The British constitution, law reform and the parliamentary legislative process

This topic enables you:

- To appreciate the role of Parliament as the dominant law-making power in the British constitution.
- To identify the influences on Parliament from law reform bodies, pressure groups and campaigners.
- To understand the law-making processes within Parliament.
- To identify the powers in the British constitution.
- To recognise that there are limits to the supremacy of Parliament in law-making.
- To take account of the importance of European Community (EC) law and its impact on the English legal system (to be read in conjunction with Chapter 5).
- To appreciate the far-reaching significance of some parliamentary law, such as the Human Rights Act 1998.

Most of this chapter will concern itself with the way in which law is made by Parliament. Parliament creates written law referred to as legislation or statute law. Legislation or statutes passed by Parliament take the form of Acts of Parliament. You can see from the illustration below, and from Chapters 1–5, that there are four main sources of law in the English legal system, of which Acts of Parliament are seen as the dominant source:

ACTS OF PARLIAMENT
Law made by Parliament, ie the House of Commons, House of Lords and Monarch

DELEGATED LEGISLATION
Law made under the authority of Parliament, eg by government departments

JUDICIAL PRECEDENT
Case law, ie law developed by judges through applying rules laid down in previous cases

EUROPEAN COMMUNITY LAW
Law made by the institutions of the European Union and then applied in Member States
In order to understand Parliament’s law-making role, it is first necessary to consider the place of Parliament within the British constitution and to describe its relationship with the other constitutional powers.

**THE BRITISH CONSTITUTION AND CONSTITUTIONAL THEORY**

What are people referring to when they talk about ‘the constitution’? It is easier to imagine this if the constitution is declared in some form: for example, the United States has a written (or codified) constitution, which sets out the limits of presidential government. However, the position is complicated in Britain, because the constitution is a product of historical development and has never been reduced to one written code or document. Therefore, on a simple level, the British constitution is often described as an unwritten constitution. Although many of the sources of the constitution are written and documented, the British Constitution remains uncodified.

Nevertheless, whether written or unwritten, a constitution will, in practice, define limits for Government and administration in a nation State. In short, a constitution sets out the way in which a country will be run. Three aspects are generally defined in any constitution:

- The way in which power is balanced between the institutions (or governing bodies) of the nation State.
- The limits to the powers exercised by such institutions, imposed to safeguard the rights and freedoms of individuals.
- The extent to which individual rights and freedoms within the nation State are protected.

The three institutional powers in the British constitution are, according to the ‘separation of powers’ theory, the executive (Government: the administration that runs the country); the legislature (Parliament: the institution of law-making); and the judiciary (judges: the adjudicators in disputes).

Of the three institutional powers, constitutional theorists have identified Parliament as being the supreme law-making body. Parliament can make, or unmake, any laws that it wants. This is the theory of parliamentary sovereignty.

An additional theory is the rule of law as developed by the 19th-century theorist Albert Venn Dicey. This places an importance on law as a check on the arbitrary exercise of power by Government; and stresses that no one individual is ‘above the law’, thus ensuring equality of treatment for all before the courts.

Table 1.1 summarises what is meant by the ‘constitution’ and the main constitutional theories.
CHAPTER 1 The British constitution, law reform and the parliamentary legislative process

Table 1.1 The constitution and constitutional theories

What is a constitution?

- Either written/codified (e.g., US constitution) or unwritten/uncodified and based on historical development (e.g., British constitution).
- Sets out how a country should be run.
- Lays down the powers of the governing bodies in the country.
- Takes into account the relationship between the governors and the governed.
- Sets out powers and duties of the governors and the rights and freedoms of the governed (citizens).

What are the main constitutional theories?

<table>
<thead>
<tr>
<th>Separation of powers</th>
<th>Parliamentary sovereignty</th>
<th>Rule of law</th>
</tr>
</thead>
<tbody>
<tr>
<td>That there are three main powers in the constitution and that these should remain separate. The three powers are: - Executive (Government) - Legislature (Parliament) - Judiciary (Judges)</td>
<td>That of the three main powers in the constitution, Parliament is the supreme law-making body. (See later comments in this section.)</td>
<td>That the three main powers of the constitution must observe the rule of law. This means: - There is a check on the power of the Government in its decision-making. - That no one is above the law – all are equal before the courts.</td>
</tr>
</tbody>
</table>

Developing the subject 1.1: Focus on the separation of powers and the rule of law

The separation of powers theory is that the constitutional powers are to some degree separate, thereby ensuring that there are checks and balances in the system, thus limiting the power of Government and enabling the judiciary to have independence in reaching legal judgments on disputes. The value of this separation of powers theory, if applied in practice, is that it avoids totalitarian government: in Nazi Germany, for example, the evils of the system occurred because there were no checks and balances, and Hitler’s regime exercised dominance over all of the powers of the State. The judiciary lacked necessary independence and the executive controlled the legislature. The practical consequences were horrendous.

The rule of law clearly places limits on the exercise of powers by the Government and protects the rights of citizens. The rule of law theory, like the separation of powers, emphasises the need for keeping the institutions and their processes within reasonable limits so as to avoid totalitarianism.
The development of the British constitution

The constitution has evolved over time, with two main strands of historical development: first, the changing relationship between the monarchy, executive and Parliament; and, second, the landmark reforms that have extended rights and liberties and delimited constitutional powers. These are summarised by Table 1.2 below and explained in ‘Developing the subject 1.2’ opposite.

The role of the Crown in the British constitution

The title ‘the Crown’ is given to the monarch or sovereign of the country, that is, the Royal Head of State. The British monarch is also the Head of the Church of England and Head of State for assenting countries within the Commonwealth (an association of former colonial nations). In its practical operation, the Crown represents the monarch and, more significantly, the Government of the day – the executive – that has responsibility for governing the country, and can call upon ‘royal prerogative’ powers that have been established during the historical development of the common law.

The Crown has legal significance in two main respects:

- Through exercise of the royal prerogative.
- Through Crown immunity.

Table 1.2 The development of the British constitution

| Changing relationship between the monarchy, executive and Parliament |
|-----------------------------|--------------------------|
| Kings and Queens have absolute power up to 17th century. |
| English Civil War takes place, in which Parliament stands up to the monarchy. |
| Glorious revolution of 1688, following the civil war, gave Parliament dominance over the monarchy. |
| Since 1688, Parliament has gained power at the monarchy’s expense. |
| Parliament develops procedures to keep executive governance in check. |

| Landmark reforms extending rights and freedoms and setting the boundaries of constitutional powers |
|---------------------------------|--------------------------|
| Magna Carta 1215: first real attempt to set out constitutional powers and give rights and freedoms to citizens. |
| Act of Settlement 1701: provided for judicial independence from the other constitutional powers. |
| Extension of voting rights (19th/20th centuries): led to parliamentary democracy. |
| UK joins the European Community in 1973 and therefore becomes subject to European Community law. |

The Crown and the ‘royal prerogative’

In his landmark work on the Law of the Constitution (1885), AV Dicey defined the royal prerogative in the following terms:

The prerogative is the name for the remaining portion of the Crown’s original authority, and is therefore . . . the name for the residue of discre-
Developing the subject 1.2: Notable events in the historical development of the British constitution

Kings and Queens tended to wield ‘absolute’ power in affairs of State prior to the seventeenth century. The turning point came with the English Civil War (1642–1648) and the battle between the Royalists (represented by the ‘Cavaliers’), who supported the monarch, King Charles I, and the Parliamentarians (represented by the ‘Roundheads’), led by Oliver Cromwell, who sought to challenge the monarch’s powers. In bringing the relationship between the powers of the monarch and Parliament to the fore, it was not long before a settlement was reached which sought to define the appropriate balance of these powers. This settlement resulted from the ‘Glorious Revolution’ of 1688, in which King William III (William of Orange) agreed to a ‘bill of rights’ for the protection of individual rights and liberties, and parliamentary dominance over the monarchy was declared. After 1688, Parliament continued to gain power at the monarch’s expense, to the extent that the monarch is today a largely ceremonial figure with very limited powers (see further discussion of the Crown in this chapter).

As for constitutional landmarks, the Magna Carta of 1215, signed by King John and the major feudal landowners, is still seen as a reference point for the protection of civil liberties. It required that every man accused of a crime should be given a fair trial and be judged by his peers, and that the legal system be free of bribery and corruption. These principles are of continuing relevance today. The right to a fair trial, for example, is now explicitly protected in law under the Human Rights Act 1998, a very recent landmark in the development of the British constitution. This Act brings many of the rights and freedoms laid down in the European Convention on Human Rights into English law.

