# THE BRITISH MODEL OF REPRESENTATIVE GOVERNMENT: POLITICAL ACCOUNTABILITY AND LEGAL CONTROL

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SUMMARY: I. *Liability of Government in Private Law: Crown Proceedings and Crown Privilege.* II. *Administrative Law: the judicial control of statutory and prerogative power.* III. *The protection of individual rights and civil liberties.* IV. *The European Convention on Human Rights in English Law.* V. *Political Responsibility and Democratic Control.* VI. *Constitutional Monarchy.* VII. *The modern Constitution: legal doctrine and political principle.*

In 1885 A. V. Dicey, Vinerian professor of English Law at Oxford, published his introductory lectures on the Law of the Constitution.[1] He was anxious to provide a sound conceptual basis for British constitutional law and to demonstrate the importance of its exposition. The absence of any written Constitution —any single foundational document distributing the sovereign power of the state amongst its various elements— did not mean that Britain lacked a Constitution. It was necessary to separate the law of the Constitution, strictly defined, from those conventions, understandings and practices which made up constitutional morality. Accordingly, the rules which would be enforced by the courts must be distinguished from those maxims whose basis was solely political, such as the practice that a government which no longer enjoyed the confidence of the House of Commons should resign from office. The laws of the Constitution, suitably distinguisher, might be either written or unwritten: important statutes, such as the Act of Settlement and the *Habeas Corpus* Acts, existed alongside the common law. The British Constitution was therefore both written and unwritten —an amalgam of statute, judicial decision and legal principle. In consequence, though the law of the Constitution might be isolated as an independent field of study, it could claim no special or overriding authority. The powers of public bodies, and the rights

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[1] *Introduction to the Study of the Law of the Constitution,* 10th ed. by E.C.S. Wade, hereinafter cited as Dicey.

and freedoms of the citizen, enjoyed no preferred constitutional protection and were alike the consequence of ordinary statutes and judicial precedent. In Dicey's words, "the Constitution [was] the result of the ordinary law of the land." [2]

In Dicey's analysis, the law of the Constitution, as distinct from convention and practice, enshrined and embodied two fundamental principles or characteristics. First, the sovereignty of Parliament granted complete legislative supremacy to the Queen in Parliament. The authority of Sir Edward Coke was cited in support: "The power and jurisdiction of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds." [3] There were no limits to the scope or authority of ordinary legislation. The Act of Settlement 1701 fixed the descent of the Crown, and thereby secured the Sovereign's claim to reign. Acts of Indemnity had been regularly passed to free Dissenters from penalties, where they had accepted municipal offices without taking the Sacrament according to the rites of the Church of England. Such "legalisation of illegality" Dicey considered the "highest exertion and crowning proof of sovereign power." [4] The jurist, John Austin, had concluded that sovereignty was vested in the Queen, the House of Lords, and the Commons or the electorate: Members of Parliament were trustees for the electors. Here, however, he had confused legal with political sovereignty. Legally, Parliament itself was sovereign: no statute could be impugned in the courts merely on the ground that it lacked popular support.[5] The Septennial Act 1716 had extended the legal duration of Parliament from three to seven years: an existing Parliament thereby prolonged its own power for four years beyond the time for which the House of Commons had been elected. Clearly, sovereign legislative power in the state resided in Parliament itself: it was legally neither the agent of the electors nor a trustee for its constituents.[6]

The doctrine of legislative supremacy occupies in England the place taken in many countries by a written Constitution, declaring fundamental law. It remains, however, a question of some interest and controversy whether or not there is a formal Constitution for Great Britain

[2] Dicey, p. 203.
[3] 1 Blackstone's *Commentaries,* p. 160.
[4] Dicey, p. 50.
[5] *Idem,* pp. 71-76.
[6] *Idem,* p. 48.

or of the United Kingdom as a whole, constituting fundamental law.[7] The Treaty of Union between England and Scotland in 1707 has not been regarded in England as imposing any restraints on the legislative authority of the British Parliament. This view has, however, been doubted in Scotland, where Lord President Cooper has stated that the principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constituional law.[8] The Treaty and Act of Union declared certain matters to be fundamental, seeking to secure the continuation of the Presbyterian religion and Church of Scotland and to preserve the authority of the Scottish superior courts. Article XVIII of the Act of Union provided that the Parliament of Great Britain might make no alteration in the laws concerning private right, as opposed to public policy and civil government, "except for evident utility of the subjects within Scotland." The Lord Advocate had accepted, in argument, that Parliament could not repeal or alter such "fundamental and essential" conditions, and Dicey had himself recongnised the intention in 1707 to limit the powers of the new Parliament. However, Lord Cooper did not think that the Court of Session had jurisdiction to determine whether the governmental act in question (a proclamation describing the Queen as "Elizabeth the Second of the United Kingdom of Great Britain") conflicted with the provisions of the Treaty:

