

CHAPTER ONE

INTRODUCTION TO CONSTITUTIONAL LAW

Constitutional and Administrative Law

GENERAL INTRODUCTION TO CONSTITUTIONAL LAW

Introduction

A Constitution is not the sole preserve of states. Any body from a club, to a company, to a state needs a body of rules, which set out how it is to be organised and run. That said, we are concerned here with the constitutions of states and principally with the constitutions of first the United Kingdom and second the European Community, since the UK is a member of that organisation. Whilst the general principles of constitutional law are applicable to most modern states, every country's constitution will contain unique features.

Constitutional law is the body of rules that

- establish who governs the state (mechanisms for appointing the governors),
- determine the functions of the state (powers of the state), and
- prescribe the exercise of power (operational procedures).

WHO
WHAT
HOW

The constitution embodies the relationship between the citizen and the state. Constitutions do not exist in a vacuum. They are underpinned by social and legal theories. These are derived from general philosophy and jurisprudence (legal philosophy). They concern what various commentators think society and the state should be about, what it should achieve, what powers it should have in order to fulfil its functions and how it should fulfil those functions. The overarching philosophy of the West is that of democratic governance, the notion that a state is governed "*by the people, for the people*". Democratic values are not universally proclaimed.

In order to provide a critique of these aspects of the Constitution recourse may be had to a consideration of past and present practice. The result is that there is a strong historical and political element involved, though it must be emphasised that observation of the mechanisms governing the Constitution is paramount. The actual success or failure of political forces themselves is not the central issue, though it will become clear that the systems of government sometimes favour one political party to the detriment of another. Wide reading of text-books and articles is needed in order to get a good grasp of these notions.

The law governing relationships between citizen and state, such as police powers and judicial review of the exercise of power by organs of state, contain a jurisprudential element regarding what the law should or should not seek to achieve. These areas of Constitutional law are used daily in the courts, which have to apply statutory provisions and legal precedents.

What is a Constitution ? Some definitions.

Bollingbroke described a Constitution as '*That assemblage of laws, institutions and customs according to which the community hath agreed to be governed.*'

De Smith states that Britain has a Constitution because it has '*..... a regular system of government, with . a complex of rules defining the composition, function and interrelationship of the institutions of government, and delineating the rights and duties of the governed ...*'¹

Contrast this with the statement of de Tocqueville, the French political commentator, who wrote that Britain did not have a Constitution.

Stephen Sedley states that "*... whilst all Constitutional law pre-supposes the existence of a Constitution there is a subtler sense in which it can be said that in this country we have Constitutional law without having a Constitution ... because .. our Constitution is merely descriptive : it offers an account of how the country has come to be governed and importantly in doing so it confers legitimacy on the arrangements it describes. But if we ask what the governing principles are from which these arrangements and this legitimacy derive, we find ourselves listening to the sound of silence.*"

If one considers that a Constitution is about the way '*in which a state or other body is organised and is that body of fundamental doctrines and rules of a nation from which stem the duties and powers of the government and the duties and rights of the people*' it is clear that every state including Britain must have a Constitution. Often however, the word Constitution is used to describe a specific document containing a number of rules or laws considered to be fundamental to the relationship between a state and its citizens e.g. '*The American Constitution*' and to this extent at least De Tocqueville was correct, then and would be now, to assert that the U.K. does not possess a basic document entitled '**The Constitution**'.

¹ De Smith : Constitutional Law :

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Contents of the Constitution

The way in which the state is organised must include the composition, internal organisation of and powers of the Parliament (comprising the House of Commons, the House of Lords and the Crown in the UK) and the duties placed upon that body. It must also include a discussion of lesser parts of that body such as the Executive, the Legislature and the Judiciary and their interrelationship and the State's relationship with other sovereign states and international legal personalities such as the United Nations and the European Community.

The relationship of the citizen to the state is central to Constitutional law, and covers such topics as the powers of the state to interfere with the freedom of its citizen, the property rights of those citizens and any mechanism to protect the citizen from arbitrary powers of the state. Government departments and bodies are as wide ranging as the police, health and social security and the police. It is difficult to establish the boundary between Constitutional Law and Administrative Law.

There are many government bodies, ranging from quangos to state owned industries, which could be discussed under the umbrella of 'Constitutional Law'. Local Government Law and the Law of Institutions is a vast body of law going beyond the traditional scope of Constitutional law. Issues of national security involving the armed forces and intelligence organisations are of Constitutional interest. Executive power as exercised under statute and the Royal Prerogative are central to such considerations. Clearly, the potential topics for discussion are wide ranging. Rather than look at detailed rules this book concentrates on general principles and on several major areas of debate.

How important is Constitutional Law?

The nature of the Constitution by which the citizens of a state are governed will deeply affect their life style, in particular their thinking, ideology, education, health and wealth. Constitutions represent a delicate balance between conflicting views, aims, objectives and methods of implementation. This is particularly so for new constitutions and in changing times when the prevalent ideologies of a state are in flux. This is evident in the conflicts in the re-emergent Eastern European States and the Middle East as various ethnic minorities struggle for supremacy.

The Constitution of a state is a very complex phenomenon. It is no simple matter to create a new and better Constitution. The value of that Constitution may take a long time to manifest itself. The multitude of criteria by which people may judge a Constitution are such that even the most meritorious of Constitutions may prove insufficient to satisfy its citizens if it fails to provide law, order, personal security, health and prosperity. If the constitution fails to provide a mechanism to hold the governed to account for its failings and a way to replace the governors with others that the people believe can do a better job, the constitution may succumb to revolution. Whilst it is possible for the governed to oppress a people in the short to mid-term, history tells us that even the most autocratic of states cannot endure in perpetuity. There is no guarantee however that the people will always succeed in imposing their will over the governed. History is also littered with examples of benign governments being overthrown by dictators.

Evaluating the Constitution.

It is useful to ask firstly

'What criterion or criteria, if any, may be used to judge a Constitution by?'

And secondly, by applying those criteria, to ask

*"How meritorious is the Constitution of the U.K. or indeed that of any other state? "*²

Theoretical notions of the Constitution are very much an issue of the day with all major political parties proposing changes to the Constitution. Even the monarchy is considering redefining its role society. Furthermore, the evolutionary nature of the European Community means that the United Kingdom's relationship with the European Community and therefore the basis of the Constitution of the United Kingdom is itself undergoing a continuing process of change and evolution. A full appreciation of the theories of the Constitution is essential to an understanding of the changes that are taking place in the Constitution and of proposals for further change.

² see further "*Constitutions Compared*" by Professor Finner, who compares and contrasts the constitutions of a number of different States.

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Constitutional Law and Legal Practice.

Legal practitioners use certain areas of Constitutional Law on a regular basis, especially if they deal with criminal law and have to advise clients on the legality of police actions involving arrest search and seizure or in relation to challenges against the actions of Government departments dealing with planning permission, applications for social security, passports and visas and the like.

Classification of Constitutions

Classification provides a tool of analysis whereby various constitutional models can be compared and contrasted.

Written or unwritten.

Unlike the U.S.A., the U.K. does not have a written constitution, embodied in a single sacrosanct document entitled 'The Constitution of the United Kingdom'. It is also clear that even the 'Constitution of the United States of America' is not the whole of the U.S. Constitution, but only one small part of it. The greater part of the US Constitutional Law is to be found elsewhere.

Students should be prepared to discuss the merits or otherwise of having or not having a '*written constitution*.' Likewise they should be prepared to discuss whether or not there are any laws, which are so fundamental that they need to be set down in a special document. If there are, what are they, and why are they fundamental? Should the U.K. codify its Constitutional laws? What are the advantages and disadvantages of codification? Has the advent of the European Union and U.K. membership brought about a situation where the U.K. will eventually be forced to introduce a Written Constitution, if only to clarify the legal relationship between the U.K. and the E.C.?

Sources of the unwritten constitution.

A written constitution is used to set out guiding principles and core human rights and values. The closest the United Kingdom comes to a written constitution from this perspective is the Bill of Rights 1688, the constitutional settlement and the Human Rights Act 1999. The rest of the constitution is contained in a wide variety of sources including :-

1). The legal rules of the Constitution.

