Question: The UK not only has a constitution, it has a written constitution. Discuss

In normal constitutional language it is certainly correct to say that the UK does not have a written constitution: there is not a single document, or series of related documents, codifying the main rules of the constitution. Indeed, the fact that the UK does not have a written constitution in this sense is sometimes used as part of the argument that it has no constitution at all.

However, the terms ‘written’ or ‘unwritten’ are a little misleading because, while there is no constitutional document – known as ‘The Constitution’ – in the UK, various constitutional laws, conventions or practices are to be found in Acts of Parliament, treaties, law reports and even textbooks. Moreover, since 2011 the Cabinet Manual has existed as a record of laws, rules, conventions and practices as they relate to the operation of the executive.

These problems with the written or unwritten dichotomy when referring to constitutions have led some commentators to suggest alternatives. For instance, Adam Tomkins suggests the terms ‘codified’ or ‘uncodified’, the former being synonymous with ‘written constitution’ and the latter with ‘unwritten constitution’. Others has suggested the term ‘concrete’ as an appropriate replacement for ‘written constitution’ and ‘abstract’ for ‘unwritten constitution’.

In summary, the UK has a written constitution in the sense that much of it is written down but it is not a written constitution in the way constitutional lawyers usually use the term: to mean a constitutional document codifying the main rules of the constitution.

The assertion in the question that the UK has a constitution indicates that the matter would be disputed by some and there is, indeed, a valid argument that the UK does not have a constitution. One of the best known arguments to this effect has been made by Ridley in his 1988 article: ‘There is no British Constitution: a dangerous case of the Emperor’s New Clothes’. He contends that in the UK certain ‘essential characteristics’ of a constitution are missing, including: that there is no superior constitutional law; that the constitution is not entrenched; and that the constitution did not exist prior to, and so establish, the system of government. These are arguments that may be challenged.

In the first place, it may no longer be true to claim that the UK has no superior, entrenched constitutional law. In Thoburn v Sunderland City Council (2003) Laws LJ stated that there is a hierarchy of Acts of Parliament in the UK with constitutional statutes being superior to ordinary statutes. In addition, he stated that constitutional statutes could not be altered by mere implication; that is, that the implied repeal rule does not apply to them. He suggested that Parliament could alter them only by the use of express language. It should be noted here that Laws’ assertions are merely obiter dicta. They are, though, also commensurate with the House of Lords decision
in *R v Secretary of State for Transport, ex parte Factortame (No. 2)* where the Merchant Shipping Act 1988 was held not to impliedly repeal the European Communities Act 1972 but, rather, the 1988 Act was disapplied. The importance of Laws’ claims for present purposes are that, if he is correct, it means that constitutional statutes cannot be altered as easily as ordinary statutes and so they are, to this extent at least, a form of superior, entrenched law.

Ridley’s contention that the UK constitution did not exist prior to, and thereby establish, the system of government is correct. His criticism here echoes Paine’s assertion that a constitution should be ‘antecedent’ to the system of government and the suggestion that, where this is not the case, the government is a ‘power without right’. It is certainly the case that in many countries the constitution does establish the system of government. This will usually be because the constitution of such countries has been drafted following a significant event, such as the gaining of independence from a colonial power, which has caused a break with the past and a perceived need to create a constitution prescribing the main rules by which the government should operate. Generally speaking, there has not been such an event in the history of the UK. Rather, the UK’s constitution has developed piecemeal, over the centuries.

However, it may be asked why it should be thought more desirable that a constitution exists prior to, and establishes, the system of government. Indeed, it might be argued that it is preferable for a constitution to develop organically, as is the case in the UK, altering where appropriate to meet changing circumstances. Moreover, such piecemeal development occurs in other countries. For instance, there have been 27 amendments to the US Constitution, introducing or amending some of the most significant laws of the constitution, and it cannot be said that these laws existed before, and established, the system of government; yet no one would claim that such piecemeal development somehow invalidates the US Constitution.

In fact, it may be said that Ridley’s argument that there are essential characteristics which should be present before one can say a constitution exists is simply an argument for a particular type of constitution and that, just because the UK constitution does not fit that type, it does not mean that it does not have a constitution.

As noted above, the absence of a written (i.e. codified) constitution is sometimes used to claim that the UK does not have a constitution. Such an argument may be challenged by imagining that an Act of Parliament is passed, containing all the main existing rules of the UK constitution, and called ‘The Constitution of the UK’. In such a circumstance, it would surely no longer be possible to argue that the UK has an unwritten (or uncodified) constitution. Yet, given that no substantial change would be achieved by such an enactment, it may be argued that a written, codified constitution is not as important as may sometimes be claimed.

Finally, it may be said that the UK has a constitution because it performs the functions that one would want a constitution to exercise. In 2001 the House of Lords Select Committee on the constitution produced a working definition of a constitution. They claimed that a constitution is the ‘set of laws, rules and practices that create the basic institutions of the state and its component and related parts, and stipulate the
powers of those institutions and the relationship between the different institutions and between those institutions and the individual.’ The UK can certainly meet this, more functional, definition. As the creation of the Supreme Court by the Constitutional Reform Act 2005 demonstrates, the UK has the ‘laws, rules and practices’ to enable the creation of the ‘basic institutions of state’ and to stipulate their powers. Likewise, there are laws, rules and practices governing the relationship between the different institutions of government – for instance, constitutional conventions govern the relationships among the three arms of state – and between the institutions and the individual: the Human Rights Act 1998 is an appropriate example of a law governing the relationship between the institutions of the state (public authorities in the terminology of the Act) and the individual.
CHAPTER 3

Question: It is inappropriate in the 21st Century that some of the most significant aspects of the UK constitution are governed by non-legal rules. Discuss.

Non-legal rules of the UK constitution are commonly referred to as constitutional conventions. Marshall and Moodie define these as ‘rules of constitutional behaviour which are considered to be binding by and upon those who operate the constitution but which are not enforced by the law courts’. Constitutional conventions modify the operation of constitutional law in the UK. For instance, while the Queen may lawfully refuse to Assent to a Bill that has been passed by both Houses of Parliament, the constitutional convention is that she gives Assent unless advised to do so by her Ministers. Similarly, in law, while the Queen may appoint anyone as Prime Minister – and, indeed, is under no legal obligation to appoint a Prime Minister at all – the constitutional convention is that she appoints as Prime Minister the person who can command the majority of support in the House of Commons. Likewise, the Queen may lawfully appoint whomever she likes as a Minister but the constitutional convention is that Ministers are appointed on the advice of the Prime Minister and they must be members of either the House of Commons or the House of Lords.