Other notable developments in history include the Act of Settlement 1701, which provided judges with freedom from interference by the other constitutional powers; and the widening of public participation in the political process, with the extension of certain voting rights to men in the nineteenth century and to women in the first half of the twentieth century, thus creating, over time, a parliamentary democracy. However, perhaps the most significant constitutional development of all has been the UK’s participation as a Member State of the European Community (EC) (now European Union, or EU) since 1973. This has meant that the British constitution is subject to the exercise of powers and processes by a further set of institutions. EC law, which describes the law developed by the institutions of the European Union, is superior to English law, and there is little doubt that when the UK joined the EC it gave away aspects of its own parliamentary sovereignty (see Chapter 5). A constitutional question that remains contentious is whether the UK can, in any circumstances, withdraw from the European Union.

Tasks for developing learning:

(1) Create a time-line to illustrate the development of the British constitution.
(2) Carry out research into the constitutional reforms implemented by the Labour governments since 1997. Add the results to your time-line.
substance. Maitland, the great legal historian, once wrote ‘the Crown does nothing but lie in the Tower of London to be gazed at by sightseers’ – a comment that emphasises the ceremonial rather than the legal role of the Crown as reflected by the monarch in the British constitution. This is the Crown acting as the ‘Queen (or King) in Parliament’. The following examples of the royal prerogative illustrate the point.

The prerogative powers of the ‘Queen in Parliament’

- The monarch has the prerogative power to open new parliamentary sessions and to dissolve Parliament for the purposes of a general election. The former power is illustrated by the Queen’s (or King’s) Speech during the State Opening of Parliament, a ceremonial occasion in which the monarch reads a speech prepared by the Government outlining its proposals for new laws. In July 2007, Gordon Brown PM, broke with tradition by pre-empting the Queen’s Speech and announcing a draft legislative programme which would, he reasoned, allow more time for consultation (see www.direct.gov.uk for his 2007 and 2008 statements; the actual Queen’s Speech takes place each year in November).
- The monarch has the prerogative to give the ‘royal assent’ to legislation, thus formally making Bills (draft legislation) into operative Acts of Parliament. However, this is a formality rather than a power (the last time power was exercised by the monarch in such circumstances was as long ago as 1707). It used to be the case, historically, that the monarch signed all Bills, but today assent can be given by the signing of general documents to announce the giving of assent to the two Houses of Parliament. It is unrealistic to assume that the monarch reads the Bills that have been given assent, though detailed briefings will have been provided.
- The monarch has prerogative powers to appoint and dismiss the Prime Minister of the country, though, rather like the earlier examples, this is a matter of political convention rather than informed choice. Here, the monarch merely follows the choice of the political party with a majority in the House of Commons and appoints the leader of that party as Prime Minister after a general election victory. Moreover, the monarch will accept the resignation of a Prime Minister who loses a ‘vote of no confidence’ in Parliament, or who leads a party to defeat at the general election.

We can see, therefore, that Crown powers as exercised by the monarch are limited in practice.

The executive and its exercise of prerogative powers

A further dimension of the prerogative can be found in situations where the exercise of Crown powers is undertaken by the executive in times of war or emergency, or for the protection of overriding public interests. There have been occasions, for example, where the Government has attempted to justify
its activities as a legitimate extension of the royal prerogative to safeguard national security. The exercise of the prerogative has far more significance, and deeper political implications, in the hands of the executive as a representation of the Crown, than with the monarch.

**Crown immunity from legal action**

Part of the character of the Crown is that it is an entity with powers and rights as distinct from the citizens of the State. For this reason, the Crown enjoys legal immunity in certain respects because of its status. The origins of Crown immunity lie in the maxim that ‘the King can do no wrong’. It is still the case that the monarch cannot be sued in a personal capacity, though servants of the Crown – such as Government departments and other executive bodies and institutions – can be subject to civil legal action in the areas of contract and tort (Crown Proceedings Act 1947).

With regard to criminal law, the constitutional position is very controversial since the royal prerogative suggests that the Crown is immune from criminal prosecution. There is a fear that such a power allows the security services, in the name of the Crown, to obtain intelligence and maintain security through criminal activities, such as burglary and unlawful surveillance. However, this area is subject to the developing legal framework of human rights law, following the passing of the Human Rights Act 1998 (see pp 28–34 below), even though some of the rights are limited to take into account the need for ‘national security’. The issue of Crown immunity remains highly sensitive and controversial, as shown by media coverage of the unsuccessful attempts by lawyers for Mohammed Al-Fayed, in 2007, to require the Queen (and the Duke of Edinburgh) to give evidence at the inquest into the deaths of Diana, Princess of Wales and Dodi Al-Fayed.

The box to the right summarises the role of the Crown in the British constitution.

**SUMMARY BOX: WHAT IS THE CROWN?**

Refer either to:
- Queen or King (monarch); or
- Government (executive).

Both may exercise certain royal prerogative powers.

**What Crown powers does the monarch exercise?**

**Powers of the Queen (or King) in Parliament**
- Open new Parliamentary sessions.
- Dissolve Parliament for a general election.
- Give royal assent to legislation.
- Appoint and dismiss the Prime Minister.

These are seen as ‘conventions’ rather than powers.

**Crown immunity**
- Maxim: ‘The King can do no wrong’.
- King or Queen cannot be subject to legal action.
- Crown servants can be subject to legal action.
PARLIAMENT AND ITS LAW-MAKING ROLE: PRESSURES FOR LAW REFORM

We now turn to the dominant law-making power in the British constitution, according to theory: the legislature, represented by Parliament. This section looks at the way in which Parliament makes statute law, taking into account the influences on it and the procedures to be followed.

Statutes are examples of primary legislation. This type of legislation must be distinguished from secondary legislation, which generally assumes the form of statutory instruments (regulations, orders in council) and byelaws, and is otherwise known as delegated legislation. Delegated legislation is covered in Chapter 2 of this book.

Primary legislation is the written law made by Parliament in the form of Acts of Parliament (statutes). The word ‘Parliament’ needs some explanation. It refers generally to a democratically elected chamber with law-making powers. In English law, the Parliament has two parliamentary chambers. The two chambers are the directly elected House of Commons and the House of Lords, a non-elected chamber that includes appointed life peers and a limited number of hereditary peers.

Talking points 1.2: critically examining the British constitution

To what extent are the constitutional theories reflected in the practical workings of the British constitution?

Are the three main powers really separated?

On the face of it, there are three institutional powers and there are checks and balances between them:

- Parliament acts as a check on the Government, through debates and by amending, delaying and sometimes even defeating Government proposals.
- Judges act as a check on the Government by hearing challenges to Government decisions in judicial review cases, on the basis that the decisions have been made unreasonably or exceed the legal powers available. Judges can also consider whether the Government, or Parliament, has acted in a manner compatible with the European Convention on Human Rights.

However, did you know that:

- The Government can be found within Parliament, so the executive and the legislative branches of the British constitution are to some extent ‘fused’. The Government represents the party with the largest number of MPs in Parliament and all of the senior members of the Government, including the Prime Minister, are MPs. Therefore, if the Government has a large majority of MPs in Parliament it can wield an enormous amount of power, which Opposition MPs will find difficult to check effectively.
- The House of Lords, being the unelected chamber of Parliament, is not so easily under the control of a powerful Government, but it can only amend Government legislation and seek to hold it up. If the House of Lords chooses to delay Government legislation, the Government can force it to back down by using the Parliament Acts 1911 and 1949.
- Until the Constitutional Reform Act 2005, the senior members of the judiciary breached the separation of powers: the Lord Chancellor’s roles involved the executive (as a member of the Cabinet at the heart of Government), the legislative (as Speaker in the House of Lords) and judicial (as head of the judiciary and serving ‘law lord’ on the Judicial Committee of the House of Lords); the senior judges also have seats in the House of Lords. However, the 2005 Act includes reforms which pass the Lord Chancellor’s role as head of the judiciary to the Lord Chief Justice; will remove senior judges from entitlement to seats in the Parliamentary chamber of the House of Lords; and will replace, in due course, the Judicial Committee of the House of Lords with a Supreme Court.

Moreover, do not accept the other constitutional theories at face value. You should ask:

- Is Parliament really sovereign?
- Does the rule of law have practical relevance?

By Chapters 1–5 of this book, you should start to think more critically about these questions. For example, is Parliament truly sovereign when there are other significant law-makers in the British constitution, when some legislative power is devolved to regional assemblies (such as the Scottish Parliament) and when EC law can override UK law? How can the Government square its desire to protect national security through identity cards, the lengthy detention of terrorism suspects and increased stop and search powers with individual civil liberties and fundamental human rights? To what extent do the Government’s anti-terrorism measures breach the rule of law? To what extent should a Government lower its own legal standards – for example, by accepting evidence gained via the torture of a prisoner held in a foreign jail – to pursue suspected terrorists? At what constitutional price should national security be achieved?
number of hereditary peers (that is, members by birth). As we have seen, the House of Lords also has a judicial committee, and in this capacity is the highest appeal court in the English legal system (see Chapter 6); its role will be replaced by a Supreme Court when the Constitutional Reform Act 2005 comes fully into effect in 2009.