Legislation : Statutes and subordinate legislation³ concerning :-

- the composition of and the functioning of Parliament,
- human rights and civil liberties,
- the administration of justice,
- relationship of Parliament at Westminster and the Commonwealth,
- administrative law – the statutory powers and duties of the executive.

Common Law : This is a major source of Constitutional Law with judicial decisions regarding

- Exercise of the Royal Prerogative,
- Statutory Interpretation of powers given to the government by statute.

Parliamentary Rules : The orders and resolutions of the Houses of Parliament.

European Law : European Union Law and the European Convention on Human Rights.

2). Rules of the Constitution which are not laws.

These include Conventions, Customs and Usages. The most important of these are Constitutional Conventions, of which there are a large number, govern the conduct of the Crown, Members of Parliament and the Commonwealth.

Is the UK Constitution in fact unwritten?

It can be concluded from the above that constitutional provisions are in fact written down in the UK, at least to the extent that they are recorded in statutes or in judicial decisions. Even Constitutional conventions are widely recorded and discussed in leading text books and some have even received judicial notice in the courts. The Houses of Parliament during "*points of order*" etc will have referred to such conventions on many occasions. Written in this context refers therefore to whether or not the fundamental provisions of the Constitution are embodied in a special document, which has been enacted as a statute by the legislature.

³ legal provisions enacted under powers granted to the executive by Parliament

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Unitary or Federal.

The U.K. has a unitary Constitution since all power vests in Westminster. The U.S.A. and Germany have federal systems where individual states have their own powers which can only be altered by altering the Constitution, under a special procedure. Consider the merits and demerits of this especially in the light of the hopes and aspirations of the 'Euro-philes' who hope ultimately to see the creation of a Federal Europe with the UK as one part of a greater whole. From an economic point of view membership of the E.U. may already be tantamount to this already. Constitutionally the moment has not arrived yet and may never arrive especially if a unified currency is considered to be a prerequisite.

Flexible or Ridged.

Can the Constitution adapt quickly and easily to changes in society or is a complex mechanism in place which makes it difficult to effect changes. The U.S. has changed its Constitution on relatively few occasions since its inception, whereas the U.K. Constitution is permanently in flux. Compare the way Wheare uses the words in a non-legal sense to actually discuss the frequency of change and remarks on the fact that, despite the existence of a special procedure, Switzerland has managed a great number of changes to its Constitution.

Monarchical or Republican.

Is the state a republic or not? If it is a monarchical state then the further question as to whether or not it has a Constitutional monarchy (a mere figure head) has also to be considered.

Separated or fused powers.

Does the state adhere to Montesquieu's divisions of power of the Legislature, the Executive and the Judiciary into the hands of separate and distinct bodies or are the powers fused so that a single body exercises all of the powers.

Supreme or, subordinate.

If the Constitution requires that alteration requires cooperation between the various organs of power to effect a change it is supreme. If the Legislature acting alone can change the Constitution then the Constitution is subordinate (to the will of the legislature).

Arguably labelling or categorising a Constitution is meaningless since a Constitution may attract several labels and the totality of the Constitution is more important than its individual parts, which cannot be judged in isolation.

General Principles, Theories and Doctrines of the Constitution

There are four so called guiding principles that are considered to underpin our constitution, namely:-

Democratic Governance

This is the idea that the people are governed by the people (or at least by appointed representatives / delegates) for the benefit of the people. For this to be the case, the constitution needs to establish mechanisms to hold the appointed representatives to account.

The Sovereign State and Sovereignty of Parliament

A sovereign, self governing people, is free to exercise its will to legislate howsoever it pleases without restraint. The law plays such a central role in the constitution of the state that arguably a people who cannot make their own laws could not be considered to be sovereign. That said, control of the purse strings of state is probably equally important.

The Separation of Powers

There are three central functions or organs of state, namely the Executive, the Legislature and the Judiciary. The notion is that since "*power corrupts and absolute power corrupts absolutely*", power should either be shared out between separate and distinct bodies or alternatively that measures are adopted to ensure that whilst each organ can cooperate with the other organs, no one organ will be subservient to any other. A legislature that could also act as prosecutor, judge, jury and executioner could command total power without responsibility or accountability.

The Rule of Law.

This combines a number of concepts, including the notions that

- There are fundamental societal limits to the power to make law
- Everyone in society comes under the equal protection of the law and is accountable to that law.
- Law must be made in the regular constitutional manner – no-one can be punished arbitrarily.

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CONSTITUTIONAL LAW MATRIX

Who Can Have a Constitution

Every organisation must have rules as to composition and conduct of affairs : That is the “Constitution” of the organisation – it applies to clubs : business : and the state.

What is a Constitution ?

Bollingbroke : 'social contract theory.'

De Smith : ' regular system of government, ...defining composition, function and interrelationship of the institutions of government, and delineating the rights and duties of the governed ...'¹

de Tocqueville, “Britain did not have a Constitution.

Stephen Sedley "we have Constitutional law without having a Constitution ... unprincipled legitimacy"

Question : “Is a Bill of Rights a constitution or The Constitution?”

What is in the Constitution : Sources.

Contrast contents of a Document entitled the Constitution and the broader Constitutions.

RELEVANT CASE LAW AND STATUTES CONSTITUTIONAL CONVENTIONS.

Classification of Constitutional Conventions

Written or unwritten.

Compare UK and US – but a document is not enough – EC Constitution is in its treaties.

Unitary or Federal.

Westminster applies to the whole of the UK – but devolution smacks of federalism.

Flexible or Ridged

UK Constitution is continuously evolving – by both formal and informal methods.

Monarchical or Republican

Compare constitutional monarchy with absolute / divine rule. Democratic governance – Crown a cipher

Separated or fused powers.

Applicability of the Doctrine of the Separation of Powers – Power corrupts and absolute power corrupts absolutely.

Supreme or, subordinate

Do the executive and legislature cooperate or compete in legislative change to the constitution? Cf USA.

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DEVELOPMENT OF THE STRUCTURE OF THE BRITISH CONSTITUTION

There is a close relationship between the development of the English Legal System and the Constitution. The forces that shaped both are the same, namely the gradual recognition of the power, voice and needs of the people.

Following the Norman accession in 1066, the Law was what the King said it was, and was administered by him, under his direction. Equally the constitution was what the King said it was. There was no structured or formal Constitution.

The succeeding millennium has witnessed, by stages, the handing over of constitutional, legislative, administrative, political, economic and legal power, from the Monarch to the people and the creation of a complex Constitutional Monarchical Parliamentary process, which in turn governs the Legal System.

Stages in the Development of the Constitution : a thousand years of incremental change

- 1066 - Norman Accession – assertion of Monarchical Power. Feudalism.
- Magna Carta – rise of the Privy Council and the Lords
- The 100 years war : The wars of the Roses : The turf wars – establishment of a genuinely English Monarchy and gradual move towards a mercantile class.
- The Tudors – rise of the Commons : The Renaissance – Establishment of the Church of England.
- The Stuarts – battle of the common law to gain precedence over the monarchy.
- The Commonwealth – temporary abolition of the monarchy – Parliamentary Government. Early stages of Democracy in England and Wales.
- The bloodless revolution – the constitutional settlement and the bill of rights.
- Constitutional Monarchy – legislative power entrenched within Parliament – rise of office of Prime Minister and move away from influence of the Privy Council – mirroring the Agrarian and Industrial Revolutions. The French Revolution – major European Wars and loss the America colony.
- The Victorians – rise and fall of Empire and the transfer of Royal Prerogative to the Executive. Judicature Acts – Establishment of the Supreme Court of Judicature. Social Contract Theory
- First half of the 20th Century – Lords formally hands over ascendancy to the Commons. Loss of Southern Ireland. First and Second World Wars.
- Establishment of the Civil Service and centralisation of administrative power at Westminster. Emergence of the welfare state.
- Latter half 20th Century : The European Economic Community – European Union – Harmonisation.
- Devolution and subsidiarity – returning power to the lowest practicable levels (perhaps!).