It will be seen from the above that constitutional conventions do, indeed, govern the operation of some of the more important aspects of the UK constitution; as the examples demonstrate, they encompass rules governing the creation of legislation and the appointment of the Prime Minister and other Ministers. That such significant aspects of the UK constitution are governed by non-legal rules may seem surprising but it is not necessarily inappropriate as the question suggests. In fact, one could argue that the above constitutional conventions have allowed the UK’s system of government to move from one where the Monarch exercised real political power to one where that power is exercised in reality by democratically elected or accountable politicians. That is, they have facilitated the evolution of the constitution into a system of government that is more appropriate for a 21st Century democracy.

Moreover, while one may not design a constitution which is so reliant on constitutional conventions, the UK constitution seems to work well in practice. When the system does fail, perhaps because the constitutional actors fail to be bound by the relevant constitutional convention, then the convention may be replaced in whole or in part by legislation. This occurred, for instance, following the failure of the House of Lords to give way to the House of Commons (as required by convention) and pass the Liberal Government’s 1909 Budget; as a result, the Parliament Act 1911 (since modified by the Parliament Act 1949) was enacted to allow legislation to be enacted without the consent of the Lords.

We should not, however, see legal rules as a panacea. It is implicit in the question that legal constitutional rules would be more appropriate than non-legal constitutional conventions. Given this, some may suggest that it would be more legitimate if constitutional conventions, or –at least –those conventions governing significant
aspects of the constitution – were converted into legal rules. This would certainly be possible, as demonstrated by the enactment of the Parliament Act 1911.

Yet, converting constitutional conventions to legal rules would mean that some of the advantages they introduce to the UK constitution may be lost. One such advantage is flexibility. As Jennings stated, constitutional conventions allow the constitution to change and ‘keep … in touch with the growth of ideas’. To be sure, the examples of constitutional conventions given at the start of this essay demonstrate the way in which conventions have enabled the UK constitution to adapt to the growth of ideas concerning democratic legitimacy. Attempting to establish a constitution where only legal rules, rather than non-legal rules, operated may prevent such change.

Having said that, it should be acknowledged that there are parts of the UK constitution, governed by constitutional conventions, in which there may be flexibility but where there is arguably an inappropriate lack of certainty. One example of this is the convention of individual ministerial responsibility. It is generally accepted that the convention requires Ministers to be accountable for all that happens in their Department but responsible only for those things for which they are personally culpable. Yet, as the House of Commons’ Public Service Committee recognised, it is not always possible to draw a clear line between accountability and responsibility (Public Service Committee, Ministerial Accountability and Responsibility, 1995-96 HC 313, para 21). The result of this lack of clear demarcation between accountability and responsibility is that Ministers may sometimes escape the blame for things for which they are personally responsible.

Moreover, conventions often control areas of the constitution that may be unsuitable for legal regulation. So, for instance, while the area of ministerial responsibility lacks some certainty, this may be because it is an area which is largely governed by political expediency and thus where the hard and fast nature of legal rules may be inappropriate. Indeed, there would be a danger that attempting to regulate, what are essentially, political situations using the law would lead to legal action and embroil judges in the political arena. For example, it would surely be inappropriate for the courts to become involved in decisions about whether a Minister’s conduct is such that they should resign. Likewise, at present, the role of the Speaker of the House of Commons in the event of a tied vote is governed by convention and it is questionable whether this would be a situation in which legal intervention would be appropriate. For similar reasons, one may question whether it would be desirable for the courts to become involved in determining who should be appointed Prime Minister following a General Election where no party achieved an overall majority of support in the House of Commons (as happened in the 2010 General Election). To be sure, it may be argued that the involvement of the US Supreme Court in, effectively, determining the 2000 US Presidential election (Bush v Gore (2000)) damaged the reputation of the Court by involving it in a politically charged situation and making a decision which has been widely seen as splitting the Court along party lines.

Finally, it may be the case that enacting constitutional conventions as legal rules would be futile because new constitutional conventions would develop to govern how these new legal rules should operate in practice. In short, it is perhaps inevitable that political practices governing the operation of legal rules develop and crystallize into constitutional conventions over time.
CHAPTER 4

Question: How do the conventions of collective responsibility and individual ministerial responsibility attempt to secure accountable government in the UK?

It is seen as part of a healthy democracy that the government of a state is accountable. Accountability in the UK is generally taken to mean that the Government is under an obligation to provide full information to Parliament and the public, explaining and defending its actions, and to provide a fitting response to any criticisms of its actions – see the definition of accountability provided by the Public Service Committee, *Ministerial Accountability and Responsibility* (1995-96 HC 313).

In the UK, the two constitutional conventions that compose ministerial responsibility attempt to secure accountable government: collective responsibility and individual ministerial responsibility. Collective responsibility ensures that the Government as a whole is collectively accountable for its actions and decisions. It is itself made up of three parts: the unanimity rule, the confidentiality rule and the confidence rule.

The unanimity rule requires all ministers to publically support Government policies regardless of whether they personally agree with those policies or were involved in their formulation. A minister who cannot publicly support the Government’s policies should resign. Perhaps the most high profile case in recent years involving the unanimity rule was the resignation in 2003 of Robin Cook from the Labour Government over its decision to go to war with Iraq.

The utility of the unanimity rule in holding the Government to account is that it prevents ministers from evading accountability – that is, their duty to explain and defend Government policy – by simply claiming that they do not agree with that policy. In this regard, the rule seems to be effective; it is almost unheard of for ministers to fail to agree with, or defend, Government policy.

The confidentiality rule requires that discussions between ministers remain confidential. The rule does not directly help to ensure accountability though it does aid in maintaining the unanimity rule because it seeks to guarantee that any reservations expressed by a minister with regard to a particular policy in private do not become public and so hinder their ability to publically support that policy. This is made clear by the current edition of the Ministerial Code which states:

‘The principle of collective responsibility, save where it is explicitly set aside, requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.’

However, the confidentiality rule appears to be breached on a regular basis with leaks to the press (sometimes by the ministers themselves) detailing the positions taken, and arguments advanced, by individual ministers in private. These leaks do not, though, seem to have a negative impact on the accountability of the government to the press or the public as they do not release ministers from their obligation under the unanimity rule.
The confidence rule states that the Government should have the confidence of the House of Commons and should resign if this is not the case. This helps to guarantee Government accountability because it means that a government which fails to adequately account to Parliament or the public, or provide a satisfactory response to any criticism, may lose a vote of no confidence in the House and so be required to resign. That is, the confidence rule helps to make sure that the Government takes seriously its obligation of accountability so that it maintains the confidence of the Commons. The last Government to lose a vote of no-confidence in the Commons was the Callaghan Government in 1979; the Government resigned as a result of the vote which, in turn, led to the 1979 General Election which brought the Conservative Government under Margaret Thatcher to power.