> There is neither precedent nor authority of any kind for the view that the domestic Courts of either Scotland or England have jurisdiction to determine whether a governmental act of the type here in controversy is or is not conform to the provisions of a Treaty, least of all when that Treaty is one under which both Scotland and England ceased to be independent states and merged their identity in an incorporating union.[9]

Lord Cooper reserved his opinion concerning the powers of the court in relation to matters of private right, as opposed to "public right". More recently, however, the Court of Session has refused to grant a declarator that section 2 (1) of the European Communities Act 1972, in giving legal effect in the United Kingdom to a European regulation affecting fishing in the maritime waters of member states, was invalid because

[7] D.N. MacCormick, "Does the United Kingdom have a Constitution?" (1978) 29 *Northern Ireland L.Q.* 1.
[8] *MacCormick* v. *Lord Advocate* 1953, S.C., 396.
[9] *Idem*, p. 413.

contrary to Article XVIII of the Act of Unión.[10] Lord Keith held that the question whether a particular Act of the United Kingdom Parliament altering an aspect of Scots private law was or was not "for the evident utility" of the subjects within Scotland was not a justiciable issue. It was a political matter which lay outside the competence of the court. Dicey's first principle of the Constitution, that of parliamentary sovereignty, should therefore strictly be qualified, if only in theory, by the special status of the Articles of Union. In view of the likely absence of any practical legal sanction in the event of their violation, however, the qualification should not perhaps be pressed too far. Dicey noted that the Act of Union with Ireland 1800, which declared the continuation of the established Church of England and Ireland to be an "essential and fundamental part of the Union", had not in fact prevented the disestablishment of the Church in Ireland.[11]

It is Dicey's second fundamental principle or characteristic which marks the distinctively British contribution to constitutionalism: the observations of foreign writers, such as De Tocqueville, had pointed to "the rule, predominance, or supremacy of law as the distinguishing characteristic of English institutions."[12] The Rule of Law contained three distinct conceptions. It meant, first, that no man might be punished except for a breach of law established before the ordinary courts. In that sense, it denied the lawful exercise of arbitrary or discretionary powers of constraint.[13] Secondly, every man, whatever his rank or status, was equally subject to the ordinary law and to the jurisdiction of the ordinary courts. Accordingly, ministers and officials were personally responsible for every act done without legal justification: all men, public officials and private citizens, were equal before the law. The third aspect arose from the absence of any formal written guarantee of fundamental rights or freedoms. The principles of the Constitution were simply generalisations drawn from certain statutes and, more importantly, particular judicial decisions settling the rights of individuals:

> We may say that the Constitution is pervaded by the Rule of Law on the ground that the general principles of the Constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the

[10] *Gibson* v. *Lord Advocate* 1975, S.L.T., 134.
[11] Irish Church Act 1869; Dicey, p. 66.
[12] Dicey, p. 187.
[13] *Idem*, p. 188.

> courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the Constitution.[14]

Although Dicey recognised the value of alternative approaches —he thought the Rule of Law as marked a feature of the United States of America as of England—, he nevertheless considered that the British model of constitutionalism had special strengths. It emphasised the connection between rights and remedies. The right to individual liberty was part of the Constitution because it was secured by judicial decisions, extended and confirmed by the *Habeas Corpus* Acts: "The *Habeas Corpus* Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty." [15]

Although Dicey's exegesis has continued to provide the main foundation of modern British constitutional law and theory, it has sometimes seemed hard to reconcile his two fundamental principles. The political power which derives from the supremacy of Parliament is concentrated today in the elected House of Commons, with the result that great power is exercised in practice by any government which commands a clears majority of members in the lower House. Since important rights and freedoms enjoy no preferred constitutional status, the Rule of Law seems unable to preserve their force and scope against encroaching legislation. Modern statutes often confer extensive powers of regulation and control on public authorities, whose exercise may threaten individual rights and freedoms. Dicey, however, denied that there was any contradiction between the sovereignty of Parliament and the Rule of Law. Since the parliamentary will could be expressed only through an Act of Parliament, it was subject in application to the interpretation of the judges, whose independence from government and Parliament was carefully preserved. Dicey therefore rejected the criticism that the despotism of Parliament, and therefore of the elected government, had been substituted for the ancient prerogative of the Crown:

> The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the courts. Powers, however extraordinary,

[14] *Idem*, pp. 195-96.
[15] *Idem*, p. 199.