The constitution of a country does not occur in isolation. Recent changes in the UK have been conducted with the backdrop of global changes including :-

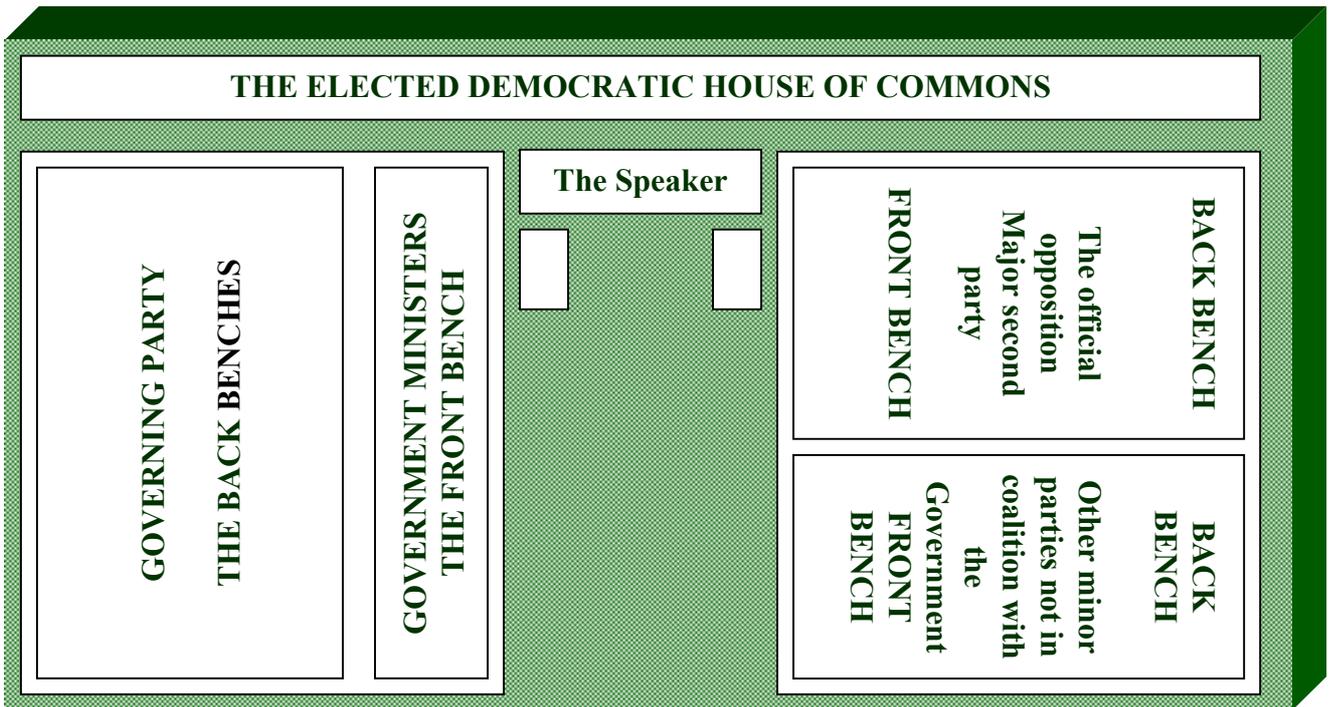
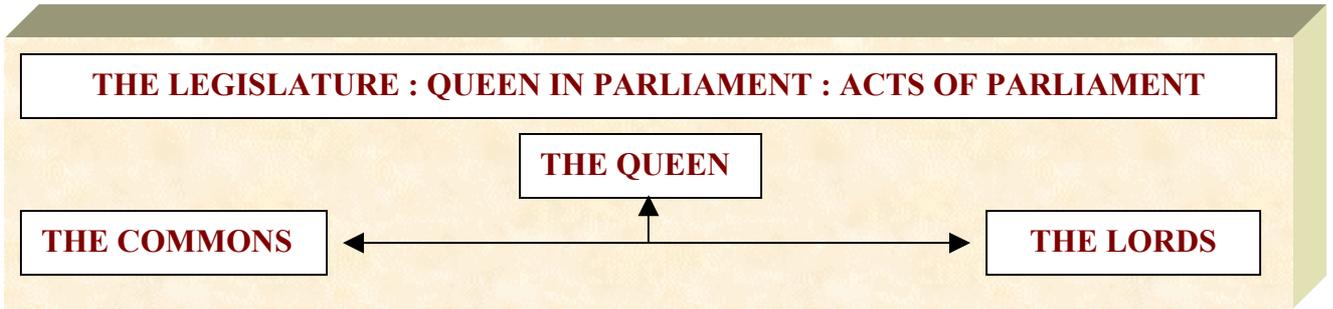
- The Technical Revolution and Globalisation – the rise of international law and the United Nations.
- Fall of the Soviet Union - Enlargement of the European Union
- The rise of fundamental global Islamic movements.
- US cultural imperialism and the war against terror.

THE EXECUTIVE : THE LEGISLATURE : THE JUDICIARY

Organs / Functions of State.

There are three principle organs of state, namely the executive, the legislature and the judiciary. The following diagrams set out the structures within which these organs operate in the UK. They are not neatly separated out into clearly distinct units and the matrix is quite confusing. The courts are administered by the executive / government, but the judicial function is considered to be separate. The House of Lords as a court is located within Parliament, in the House of Lords, but those within the general body of Lords engaged in the legislature do not serve as judges.