Law reform and the influences upon parliamentary law-making

So where does the law-making process begin? The origins of law-making may be quite diverse.

The most obvious source is a new Government that has come to power. The Government will be elected on the basis of a document known as a manifesto. Each political party has a manifesto during the election and, in effect, is saying to voters, ‘vote for us if you like what we have to say about how the country should be run’. Therefore, informed voters will choose the party with the manifesto that most appeals to them. A party that is elected for Government will claim that the majority of votes affords them a political mandate for making changes, and often these involve either new laws or changes to existing ones. The Government will often get its way in making the law because it has a majority of representatives in the House of Commons (known as Members of Parliament – MPs). The House of Lords, in which the Government may or may not have a majority, is restricted to delaying laws for up to one year (under the Parliament Act 1949) rather than defeating them altogether.

Let’s look at cases 1.1: Challenging the Hunting Act 2004

The case of R (Jackson and Others) v Attorney General (2005), involving a challenge to the constitutional validity of the Hunting Act 2004, started in the Queen’s Bench Divisional Court and ended up, via the Court of Appeal, in the House of Lords. The case had been brought by pro-hunting supporters who wanted to see the 2004 Act declared invalid, but not one of the courts found for the claimants.

So what was the background to this case?
The case centred on the way in which the Hunting Act had been passed through Parliament. The House of Commons, the elected (and therefore ‘legitimate’) chamber of Parliament had clearly voted in favour of the Bill to ban fox-hunting, but the House of Lords had persistently refused to accept the Bill. With a compromise out of reach, the Government resorted to the Parliament Acts 1911 and 1949 to force the Bill through Parliament and give effect to the will of the elected chamber. The Parliament Acts can be used when, in line with the 1949 Act’s amendments to the 1911 Act, the House of Lords has rejected a Bill in two successive parliamentary sessions. This triggers the Act’s automatic presentation for Royal Assent, subject to the further proviso that a year must have passed – between the original second reading of the Bill and its second successive passage through the House of Commons – for the provisions to take effect. Since the Bill to ban fox-hunting met these criteria, the Parliament Acts were invoked and the Royal Assent was given, thus creating the Hunting Act 2004.
So what constitutional objections were raised against this Act?
The claimants argued, amongst other things, that (1) Acts of Parliament were not constitutionally valid unless approved by both Houses of Parliament; (2) the Parliament Act 1949 had accordingly been passed without the consent of the House of Lords and so was itself invalid; (3) the Parliament Act 1949 was, in fact, delegated legislation and not primary legislation, and so could not validly increase the power of the House of Commons at the expense of the House of Lords.

The general rule is that no court can declare an Act of Parliament invalid, since that would undermine the concept of parliamentary sovereignty (Pickin v British Railways Board, 1974), but the House of Lords heard this case on the basis that a matter of constitutional law had to be resolved, which Parliament, itself, could not answer. To find otherwise would amount to a breach of the rule of law, since this would leave an important question of law unresolved.

Why did the claimants lose their case?
Senior judges in all three of the courts dismissed these arguments. Acts of Parliament could be valid without the consent of the House of Lords; whilst this might be perceived to erode checks and balances, leaving the House of Commons at the control of a strong Government, this was not a new position. The Parliament Acts have been used before, in 1991 pushing through the War Crimes Bill (to allow for the prosecution of ‘war criminals’ from World War II), in 1998 to give effect to a Bill allowing proportional representation for European Parliamentary Elections and in 2000 to enact the Sexual Offences (Amendment) Bill, which reduced the age of consent for homosexual activity to 16. The Parliament Act 1949 was clearly to be regarded as an Act of Parliament, rather than delegated legislation, from the wording of the 1911 Act; and it did not seek to increase the powers of the House of Commons, but rather to place limits on the powers of the unelected House of Lords. As Lord Bingham concluded in the House of Lords, the Parliament Act 1949 and the Hunting Act 2004 were Acts of Parliament of full legal effect. More recently, in R (Countryside Alliance) v Her Majesty’s Attorney General (2007) a further challenge to the Hunting Act 2004 – that it was incompatible with the European Convention on Human Rights – was rejected by the House of Lords.

Tasks
(1) The Parliament Act 1911 was passed because Conservative hereditary peers in the House of Lords had begun to overstep the mark in rejecting the constitutional and social legislative programme of a popular Liberal Government, which dominated the House of Commons. Compare this situation with the controversy over the Hunting Act 2004. To what extent might it be said that Governments are too willing in modern times to invoke the Parliament Acts ’not for the major constitutional purposes for which the 1911 Act was invoked, but to achieve objects of more minor or no constitutional import’ (Lord Bingham)?

(2) Summarise the Parliament Act procedures and make a brief set of notes on this important constitutional case.

(3) Why is it important to have ‘checks and balances’ within a constitution? Consider whether the decision of the House of Lords in this case ‘erodes’ those checks and balances in the British constitution?

(4) What does this case tell you about the relationship between the respective powers of the Crown, Commons, Lords and Government? Use your answer to draw up a list of evaluative points about the legislative process.

The Government will often consult widely before proceeding with substantial changes to the law. After a proposal has been made, the next stage of law-making is often the production of consultation documents: a Green Paper is a document outlining the Government’s proposals for the purposes of further discussion; more significantly, a White Paper, taking into account one round of discussion, is a document containing a detailed explanation of the proposed legal changes. Although the consultation process can be long and at
times frustrating for those seeking law reform, it ensures that the laws are carefully considered and subject to wide-ranging scrutiny and informed comment. The Government will be criticised if it announces changes without having carried out adequate consultation, as illustrated by the Government’s handling of reforms affecting the Lord Chancellor and constitutional position of the senior judiciary (see Chapter 8 for elaboration).

However, the impetus for new law does not always arise from Government proposals. The following sources are also very relevant.

Public opinion
At times, the public can demand new laws, usually encouraged by media campaigns. Public concern about dangerous dogs, for example, led to swiftly made – and now often criticised – legislation (the Dangerous Dogs Act 1991). A more recent example, responding to media coverage and concerns about arranged marriages in some communities, is the Forced Marriage (Civil Protection) Act 2007.

Campaigns by pressure groups
Pressure groups are those organisations that seek to influence the direction of law and policy on the basis of particular interests or causes. The pressure groups that most readily spring to mind are those that support certain causes: these will often be seen in newspapers or on television campaigning about issues such as health, human rights, consumer protection and the environment. Anyone can join a cause group, and popular examples include the Royal Society for the Protection of Birds (RSPB), Greenpeace, Amnesty International and Compassion in World Farming. If a pressure group begins to reflect mass public opinion, and the membership of the group rises, it can exert a great deal of pressure on law-makers. It is certainly true, for example, that by the late 1980s, environmental pressure groups had influenced legislation on the need for industries to protect the environmental media of air, water and land. More recently, a battle of cause groups – the League Against Cruel Sports in one corner, and the Countryside Alliance in the other – raged over the Government’s proposal to ban hunting with hounds, with the resulting legislation, the Hunting Act 2004, favouring the former, leaving the latter to carry out a series of unsuccessful legal challenges in the courts (see R (Jackson and Others) v Attorney-General on pp 15–16, a challenge rejected by the House of Lords in October 2005 and R (Countryside Alliance) v Her Majesty’s Attorney General which was rejected in 2007).

The interest pressure groups may be less familiar to you, but are perhaps even more influential in the law-making process. This is often because they are consulted at an early stage by the Government and are therefore heavily involved in the law-making process. Interest groups differ from cause groups in that they represent the interests of a specified membership. The most obvious examples of interest groups are the Trades Union Congress (TUC), representing workers, and the Confederation of British Industry (CBI), representing business and management. The debates between these bodies have influenced a great deal of employment legislation and inform the Government’s stance on EC law and policy proposals relating to the workplace.
**Private Members’ Bills**

Here, a Member of Parliament, without the official support of the Government or his/her party, puts forward an idea for legal change. This is an opportunity for ideas to be presented to Parliament which would otherwise be ignored because they are divisive within the political parties. A Private Member’s Bill was the source, for example, of the Act that abolished the death penalty in this country: the Murder (Abolition of the Death Penalty) Act 1965. Another famous example is the Abortion Act 1967, which had been introduced as a Bill by the Liberal MP, David Steel.

MPs may also use such Bills to push an issue of particular concern to their constituents or an issue that they feel strongly about: for example, the Labour MP Ann Clwyd, who has long championed the rights of women, succeeded in creating the Female Genital Mutilation Act 2003 following reports that this practice was still being carried out in some communities and by some British citizens, at home and abroad. A Private Members’ Bill introduced to Parliament by Conservative MP David Maclean, the Freedom of Information (Amendment) Bill, recently caused great controversy because it sought to exempt Members of Parliament from freedom of information requirements. Maclean feels strongly that communications between MPs and constituents or public bodies should remain confidential and should not be subject to freedom of information challenges. The Bill did not survive the parliamentary process.

