PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

At the beginning of the twenty-first century it appears that the traditional Diceyan model of a unitary constitution has been superseded as power has come to be distributed—particularly in the post-1997 period—between institutions at European, national, devolved and local level. Furthermore, the courts have come to play a powerful role at all levels through judicial review, while forms of regulation and contracting, together with other informal techniques of governance, have emerged. The contemporary constitution can be characterised as involving a multi-layered distribution of power—a situation which raises many key questions about the role of public law. How is the distribution of power between the different levels of the contemporary constitution to be policed? What is the emerging contribution of the courts in regard to EC law, the Human Rights Act 1998 and devolution? What roles should be played by the legislative and judicial bodies at each level? Who should have access to the courts in public law disputes, and on what grounds should the courts regulate the exercise of public power? Can a coherent distinction be maintained between public and private law? The essays in this important collection tackle such questions from a variety of perspectives, aiming between them to provide a dynamic picture of the role of public law in the contemporary, multi-layered constitution.

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Edited by

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Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
5804 NE Hassalo Street
Portland, Oregon
97213-3644
USA

Hart Publishing is a specialist legal publisher based in Oxford, England.
To order further copies of this book or to request a list of other publications please write to:

Hart Publishing, Salters Boatyard, Folly Bridge, Abingdon Rd, Oxford, OX1 4LB
Telephone: +44 (0)1865 245533 Fax: +44 (0) 1865 794882
email: mail@hartpub.co.uk
WEBSITE: http//:www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN 1-84113-282-9 (hardback)
1-84113-283-7 (paperback)

Typeset by John Saunders Design and Production
Printed and bound in Great Britain by
Biddles Ltd, *www.biddles.co.uk*

Preface

This collection of essays aims to engage with what we describe as the 'multi-layered' nature of contemporary constitution. The UK constitution has been—and still is—characterised by evolutionary change, but in the last thirty years of the twentieth century it was quite fundamentally and often deliberately refashioned in a number of areas, something which has had important consequences for the role of public law. No single collection of essays could hope to chart every aspect of this process, nor to provide a definitive account of the boundaries and content of the contemporary system of public law. Instead, having sketched out the nature of the refashioning in the first chapter, subsequent chapters analyse some of its key aspects in an attempt to offer some suggestions or tentative conclusions about the architecture of the contemporary constitution. We hope, in consequence, that the essays will be of use to scholars, students, practitioners, and anyone else with an interest in public law.

Early versions of many of the essays were presented at a weekend seminar in April 2002, generously sponsored by Linklaters and Hart Publishing, and held at The Queen's College, Oxford. Thanks are due to the sponsors, to Queen's, and to Sir Stephen Sedley, who chaired several sessions of the seminar. The editorial work would not have been nearly as smooth were it not for the willingness of our contributors to meet deadlines and to make helpful suggestions, and we should like to thank them for this. We should perhaps also say that even in an academic world driven by e-mail, we would not have found our work as editors nearly as straightforward had it not been for the fact that we are relatively close neighbours in north London.

We should also like to express our thanks to Terry Woods and Bridget Shersby at London Metropolitan University, to Richard Hart and April Boffin at Hart Publishing, and to Putachad Leyland for providing Thai refreshments at crucial moments. Finally, we would each like to express our thanks to or, where appropriate, to remember our respective parents: Colin and the late Joyce, and the late Basil and Enid.

London NW1
July 2003

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Public Law in a Multi-Layered Constitution

NICHOLAS BAMFORTH AND PETER LEYLAND

ANY ACCOUNT OF the role, dimensions and mechanisms of public law in a particular jurisdiction must involve—whether as a presupposition or as an explicit proposition—some view of the workings of the constitution of that jurisdiction. Public law, however defined, is concerned with the exercise of power by public bodies and with the mechanisms for controlling such power,[1] so it must follow that the underpinning constitutional provisions—concerning, for example, the role and nature of the state, the allocation of power between constituent institutions of the state, the proper role of the legislature, executive and judiciary, and notions of democratic accountability and representation—will play an important role in delimiting both the territory within which and the way in which public law is to operate. To suggest otherwise would be tantamount to claiming that it is possible to understand and to navigate the geography of a settled area without first comprehending basic notions such as distance, height and terrain, quite apart from more sophisticated concepts such as public and private property. Professors Carol Harlow and Richard Rawlings have made the normative claim that 'behind every theory of the law, there lies a theory of the state'.[2] Our claim—that any understanding of the dimensions of public law presupposes a coherent account of the constitutional terrain—operates in an analogous fashion to this normative claim, but does so at a purely *analytical* level.

In itself, our claim should hardly be contentious. We make it openly only because it provides the analytical foundation for much of what follows in this collection of essays. The central theme running through the collection is that the restructuring of the constitutional architecture of the United Kingdom in the past

[1] For rival definitons, see C Harlow and R Rawlings, *Law and Administration* (London, Butterworths, 1997), pp 25–28, chs 2–4.