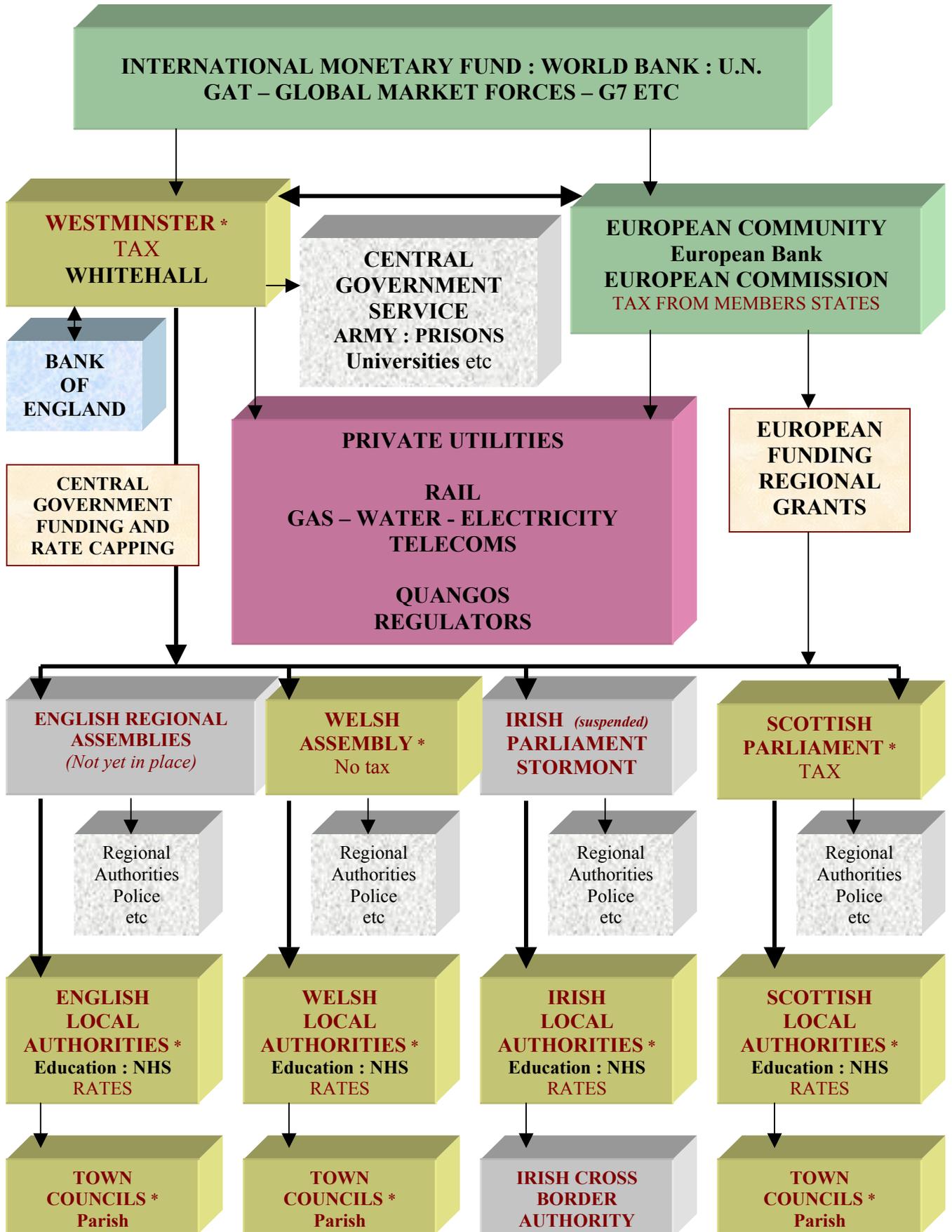
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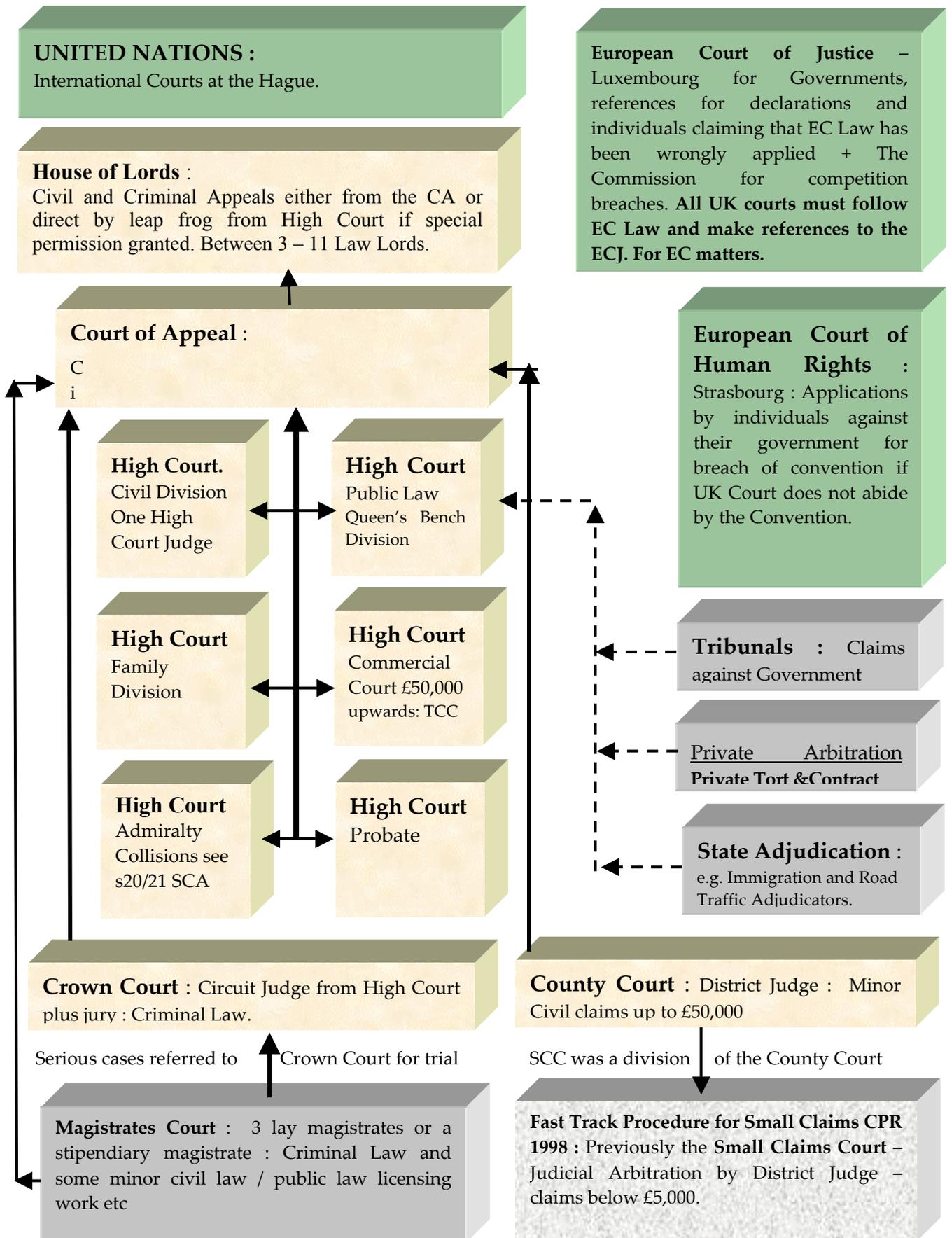
GLOBALISATION – THE ECONOMIC CONSTITUTION – CONTROL LINES

ELECTED BODIES *



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Hierarchy of the Courts.



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THE PRINCIPAL PUBLIC OFFICES / MINISTRIES IN ENGLAND AND WALES

There is no Minister of Justice in the U.K. However four Ministers of the Crown provide a link between the judicial system and the legislative and executive functions of Parliament.

The Home Secretary. (Secretary of State for the Home Department)

He is a Member of the House of Commons and the Cabinet. His responsibilities include

- i). The prison and probation services.
- ii). The police.
- iii) The administration of the Metropolitan Courts.
- iv). Advice to the government on the treatment of offenders and on the prerogative of pardon.

The Lord Chancellor.

He is a member of the House of Lords, appointed by the Crown on the advice of the Prime Minister. He is a member of cabinet and also

- i). Head of the judiciary
- ii). Head of the Chancery Division of the High Court.
- iii). He is responsible for advising the Crown on the appointment of High Court (Puisne) Judges.
- iv). He is responsible for the work of the Lord Chancellor's Department - LCD. Including the Law Commission, The Land Registry, The Public Trustee & Public Record Office.
- v). He acts as general legal advisor to the government and as its spokesman in the House of Lords. He is the speaker of the House of Lords, in charge of the procedure and discipline of the House. He is the official head of the Judiciary and is responsible for the administration of the courts. He advises the crown on appointments of judges and magistrates. It is a political appointment and as a member of the Cabinet he must resign if the government is defeated.

Lord Mackay of Cragfern, the LC under the Conservative Government was replaced by Lord Irvine of Lairg under the current Labour Administration. Mackay started off a major reform of the legal system aimed at reducing costs and speeding up the legal process. This was continued by Lord Irvine. The Civil Procedure reforms led to the Civil Procedure Rules 1998. Criminal Procedure is undergoing a similar reform process.

Both Lord Chancellors championed higher levels of jurisdiction for the minor courts, increased access for solicitors and promoted alternative forms of dispute resolution such as the introduction of Adjudicators to the Construction Industry in 1996, employment arbitration in 1998 and the Arbitration Act 1996. The legal aid budget is constantly under review and this in turn will force those not entitled to legal aid to seek cheaper faster non-legal forms of dispute resolution. As discussed above the judicial role of the Lord Chancellor may be removed as a result of a ruling of the European Court of Human Rights.

The Lord Chancellor's Department took over control of the administration of justice from the Lord Chief Justice in the 1980s and gradually the LCD was turning into a major bureaucratic organisation. It has introduced web site based services including electronic reporting of cases and a significant information delivery. It has instituted major inquiries and investigations into how to deliver best quality and value within the system. Legal aid provision is controlled by the LCD. With the advent of the Department of Constitutional Affairs, on going reforms are transferring powers from the LCD to the Department of Constitutional Affairs (DCA). Irvine's replacement, Lord Falconer of Thoroton doubles as the minister for Constitutional Affairs.

The Attorney General and the Solicitor General. They are known as the Law Officers of the Crown. They are political appointments though they are not usually in the cabinet. The Attorney General is a barrister and an M.P. and has a number of roles - he represents the Crown in civil matters, prosecutes in important criminal matters and is the head of the English Bar. He rules on points of professional etiquette that are referred to him. He advises government departments on legal matters. They sometimes make legal pronouncements. The AG he gave a statement on the legality of road blocks during the Miner's Strike (and got his advice wrong !!). The pronouncements are politically significant but they are in no way binding and have no legal status. The Solicitor General is subordinate to the Attorney General and despite his title is usually a barrister though not necessarily an M.P. though he may be. While in their posts they are not allowed to practice privately.