It is worth noting that the consequences of a vote of no-confidence are now governed in part by the Fixed-term Parliaments Act 2011. Section 2 of this Act states that if there is a vote of no-confidence in the Government, and this is not followed within 14 days by a vote of confidence in the same, or an alternative Government, then there should be a General Election.

Individual ministerial responsibility requires ministers to account to Parliament and the public for their own behaviour and for the actions of their Departments, civil servants and any Next-Steps Agencies for which their Departments are responsible. The Ministerial Code states that it is part of ministers’ obligation of accountability to be as open and truthful with the public and with Parliament.

Accountability to the public primarily occurs via the news media; for instance, the Government and its Departments will hold press conferences to announce Government policies, defend those policies or respond to criticisms on a particular matter. Ministers will also submit themselves for interview by members of the press or appear on current affairs radio or television programmes.

Accountability to Parliament occurs in two main ways. First, Ministers may be held to account in the Chambers of the House of Commons or the House of Lords. This may occur through Ministerial Question Time (of which Prime Minister’s Question Time is an example) whereby ministers will submit themselves for questioning on behalf of their Departments. It may also occur during debates or when enacting legislation where ministers will explain and defend the Government’s policies.

Second, ministers and their civil servants may be subjected to scrutiny by parliamentary Select Committees. Such Committees may be regular (such as the Public Accounts Committee), Departmental or ad hoc (dealing with a particular issue of the day). These Committees are able to take evidence from a range of sources such as academics, business leaders or members of the public. They are able to question ministers and civil servants in-depth. Departmental Select Committees issue annual and special reports which may be debated in the House of Commons, thereby subjecting the Government to further scrutiny.
Question: In what ways does the UK fail to meet the principle of separation of powers?

Montesquieu, who built on the earlier work of John Locke, is credited with producing the first version of the principle of separation of powers that corresponds with the principle as we recognise it today. He argued that the power of the state should be divided into three: executive power, legislative power and judicial power. This division would help to guard against tyranny and an abuse, or arbitrary use, of power. This is because it would prevent a concentration of state power in the hands of one person, or group of people. Division of power among an executive, a legislative and a judicial arm of state also prevents an abuse by enabling each arm of state to act as a check on the other two.

In the UK, the executive is usually referred to as the Government, Parliament is the legislature and the courts exercise judicial power.

Bradley and Ewing specify the requirements of separation of powers as it is usually understood today. They argue that the principle requires separation in terms of: personnel, that no one should be a member of more than one arm of state; control, that no arm of state should control or intervene in the work of another; and functions, that no arm of state should exercise functions that more properly belong to another. This threefold division of separation in terms of personnel, control and functions provides a convenient structure which one may use to identify areas where the UK does not fully adhere to the principle of separation of powers.

It is worth noting first, however, that Bradley and Ewing also write that complete separation is ‘possible neither in theory or in practice.’ In fact, one would not want complete separation for two reasons. First, complete separation would prevent the three arms of state from working together to undertake the business of government. For instance, if the executive and the legislature were completely separate so that they were prevented from working together then the Government would have no way of persuading Parliament to enact the legislation which it believes necessary. Second, as has already been noted, it is an important part of separation that each arm of state can act as a check on the other two; this would not be possible if separation was absolute.

In terms of personnel, there are two groups of people in the UK who are members of more than one arm of state: the Queen and ministers. Nominally, the Queen is a member of all three arms of state. The executive is Her Majesty’s Government and, in law, she is the Head of Government. Parliament, sometimes referred to as the Queen in Parliament, is made up of three bodies: the House of Commons, the House of Lords and the Queen. The Courts are Her Majesty’s Courts and she is known as the Fount of all Justice. However, the Queen’s role in each of the three arms of state is almost entirely ceremonial and she exercises no real personal power. That is, while – on the face of it – the Queen’s position seems to be a significant departure from the principle of separation, the reality is that there is no significant breach.
Ministers are required by constitutional convention to be members of either the House of Commons or the House of Lords. This does represent a significant breach of the separation of powers principle because it means that ministers are members of two arms of state – the executive and the legislature – and exercising real power in each. However, it is worth noting that the convention requiring this exists to help ensure direct accountability of ministers to Parliament. Thus, it may be said that, in the UK, one principle (separation between the executive and the legislature in terms of personnel) has been sacrificed in favour of another desirable principle (direct accountability of ministers to Parliament).

In terms of control, there are a number of areas where it may be said that the principle of separation is not adhered to. First, the courts will rule on the legality of government action or decisions, often in claims for judicial review, and, to this extent at least, it could be said that the courts exercise control over, or intervene in the work of, the executive. Second, one important role of Parliament in the UK is to hold the Government to account; again this may be seen as one arm of state, the legislature, exercising control over another, the executive. Yet, one may question whether these two apparent breaches of separation are departures from the principle. That is, one may argue that the courts ruling on the legality of Government action and Parliament holding the Government to account are examples of two arms of state – the judiciary and the executive – acting as a check on the third. That is, these roles of the courts and Parliament seem commensurate with one rationale underlying separation: that the three arms of state can act as a check on the others to prevent an abuse of power.

Less justifiable is the control exercised by the Government over the House of Commons. The Government is able to exercise this control by virtue of the fact that it will have the support of a majority of the Commons because constitutional convention dictates that the Prime Minister is the person who can command the majority of support in the Commons. This in-built majority means that the Commons – the most democratic and significant body of Parliament – is unable to operate independently from Government.

In terms of function, there is a breach of the principle of separation in a number of ways. First, it may be said that the courts create law and that this is a breach because the creation of law is more properly a function of the legislature. However, in response, it may be argued that such judicial law making is an inevitable part of the judicial function which, in part, involves applying existing laws to new situations and, thereby, developing and creating law with respect to those situations. This is particularly the case in a common law legal system like the UK’s, where decisions of the higher courts create binding precedents.

