rights and responsibilities of individuals. In the past, treaties tended to be concerned with matters, such as regulating trade between Nation States, military alliances and the recognition of diplomats. Since the Second World War, many treaties have established international institutions to monitor and adjudicate on the people's rights (see below, 19.3). Thus, the European Court of Human Rights in Strasbourg adjudicates on complaints made by individuals that their rights have been violated by the countries which are parties to the European Convention on Human Rights (see below, 19.6). Under the auspices of the United Nations, a complex system of committees and officials monitor and report on human rights abuses around the world. And in 1998, countries agreed to establish a permanent International Criminal Court with jurisdiction to try individuals for offences including genocide, crimes against humanity and war crimes. If public law is the study and practice of legal relationships between public authorities and people (see above, 1.3), then we need to recognise that these are now sometimes played out in international forums: policy and law may be made outside the boundaries of national States.

Policy constraints from treaties

Thirdly, treaties constrain the choices that public authorities in the UK may make – including the UK Parliament and government, the devolved executive and legislative institutions in Scotland, Northern Ireland and Wales, and the courts. The incorporation into national law of the European Convention on Human Rights by the Human Rights Act 1998 will require public authorities to avoid infringing Convention rights (see below, 19.10). Although the UK Parliament itself will not be bound, as a matter of national law, by the Convention, clearly the Convention will exert a powerful influence on the content of Acts of Parliament. Outside the field of human rights, many other policy choices are also limited by the treaty obligations of the UK. For instance, the treaty made in Kyoto in December 1997 on climate change commits the UK to pursue policies designed to reduce emissions. If a government of the UK were one day to favour the decriminalisation of cannabis, it may nevertheless feel constrained from doing so by UK treaty obligations, such as those contained in the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

THE NEW CONSTITUTIONAL SETTLEMENT

Reforms over the past few years amount to a new constitutional settlement for the UK. One of the practical purposes of a constitution is to distribute decision making powers ('competences') to office holders and institutions. Theorists suggest that the principle of separation of powers ought to influence the allocation of competences, but this has not had a great influence on the UK's system of parliamentary government – except for the principle that the judiciary should be independent of the executive.

Sources of constitutional law

In the absence of a codified constitutional document, constitutional laws are found in the form of ordinary laws of the UK. These include the Treaty on European Union and the Treaty Establishing the European Communities, incorporated into national law by the European Communities Act 1972. Numerous other Acts of Parliament deal with matters of constitutional importance and the common law also recognises constitutional principles. Many norms exist as constitutional conventions which are not, as such, enforceable in the courts.

Allocation of competences between the EC and the UK

The first pillar of the European Union, the European Community, has powers to make policy and law in relation to a wide range of areas; policy making in some fields is shared with the Member States. Member States continue to have independence from the EC to make policy on some subjects.

Allocation of competences within the UK

At the level of the UK, Parliament in practice has limited its competence to legislate on some subject areas. This is because it has delegated powers to do so to the Scottish Parliament, the Northern Ireland Assembly and the institutions of the EC. The same is true of the UK Government. Throughout the UK, over 600 local authorities exercise very limited powers to govern. Policing in the UK is also organised mainly on a local level, with 43 separate forces.

Devolved institutions

The Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998 create legislative and executive bodies for those parts of the UK. The Acts allocate competences to the bodies in different ways. England has no legislative assembly or government separate from that of the UK. Disputes about 'devolution issues' are heard by the Judicial Committee of the Privy Council.

The judiciary

There are three distinct legal systems in the UK: one for Scotland; one for Northern Ireland; and one for England and Wales. It is regarded as important that the judiciary are independent from the executive branch of government. Judges of the higher courts may not be removed from office except by a resolution passed by both Houses of Parliament. Some commentators are sceptical about the notion of independence, arguing that, because of their social background and their status, judges are necessarily conservative. During the early 1990s, however, there was considerable tension between the Conservative government and the higher courts, especially over judicial review cases. Under the Human Rights Act 1998, the courts have new powers to consider the case law of the European Court of Human Rights and to declare Acts of Parliament incompatible with the Convention.

Globalisation

Important government functions are now both facilitated and constrained by treaty obligations and supranational institutions. Treaties do not automatically become part of national law in the UK; only if a treaty is expressly incorporated by an Act of Parliament will it be recognised by courts as capable of creating rights and obligations.