> which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges.[16]

The Rule of Law may be seen therefore to demand a separation of powers between government and Parliament, on the one hand, and the judiciary, on the other. The independence of the judges, in particular, preserves the freedom of the subject under the law. Since the members of the government are drawn from Parliament, however, there is no strict separation of powers between executive and legislature —in the sense that, although Parliament alone can change the law, the government is represented in Parliament. There is no strict division of personnel. It is a system of Cabinet government, in which Ministers are collectively responsible to Parliament in the performance of their duties. The British model of constitutional government therefore entails a combination of legal and political responsibility. The convention of ministerial responsibility ensures political accountability: Ministers must answer in Parliament for their decisions, and a government which forfeits the confidence of the House of Commons is expected to resign. Every Minister and official is, in addition, individually answerable in the courts for any action taken without legal justification. The traditional division of responsibility has been recently confirmed:

> It is not... a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.[17]

The principle of equality before the law here serves to protect the liberties of the citizen against the abuse of power. In Entick v. Carrington,[18] the King's Messengers were held liable in trespass for breaking and entering the Plaintiff's house and seizing his papers in pursuance of a

16 *Idem*, p. 413.

17 *Inland Revenue Commissioners* v. *National Federation of Self Employed* [1982] AC 617, 644 (Lord Diplock).

18 (1765) 19 State Trials 1030.

warrant issued by the Secretary of State. The Minister had acted unlawfully, and had no special authority to act outside his legal powers for the benefit of the State: "With respect to the argument of State necessity, or the distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions." [19]

## I. Liability of Government in Private Law: Crown Proceedings and Crown Privilege

Although an impressive ideal, well capable of development and refinement, Dicey's conception of the Rule Law was in some respects inadequate. The British contribution to constitutionalism during the last seventy years may be viewed as the gradual adaptation of his theory to modern conditions. In constitutional theory, all Ministers and civil servants are servants of the Crown.[20] The doctrine of equality before the law, though securing the liability of individual officials, nevertheless left the citizen at a disadvantage vis-a-vis the Crown. At common law, the principle applied that the King could do no wrong: nor could he be sued in his own courts. Accordingly, the Crown could not be made liable for wrongs committed by its servants in the course of their employment. The Crown Proceedings Act 1947, however, has established the principle that the Crown is, in general, subject to the same liabilities in tort as if it were a private person. The modern law thus imposes vicarious liability for the torts of Crown servants and renders the Crown liable for breach of a statutory duty, where the statute in question binds the Crown as well as private persons. The general principle that officials and public authorities are subject to the same law of civil liability as private persons may also be disadvantageous: it means that an action must be based on an independent tort. English law does not recognise any general right to compensation for loss inflicted as the cousequence of invalid administrative action.[21] The scope of ordinary civil liability has, however, been recently widened. It is now clear that and individual may sometimes recover damages if he can establish negligence in the exercise of a discretion conferred on a public authority. The courts have distinguished between the sphere of policy or discretion, granted by statute to a public

19 *Idem*, 1073 (Lord Camden C.J.).

20 For modern riscussion see *Town Investments Ltd.*. v. *Department of the Environment* [1978] AC 359.

21 *Dunlop* v. *Woollahra Council* [1982] AC 158.

authority, and an operational area in which the policy once determined, would be carried out. Although the distinction was one of degree, it could "safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose upon it a common law duty of care." [22] It does not follow, moreover, that the authority is accorded complete immunity from suit within the policy sphere. Damages may sometimes be awarded if a public body has failed to exercise a discretion in deciding whether or not to act, where its omission to act has resulted in loss to a citizen affected. An error of judgment in the exercise of a statutory discretion would not in itself be sufficient to found an action in negligence. "But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power." [23] In these circumstances, an ordinary civil action for damages may lie against the public or official body in question.

