

The rule of law and separation of powers

Introduction

an umbrella term; a moral construct;
what 'government' can do – and how 'government' can do it

1. The Diceyan orthodoxy(ies)

A strong – dominant - understanding by late 1800s

suffer in body or goods > distinct law > ordinary courts > no arbitrary power > 'equality'

1.1 Entick v Carrington (1765)

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

Camden's methodology – "it will be found in our books" >>> legal certainty

Executive has no inherent lawmaking power

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

2. Modern reformulations

Harlow/Rawlings (1984) *Law and administration*



Hayek (1944) *Road to serfdom*

minimalist state > rules

Jones (1958) *Welfare state and rule of law*

expansive state > discretion

3. Judicial review as a common law construct

Baggs Case (1615) Coke CJ; courts can review all government behaviour

Judicial review principles

Control of the executive – not of Parliament

An inherent common law jurisdiction

Presumption always available, **unless parliament excludes**

3.1 The traditional grounds – *Wednesbury* (1948)

Illegality

four corners; excess of jurisdiction

Irrationality

so absurd no sensible person could dream; (*GCHQ* - so outrageous in defiance of logic or accepted moral standards)

Procedural unfairness

right to be heard

bias

Parliament can create new statutory grounds of review; alter or abolish common law grounds

4. Principles of statutory interpretation

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

literal rule > golden rule > mischief rule > teleological interpretation

4.1 *Magor and St Mellons RDC* (1950)

Court of Appeal (Denning)

courts can fill in gaps to make sense of legislation and give effect to intentions of Ministers

House of Lords (Symonds)

“naked usurpation of the legislative function...”

4.2 *Liversidge v Anderson* (1942)

The text of reg 18b

“reasonable cause to believe... hostile origins or association”

The majority

Home Secretary’s decision; no review; teleology (war)

Atkin in dissent

star chamber; humpty-dumpty; conservative literalism

Divergent analyses

Allen (1942) LQR

Goodhart (1942) LQR

4.3 Rossminster v IRC (1980)

Court of Appeal (Denning)

spanish inquisition; judicial duty to interpret statute so that interferes as little as possible with liberties; teleology

House of Lords (Wilberforce)

Parliament may choose to curtail liberties; court must not impede working of legislation; literalism

5. Legal certainty

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

5.1 Retrospective legislation

not what law is; or will be; but was

Burmah Oil (1964)

3-2 majority; destruction in anticipation of battle; right to, not ex gratia, compensation; announces law in 1942 and since 1942

War Damage Act 1965

changes law in 1942 – and in future; no old claims; no new claims; £000 millions; what 'price' legal certainty

5.2 Retrospectivity at common law ?

London Tramways (1898)

rigid precedent: certainty > substantive justice

1966 Practice Statement

firm precedent; certainty not always > substantive justice

R v R (marital rape) (1991)

Hale's 18th century maxim

common law is elastic; responds to changing moral values

Is common law innovation declaratory or transformative ?

The traditional view

DPP v Shaw (1961) – conspiracy to corrupt public morals

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

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

The 'modern' view

Reid (1970 *SPTL*) fairy tales; judges do make law

6. Ouster clauses

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

Gilmore (1957)

MAT decisions '**shall be final**'

Denning

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

Anisminic (1968)

Foreign Compensation Act 1950 s.4(4)

FCC's determinations '**shall not be called in question in any court..**'

Reid

unlawful decision is only a 'purported determination'
distorts literalism to preserve Diceyan rule of law

Wade (1969) *LQR*

Criticises Parliament's disregard for the rule of law

Griffiths (*Politics..*)

Criticises judicial disregard for parliament's sovereignty

7. Conclusion

Contrast

Reid in *Madzimbamuto* parliamentary sovereignty > rule of law

Reid in *Anisminic*

rule of law > parliamentary sovereignty?

Last word ?

Bishop Hoadley in 1701 – interpreter truly the lawgiver