The executive also exercises functions which more properly belong to the legislature because it has the power to enact legislation. This power may be derived from an Act of Parliament, giving a minister the power to enact delegated legislation. Alternatively, it may be a power derived from the Royal prerogative, usually exercised in the form of an Order in Council.
It is also sometimes claimed that ministers exercise a judicial function in that they may make the final decision on some immigration cases and large planning applications. However, it is difficult to see how these functions are definitely functions which more properly belong to the judicial arm of state. Indeed, on this point, Bradley and Ewing write: ‘There is no sharp distinction between decisions which should be entrusted to courts and tribunals on the one hand, and those which should be entrusted to administrative authorities on the other.’ Moreover, it is worth noting that, even if one accepts that these are judicial or quasi-judicial functions, the courts will usually have an oversight role with regard to their operation in the form of judicial review.
Question: Explain the ways in which parliamentary sovereignty may be limited in the UK.

The traditional view of parliamentary sovereignty can be said to comprise four interrelated rules. First, that Parliament can enact any law whatsoever, as was made clear by Lord Reid in *Madzimbamuto v Lardner-Burke* (1965). Second, that the courts cannot question Acts of Parliament on any grounds either procedural, as per Lord Campbell in *Edinburgh v Dalkeith Railway Co. Ltd* (1842), or substantive – see, again, Lord Reid in *Madzimbamuto*. Third, that Parliament cannot bind itself, it cannot enact a law which cannot be altered as easily as any other – *Ellen St Estates v Minister of Health* (1934). Fourth, that Parliament can legislate for any time – even retrospectively as demonstrated by the War Damage Act 1965 enacted following the decision in *Burmah Oil v Lord Advocate* (1965) – or any place, as Jennings famously stated: Parliament could legislate to ban smoking on the streets of Paris.

There are, however, a number of possible limitations to this traditional view of parliamentary sovereignty. These limitations may be imposed by, or arise because of: manner and form theory; the Treaty and Act of Union between England and Scotland; membership of the European Union; Laws LJ’s reference to ‘constitutional statutes’; judicial doubts about unlimited sovereignty; practical constraints on parliamentary sovereignty; and the courts’ treatment of ouster clauses.

Manner and form theorists argue that Parliament may specify the procedure which Parliament in the future must use to enact legislation and, further, that the courts would require Parliament to legislate according to the new procedure. The theory received some obiter judicial support from Lord Steyn and Baroness Hale in *R (Jackson) v Attorney General* (2006). The theory differs from the traditional approach taken by the courts – as stated by Lord Campbell in *Edinburgh v Dalkeith Railway Co. Ltd* (1842) and Lord Reid in *British Railways Board v Pickin* (1974) – that, as long as an Act has been passed by the Commons, Lords and received Royal Assent, it is valid and the courts will not question it.

The Treaty of Union between Scotland and England 1707 created the United Kingdom of Great Britain. The Treaty can also be said to have created the UK Parliament. In this sense, it may be seen as the foundation document of Parliament. The Treaty – and the identical Acts of Union enacted by the English and Scottish Parliaments before their abolition and replacement with the UK Parliament – seems to contain guarantees that certain things cannot be altered. For instance, Article 1 states that the union between England and Scotland will last forever (i.e. it cannot be severed). Some argue that Treaty, as the founding document of Parliament, puts limitations on Parliament’s ability to legislate contrary to its provisions. Support for this argument can be found in the obiter dicta of Lord Cooper in *MacCormick v Lord Advocate* (1953) and Lord Keith in *Gibson v Lord Advocate* (1975).

Membership of the EU may infringe the traditional view of parliamentary sovereignty because of the principle of EU law that it must take precedence over any conflicting law of a member state; see *Van Gend en Loos* (1963). This would seem to be a
restriction on Parliament’s legislative competence because it appears to prohibit Parliament legislating in a way which contravenes EU law. Indeed, this seemed to be the result in *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* where the House of Lords disapplied relevant parts of the Merchant Shipping Act 1988 because of the conflict with EU law and following a preliminary reference decision from the European Court of Justice. While this appears to be a significant limitation of Parliament’s legislative competence, Lord Denning made it clear in *Macarthy v Smith* (1979) that Parliament is able to legislate in a way which conflicts with EU law, and the courts will adhere to and apply such legislation, if it makes its intention clear in express terms.

In *Thoburn v Sunderland City Council* (2003) Laws LJ claimed there is a hierarchy of statutes and suggested that constitutional statutes could not be impliedly repealed in the same way that ‘ordinary’ statutes can. This conflicts with the traditional view that there is no hierarchy of Acts of Parliament and each Act of Parliament can be altered as easily as any other. This traditional view has been captured by Dicey:

‘Parliamentary sovereignty [means]: first, the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any legal distinction between constitutional and other laws ...’

While Laws LJ’s claim with regard to constitutional statutes are merely obiter it is worthwhile noting that they are commensurate with the decision of the House of Lords in *Factortame* (in effect, that the Merchant Shipping Act 1988 did not impliedly repeal the European Communities Act 1972) and with Lord Denning’s comments in *Macarthy v Smith* (both noted in the preceding paragraph).

Several judges have also doubted whether it is true to claim that parliament’s legislative competence is unlimited. Such doubts were expressed, obiter, by Lord Hope, Lord Steyn and Baroness Hale in *R (Jackson) v Attorney General* (2006). These views are, though, not universally accepted by all judges. For instance, in the same case (i.e. *Jackson*) Lord Bingham stated that Parliament can make or unmake any law. Similarly, in a 2011 lecture, Lord Neuberger questioned the stance taken by Lord Hope, Lord Steyn and Baroness Hale in the *Jackson* case and expressed his support for the traditional view of parliamentary sovereignty.

There may also be practical constraints on the legislative supremacy of Parliament. The argument here is that, while it might be that Parliament has unlimited legislative competence in theory, the reality is different. It may be, for instance, that Parliament can theoretically legislate to ban smoking on the streets of Paris but the reality is that such legislation would be highly unlikely to have any effect. This distinction between theory and reality has been recognised by Viscount Sankey LC in *British Coal Corporation v The King* (1935): ‘It is doubtless true that the power of ... Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired ... But that is theory and has no relation to realities.’

Finally, the courts’ treatment of ouster clauses appears to be a real contravention of legislative supremacy. The plain meaning of such clauses seems to be that the jurisdiction of the courts over a particular matter is excluded. Yet, as demonstrated by the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* (1969), the courts commonly interpret such clauses so that they do not exclude their
jurisdiction. It is hard to see such an interpretation as anything other than a questioning, and failing to adhere to, an Act of Parliament and it is for this reason that the courts’ treatment of ouster clauses amounts to an infringement of parliamentary sovereignty.
Question: Explain why the UK is considered to be a constitutional, rather than a strong or absolute, monarchy.