**The need for a legal response to changing circumstances**

Sometimes law-making is required quickly because of changing circumstances. Here, secondary, delegated legislation is used at times because it is more flexible than primary legislation. However, primary framework legislation is often required to deal with extreme circumstances. The terrorist attack on the US World Trade Center in 2001 prompted the UK Government to create primary legislation to combat terrorism (Anti-Terrorism, Crime and Security Act (ATCSA) 2001). The only problem with this situation is that legislation can be rushed into force without its consequences being properly thought through, and this may mean that the law is less effective, in practice, than it should be. Indeed, the House of Lords, in 2004, declared the regime created by the ATCSA to subject foreign terrorist suspects to indefinite detention without trial to be incompatible with the European Convention on Human Rights (A and Others v Secretary of State for the Home Department, 2004) and forced the Government to re-think its response to terrorism. Ironically, the Government’s solution – in the form of ‘control orders’ – have also been brought into question by successful human rights challenges (Secretary of State for the Home Department v JJ and others, 2007).

**Legal changes prompted by the requirements of European Community law**

The importance of European Community law, which is covered in depth in Chapter 5, is such that the UK has an obligation to give effect to European Community legislation. An example is provided by the Equal Treatment Framework Directive, which obliged the UK to pass laws, in 2003, to outlaw discrimination in the workplace on the grounds of sexual orientation and religious belief.
Legal changes prompted by the requirements of the European Convention on Human Rights
We will see on pp 28–34 the wider impact that this Convention is having on English law following the Human Rights Act 1998. However, an example of a decision of the European Court of Human Rights (ECtHR) which led to parliamentary law reform (Gender Recognition Act 2004) is the case of Goodwin v UK (2002), which highlighted the inequalities in the current law relating to transsexual rights.

Legal changes prompted by the law reform bodies/agencies
Attempts have been made over the years to make the system of law reform more logical. As the list of categories above shows, new laws can arise from so many different sources, and yet it has long been understood that law reform requires careful consideration and informed discussion.

The most significant law reform body is the Law Commission, which is an independent, full-time agency set up systematically to reform the law. The Law Commission was itself the product of primary legislation – the Law Commissions Act 1965 – reflecting Parliament’s anxiety to reform the law in a consistent manner. The Act states that the Law Commission’s role is to keep the law under review. The Law Commission responds to proposals from judges, academics, the legal profession and others on the sorts of reform projects that need to be undertaken. Although it has its critics, the Law Commission has generally been successful in encouraging law reform. Between 1966 and 2006, of 174 law reform reports, 20 reports were rejected and there are a further 28, dating back to 1991, which await a response from the Government. However, since these statistics were collated, at least one of the outstanding reports – on Fraud (2002) – influenced the Fraud Act 2006. Examples commonly given of the Law Commission’s role in reforming the law include:

• the Unfair Contract Terms Act 1977 (which considers contract terms that seek to exclude or limit liability to the potential detriment of the other party or parties to the contract);
• the Supply of Goods and Services Act 1982 (which creates terms to be implied into all contracts for the supply of services); and
• the Contract (Rights of Third Parties) Act 1999 (which gives third parties, that is, those persons not directly involved in a contract but nevertheless affected by it, the ability to enforce certain contractual rights).

More recently, the Law Commission’s reports on hearsay evidence in criminal proceedings (1997), double jeopardy and prosecution appeals (2001), bail and human rights (2001) and evidence of bad character in criminal proceedings (2001) have all been implemented in the Criminal Justice Act 2003. It also suggested reforms implemented in the Domestic Violence, Crimes and Victims Act 2004 and recently published a well-received proposal to simplify the framework for unfair terms in contracts (2005). However, the Commission’s attempts to codify the criminal law – perhaps its biggest project – have not been so successful and have been only partially implemented.
Developing the subject 1.3: The Law Commission

The Law Commission structure includes five full-time commissioners (including a High Court Judge as Chairman on a three-year secondment) heading respective departments – common law and commercial law; criminal law; public law; property, family and trust law; statute law – within which can be found solicitors, barristers, academics, parliamentary draftsmen and a number of graduate research assistants. Each department usually has a number of projects on the go. The Law Commission is both proactive, in planning projects for the attention of the Lord Chancellor, and reactive, in that it responds to Government requests to investigate law reform possibilities in specific areas. Its first stated aim is to ‘ensure the law is as fair, modern, simple and cost-effective as possible’ and as such it is engaged not only in the process of developing new proposals, but also in consolidating the existing statute law in an area, suggesting revisions to statutes (with a particular interest in updating, or removing, old and obsolete laws and eliminating loopholes), and, at its most ambitious, codifying whole frameworks of law (thus reducing years of common law and statutory development to single ‘codes’ or pieces of legislation).

A review of the Law Commission’s work, the Halliday Report (2003), was favourable and said that the Commission’s contribution to law-making was ‘held in high esteem’, thus echoing the Lord Chancellor’s view prior to the report that the ‘Law Commission is a highly respected and expert body, with a fine record of producing well-argued recommendations for law reform’.


Research task:
Visit the Law Commission website and check out the Law Commission reports available from 1996 onwards (www.lawcom.gov.uk/lc_reports.htm). Pick any two reports that appeal to your interests and use the press release or executive summary information, alongside the actual reports, to make notes of examples of the Law Commission’s work.

Another type of law reform agency with great significance is the ad hoc committee, with Royal Commissions being the most important examples of these. Royal Commissions have prompted a great deal of law reform in the criminal justice system (with the Runciman and Philips Commissions being especially important in relation to criminal law procedures and police powers), though they have had less success in terms of civil law. The Pearson Commission of 1978 was perceived as a notable failure, in that the Government did not take up a number of proposals relating to the law on personal injury. Royal Commissions have advantages in that they attract resources to carry out their work and are staffed by a broad range of experts, both legal and non-legal. However, the opportunities for following up important themes and issues are limited since Royal Commissions generally disband after they have delivered their reports. This increases the likelihood that law will develop in a piecemeal fashion rather than on the basis of logical progression. Ad hoc committees more generally are established to look at particular problems or situations that have occurred, and their influence on law reform will vary. Inquiries, such as those held into rail disasters or high-profile murders, are a form of ad hoc committee. Two recent ad hoc committees with great influence on law reform are the Woolf Commission on Civil Justice and the Auld Review of the Criminal Justice System. The implications of these law reform reports are considered later in this book (see Chapters 6 and 9, respectively).
For technical law reform – those reforms referred to as ‘lawyers’ law’ because they relate, say, to the specific wording of statutes rather than to issues of general policy – two bodies would operate on an advisory basis. The Law Reform Committee dealt with narrow matters of civil law, and the Criminal Law Revision Committee operated likewise in criminal law, receiving credit for influencing the Theft Acts. As the Law Commission now takes on these roles, the committees are no longer convened. Moreover, a result of the Woolf Commission on Civil Justice, mentioned above, is that other bodies (namely the Civil Justice Council and the Legal Services Commission) now keep the civil law under review, thus overshadowing the Law Reform Committee.

Another related source of influence on law reform are the academic law journals published by university presses, and also highly respected textbooks. These often contain a critical examination of the current law and may influence the direction of reforms. Lord Bingham, in leading the House of Lords to overrule the Caldwell (1981) recklessness test in the landmark criminal law case of R v G and R (2003) (see also Chapters 4 and 12), remarked that: ‘A decision was not, of course, to be overruled or departed from simply because it met with disfavour in learned journals. But a decision which attracted reasoned and outspoken criticism by the leading scholars of the day, respected as authorities in the field, must command attention’.

Judicial decisions
Judicial decisions can make new law through contributing to the development of common law, that is, the set of legal rules created through decisions in the courts over time (see Chapters 3 and 4 for elaboration). Clear examples of law-making, from judges in the courts, include the House of Lords’ decision in Ghaidan v Godin-Mendoza (2004) that homosexuals in long-term loving relationships should enjoy the same tenancy rights as heterosexual couples; and the House of Lords’ decision in R v R (1992) to recognise the offence of ‘marital rape’, after years of confusion. However, because these issues relate to ‘public policy’, primary legislation is often seen as preferable to judicial law-making. Developments in the common law may lead to statutory law reform, and may serve as an inspiration for law reformers to tackle certain issues.

So, as we have seen, there are many influences that may suggest a change in the law and the need for primary legislation. When the proposed change has taken shape, the next stage is for the outline to be drafted into the form of a Bill. It is this document, in effect a draft law, which will then proceed, if supported, through Parliament and become, after several distinct stages, an Act of Parliament.