[2] N 1 above, p 1. To similar (albeit broader) effect, see also Professor Harold Laski's assertions that 'No theory of the state is ever intelligible save in the context of its time. What men think about the state is the outcome always of the experience in which they are immersed' (H. Laski, *A Grammar of Politics* (London, Allen and Unwin, 1925), p i) and that 'Law cannot transcend the relations it is intended to enforce. Its ultimate postulates are never self-determined, but given to it by the economic system of which it is the expression' (p xxii; see also ch 10, p 544).

thirty or so years—in particular, since 1997—has been fundamental, and poses important questions for the role of public law. In practical terms, power (both legislative and political) has been spread away from the Westminster Parliament, both 'upwards' to the European Union and 'downwards' to the devolved assemblies. There has also been what might be seen as a rebalancing of the roles of the courts and Parliament in holding the executive to account, given the development by the courts—particularly since 1977—of a comprehensive regime of judicial review, a regime which has arguably been strengthened by the passage of the Human Rights Act 1998. The domain of government has also been altered by the processes of privatisation and contracting out, and the administrative processes of government altered by the techniques of 'new public management'. These latter developments require us to think about how we understand the shape of the state and the appropriate methods of regulating state power.

The various changes highlighted here have been prompted by a diverse collection of rationales, justifications and ideologies. The Human Rights Act and the devolution legislation were enacted in the post-1997 period by the New Labour government, for example, while privatisation, contracting out and 'new public management' have their origins in the period of Conservative government from 1979 to 1997 (which is not to say that they were not embraced by the incoming government in 1997). More specifically, it might be fair to say that the package of constitutional reform measures enacted since 1997 does not appear to have been based upon an overall plan.[3] In addition, the development of domestic judicial review has been the responsibility of the courts (whatever one's view as to the constitutional basis of the review jurisdiction) and has not always been welcomed by the government of the day.[4] Looked at in the round, the various developments we have outlined might therefore be felt to have produced something of a patchwork quilt effect, constitutionally-speaking. Nonetheless, the *overall consequence* has been to bring about a profound constitutional change, in that the United Kingdom could now be said to possess what might be described as a *multi-layered* constitution. As mentioned above, there has been a two-way redistribution of power from Westminster level to the European Union and the devolved levels of government, and the European Convention on Human Rights now plays a direct role in national law. Elected public bodies and courts must—to varying degrees—take account of and reflect such changes, and the allocation of power between such bodies might be said to vary according to factors which operate *both* at the same constitutional level as the body itself *and* at higher (or lower) levels within the constitution. Two examples will illustrate this. First, national courts were traditionally said to be concerned to give effect to the Sovereign will of the Westminster Parliament.[5] In

[3] Responsibility for drafting the various pieces of legislation was widely spread.

[4] For contrasting perspectives, see C Forsyth (ed), *Judicial Review and the Constitution* (Oxford, Hart, 2000).

[5] Significant examples in relation to statutory interpretation include *R. v Hull University Visitor, ex p. Page* [1993] AC 682; *R. v Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 AC 513. In relation to Parliamentary Sovereignty, see, eg, *Ellen Street Estates v Minister of Health* [1934] KB 590; *British Railways Board v Pickin* [1974] AC 765.

today's constitution, however, they must read that will (as far as possible) subject to the jurisprudence of the European Court of Human Rights and subject to the overriding force of European Community law.[6] Secondly, the permissible scope of executive action—whether at UK or at devolved level—is regulated by general United Kingdom-level laws, by the requirements of EC law and the European Convention (via the European Communities Act 1972 and Human Rights Act 1998 respectively) *and*, to varying extents, by the rules delimiting the power of the devolved institutions. In this sense, the constitution might be said to have taken on the appearance of a structure with multiple, but inter-connected and sometimes overlapping layers.

A further complicating factor has been that power— and the mechanisms for regulating its exercise—seem to have diffused sideways as well as vertically upwards and downwards. At both national and EU levels, it is clear that the mechanisms of constitutional accountability must be measured in judicial as well as in political terms. However, the proper boundary between the realms of legal and political accountability remains the subject of fierce debate,[7] the resolution of which has not been helped by the fact that the methods of exercising power have—via processes such as privatisation and contracting out—spread laterally away from a centralised executive. Such developments do not inevitably occur alongside the emergence of a multi-layered constitution—it would be quite possible to conceive of a multi-layered constitution in which they were not present—but they do form an important feature of the contemporary constitutional landscape, and one which has particular resonance given the existence of a multi-layered constitution in that the boundary between state and non-state actors appears currently to have been drawn in different places in different constitutional layers.

The primary purpose of the essays gathered together in this collection is to reflect upon the role of public law in the present, multi-layered constitutional ordering. The contributors focus on a variety of different features of the contemporary constitution and argue from a variety of standpoints. However, each essay has something important to say about the multi-layered theme. In general, the essays are concerned to evaluate specific, practical questions: how do the different layers interact, for example? What is the appropriate role of legal as opposed to political accountability within each layer? Deeper-level questions are, of course, posed by the emergence of a multi-layered constitution. How, for example, do we now understand the idea that the Westminster Parliament is a legally sovereign body? Do we now have competing—or overlapping—notions of sovereignty at different levels of the constitutional structures which apply in Western Europe? Should we see the driving force behind our constitution in a 'top down' way—that is, that it is ultimately determined by the rules and principles of the European Union—or in a 'bottom up' fashion, by stressing the continuing importance of the voluntary adherence of member states to the European Union? These questions

[6] On the Convention, see Human Rights Act 1998, s 3; *R. v A.* [2002] 1 AC 45, paras. [44], [108] and [162]. On EC law, see *R. v Secretary of State for Transport, ex p. Factortame (2)* [1991] 1 AC 603.

[7] See, eg the chapters by Tomkins, Harlow, Taggart, Hunt and Gearty in this volume.