Using K. C. Wheare’s classifications, the UK is considered to be a monarchical constitution. Yet, it is not a strong or absolute monarch because the Monarch in the UK does not exercise significant political power. Rather, the UK is said to be a constitutional, or limited, monarchy.

The Queen’s powers are derived from the Royal prerogative. Dicey described the prerogative as: ‘The residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.’ Blackstone stated that the prerogative is derived from the common law and is unique to the Crown.

With regard to these powers, there is a distinction between appearance and reality. On the fact of it, the Queen seems to have a great deal of personal power. Nominally, for instance, she is a member of all three arms of state. She is the Head of the Government, it is Her Majesty’s Government. The Monarch is one of the three bodies, along with the House of Commons and the House of Lords, thatcompose Parliament, as is made clear by the more formal name by which the legislature is known: the Queen in Parliament. The courts are Her Majesty’s Courts, the judges are Her Majesty’s Judges and she is the Fount of all Justice in the UK.

However, the Queen’s role in the three arms of state is largely, and in some cases wholly, ceremonial. She plays no active role in the operation of the courts; her power to dispense justice has been irrevocably delegated to her judges who dispense justice in her name. That is, she has no right to play an active role in the courts; this was made clear by Coke CJ in Prohibitions del Roy (1607) where he ruled that James I did not have the right to dispense justice personally.

Likewise, the Queen’s role in Parliament is governed wholly by tradition and constitutional convention. For instance, her power to grant or withhold Royal Assent – the final legislative stage of a Bill – is governed by a constitutional convention which dictates that she exercises this power according to the advice of her Ministers. Similarly, the Queen’s role in the State Opening of Parliament is ceremonial and, by constitutional convention, her speech is written for her by Ministers.

The same is true for the Queen’s executive powers: they are derived from the Royal prerogative but, by and large, they are exercised on her behalf by her ministers or their exercise is governed by constitutional convention. For example, her prerogative powers with regard to international relations – the making of treaties, etc – are exercised by ministers. Other powers may be exercised personally by the Queen but their exercise is governed by convention. We have seen an example of this with regard to the granting of Royal Assent to Bills passed by the Commons and Lords. Another example is with regard to the appointment of the Prime Minister: legally, the Queen may appoint as Prime Minister whomever she chooses but, by convention, she appoints the person who commands the majority of support in the House of Commons.
It is because the Monarch’s significant prerogative powers are, in practice, limited by constitutional convention that it is said that the UK is a constitutional monarchy, rather than a strong or absolute monarchy.

There are two final points to make. First, there are some prerogative powers which the Queen exercises personally, according to her own discretion. The main example is the conferment of some honours. The Queen is the Fountain of Honour. While honours are mainly conferred on the advice of her ministers, there are recipients of some which the Queen chooses personally; these include: the Order of Merit; the Order of the Garter; and the Order of the Thistle.

Second, the Queen has some influence over the exercise of executive power. As was made clear by Bagehot writing in the Nineteenth Century, and the Queen’s Private Secretary, Sir William Heseltine in his 1986 letter to *The Times*, the Monarch has the right to be informed and consulted about the Government’s actions and has a right and a duty to counsel, warn, advise and encourage. This right and obligation is exercised primarily in two ways: first, she receives Cabinet Papers, the minutes of Cabinet meetings and other significant Government papers; second, she also has a weekly audience with the Prime Minister at which she is informed of the Government’s actions and decisions and where she is able to express her opinion. Thus, while it is indeed true to say that the Monarch’s constitutional role is limited and largely ceremonial, she exercises – and, indeed, is obliged to exercise – some influence over the exercise of executive power.
CHAPTER 8

Question: Describe and explain the meaning Dicey ascribed to the rule of law.

At its most basic, the doctrine of the rule of law refers to the belief that society should be ruled – that is, governed – by law. The doctrine is posited, in the main, in contrast to two possible alternatives. In the first place, it is posited as being preferable to a government by individuals. This is captured in Aristotle’s assertion that ‘It is better for the law to rule than one of its citizens’. It is also evident in judgment of Marshall CJ in the US Supreme Court case of *Marbury v Madison* (1803): ‘The government of the United States has been emphatically termed a government of laws, and not of men.’

Secondly, the rule of law is posited in contradistinction to an absence of law. As Bradley and Ewing write: ‘Law and order [is] better than anarchy’.

There are a number of other principles inherent in this basic conception of the rule of law. First is the idea that, not only should we be ruled by law but, also, that we should be ruled lawfully. This means that the Government is itself obliged to abide by the law. This requirement of lawful government can famously be seen in two cases: *Entick v Carrington* (1765) and *M v Home Office* (1994). Second, the rule of law requires that all are bound by the law. A society would not be ruled by law if some of its members were immune and could act in a way which would be unlawful for others. Third, if all members of a society are bound by the law, the implication is that the law should apply equally to all. However, it is generally accepted that it is a little too simplistic to claim that the law should apply equally to all. Rather, complex societies need to assign different rights and duties to different people; it is considered appropriate, for instance, for the police to have powers of arrest that are greater than those applying to ordinary citizens. Given this, it is perhaps better to say that while equality is the general principle, differences in treatment may be acceptable if they are capable of being justified in some legitimate way.

It is also inherent in the rule of law that people are able to discover, relatively easily, what their rights and obligations are so that they can lead their lives lawfully. Citizens could not think of themselves as governed by law if they could not reasonably discover what the law required of them.

These basic principles are reflected in Dicey’s conception of the rule of law. He ascribed three meanings to the rule of law. First, he argued that the rule of law meant that no one could be punished except for a breach of the law, established in the ordinary legal manner before the ordinary law courts. Also, he stated that the rule of law is against the existence of wide arbitrary or discretionary power on the part of the government.

The idea that people can only be punished for a breach of the law, and nothing else, is consistent with the most basic principle of the rule of law: that citizens are ruled by law and not by individuals. The antithesis of this would be the position where one could be punished at the whim of an individual even though one’s actions did not break the law. Dicey’s claim that the rule of law is against wide arbitrary or discretionary power is also consistent with the basic principle that citizens are
governed by law. This is because, the citizens of a country ruled by a Government with wide discretionary powers would not be ruled by laws which could be ascertained with sufficient certainty so that they could know their rights and obligations; rather, citizens of such a country would be in danger of being governed by capriciousness and whim where there could be no guarantee of equality of treatment.