Figure 1.1 summarises the influences on parliamentary law-making that stimulate law reform.
Bills

Bills may be divided into two main forms: Public Bills and Private Bills.

Public Bills

These affect the law in general and have relevance for a wide range of persons, organisations and areas. Public Bills include:

- **Government Bills.** Government Bills are brought forward by Ministers: for example, the Secretary of State for Business, Enterprise and Regulatory Reform (formerly Trade and Industry) will be responsible for Bills relating to business regulation, consumer protection and fair trading. Government Bills are likely to succeed in becoming Acts of Parliament because the Government has a majority of seats in the House of Commons; and the House of Lords, even if opposed to the Bill, can only delay the process of implementation. The Government can try to ensure that it gets all its members voting in favour of a Bill it has put forward by using the Whip system, which requires MPs to vote with their party. MPs rarely defy the Whips (that is, those politicians given the job of enforcing the system) for fear of damaging their chances of promotion within the Government. On occasions, the Government has suspended MPs who refused to follow the Whip in a crucial vote. In fact, the House of Lords provides a good check on Government Bills by suggesting sensible amendments and influencing the policy direction of the new law. The vast majority of Acts considered in this book – such as the Criminal Justice Act 2003 and the Courts Act 2003 – originated as Government Bills.

- **Private Members’ Bills (PMBs).** Despite their name, PMBs are types of Public Bill since they affect the general law. A recent example is the Christmas Day (Trading) Act 2004, which was introduced as a Bill by Labour MP Kevan Jones to prohibit the opening of large stores on Christmas Day in order to protect workers and offer time for families to come together. However, these Private Members’ Bills rarely have the support of Government, and therefore it is a struggle for the individual MPs to get these Bills successfully through Parliament. For further information on Private Members’ Bills, visit www.parliament.uk/directories/hcio.cfm and have a look at Factsheet L3 in the Legislation series: ‘The Success of Private Members’ Bills (1945–2006)’. Members of the House of Lords can also initiate these types of Bills, but these are known as Private Peers’ Bills. A recent example is the Assisted Dying for the Terminally Ill Bill, initially introduced in 2004 by Lord Joffe, scrutinised by a House of Lords Committee and then re-introduced, with amendments, in 2005. Peers share similar difficulties to those experienced by MPs in making progress with these types of Bills. The Assisted Dying for the Terminally Ill Bill 2005, for example, was defeated on second reading in the House of Lords (May 2006).

Private Bills

Private Bills affect only a limited area or range of persons. In certain, very rare, situations they might only relate to one or two people and are then
CHAPTER 1 The British constitution, law reform and the parliamentary legislative process

Table 1.3 Public and Private Bills

<table>
<thead>
<tr>
<th>Public Bills</th>
<th>Private Bills</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bills that propose general changes in the law:</td>
<td>Bills that propose changes in the law that affect only specific areas or persons.</td>
</tr>
<tr>
<td>• Government Bills (brought forward by Ministers heading Government departments).</td>
<td>These are brought to Parliament by outside bodies.</td>
</tr>
<tr>
<td>• Private Members’ Bills (brought forward by individual MPs).</td>
<td>These Bills are relatively rare.</td>
</tr>
</tbody>
</table>

referred to as Personal Bills. They are far less common than Public Bills and arise through petitioning from outside bodies or campaigners. A recent example is the Mersey Tunnels Act 2004, which enables local transport authorities in Merseyside to use surplus money from the operation of road toll schemes for the improvement of local public transport services. Private Bills have their own special procedures in Parliament, allowing for objections from members of the public to be submitted formally and taken into account.

Table 1.3 summarises the main types of Bills that may be encountered.

If a Bill affects only a limited area or range of persons, and yet has wider significance for the nation, it might be classed as a hybrid Bill. For example, the Crossrail Bill is before Parliament at the time of writing which would give effect, if passed, to an east-west rail link across Central London. A hybrid bill is treated as a Private Bill for the purposes of parliamentary procedure.

THE PARLIAMENTARY LAW-MAKING PROCESS: HOW A PUBLIC BILL BECOMES AN ACT

The formal process of statute creation (that is, the passing of a Bill to an Act) can be described as a six-part process, though note that the first five parts are repeated in the next House of Parliament (for example, most Bills start off in the House of Commons and then go to the House of Lords, so both Houses follow parts one to five). The House of Lords can delay a Bill or seek amendments, but they cannot prevent the elected House of Commons from passing a Bill for more than a year: if they seek to do so, the House of Commons can use powers in the Parliament Acts 1911 and 1949 to force the legislation through Parliament (as occurred with the Hunting Act 2004, see pp 15–16).

The term ‘readings’, which you will see below, is maintained for historical purposes and refers to the times when, prior to the introduction of printing, Bills were read out in the parliamentary chamber. Clearly, today MPs can obtain a printed copy of the Bill for reference. It is also necessary to point out that some Bills are ‘fast-tracked’ through Parliament. This is largely reserved for Bills that are not contentious (that is, unlikely to cause great debate or argument).

First reading

This is seen as something of a formality and consists merely of introducing the Bill to Parliament so that MPs can prepare for further discussion.
Second reading

This is a very important stage of the Bill’s passage through Parliament, since the Minister in charge of the Bill explains the main aims and objectives of the proposed law and answers any questions MPs may have. It is at this stage, often, that lively debate ensues. A vote will be taken at the end of the second reading, and if sufficient approval is given, the Bill will proceed to the Committee stage. ‘Sufficient approval’ may mean that enough MPs shout ‘Aye’ rather than ‘No’; or where this is not clear, the MPs take a formal vote. The formal votes are also based on ‘Ayes’ and ‘Noes’, though these opinions are expressed by MPs choosing to walk through one of the designated division lobbies adjoining the parliamentary chamber. The MPs who choose to walk through the ‘Aye’ lobby will be counted as against those who walk through the ‘No’ lobby.

Committee stage

This stage of the Bill’s passage through Parliament is significant because it allows for detailed examination of the Bill by a small group of MPs (forming a Standing Committee) with an interest in its contents; and it is also the first occasion when amendments can be added. Votes will be taken on any amendments, within the confines of the Committee. Some very important or controversial Bills may be heard by a Committee of the whole House, but these occasions will be rare.

Report stage

The results of the Committee stage are reported back to the whole House. Clearly, if there was a Committee of the whole House this stage will not be necessary. MPs can, at this point, suggest further amendments to the Bill. Votes will take place on proposed amendments. It was at this stage of parliamentary proceedings that Labour backbenchers in 2005 rebelled against the then Blair Government’s plans, in its Terrorism Bill, to detain terrorist suspects for up to 90 days without charge; this was the first occasion the Blair Government had been defeated on a whipped vote since gaining power in 1997. MPs favoured an amendment of a 28-day time-limit, which the Government was forced to accept. The amended Bill eventually became the Terrorism Act 2006.

Third reading

This is the final overview stage of the Bill’s passage, whereby it is considered in its amended form as a whole. MPs engage in further debate. The Bill then goes to the next House for these steps to be repeated and further amendments made and agreed. If a Bill is particularly controversial then disagreements between the two Houses may lead to a ‘ping-pong’ process, in which issues are batted back and forth between them until a compromise is reached. In 2006, the Terrorism Bill 2005 and the Identity Cards Bill 2005 were ‘ping-ponged’ between the Houses, though the Government managed, in both cases, to steer these through Parliament – albeit with some amendments – and onto the statute book.
Royal assent

Once the Bill has completed the parliamentary process in both Houses of Parliament then it is ready to become an Act. To give effect to this, the Queen has to give her assent. In modern times, the Queen merely signs her general consent to the Bills passed in each parliamentary session, and such assent is usually communicated to the relevant House by its Speaker. As we have seen, this is one of the few residual powers of the Crown in the British constitution, but as you will note, it is a formality rather than a power to be exercised freely by the Queen.

Table 1.4 summarises the stages through which a Bill has to pass on the way to becoming an Act of Parliament.

Table 1.4 The passing of a Government Bill

<table>
<thead>
<tr>
<th>The House of Commons</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Reading</td>
</tr>
<tr>
<td>A formal stage. Title of the Bill is read out.</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Second Reading</td>
</tr>
<tr>
<td>Debate on general principles of the Bill followed by a vote.</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Committee Stage</td>
</tr>
<tr>
<td>Bill is debated clause by clause: this is usually by way of a Standing Committee composed of MPs from different parties. Amendments may be made to the Bill.</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Report Stage</td>
</tr>
<tr>
<td>Any amendments made at Committee Stage are reported back and voted on. Further amendments may be made.</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Third Reading</td>
</tr>
<tr>
<td>Another general debate on the Bill in its revised form.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The House of Lords</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill goes through the same five stages as in the Commons – First Reading, etc.</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Lords may accept the Bill, delay its passing by rejecting the Bill or amend the Bill. Any amendments made by the Lords must also be considered by the Commons, which may accept or reject the changes.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Royal Assent</th>
</tr>
</thead>
<tbody>
<tr>
<td>A formal stage. Royal Assent has not been refused since 1707.</td>
</tr>
<tr>
<td>Bill is now an Act.</td>
</tr>
</tbody>
</table>
Reference has already been made at pp 8–9 to the constitutional theory of parliamentary sovereignty, and this underlines the importance of primary legislation. Parliamentary sovereignty means that:

(a) Parliament is the **supreme law-making body** in the British constitution. Parliamentary law should therefore **prevail** over all other sources of law. This means that Acts of Parliament are superior to, and can therefore override, the common law rules made by judges. If it appears that primary legislation is out of date – and this is noted by judges in relevant cases that come before them – the enacted legislation will nevertheless remain in force until **expressly or impliedly repealed** (cancelled out).