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The Attorney General (A.G.). (Also a separate Advocate General for Scotland)

He is appointed by the Crown on the advice of the Prime Minister and is the senior law officer of the Crown and head of the English Bar. He appoints and supervises the Director of Public Prosecutions.

The Solicitor General.

He is a barrister and deputy to the Attorney General. By the Law Officers Act 1944 any functions authorised or required to be discharged by the Attorney General may unless expressly excluded may be discharged by the Solicitor General.

Director of Public Prosecutions (D.P.P.).

The office of D.P.P. is governed by the Prosecutions of Offences Act 1979. The D.P.P. must be a barrister or solicitor of at least 10 years standing. His role concerns the administration of criminal justice and this duty is to institute proceedings

- 1 When the offence is punishable by death.
- 2 When a case is referred to him by a government department.
- 3 In other cases where he considers that his intervention is needed.

Created by the Prosecution of Offences Act 1897, the D.P.P. is not a political appointment in the sense that he is not a member of the government and does not have to resign on the fall of a government. He is appointed by the Home Office. He operates under the supervision of the Attorney General. Today prosecutions are carried out not by the DPP but rather by the Crown Prosecution Service. Nonetheless, the prosecution of certain types of crimes still requires the consent and approval of the D.P.P. eg. s8 Sexual Offences Act 1967.

The Crown Prosecution Service (CPS).

The CPS carries out most criminal prosecutions.

Senior Ministerial Posts : The Cabinet (Ministries come and go at discretion of the PM)

The Prime Minister.

The Prime Minister is a Member of the House of Commons (MP), the official head of the government and the leading member of the cabinet. The Prime Minister is appointed by the Crown as the person who can command a majority in the House of Commons.

The Chancellor of the Exchequer

Minister in charge of government finances and the budget. He determines, in cooperation with the Treasury, the funding allocations of other departments and ministries. The Chancellor used to set interest and bank rates until this task was handed over to an independent board at the Bank of England.

Deputy Prime Minister

No specific ministry or job – general factotum.

The Foreign Minister (Secretary of State for Foreign and Commonwealth Affairs)

Minister in charge of foreign affairs. The Prime Minister is likely to have the final say in decision making.

Chancellor of the Duchy of Lancaster

No specific ministry or job – general factotum.

Secretary of State for Defence

In charge of the armed forces.

Chief Whip (Parliamentary Secretary to the Treasury and Chief Whip – supported by a team of junior whips)

The job of the party whips is to ensure that members of the party vote for the government whenever the government whip is imposed.

The opposition parties will also operate a whip system.

Often the whips will trade off MP's who will be absent from the chamber for illness or other outside commitments, to maintain the power balance in the House, without having to force everyone to attend to vote.

The following ministerial posts are maintained by the present government :-

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Minister for Constitutional Affairs (Secretary of State for Constitutional Affairs)

Minister for International Development (Secretary of State for International Development)

Minister of Labour (Secretary of State for Work and Pensions)

Minister of Education (Secretary of State for Education and Skills :)

Minister for the Environment (Secretary of State for Environment, Food and Rural Affairs)

Minister of Transport (Secretary of State for Transport and Secretary of State for Scotland)

Minister of Health (Secretary of State for Health)

Minister for Northern Ireland (Secretary of State for Northern Ireland)

Minister of Trade (Secretary of State for Trade and Industry and Minister for Women)

Minister of Sport (Secretary of State for Culture, Media and Sport)

Minister without Portfolio (no specific ministry or job – general factotum)

Treasury (Chief Secretary to the Treasury)

Leader of the House of Commons, Lord Privy Seal and Secretary of State for Wales

Leader of the House of Lords and Lord President of the Council

Also attending cabinet:

Lords Chief Whip and Captain of the Gentlemen at Arms .

Special Roles in Parliament

Speaker of the House of Commons.

The speaker is selected to act as chairman of debates in the House of Commons. The speaker does not vote. He has the job of keeping order in the House. He determines who can speak and the order in which MP's are allowed to speak. He is supposed to act in a non-partisan manner. He has the power to suspend MPs for breach of the rules of etiquette of the House. The speaker is not challenged or opposed in elections.

The speaker is supported by a number of paid officials.

Reading Materials

De Smith : Constitutional Law : General Foundations and Chapter One.

Hood Phillips – Constitutional Law : Chapter 1.

The Sound of Silence : Constitutional Law without a Constitution :

Stephen Sedley Justice of the High Court of Justice : LQR 1994 p270.

John Alder – Constitutional Law : Chapter One.

Bradley & Ewing Constitutional Law : Chapter 1 & 2.

Geoffrey Marshall Chapter One.

Laws & Conventions Revisited. William Maley. 48 M.L.R. 121.

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STUDYING ENGLISH LAW⁴ AND THE CONSTITUTION

It is not sufficient, in order to acquire an understanding of how law impacts society, be it civil, private domestic life or industry and commerce, simply to learn large quantities of legal rules. The bare rules tell us little of their aims and objectives. As such they are insufficient to enable us to apply them to situations, which do not fall neatly into the exact specifications of the rules. Understanding the notion of the incremental development of law empowers us to apply the law to new situations and to adapt the law to an evolving social and commercial environment. Law operates within an administrative framework. It is important to understand the functions of the various bodies and the rules that these bodies have to follow when administering the law. This introduction to the study of law discusses some aspects of the nature of law and provides some hints and guidelines on how to study Constitutional Law and how to approach academic assessments exercises on the subject.

The total body of law in the United Kingdom is so extensive that no one could learn all the rules. The most that one can aim for is to know how to find out what the rules are and refer to them before carrying out an operation, assuming that the rules are written down clearly and unambiguously so that everyone is able to understand and follow them. Law in the United Kingdom comes from a wide variety of sources. Understanding how to find the law by developing the ability to use a law library is essential to the acquisition of legal knowledge. Even when one has found a rule, that may not be the end of the matter. Not all law is of equal standing. Superior sources of law can over ride inferior sources so it is important to understand the hierarchy of legal sources.

Law as a discipline involves a unique form of pseudo-science. The law is often proclaimed to be logical and consistent yet is frequently ridiculed as being “an ass” and highly illogical. This is because the judicial system is required to administer rules developed from societal norms. A rule developed to achieve a specified objective can appear highly illogical when it frustrates the achievement of a different objective. The methods of interpreting laws in order to understand what the impact of a particular law is and how it applies to a given situation are important. The methods of interpretation are designed to elucidate the intentions of the law-maker and is facilitated by an understanding of what the various functions of law are. The difficulty is often that a law may be intended when created to fulfil more than one function. Often, it proves necessary to apply rules to situations, which were not considered at the time when the law was made or those applying the law seek to fulfil a different function to the one envisaged when the law was made.

All aspects of our civil, social and commercial society are conducted within a legal frame-work. Law provides a mechanism for the resolution of disputes and rules of conduct that govern the relationships between persons and organisations.⁵ Thus, an understanding of one’s legal rights and duties enables businessmen to conduct commercial transactions in a legally sound manner and to adopt good business practice to minimise exposure to unnecessary and undesirable risks and liabilities. Whilst law is an abstract concept it is used in concrete definable situations. Law is best understood by applying it to given situations and by taking note of the reciprocal rights and duties of the persons involved in those situations. This involves learning a variety of legal rules but most importantly requires an understanding of the methodology of and logic involved in solving legal problems. This is where an understanding of the English Legal System and the methodology of law is essential. If one does not understand how the system operates the rules may well be meaningless. English law provides clear predicable answers to things that have happened before but it only provides principles for the application of existing rules to novel situations. Rote learning is tedious and uninspiring especially if it is not targeted and specific. However, lists of **do’s** and **dont’s** are useful for given activities. Application and problem solving is fun and provides the best way of acquiring an insight into law and its relevance to our private lives, our interaction with society at large and to business practice.⁶

Public Law is specialised and deals with the inter-relationship between governor and governed and also the relationships between the various organs of government and their powers and duties. Public Law continuously evolves and adapts to the changing needs of society. The key to any critique of Public Law is to understand the underlying rationale for constitutional laws and rules.