The second meaning of the rule of law given by Dicey is that the law should apply equally to all, as established by the ordinary law courts, and that there should be no exemption for officials. This requirement of equality echoes that referred to above, though Dicey’s version seems to be a little less sophisticated as it does not state that differences in treatment may be legitimately justified. His stipulation that there should be no exemption for officials is commensurate with the basic principle that the Government (and its agents) is itself bound by law. Dicey’s view that the law should be established in the ordinary law courts seems to be a guarantee of equality – that equality of treatment would be at risk if different groups or classes of people were dealt with by different courts. It is for this reason that he was so dismissive of the administrative law and administrative tribunals of France: he feared that different courts, applying different legal rules, when dealing with cases involving the Government might lead to different treatment – and possible exemption – for officials rather than official and citizen being equally obligated under the law.

Dicey’s third statement with regard to the rule of law is that the doctrine runs through the constitution and that principles of the constitution are the result of judicial determinations rather than a guarantee in some constitutional document. The first point to make here is that it seems to be implicit in Dicey’s conception of the rule of law that the rule of law requires protection of certain liberties. This is a view with which other commentators have agreed. Bingham, for instance, also writes that the rule of law requires the protection of fundamental rights. Others, however, disagree. Raz, for instance, posits a procedural version of the rule of law whereby he argues that the doctrine has formal requirements about the way in which the law is created and promulgated but makes no demand about its content. As such, he argues that, while one might agree that protection of certain rights and liberties is desirable, the protection of such rights should not be taken to be a requirement of the rule of law.

Dicey may have a point with regard to his argument that rights are better protected if they derive from judicial decisions rather than a constitutional document. Take, for instance, the 1982 Constitution of the People’s Republic of China which guarantees freedom of speech, assembly, association and demonstration. These guarantees appear to be empty promises on which Chinese citizens cannot always depend. In contrast, where rights are derived from case law, they may be more reliable in future cases on the basis that judges have been prepared to defend them in the past so they are likely to be willing to defend them in the future.

In short, Dicey’s suggestion that it is preferable under the rule of law for the principles of the constitution to be derived from case law rather than a constitutional document may be explainable in the following way: if one agrees that the protection of such rights is required by the rule of law then this protection is more likely to occur if the rights in question are the result of judicial decisions, where the courts have
proved themselves willing to protect them, than if the rights are derived from a constitution, a bill of rights or similar document.

However, Dicey’s argument here conflicts with the traditional view of parliamentary sovereignty (of which he was also an advocate) that Parliament may enact any law whatsoever. That is, judges may not be able to protect rights better than a constitutional guarantee because Parliament may simply legislate to curtail or abolish those rights. This was a difficulty which Dicey himself recognised though not one to which he providing a convincing answer.
CHAPTER 9

Question: With regard to EU law, explain the principles of direct effect and direct applicability and how these apply to treaties, regulations and directives.

The EU treaties are the primary source of EU law. Article 288 of the Treaty on the Functioning of the European Union (TFEU) makes provision for the creation of other sources of EU law: ‘To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.’ Article 288 also gives the definitions for these other sources of law. Regulations are defined in the following way: ‘A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.’ The definition of a directive is: ‘A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’

Both regulations and the provisions of the treaties are directly applicable. This means that they become part of the law of the member states without any further act of legislation or implementation by the member states. Regulations and treaty articles may also have direct effect. A provision has direct effect if it creates rights which are enforceable by citizens in the courts of the member states. Regulations and treaty articles will have direct effect if they are sufficiently clear and precise so that they may be applied by the different courts of the national states without significant discrepancies in interpretation.

Where regulations and treaty articles have direct effect, so that they give rise to rights which are enforceable in the courts, they will have both vertical and horizontal direct effect. Where a provision has vertical direct effect, it means that a citizen may use it to enforce their rights against the state. Where a provision has horizontal direct effect, it means that a citizen may use it to enforce rights against other citizens or private organisations. The vertical direct effect of treaty articles was first established by the European Court of Justice (ECJ) in Van Gend en Loos (1962). That such provisions also have horizontal direct effect was first confirmed by the ECJ in Defrenne v SABENA (1975). The vertical direct effect of regulations was confirmed by the ECJ in Leonesio v Italian Ministry of Agriculture (1971); their horizontal direct effect was seen in Munoz v Frumar Ltd (2000).

Directives will specify an objective but leave it to each member state to decide how that object may best be achieved. The directive will specify a time limit by which it should have been implemented. Thus, directives do not have direct applicability because they do not automatically become part of the law of the member states without legislation or implementation. However, even where a directive has not been implemented by a member state within the specified time, or where it has been partially or incorrectly implemented, it may give rise to enforceable rights, and therefore have direct effect, if certain conditions are present. These conditions are that the obligations imposed by the directive must be sufficiently clear and precise and leave no discretion as to the manner of its implementation (Van Duyn v Home Office (1974)).
Directives will, though, only have vertical direct effect; that is, they may only be enforced against the state or against an arm of the state (Marshall v Southampton Area Health Authority (1986)). Despite this it may still be the case that a directive which has not been implemented – or has been partially or incorrectly implemented – by a member state, may affect the relationship between private individuals or organisations. This is because, even in cases between private individuals, the courts – as part of the state – are obliged to interpret national law in a way which conforms with EU law. This was made clear in Von Colson v Land Nordrhein-Westfalen (1984) and is referred to as incidental (or indirect) horizontal direct effect.
Question: Explain the operation of the permission stage, the time limit and the sufficient interest requirement in judicial review.

Judicial review is the procedure by which the courts ensure that those exercising governmental (or public) power do so lawfully. There are some procedural hurdles which a claimant, when bringing a claim in judicial review, must overcome. These are: the permission stage; the short time limit and the sufficient interest requirement.

Judicial review is a two stage process. There is the permission stage, in which claimants must obtain the permission of the court for their claim to proceed, followed by the substantive or main hearing. The permission stage, which was formerly known as the leave stage, is required by s. 31(3) of the Senior Courts Act 1981 which states: ‘No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court’. Part 54.4 of the Civil Procedure Rules also state that the permission of the court is required before a claim may proceed: ‘The court’s permission to proceed is required in a claim for judicial review whether started under this Part or transferred to the Administrative Court’.

The rationale underpinning the permission stage is that the courts should filter out those cases which are unarguable and have no realistic prospect of success. The courts may also prevent cases from proceeding at this stage if the claim is out of time or the claimant does not have sufficient interest in the matter to which the claim relates. The permission stage is a summary procedure in that, in most cases, a judge will make a decision on whether a claim should proceed by reference only to the claimant’s claim form and the defendant’s response. In cases where it is deemed necessary, a judge may request a short hearing. Alternatively, if a claim is refused the claimant may request that it be heard again at a short oral hearing where the defendant will also be invited to present their case (Civil Procedure Rules, 54.12(3)). If permission is still not given, a claimant may make an appeal to the Court of Appeal.