(b) Parliament can **make any laws that it wants**. This follows from an acceptance of Parliament as the supreme law-making body and is both subject to, and supported by, the **doctrine of implied repeal**. This amounts to a practical rule that a differing later statute dealing with a subject in an earlier statute, in the absence of any express statement, **impliedly repeals the earlier statute**. The doctrine requires that **no Parliament bind its successors** (that is, for no Parliament to make laws that will restrict law-making in future Parliaments), and thereby allows for freedom in law-making. Moreover, since Parliament is of a superior status to the courts, the traditional view is that judges cannot question or challenge Acts of Parliament.

**Limitations to parliamentary sovereignty**

The above points represent the theory of parliamentary sovereignty, but is Parliament really the **supreme law-making body** in practice? It is not difficult to find limitations to the supremacy concept. As Chapter 2 indicates, statistically speaking, Acts of Parliament are not the dominant form of written law produced each year. A far greater body of law-making is carried out by **Government Ministers**, amongst others, in the form of **secondary – or ‘delegated’ – legislation**. While this legislation is dependent on primary legislation for its development, there is far more of it produced than Acts of Parliament, and the parliamentary controls over it are relatively limited.

Moreover, it is now accepted that judges **do make law**, and the **common law** has contributed large bodies of law independent of statutory intervention (see Chapter 4, for example). This is seen particularly in the areas of contract and tort law, where common law development far outweighs statutory provisions and has given rise to new forms of liability, such as that in tort relating to nervous shock.

Parliament is also sensitive to **public opinion**, and the Government’s plans for law-making will reflect this. Therefore, the idea that Parliament can do what it wants is constrained by practical reality.

One of the most significant limitations on the concept of parliamentary sovereignty is that of **entrenched** laws, those laws that for historical, social or political reasons have become embedded within the constitution. It is highly unlikely, for example, that Parliament would dismantle the recent policy of **devolution**, which has granted some legislative power to a Scottish
CHAPTER 1 The British constitution, law reform and the parliamentary legislative process

Parliament: it would be difficult for any future Parliament to repeal such powers. The problem of entrenched laws raises question marks about the rule that Parliament shall not bind its successors.

It is difficult to find a better illustration of the latter point than the UK's membership of the European Union. The UK joined the then European Community in 1973, as effected by the **European Communities Act 1972**. This statute is entrenched as a matter of 'political reality': because of the UK's status as a Member State, English law is subject to the laws of the institutions of the European Union and the UK is a participant in, and a recipient of, social, economic and political policies. The constitutional writer, Wade, has argued that this marks a 'constitutional revolution' in that Parliament did, in impact, bind its successors back in 1972. Those who argued against membership of the European Community in 1972 tried to insert a clause into the European Communities Bill safeguarding UK sovereignty. They failed. There is little doubt that since 1 January 1973, **parliamentary sovereignty** has been limited by membership of the European Union and the impact of European Community law, a point underlined by the furious debates that have taken place in the UK – and other Member States – about the significance of the **Draft European Union Constitution** and the successor legislation made at the **Treaty of Lisbon** (see also Chapter 5). However, before leaving this issue of EC law's impact on parliamentary sovereignty, it should be recognised that the situation can be viewed more positively. **Chris Turner**, for example, has argued in **A-level Law Review** (Jan 2007, Vol 2, No 2) that the benefits that EC law has delivered to UK workers and consumers should not be overlooked; and **Gary Slapper**, in his latest book ‘How the Law Works’ (2007) puts the sovereignty issue into perspective (p 310): ‘... the UK remains a distinct and independent state (of the EU). It has neither opened its borders, nor adopted the Euro currency, and it has engaged in many political activities (in its foreign policy, for example) which have been widely disliked by many of its fellow member states.’

A more recent reform that has had a further diluting effect on the sovereignty principle is that of the **Human Rights Act 1998**, which implements, to a large extent, the **European Convention on Human Rights**. While there is some debate about the status of the Convention, it has far-reaching implications for English law. One of the most significant points is that Parliament now has to pass Bills which are 'compatible' with the Convention, unless specific derogations from the Convention are made (in other words, it is made clear that Convention rights will be waived, say, for reasons of national security). This means that Parliament can no longer do precisely what it wants. The Act also permits judges to declare Acts of Parliament 'incompatible' with the Convention, thus undermining the sovereignty principle that Parliament is the supreme law-making body in the Constitution and that Acts of Parliament cannot be challenged in the courts. It can be argued, of course, that in practice Parliament's role is secured, because it can refuse to respond to a judicial 'declaration of incompatibility' under the Human Rights Act (a luxury it is not afforded, incidentally, under the separate regime of EC law, where EC law must be followed). However, the fact that judges are now able to challenge the validity of Acts is highly significant, and reflects a discernible shift in the separation of powers.

Table 1.5 overleaf summarises the issue of **parliamentary sovereignty**.
Table 1.5 Nature and limits of parliamentary sovereignty

What is parliamentary sovereignty?

In theory:
• Parliament is the supreme law-making body.
• Parliamentary law is superior to all other types of law.
• Parliament can make any laws that it wants.
• Parliament can unmake any laws (through express or implied repeal).
• Parliaments are not bound by their predecessors, so have freedom to make new law.

But is parliamentary sovereignty limited in practice?

<table>
<thead>
<tr>
<th>Limitation to sovereignty theory</th>
<th>Brief description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delegated legislation</td>
<td>See Chapter 2. More delegated legislation than primary legislation – so is this the dominant form of law, in practice?</td>
</tr>
<tr>
<td>Common law</td>
<td>See particularly Chapters 4 and 13. Law made by judges has contributed whole areas to English law, without the need for statutes – so Parliament has not been involved.</td>
</tr>
<tr>
<td>Public opinion</td>
<td>Parliament cannot create laws that the public will not tolerate. Therefore, practical limits to law-making power.</td>
</tr>
<tr>
<td>Entrenched laws</td>
<td>Some parliamentary laws clearly bind successor Parliaments – what sort of Parliament would seek to repeal the Scotland Act 1998, for example?</td>
</tr>
<tr>
<td>European Community law (brought into English law by the European Communities Act 1972)</td>
<td>See Chapter 5. Parliament is now subject to the laws made by the European Union institutions – it is no longer the dominant law-maker in some areas of policy. For the UK to withdraw from the European Union would create huge practical, constitutional and legal difficulties.</td>
</tr>
</tbody>
</table>

THE HUMAN RIGHTS ACT 1998: SOME QUESTIONS ANSWERED

The 2 October 2000 marked the beginning of radical legal change in this country when English law substantially incorporated the European Convention on Human Rights (‘the Convention’). While claimants seeking to establish that their rights have been breached have been able to take their cases to the European Court of Human Rights (ECtHR) in Strasbourg, the implementation of the Human Rights Act 1998 provides for the enforcement of such rights in the English courts. The following summary answers some key questions about this important legal change.
What is the European Convention on Human Rights?

As a response to the horrors of World War II, the Convention provided a framework for the protection of fundamental rights and freedoms. It was created in 1950 and gained the status of an international treaty in 1953. It has since been ratified by over 40 States. For many of these States, the formal acceptance of the Convention as an international treaty automatically incorporated Convention rights into their domestic legal systems. This did not occur in the UK for a number of reasons (the lack of a written constitution being a significant factor).

Therefore, although the UK was an original signatory of the Convention, it chose not to incorporate its terms into English law. The UK did, in 1966, recognise the authority of the European Court of Human Rights (ECtHR) to hear, and adjudicate on, complaints from UK citizens, but again it chose not to incorporate the Convention.

Despite calls for incorporation in the 1980s and early 1990s, the Conservative Government always resisted the move on both policy and practical grounds. A new Labour Government in 1997, however, promised to bring about incorporation of the Convention into English law and swiftly introduced a Human Rights Bill to Parliament. The resulting statute was the Human Rights Act 1998. The Act received its royal assent in November 1998, but did not come into force in England and Wales until 2 October 2000. One reason for the gap between royal assent and the Act coming into force was the need to train judges and magistrates.