⁴ England includes Wales. Scotland and Northern Ireland have their own distinct, separate systems of law.

⁵ See p2 below on The Functions of Law.

⁶ For additional information see Glanville Williams. *Introduction to Law*.

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FUNCTIONS OF LAW ⁷

Law fulfils a wide variety of functions in society. For every function of modern society there is a corresponding body of law. The categories discussed are not intended to be exhaustive but identify some of the main functions of law. An understanding of the intended function or functions of a particular law facilitates interpretation and application of that law.

Law provides a formal means of social control. Whereas small, undeveloped societies can rely on the customs and recognised standards of behaviour within that society to maintain an ordered existence the development and growth of society brings with it the demand for effective social control and formal means of social control. This is assisted most obviously by the criminal law but ethical codes of acceptable behaviour within society are embodied within family law, the laws of contract and tort and in property law. Law draws the parameters of acceptable behaviour regarding a wide range of human activities. The citizen submits himself or herself to the control of the law in exchange for the protection that is afforded to him or her by the law. Submission is not consensual. Submission is automatic, by virtue of being a member of the society, most often by birth but it can occur by naturalisation. No member of society can live within that society and at the same time exempt themselves from its prescriptions.

Law provides a forum for settling disputes. The settlement of disputes in court provides one example of third-party dispute settlement (others include arbitration, mediation and conciliation). A prescribed and respected court procedure helps maintain order in a complex society since parties do not take the law into their own hands and seek satisfaction through force. It is not legally possible to exclude the role of the courts even by agreement, though alternative methods of dispute resolution (ADR) can be made a pre-requisite to court action. Once the parties have participated in the prescribed ADR process it may well be possible to then refer the dispute for review, appeal or enforcement, as the case might be, to the courts.

Law can be used by the State as an instrument of change. Law assists in the planning of change within our social system. It is an instrument of social engineering. Thus revenue law and social security law affect all classes in society though to an extent which is governed by the political party, which forms the government at a particular time. The existence of the State itself is a legal entity in its own right. The form of that legal entity is continuously being changed as it evolves to meet the changing needs of society.

Law provides the citizen and the state with security. Law provides us with order and security in the sense of providing us with a system within which we can conduct an ordered life. A will is a legally recognised form for passing on property after death and can therefore be used in the knowledge that it will be upheld by the legal system. Records of births, marriages, deaths, interests in land, limited liability companies and directors, etc, assist in the settlement of disputes and facilitate activities. Negotiable instruments such as money, cheques, bills of exchange etc are artificial legal tokens enabling commerce to function.

CLASSIFICATION OF LAW ⁸

It is useful to be able to classify law because each of the divisions tends to involve its own distinct methods of application involving different logic processes for the development of rules within that particular sphere and distinct legal procedures for taking disputes to court, often in distinct courts established to deal with that area of law. This is not always the case however.

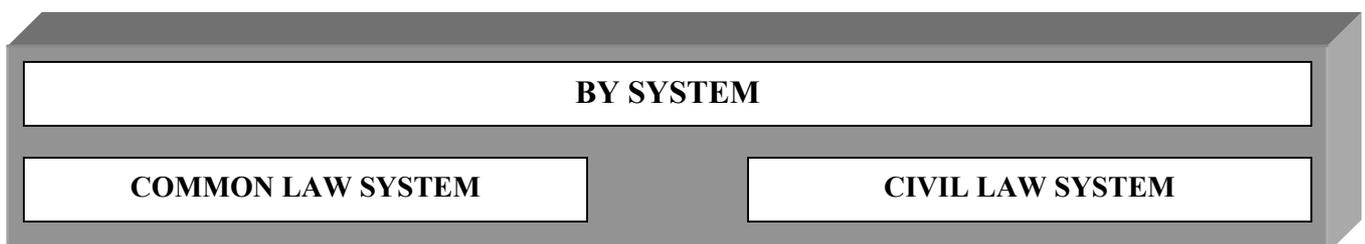
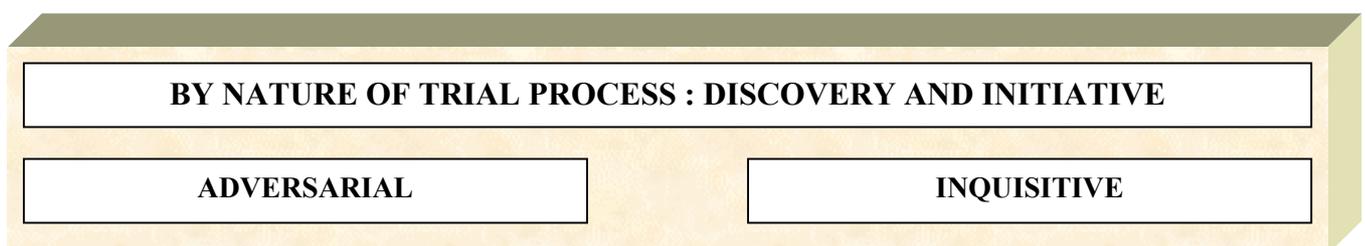
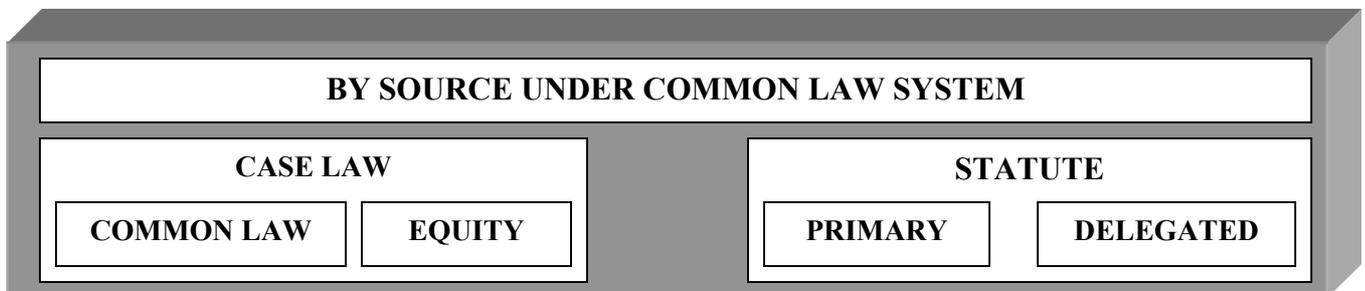
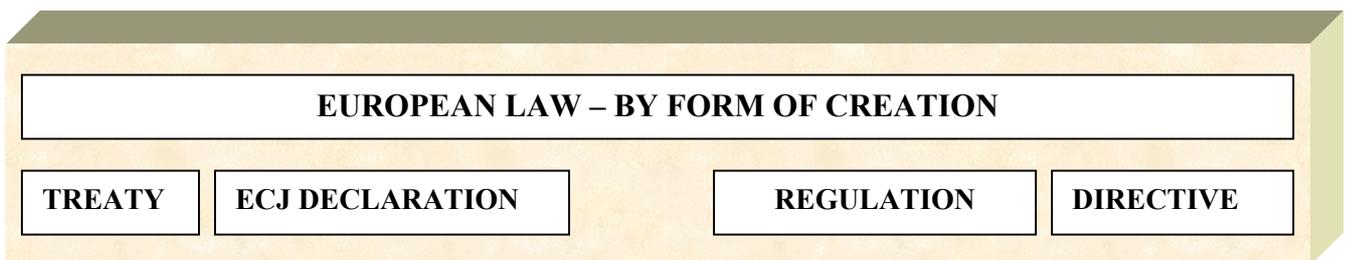
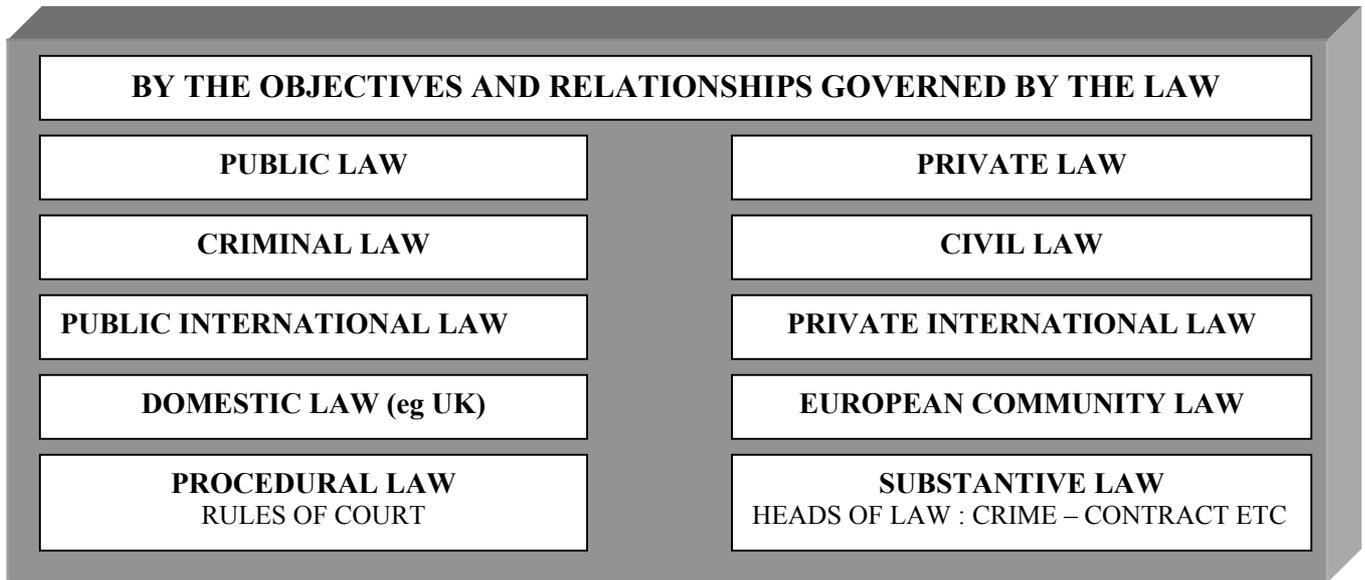
There are a number of ways of classifying law. Law is classified in different ways for different purposes but despite the differing aims the methods are not necessarily mutually exclusive.