The time limit in judicial review cases is very short. Part 54.5 of the Civil Procedure Rules states that a claim should be made promptly or within three months after the grounds to make a claim first arose. It is important to note that this means that the courts may decide that a claim has not been made promptly – and so has been made with undue delay – even if it has been made within three months: this was the finding in *R v Swale Borough Council, ex parte Royal Society for the Protection of Birds* (1990).

Section 31(6) of the Senior Courts Act 1981 states that where a claim for judicial review has been made with undue delay a court may refuse permission for it to proceed or, alternatively, allow it to proceed but refuse to grant any remedy.

Alternatively, the courts do have the power to allow a case to proceed, even if it is outside the three months time limit, if they think there is good reason to do so. For example, in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p*
World Development Movement Ltd (1995) Rose LJ thought that there was good reason for extending the time limit for the claim even though it was made three years after the decision being challenged. This power to extend the time limit should, however, be used sparingly, only in exceptional circumstances (Judicial Review Pre-Action Protocol, fn 1).

Section 31(3) of the Senior Courts Act 1981 states that a court should not give permission for a claim to proceed 'unless it considers that the applicant has a sufficient interest in the matter to which the application relates'. At one time, a claimant would only satisfy this requirement if they had an interest over and above the general interest or they had a direct pecuniary interest (see the judgement of Sedley J in R v Somerset County Council, ex parte Dixon (1998)). However, the courts take a more relaxed approach to the question of sufficient interest. This may be because of the possibility that too strict an application of the test may leave unlawful government action unchecked. Worries that a strict approach would have such an effect were expressed by Lord Diplock in Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd (1982).

Indeed, it was, perhaps, the decision of the House of Lords in Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd that gave rise to a more liberal approach to the sufficient interest requirement. This is because their Lordships determined that a claim should only be blocked at the permission stage if a claimant obviously has no interest in the matter to which the claim relates. In all other cases, the claim should be permitted to proceed to the substantive hearing where it will be considered in the legal and factual context of the case – which seems to mean that, at the substantive hearing, a claimant will be more likely to be considered to have sufficient interest if their case has merit on the law or the facts.

The relaxed approach to the sufficient interest requirement can be seen in a number of cases. In R v HM Treasury, ex parte Smedley (1985), Mr Smedley was held to have sufficient interest to challenge a payment by the Government to the EU ‘if only in his capacity as a taxpayer’ (i.e. he had sufficient interest here simply by virtue of being a taxpayer). In R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg (1994), Lord Rees-Mogg had sufficient interest to challenge the Government’s ratification of the Treaty on European Union because of ‘his sincere concern for constitutional issues’. In R v Secretary of State for Foreign Affairs, ex parte World Development Movement (1995), the World Development Movement had sufficient interest to challenge a grant of money to the Malaysian Government because, among other things: the importance of the issue raised; the importance of vindicating the rule of law; and because of the World Development Movement’s prominent role in giving advice, guidance and assistance regarding aid. In these three cases (Smedley, Rees-Mogg and the World Development Movement) the more liberal approach of the courts is evident because it cannot be said that in any of them the claimant had a direct pecuniary interest or an interest over and above the general interest.
Question:

The (fictional) Education Act 2011 gives the Secretary of State for Education the power to remove individual schools from local authority control and to allow them to be run by private organisations for profit. Section 3 of the Act states:

Section 3
(1) The Secretary of State for Education alone shall make the decision as to whether a school should be removed from local authority control.
(2) The Secretary of State shall take into account the views of those affected by the decision.
(3) The Secretary of State may also consult with any parties as he sees fit.

On 10th April 2012, the Secretary of State writes to the headmistress of Muir Hill School informing her that he is considering using his powers under the Education Act 2011 to remove the school from local authority control and to allow it to be run by Shark Ltd, a company specialising in education.

On hearing of this news, Irene Platt, a parent of a child at the school, begins to organise a petition of other parents and teachers against the plans. When informed of this during a radio interview, the Secretary of State says that he will not be swayed by the petition and has no intention of listening to the views of those organising or signing it as they are unlikely to have anything useful to say.

During the same interview, the Secretary of State also announces that the final decision about Muir Hill School will be made by Arthur Brick, a civil servant. On 20th April, Mr Brick writes to the Governors of Muir Hill School asking for their views about whether the school should be removed from local authority control to be run by Shark Ltd. His letter states that he should receive a reply by 25th April and that this should be accompanied by a £25 ‘processing fee’.

On 30th April, Mr Brick announces that he has decided that Muir Hill School will be removed from local authority control and will be run by Shark Ltd. On the same day, the local newspaper reports that Mr Brick’s wife is a major shareholder in Shark Ltd.

Advise the School Governors and Irene Platt about the possible grounds of judicial review which may enable the decision to close the school to be challenged.

Judicial review is the procedure by which the courts ensure that those exercising governmental (or public) power do so lawfully. Broadly speaking, there are three grounds for review as specified by Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service (1984): illegality, irrationality (or unreasonableness) and procedural impropriety. These three broad grounds of review encompass a number of sub-grounds, including: exceeding the power given and abuse of discretion (which are both classified as examples of illegality) or failing to adhere to the rules of natural justice (which is considered a requirement of procedural impropriety). In the scenario
given in the question, there are a number of possible grounds for judicial review on which the School Governors and Irene Platt may rely.

To begin with, the Secretary of State’s refusal to listen to the views of those organising or signing Irene Platt’s petition on the basis that ‘they are unlikely to have anything useful to say’ appears to be unlawful in two ways. First, it may be an example of the Secretary of State fettering his discretion because he appears to have shut his ears to the possibility that the petitioners have anything useful to contribute. Second, it appears to be contrary to his statutory obligation under s 3(2) of the (fictional) Education Act 2011 to take into account the views of those affected by the decision. For this reason, it may be an example of procedural impropriety because the Secretary of State has failed to adhere to the procedural requirements specified in the statute.

The decision to delegate the decision on this matter to Arthur Brick is an unlawful delegation of discretion (see Vine v National Dock Labour Board (1957)). At first sight, this delegation appears to be permissible on the Carltona principle that ministers may delegate the exercise of their powers to civil servants (Carltona Ltd v Commissioners of Works (1943)). However, s 3(1) of the (fictional) Education Act 2011 makes it clear that the decision on this matter must be taken by the Secretary of State personally.