The rights protected by the Articles (Arts) of the Convention, and contained within Schedule 1 to the Human Rights Act 1998, include:

- a right to life (Art 2);
- rights prohibiting torture (Art 3);
- rights prohibiting slavery and forced labour (Art 4);
- rights to liberty and security (Art 5);
- a right to a fair trial (Art 6);
- a right to privacy and family life (Art 8);
- a right to marry (Art 12); and
- rights against discrimination (Art 14).

There are also established rights relating to freedom of thought, expression, religion and assembly.

Is the European Convention on Human Rights a source of EC law?

No. The European Convention on Human Rights is quite separate from the European Community. The European Convention on Human Rights was made in 1950 by a body called the Council of Europe. Cases on human rights matters brought under the Convention go to the ECtHR in Strasbourg (and now also to English courts). The European Community (EC), on the other hand, was not created until 1957 and brings Member States together to achieve common economic and social aims. The EC, now referred to as the
European Union (EU), consists of (currently) 27 Member States and is governed by a set of institutions that include the European Court of Justice in Luxembourg. Do not confuse the EU’s European Court of Justice with the Council of Europe’s European Court of Human Rights.

How does the Human Rights Act 1998 incorporate the Convention into English law?

The Human Rights Act 1998 requires that, as far as possible, primary legislation and delegated legislation are made compatible with the Convention. If such legislation comes before the courts and is found not to be compatible, the courts have the power to make a declaration of incompatibility under s 4 of the 1998 Act. This acts as an encouragement to Government and Parliament to make the necessary amendments – via primary or delegated legislation – to ensure compatibility.

The UK courts can hear any cases in which claimants allege that their rights have been breached by public authorities (that is, the State or bodies with functions of a ‘public nature’, for example, the NHS, Police, etc) under ss 6 and 7 of the Human Rights Act 1998. In determining these cases, previous decisions of the ECtHR should be taken into account, thus affecting the system of judicial precedent, discussed in Chapter 4. Moreover, s 3 requires courts to read and give effect to legislation ‘so far as it is possible to do so’ in order to achieve compatibility with Convention rights, thus necessitating a purposive approach to interpretation, as discussed later in Chapter 3. The Act gives a degree of discretionary power to the court, under s 8, in awarding remedies or relief to claimants who have suffered a breach of their rights (for example, damages, injunctions and remedies available under the judicial review procedure). It does not incorporate Art 13 of the ECHR – ‘Everyone whose (Convention) rights and freedoms . . . are violated shall have an effective remedy before a national authority’ – though claimants reserve the right to take their cases to the Strasbourg court (ECtHR) if all domestic appeals have been exhausted.

Table 1.6 summarises some of the main features of the Human Rights Act 1998.

Overview of some of the impacts of the Human Rights Act 1998 so far . . .

At the time of writing, the Human Rights Act 1998 has been in force for almost eight years and perhaps a measure of its success is the amount of controversy it has generated over that period. One of the aims of the Act was to create a ‘rights culture’ and the extent to which this has begun to challenge traditional power relationships has generated lots of debate about the scope and exercise of State powers and the sort of rights that individuals can legitimately expect to be protected. However, if some politicians get their way, the Act might become a victim of its own success, with sections of the media clearly alarmed by its implications (see, for example, coverage in The Sunday Telegraph, 14/5/06), David Cameron, leader of the Conservative Party, arguing for its repeal and Tony Blair, whilst PM, discussing whether
the Act needed some amendment. Both David Cameron and Gordon Brown have raised the prospect of a British ‘Bill of Rights’ as a constitutional reform worth investigating, though on the basis of rights and responsibilities.

Particular issues raised about the Human Rights Act 1998 have included:

- A shift in the power relationship between judges and the other constitutional powers. The judges’ ability, in particular, to make declarations of incompatibility in respect of primary legislation (of which there had been 17 examples by 2005, of which 10 have remained in force) has, according to Professor David Feldman (2005), marked ‘a major move away from the . . . principle of parliamentary sovereignty’. In addition, the separation of powers has been strengthened, with the judiciary keeping Parliament and the Government in check, and thus protecting the rule of law.

- Political controversy arising from the uses to which the Human Rights Act has been put, featuring in 557 court cases in 2002–2003 and running at about 400 cases per year (The Times, 26/12/05). The Conservative Party’s commitment, prior to the 2005 General Election, to review the Act on the grounds of the ‘compensation culture’ it had created is an example of this controversy. Conservatives were particularly concerned by decisions that provided rights to gypsies and travellers, and to prisoners. The Government has also, at times, lost its patience with the judges – David Blunkett, when Home Secretary in 2003, was quoted as saying that he was ‘fed up’ debating issues in Parliament only for judges to overturn the decisions made, and, more recently, Tony Blair (when Prime Minister) described a decision, giving refugee-status to nine Afghan nationals who had hijacked a plane, as ‘an abuse of common sense’ – though it has introduced amended legislation to Parliament to address declarations of incompatibility so far.

- The capacity of the Act to affect relationships between private individuals as well as between citizens and public authorities. Under s 6 of the Act, the courts as a ‘public authority’ are under a duty to apply and develop
the law in a way that is compatible with Convention rights. Therefore, if areas of common law can develop compatibly with Convention rights then the Act will be of relevance to private disputes. This has proved especially relevant in a number of high-profile disputes between celebrities and newspapers or magazines, in which celebrities have sought to rely on a right to privacy (Art 8) and the media has claimed freedom of expression (Art 10).

Let’s look at cases 1.2: The right to privacy cases

The following cases in the English courts have considered the relationship between: the common law protections relating to privacy, including the tort of breach of confidence, and the right to privacy in Art 8 of the ECHR; the potential for Art 8 to be raised in essentially private disputes; and the relationship between the Art 8 right to privacy and the Art 10 right to freedom of expression.


The Hollywood couple, Michael Douglas and Catherine Zeta-Jones, together with OK! magazine, successfully claimed damages, but not an injunction, in a claim against Hello! magazine, which had published unauthorised photographs of the couple’s wedding. OK! magazine had been given an exclusive contract for the wedding, which Hello!, its rival, had sought to undermine. At the Court of Appeal stage, Lord Justice Sedley expressed the view that English law would now, following the Human Rights Act 1998, uphold a general right to privacy under Art 8. However, the case was resolved, instead, by common law relating to commercial secrets (breach of confidence) and data protection law.

**Wainwright v Home Office (2003)**

Two prison visitors, suspected of carrying drugs, had been strip-searched in a manner that breached established Codes of Practice and caused them distress and psychiatric injury. The trial judge found that Mrs Wainwright could establish a claim in tort based on the Art 8 breach of privacy. However, the Court of Appeal and the House of Lords, in subsequent appeals, did not accept that view. Lord Hoffmann made it clear that he was unconvinced by arguments that equated a right to respect for privacy with a general right to privacy in English law. (The European Court of Human Rights found that there had been a breach of privacy when it heard a further appeal in 2006, see also p 34.)

**Campbell v MGN (2004)**

Here the supermodel, Naomi Campbell, sued the Daily Mirror (owned by MGN) when it published photographs and a story about her attending a drugs clinic. Her tort claims included the common law breach of confidence, which the House of Lords accepted could be informed by the values of Art 8, and that specific instances, such as the breach of confidential information, could allow Art 8 to outweigh the newspaper’s Art 10 (freedom of expression) defence. Lord Hope, in particular, seemed to recognise a specific right to privacy action for misuse of private information based on Art 8 that can be contrasted with the unwillingness, in Wainwright, to recognise a general right to privacy. Campbell won the case, leaving the Daily Mirror with a large bill for costs. (See also Chapter 11.)

The point of these cases seems to be that whilst incorporation of the European Convention on Human Rights in the Human Rights Act 1998 is not immediately changing English common law, it is, over time, influencing the rights available.
Some landmark decisions of the English courts relating to the Human Rights Act 1998

R (on the application of Anderson) v Secretary of State for the Home Department (2002) – the House of Lords found that English law in respect of mandatory life sentences, and the Home Secretary’s role in determining the period to be served, was incompatible with the Art 6 right to a fair trial, since this should be a matter for the judiciary (an interesting case, particularly in its defence of the separation of powers within the British constitution). The Government subsequently introduced provisions to address these concerns to Parliament and they were subsequently passed as part of the Criminal Justice Act 2003.

Bellinger v Bellinger (2003) – the House of Lords found that English law was in breach of the Art 8 right to privacy and the Art 12 right to marry when a transsexual was unable to enter a valid marriage because the law would not recognise her changed gender. The Government – also under pressure on the problems faced by transsexuals after the European Court of Human Rights found the UK to be in breach of rights in Goodwin v UK (2002) – subsequently acted on the declaration of incompatibility by securing Parliament’s approval for the Gender Recognition Act 2004.