There has been an important development in the law of evidence which has assisted the citizen who wishes to bring proceedings against a public authority. The House of Lords has held that the disclosure of relevant documents in litigation cannot automatically be resisted on the ground that revelation of their contents would prejudice the public (or governmental) interest. In *Conway* v. *Rimmer* [24] the Home Secretary objected to the production of reports made on the progress of a probationer police constable, who had brought an action against his former superintendant for malicious prosecution. The Minister's contention that their production for use in the litigation would injure the public interest failed to persuade the court, which ordered their disclosure. Rejecting the view that the Minister's certificate, claiming immunity, was conclusive, the House of Lords held that the court had a duty to balance the public interest in non-disclosure against the countervailing public interest in ensuring the proper administration of justice. A litigant who was unable to obtain access to relevant evidence might be unable to prove his case against the government or other public authority. The Minister's wish to preserve the confidentiality of police probation reports, in order that the candour of senior officers should not be inhibited when writing them, was outweighed by their importance as evidence in the plaintiff's action. The traditional concept of "Crown privilege" has been replaced

[22] *Anns* v. *Merton London Borough Council* [1978] AC 728, 754 (Lord Wilberforce).
[23] *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] AC 1004, 1031 (Lord Reid).
[24] [1968] AC 910.

by the modern notion of "public interest immunity" —reflecting its extension beyond the field of central government, where a legitimate interest in confidentiality can be established,[25] but also its vulnerability to judicial assessment of conflicting public interests.

The difficult question of the conflicting claims of government secrecy and the administration of justice was further considered in *Burmah Oil Co. Ltd.* v. *Bank of England*.[26] The Company sought to have a sale of stock to the Bank set aside as unconscionable. At the request of the Crown, the Bank objected to production in the litigation of documents recording the role of the government in the transaction. The Chief Secretary to the Treasury gave a certificate stating his opinion that their disclosure would be injurious to the public interest because it was "necessary for the proper functioning of the public service" that they be withheld. The documents consisted of memoranda of meetings attended by Ministers and government officials and related to the formulation of policy. The House of Lords considered that the documents were sufficiantly likely to assist the fair disposal of the action to justify the court in inspecting them; although on inspection it was held that their contents did not demand an order for their production. In the result, therefore, the Crown's objection to production was upheld. There was, however, no rule against the discovery of important policy documents in a suitable case: disclosure of even the most sensitive communications at the highest level of government could be ordered if the nature of the litigation, and the importance to it of the relevant documents, demanded it in the interests of justice. Although Lord Wilberforce thought that it was important to recognise the need for frank and uninhibited advice from the Bank to the government, and between civil servants and Ministers, Lord Keith's view was more robust:

> The notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in a litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so. Nowadays the State in multifarious manifestations impinges closely on the lives and activities of individual citizens. Where this has involved a citizen in litigation with the State or

[25] Eg. *D* v. *NSPCC* [1978] AC 171.
[26] [1980] AC 1090.

one of its agencies, the candour argument is an utterly insubstantial ground for denying him access to relevant documents.[27]

Government documents recording the formulation of policy were ordered to be disclosed in a subsequent case,[28] where the plaintiff, who had been detained in an experimental "control unit" set up within the prison system to isolate disruptive prisoners, claimed damages for false imprisonment against the Home Office and a declaration that the Home Secretary had acted *ultra vires*. McNeill J. decided that the claim for immunity was overridden by the interests of justice, which required that the liberty of a prisoner preserved by statute and prison rules must be protected. Accordingly, the judge inspected the documents, which were concerned with the consideration of policy by Ministers and senior officials, and ultimately ordered six of them to be disclosed. The morern law therefore strengthens the position of the citizen in litigation against public authority: but his task may sometimes be difficult nonetheless. The order of the trial judge for disclosure of documents in a later case[29] was reversed by the Court of Appeal and House of Lords. A number of international airlines challenged increased airport charges imposed by the British Airports Authority on the Ground that they were the result of *ultra vires* and unlawful directions of the Secretary of State. It was alleged that the Minister had imposed financial constraints on the Authority for the ulterior purpose of reducing the public sector borrowing requirement. Bingham J., at first instance, was prepared to order the production of communications between Ministers, or made for the use of Ministers, on the ground that they were likely to be necessary for the just determination of the plaintiff's case. In the House of Lords, Lord Scarman and Lord Templeman agreed that the judge should inspect the documents, although in the circumstances they did not think that disclosure was warranted. The majority, however, accepted the view of the Court of Appeal that no case for inspection had been made out: the plaintiff had not established that the documents were likely to contain material providing substantial support for its case. It may be commented that, when he has not seen the documents in question, it may be difficult for the plaintiff to meet this initial hurdle; and if the court is unwilling to inspect, it cannot usually undertake the necessary balancing of public interests.