⁷ See also *The Functions and Methods of Law* L.M.Friedman, Law & Society.

⁸ See also : Smith & Keenan, *The English Legal System*

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VARIOUS METHODS OF CLASSIFYING LAWS AND LEGAL SYSTEMS



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PRINCIPAL FORMS OF LAW CLASSIFIED BY OBJECTIVES AND RELATIONSHIPS

PUBLIC LAW : SUPERVISORY JURISDICTION OF Q.B.D. HIGH COURT

- This is concerned with the relationship between the state and its citizens.
- Public law is made up of constitutional law and administrative law. Compare Criminal law, which also involves the citizen and the state but is not dealt with under this classification.
- Generally a public law action is sought by an individual, against the state, or a government department, to maintain a legal right which has been adversely affected by an activity or decision of the state.
- A typical case would be **R v Northumberland Compensation Appeal Tribunal, ex parte Shaw**,¹² The plaintiff is the Crown [R], the Defendant is the Tribunal, but the person who claimed to have suffered a loss was Shaw who is represented by the Crown i.e. Ex Parte, on behalf of. Of interest to the construction lawyer would be issues involving planning applications.
- Public Law has its own special procedures, which are dealt with by a specialist branch of the Queen's Bench Division of the High Court and frequently involves specialised tribunals to deal with issues at first instance.

PRIVATE / CIVIL LAW BEFORE THE CIVIL COURTS

Private law is concerned with the rights and duties of individuals towards each other. It includes: the law of contract; tort; property; succession; and family law. The defendant is sued to remedy a private wrong carried out by one person which causes a loss to another, the plaintiff. A typical case is **Carlill v Carbolic Smoke Ball Co.**¹³. The Claimant, Carlill claimed that the defendant (The Smoke Ball Co) had breached a contract, causing Carlill financial loss.

CRIMINAL LAW BEFORE THE CRIMINAL COURTS

A crime is an offence against the state. A typical case would be **R v Steane**.¹⁴ The defendant (the alleged wrong-doer) is prosecuted, by the Crown, so as to maintain order. Punishment is a sanction. Criminal Law impacts on commerce : For example the Construction Industry must comply with CDR construction regulations, Health and Safety at Work Regulations : all commerce must avoid unlawful methods of achieving lawful objectives such as lorry drivers exceeding the speed limit : The Merchant Shipping Acts and allied Statutory Instruments contain a large number of rules, reinforced by sanction before the criminal courts.

INTERNATIONAL LAW BEFORE THE INTERNATIONAL COURTS

Public International law. The law governing the relationships between nations. Until recently it did not afford rights to or impose duties on individuals but today this is starting to change as the United Nations develops codes intended to apply to the whole of mankind. In particular the Law of the Sea can now have an impact on the maritime construction industry:

Private International Law & Conflict of Laws. Deals with civil disputes between citizens of different states. Relevant to International Trade, including shipping and construction regarding contract, tort and bailment : choice of law and choice of jurisdiction.

⁹ **R v Northumberland Compensation Appeal Tribunal, ex parte Shaw**, [1952] 1 K.B. 338.

¹⁰ **Carlill v Carbolic Smoke Ball Co** [1893] 1 Q.B. 256 C.A.

¹¹ **R v Steane** (1947) K.B. 997.

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HOW TO APPROACH THE STUDY OF CONSTITUTIONAL LAW

- Constitutional and Administrative, or Public Law can be divided into “black letter law” areas which set out the legal rights and duties of both the governors and the governed and “constitutional / political” areas which discuss the rationale for government and the way that its various organs are instituted. As with all law, there are underlying principles governing the way the rules and laws have evolved and what they are supposed to achieve and why. However, the two areas require different approaches because of the way that they are applied and regulated.
- The black letter law areas are governed by the courts and so the traditional methods of legal analysis and application apply. The constitutional / political areas are governed by the mores of political practice and are in many ways self regulatory, reflecting the degree of influence exerted by “the people” from time to time upon those who practice the art / science of government.
- Black letter law areas may be examined either by application exercises or by essay type questions that require a critical analysis of the law.
- The constitutional / political areas are likely to be examined by essay type questions.

CRITICAL ANALYSIS

Learning and thinking are distinct and different mental processes. Whilst it is important to learn legal rules, this is simply one aspect of legal study. Indeed, the fact that the legal rules frequently change over a period of time means that knowledge of the law is in many ways a lifetime learning exercise rather than simply something that is done by students at a training institution. Understanding why rules have come into existence and what they are intended to achieve is important both to evaluate the effectiveness of the law and to assess whether or not the law needs to be changed or modified in any way. Furthermore, critical analysis of the understanding of what individual laws are supposed to achieve provides guidelines for interpreting law to ensure that it continues to fulfil its stated or underlying purpose.

BLUE PRINT FOR TACKLING ANALYTICAL QUESTIONS : AIM TO :-

1	DEFINE : Learn a number of key legal rules and doctrines.
2	IDENTIFY THE PROBLEM ADDRESSED BY A LAW OR DOCTRINE : Understand why the law or doctrine was introduced or developed (problem addressed)
3	STATE THE AIM OF A LAW OR DOCTRINE : Understand what the law or doctrine seeks to achieve (aim)
4	STATE HOW IT WORKS – METHODOLOGY : Understand how the law or doctrine seeks to achieve its aims
5	STATE THE INTENDED RESULT : Evaluate the intended outcomes of applications of the law or doctrine.
6	CRITICAL ANALYSIS 1 : 3-5 above provide the criteria/tests to carry out a critical analysis of the effectiveness of the law or doctrine in fulfilling its stated aims, objectives and outcomes. Historical events, be they examples of past / present political practice or case law will provide the raw material to show how the law or doctrine works in practice.
7	CRITICAL ANALYSIS 2 : A critical analysis can also provide a critique of the stated aims, objectives and outcomes where it is considered that they are misconceived.
8	REFORM : If it is considered that the law or doctrine fails to deliver on its stated aims, objectives or outcomes, then be prepared to propose ways in which the law can be revised and improved.