Ghaidan v Godin-Mendoza (2004) – the House of Lords, by interpreting English law compatibly with the Art 14 Convention right prohibiting discrimination, found that surviving members of same-sex relationships were to be treated in the same way as husband or wife and granted secure rights of tenancy. Thus, the Mendoza decision prevented discrimination on the grounds of sexual orientation in tenancy law.

A v Secretary of State for the Home Department (2004) – the House of Lords found that the Anti-Terrorism, Crime and Security Act 2001, which allowed for the indefinite detention of foreign terrorism suspects without trial, breached the Art 5 right to liberty and the Art 14 right prohibiting discrimination (since this procedure was provided only for foreign suspects). Some of the Law Lords saw this as an opportunity to defend the rule of law against an over-powerful executive, with Lord Hoffmann’s comment that ‘the real threat to the nation . . . comes not from terrorism but from laws such as these’ receiving a great deal of media comment. The Government responded by producing another controversial Prevention of Terrorism Act (2005) to address concerns about liberty (replacing indefinite detention with house arrest in the form of ‘control orders’) and discrimination (the new provisions apply to all terrorism suspects). Even this response, however, has not found favour in the courts (with the House of Lords finding aspects of the ‘control order’ regime in breach of the European Convention on Human Rights in Secretary of State for the Home Department v JJ and Others, 2007).

The impact of the European Court of Human Rights (ECtHR)

The ECtHR in Strasbourg has heard lots of UK cases since 1966 and even today, with the European Convention on Human Rights incorporated in
English law, applicants unable to gain a remedy in the national courts continue to take their cases there. Indeed, those at school should thank the ECtHR for the fact that caning, birching and spanking are no longer permitted for bad behaviour: a ban on corporal punishment in the UK being influenced by a number of ECtHR cases relating to the Art 3 right not to suffer degrading treatment and the Art 8 right to respect for private life (such as X v UK (1981) and Costello-Roberts v UK (1995)). The impact on society of such rulings is undeniable. Chapter 1 ends, then, with a very brief round-up of recent ECtHR cases and some discussion points.

**Talking points 1.3: Human rights and the British constitution**

Reviewing coverage of the Human Rights Act 1998 in Chapter 1, it is worth thinking about and discussing some of the issues raised by this important constitutional reform. Consider the following:

- To what extent has the Human Rights Act 1998 supported the principles of the British constitution?
- Has the Act given the judges too much power?
- Are there any cases in this chapter, or that you have seen in the media, that have particularly impressed you? Are there, likewise, any cases that you think should not have been brought?
- Is there too much talk today about rights, at the expense of responsibilities?
- Has the rights culture had a positive impact on the UK?

**Some recent ECtHR cases**

*Dickson v UK* (2007): the UK was in breach of the right to private and family life when the Home Secretary refused the request of a prisoner serving a life sentence to conceive a child with his wife by artificial insemination. The Grand Chamber of the ECtHR found a breach of Art 8 ECHR (damages and costs awarded).

*Evans v UK* (2007): the UK was not in breach of the right to private and family life (Art 8 ECHR) when its policy, expressed in the Human Fertilisation and Embryology Act, of recognising the consent of parties with regard to the storage of embryos meant that a male could withdraw his consent to the storage and use of embryos by his former female partner. Moreover, an embryo did not have a ‘right to life’ under Art 2 ECHR.

*Wainwright v UK* (2006): the UK was in breach of the right to private and family life (Art 8 ECHR) when a mother and son, visiting a family member in prison, were subjected to distressing strip-searches by prison staff, though these were not severe enough to amount to inhuman and degrading treatment (Art 3 ECHR). However, because the UK has not incorporated Art 13 ECHR, the UK was also in breach of its obligations as there was no way of obtaining redress in the national courts. (Costs and damages awarded. Refer back to p 32 for coverage of this case in the UK Courts.)

*Steel and Morris v UK* (2005): in the ‘McLibel’ case, where two animal rights protesters (Steel and Morris) were sued for libel by McDonald’s, the ECtHR held that the proceedings had been conducted unfairly because the defendants had been denied legal aid. (Breach of Art 6 ECHR: damages and costs awarded.)

*Hirst v UK* (2005): the UK was in breach of the right to free elections, as laid down in a protocol to the ECHR, when it automatically denied the right to vote to Mr Hirst, one of 48,000 convicted prisoners, under the Representation of the People Act 1983. The ECtHR left it to the UK Parliament to remedy this situation. (Costs awarded.)
CHAPTER 1 The British constitution, law reform and the parliamentary legislative process 35

Exercise for Chapter 1: Recap quiz

(1) Which constitutional theory or feature represents:
(a) checks and balances between executive, legislature and judiciary?
(b) a check on arbitrary power and an insistence that no individual is above the law?
(c) the Queen’s remaining powers and those assumed by the executive in certain circumstances?
(d) the dominance of parliamentary law over other types of law?
(e) the sharing of some sovereign executive or legislative power with the regions?
(f) the UK’s entrenched status, since 1973, of being a Member State?
(g) the enforcement of the ECHR in the national courts?
(h) the lack of a single written code of fundamental principles?

Options: parliamentary sovereignty; Human Rights Act 1998; unwritten constitution; rule of law; prerogative powers; separation of powers; EC law obligations under the European Communities Act 1972; devolution.

(2) Which influence on Parliament or specific law reform body is suggested in the following examples:
(a) a campaign by the National Farmer’s Union to influence a Bill on agriculture?
(b) a full-time body, created by statute, which keeps the law under constant review?
(c) a Bill put forward on a single issue by an MP or peer?
(d) any form of law reform body that is set up to tackle a specific issue and then disbands once its report has been published?
(e) a change initiated by judicial decisions in the courts?

Options: ad hoc committees; pressure groups; private members’ Bill; common law; Law Commission.

(3) Which stages of the process of statute creation (parliamentary law-making) are represented by the following summaries:
(a) Minister explains Bill, followed by major debate and vote?
(b) Queen formally approves a Bill that has passed through both Houses?
(c) Bill formally introduced to Parliament?
(d) Feedback to Parliament on scrutiny of a Bill by Standing Committee?
(e) Final reading stage?
(f) Scrutiny of a Bill by Standing Committee?

Options: first reading; second reading; committee stage; report stage; third reading; royal assent.

For Answers, please visit the companion website:
www.routledgecavendish.com/textbooks/9780415458528

Useful website addresses

European Court of Human Rights  www.echr.coe.int
Law Commission  www.lawcom.gov.uk
Liberty  www.liberty-human-rights.org.uk
Ministry of Justice  www.justice.gov.uk
Parliament (Bills/Acts)  www.parliament.uk
Materials directly for AS studies:
John Deft (St Brendan’s Sixth Form College)  www.stbrn.ac.uk/other/depts/law
Asif Tufal  www.a-level-law.com
This section of the exam specifications is a challenging one for students and teachers, because (a) it is so broad in scope; and (b) it informs most other topics in the sources of law area. Before developing the comment in (b), let’s first address (a): how can this broad topic be broken down? What should, with confidence, be revised?

- Role of the Queen in Parliament (eg, conventions, royal assent).
- Influences on Parliament and law reform (eg, role of bodies such as the Law Commission).
- From a Bill to an Act of Parliament – referred to as the process of statute creation (eg, first reading, second reading, etc – and with some appreciation of the roles of Government, Parliament and Queen).
- The doctrine of parliamentary sovereignty and the limits placed on it (eg, EC law, devolution, the European Convention on Human Rights etc).

Around these central topics, the remainder of Chapter 1 has been about context-setting: ensuring that you understand the relationships between the powers in the British Constitution; and providing some additional knowledge on how certain sources of law have affected sovereignty (such as the European Convention on Human Rights, as incorporated by the Human Rights Act 1998).

For the topics bullet-pointed above, make sure you revise enough so that you can describe and explain the areas and provide examples; also make sure you note down any critical comments about these roles, concepts and processes, and also their perceived strengths, in order that you can offer some evaluation for each one.

Turning attention to my earlier comment (b), the broad nature of this topic means that you have to plan ahead for the possibility of mixed topic questions. However, don’t worry about this, since some of the links between topics are easy to spot. Here are some likely combinations of topics in this chapter with topics covered later in this book:

- Parliament’s law-making role as illustrated by statute creation, might be contrasted with other forms of law-making (see, for example, delegated law-making in Chapter 2, and judicial law-making in Chapter 4).
- The concept of parliamentary sovereignty might be contrasted with its limitations: such as delegated legislation (Chapter 2) or EC law (Chapter 5). Brief coverage of the Human Rights Act 1998, from this chapter, would be relevant here.

This chapter informs your general understanding of the sources of law and will allow you, in time, to evaluate the other topics in Chapters 2–5.