[27] *Idem*, 1133.
[28] *Williams* v. *Home Office* [1981] 1 All E. R. 1151.
[29] *Air Canada* v. *Secretary of State for Trade* [1983] 2 AC 394.

To this extent, the Crown retains a privilege which may impede the citizen's attempt to litigate.[30]

## II. Administrative Law: the judicial control of statutory and prerogative power

It is not, however, in relation to the rules governing civil liability in private law that the Rule of Law makes its most important contribution. As a means of securing Lawful, constitutional government, the Rule of Law may be harnessed to provide a foundation for public law —the principles and doctrines applied at common law to check excess or abuse of power on the part of public authority. Dicey's initial characterisation was unable to offer much assistance here. He considered that the Rule of Law excluded the existence of "wide discretionary authority on the part of the government." [31] He also strongly opposed any separation of public and private law, insisting on the subjection of all officials to the jurisdiction of the ordinary courts. He therefore denied the existence of administrative law entirely as an idea "utterly unknown to the law of England, and indeed... fundamentally inconsistent with our traditions and customs." [32] By 1916, however, Dicey had begun to change his view. As the State assumed a wider range of administrative and social welfare functions in the early years of the century, legal principle had to be developed to meet the challenge. The very strict separation of powers between certain organs of state, which had underpinned earlier accounts of the Rule of Law, had to be modified to accommodate new demands. In *Local Government Board* v. *Arlidge* [33] the House of Lords rejected the claim that the Board was obliged to adopt the procedure of a court of law in hearing an objection to the imposition of a closing order on a house under the Housing and Town Planning Act 1909. It helr that the Board could lawfully follow its own procedure without denial of natural justice to the appellant, provided that the appeal were fairly conducted and the objector afforded the opportunity to present his case. Parliament had to be understood as permitting the Board to follow the procedure it had devised for the efficient execution of its work: the appeal provided

[30] Allan (1985) 101 L.Q.R. 200. See generally *Cross on Evidence*, 6th ed., Ch. XIII; Zuckerman, "Privilege and Public Interest" in Tapper (ed.), *Crime, Proof and Punishment* (1981).
[31] Dicey, p. 202.
[32] *Idem*, p. 203.
[33] [1915] AC 120.

was made to a department of State and not to a judicial body. Lord Loreburn laid down a similar principle in *Board of Education* v. *Rice:*[34] the Board must act in good faith and conduct its hearing of an appeal fairly, but need not adopt the formal procedures of a trial. Commenting on these decisions, Dicey considered that they prompted the general question:

> Has recent legislation, as now interpreted by English courts, introduced or tended to introduce into the law of England a body of administrative law resembling in spirit, though certainly by no means identical with, the administrative law *(droit administratif)* which has for centuries been known to, and during the last hundred years been carefully developed by, the jurists and legislators of France?[35]

The question warranted, he concluded, a tentative but affirmative answer.

Although there can no longer be any doubt that English jurisprudence embraces a reasonably systematic body of administrative law, regulating the powers and duties of public bodies and governing their relations with the citizen, it is largely the product of the last twenty years.[36] It is also a developing body of common law —fashioned by the judges in response to their heightened perception of the danger of abuse of power by public authority. Its modern restatement as a coherent corpus of principle owes much to Lord Diplock, who considered that it constituted a system of administrative law which in substance was nearly as comprehensive in scope as French *droit administratif.*[37] In *Council of Civil Service Unions* v. *Minister for the Civil Service*[38] he set out the grounds on which administrative action was subject to control by judicial review. The first he classified as "illegality": a power must be exercised in accordance with the law, correctly interpreted. In the case of a statutory power, its exercise is subject to the terms of the statute, whose final construction must be a matter of the court. Where Parliament conferred a discretion, it must be used to promote the policy and objects of the Act, as these are determined by the judges in a case of doubt. In *Padfield*

[34] [1911] AC 179.
[35] *Dicey,* pp. 494-95 (reprinted from the *L.Q.R.,* vol. 31 [1915]).
[36] Compare *Ridge* v. *Baldwin* [1964] AC 40 at 72 (Lord Reid) and *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 279-80 (Lord Diplock).
[37] Administrative Law: Judicial Review Reviewed [1974] 2 *C.L.J.* 244.
[38] [1985] AC 374.