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APPLYING THE LAW

The traditional role of the lawyer is to apply the law, through advice to a client either in respect of how to arrange social / commercial affairs to comply with the law or alternatively, to prepare for trial either to seek a remedy against a third party or to defend an action brought by a third party against the client. Such advice covers both form / methodology and an opinion on legal rights, liabilities and duties. Form and methodology, including proof, is normally the subject matter of legal practice courses whereas statements of legal rights, liabilities and duties are principally covered by academic courses

The constitutional / administrative / public law student is most likely to encounter problem type questions that involve advising someone on their respective rights, liabilities and duties arising out of a given situation set out in a scenario. There is a degree of artificiality in such scenario in that unlike actual practice the amount of information provided is very limited. Furthermore, such problems tend to be carefully constructed to examine specific aspects of the law, whereas in real life the practitioner is likely to be presented with problems that are not pigeon-holed into a single legal area or a single issue. Furthermore, the practitioner will have to conduct interviews to determine the relevant facts whereas the candidate is presented with the given relevant facts and does not have to separate the wheat from the chaff before providing advice. An important piece of advice in this respect therefore is to

**ANSWER THE QUESTION YOU ARE GIVEN
NOT
THE QUESTION YOU WOULD HAVE LIKED TO BE ASKED.
SO
DO NOT SPECULATE ON FACTS NOT PROVIDED.**

A tribunal decision involves the application of facts and law to produce a statement of the legal rights and liabilities of the parties arising out of the respective legal responsibilities of the parties to a civil/public dispute or criminal action. This is represented by the equation :-

FACTS + LAW = DECISION

Whilst you are not required to act as a judge and provide a definitive ruling on the legal rights, liabilities and duties of an individual arising out of the events outlined in the scenario, you are required to provide a considered opinion as to what a judge might decide. In effect you are providing a risk analysis of likely outcomes of a trial. In practice, the practitioner outlines and evaluates the risks to the client and then seeks the client's instructions, which the practitioner then carries out to the best of his professional ability. The eventual outcome will depend upon which side of the divide the judge falls, which may well in turn depend on the quality and strength of evidence presented to the tribunal by both parties. A major uncertainty in a trial is that it is often hard to evaluate what new evidence the other side might produce or even how well your own client and witnesses stand up in court. However, none of this is of concern to you when responding to a problem question.

At this stage you are concerned merely with evaluating what the law will do in a given set of circumstances. It is not your job to speculate on whether or not those given circumstances can be proved, though this would be an integral part of the advice a practitioner would have to provide a client. The problem that you will encounter and must address is that such problem questions often involve an area of law which is not clearly decided and is subject to some degree of uncertainty. Two or more cases may well have been decided in different ways because of slight changes in circumstances. The candidate is then presented with a problem where the circumstances fall somewhere between the facts of the decided cases, so that it is unclear which of the cases a judge might follow in the given scenario. Because you are not a judge you will not have to decide which case applies, but rather to provide an evaluation of which case the judge is most likely to follow, coupled with advice in turn about the consequence for the client of the judge going either way.

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PREPARATION FOR EXAMS : REVISION

- 1 **Long term study strategy.** Use past exam papers to identify the style and nature of questions. Prepare for exams during the entire course. Use tutorials to answer problem issues and to debate essay questions.
- 2 **Question spotting :** This is dangerous if you draw too narrow a focus and target a limited number of topics. Many candidates focus on a number of topics and discard others but remember that it is quite possible that you will be unhappy about addressing a question on a topic that you have prepared. If you have no other fall back topic you can answer you will be in trouble.
- 3 **Pre-revision :** Start to prepare some topics early. Preparation before an exam involved starting from scratch, firstly reminding yourself about the topic before making a considered opinion about what to revise. If you draw up a list of essentials immediately after tutorials on a topic, whilst it is fresh in your mind, it will take much less time. The revision note will kick start your pre-exam revision and save much time and effort at a stage when you are under pressure.
- 4 **Remember** – exams are not about how much you know but rather about how much you understand and the ability to apply that understanding in a clear and meaningful way.

SITTING THE EXAM

- 1 **Read the exam rubric** – make sure you know how many questions you must attempt and take care to ensure that instructions regarding compulsory questions of section quotas are observed.
- 2 **Attempt the correct number of questions**, even if you are weak on a particular topic. It is easier to get to 50% on any given topic than to get to 70% so the chances of passing if you only answer three out of the required four are considerably reduced.
- 3 **Time Management :** Practice writing to time in advance and make an assessment as to whether you need to expand revision or slim down your material and refocus on essentials.
- 4 **Last minute Cramming :** Do not cram too much especially at the last moment. It is important to ensure that you are not too tired to think. It is best to finish revision in the evening and sleep on it over night than to swot first thing in the morning before an exam or even worse to swot all night and take the exam with the intention of sleeping afterwards. Extreme fatigue during exams is fatal.
- 5 **After the exam**, forget about it, move on and focus on the next exam. Post exam analysis immediately after the event wastes time and nervous energy.
- 6 **Space out your answer** - exam paper is free. Use new paragraphs for each point. It is better to cover as many relevant issues as possible rather than to go into excruciating detail about some issues to the detriment of other issues that the examiner is also looking for comment on. Always ask, is this relevant to and does it answer the question and is the scope of the response proportionate to the entirety of the question.
- 7 **Highlight or underline cases.** If you have a short-term memory loss regarding a case name you can for instance write "*As decided in the case of there is a duty*" If you later remember the case it is easy to locate the omission and fill in the gap, without having to squeeze it in between the lines or in the margin. A lot of time can be wasted reading through your script to find where to add the remembered case.
- 8 **Statute books**, where permitted should be used as a comfort blanket. You should not rely on the statute book but rather should know the issues in advance and where to look for any information you wish to double check. Do not copy sections of statute out verbatim – summary and explanation are what is called for.
- 9 **Do not write out a question or summarise all the facts.** You should target issues and use quotes from questions to demonstrate you are answering the questions. E.g. "*Regarding the assault on Fred*" or "*Thus it is clear that s49 XX Act does / does not fulfil the purpose of YYYY ...*"

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ESSAY QUESTIONS

- 1 Past papers are useful to identify topics but not to determine the focus or objective of future exam questions.
- 2 Always answer the question and respond to its focus using only relevant information. Do not write all you know about a topic. All topics have linked themes and cases and common / logical sequences which can be sub-grouped and learnt in "bubbles". Then think in the exam how to link up the sub-categories, leaving out the bubbles not called for in the question and then draw up focussed conclusions.
- 3 Identify an area : Define : State function and Purpose : Does it work i.e. fulfil its functions and purposes – and if not why not ? Critiques, articles and commentary can be usefully drawn upon – but you should also draw your own conclusions, agreeing or disagreeing with other commentators.
- 4 If the law fails to fulfil expectations what can be done about it ? Conclusions.
- 5 Beware of the essay that looks like a problem. Some questions use a scenario to highlight an area but really require an essay answer. The key is often words such as "provide a critical analysis" as opposed to "Advise John."

PROBLEM QUESTIONS

- 1 Identify area of law.
- 2 Define target – legally
- 3 Dissect ingredients and apply one by one using the equation $LAW + FACTS = DECISION/ADVICE$ which can be repeated several times in the same question. Do not set out all the law in an area, whether relevant or not, followed by some broad general conclusion such as "and therefore Fred wins." It will not be clear to the examiner, which bits apply and which bits do not.
- 4 Problems may have several issues. Sometimes you will be presented with one problem requiring sequential analysis and other times you will be presented with two or more distinct issues
- 5 For all areas, draw up and revise a logic flow diagram or decision chart e.g. negligence / defences / damages.
- 6 Either or questions. Questions pitch facts halfway between cases – it is often not clear which applies – you are giving advice not judgement so give both sides and a considered opinion / evaluation of which is most likely after which in practice one would then seek client's instructions.