Mr Brick’s letter to the School Governors on the 20th April appears to be an attempt to consult with them about the proposed changes. However, the letter gives just five days for a reply, which – it may be argued – leaves the School Governors insufficient time to fully consider the matter. Furthermore, if Mr Brick has simply sent a letter asking for a response, as the question seems to suggest, then the Governors have not been given adequate information which they may use to formulate their response. For these reasons, the attempt at consultation fails to meet the essence of genuine consultation as described by Webster J in R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities (1986).

In addition, the request for a £25 processing fee from the School Governors does not appear to be sanctioned by the (fictional) Education Act 2011. Without such lawful authority, the request for a fee is an attempt to unlawfully raise revenue and, so, illegal (see Congreve v Home Office (1976)).

Finally, the revelation that Mr Brick’s wife is a major shareholder in Shark Ltd invalidates the decision because of apparent bias. Mr Shark has a pecuniary interest in the decision (via his wife) and, consequently, the decision is automatically invalidated. Authority here may be derived from Dimes v Grand Junction Canal Proprietors (1852) where previous decisions of the Lord Chancellor, Lord Cottenham, were set aside because of his shareholding in the Grand Junction Canal company; this was so even though, as Lord Campbell asserted, ‘No on can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern’.
Question: Explain the relationship between sections 3, 4 and 10 of the Human Rights Act 1998. Also, explain the meaning of ‘public authority’ under the Act.

The Human Rights Act 1998 (HRA) attempts to make rights guaranteed under the European Convention on Human Rights part of UK law and enforceable in the courts. This is achieved in a number of ways by the Act; this essay will look at sections 3, 4 and 10 and at the meaning of ‘public authority’ under section 6.

Section 3 of the HRA obliges the courts to construe legislation in a way which is compatible with the Convention rights, ‘so far as it is possible to do so’. However, section three does not specify how far the courts may go in attempting to interpret legislation so that it conforms with, and gives effect to, the Convention rights. Some guidance may be derived from the House of Lords decision in Ghaidan v Godin-Medoza (2004) where their Lordships stated that construing a provision to conform with the Convention rights may require the court to give a meaning to legislation other than that it would normally have, and perhaps contrary to what Parliament intended. The courts should not, though, interpret a legislative provision in a way which is contrary to the underlying rationale of the statute as a whole. In R v A (2002) Lord Steyn stated that section 3 may oblige the courts to adopt an interpretation which ‘linguistically may appear strained’ whereas Lord Hope appeared to advocate a more cautious approach with the reminder that section 3 ‘does not entitle the judges to act as legislators’.

Under section 4, if the courts are not able to construe legislation in a way which conforms to the Convention rights, the higher courts may make a declaration of incompatibility. The higher courts are: the Supreme Court; the Judicial Committee of the Privy Council; the Courts-Martial Appeal Court; the High Court of Justiciary or the Court of Session (Scotland); and the High Court or the Court of Appeal (England, Wales and Northern Ireland).

It is important to note that neither a failure to interpret legislation to conform with the Convention rights under section 3 nor a declaration of incompatibility under section 4 affects the validity or continuing operation of legislation.

Under section 10, a Minister may make an order to amend primary or secondary legislation if there has been a declaration of incompatibility under section 4 or it is apparent from a decision of the European court of Human Rights that a provision of UK legislation does not comply with the Convention rights.

So, sections 3, 4 and 10 of the HRA work together to attempt to make the Convention rights part of UK law. Section 3 attempts to do so by obliging the courts to try to interpret legislation in a way which conforms with the Convention rights. If this is not possible, section 4 enables the higher courts to make a declaration of incompatibility which may be used as the trigger for the Minister’s power under section 10 to make an order amending the legislative provision in question so that it does comply.
Section 6 of the HRA makes it unlawful for public authorities to act in a way which is incompatible with a Convention right, unless the public authority is prohibited from acting differently because of primary legislation, or provisions made under primary legislation. The HRA does not give a definition of ‘public authority’ save that it excludes ‘either House of Parliament or a person exercising functions in connection with proceedings in Parliament’ but includes courts and tribunals and (under section 6(3)(b) ‘any person certain of whose functions are functions of a public nature’. With regard to the latter, section 6(5) states: ‘In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private’.

It is generally accepted that there are two types of public authority under the HRA: core (or pure) public authorities and functional public authorities (which are sometimes referred to as hybrid or s 6(3)(b) public authorities). The former include those bodies which are obviously part of the state; they are obliged to act compatibly with the Convention rights in all that they do. The latter refer to bodies which are essentially private in nature but which exercise some functions of a public nature; these are obliged to act compatibly with the Convention rights only with regard to those functions but not with regard to private acts.

It seems at first instance that the HRA has only vertical effect in that, by imposing obligations to act compatibly with the Convention rights only on public authorities (i.e. aspects of the state) it affects the legal relationship only between citizens and the state. However, because of section 6(3)(b), the Act may impose obligations on private bodies which exercise functions of a public nature. Thus, section 6(3)(b) means that the obligations imposed by the HRA go beyond the state in the strict sense. It should be noted here, though, that courts’ decisions in Poplar Housing and Regeneration Community Association Ltd v Donoghue (2001), R (Heather) v Leonard Cheshire Foundation (2002) and YL v Birmingham City Council (2007) have left the position unclear as to when a function will be considered to be one of a public nature.

Moreover, the HRA is also said to have indirect horizontal effect – thereby affecting the relationship between private individuals or organisations. This is because, as noted above, the definition of public authority includes courts and tribunals. This means that they are under the section 6 obligation to act in conformity with the Convention rights in all that they do, including in the way they determine cases. That is, even in cases involving only private bodies, the courts are obliged to determine the legal rights of the parties to the case in a way which complies with the Convention rights. Baroness Hale captures this obligation thus: ‘The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties’ Convention rights’ (Campbell v MGN Ltd (2004)).
CHAPTER 13

Question:

Alex is the editor and owner of the Daily Blab. Alison is running for election as Police Commissioner. It is a significant part of Alison’s election campaign that police corruption needs to be eradicated. Alex writes an article supporting Alison and arguing that any police officers found guilty of corruption should be heavily sentenced. In the article, he names PC Muir as deserving of such treatment. The article is published on the third day of Muir’s trial for various crimes of police corruption. The Attorney General seeks an order of the court for contempt of court under s2 of the Contempt of Court Act 1981.

Alex seeks your advice. Explain to him why his article might amount to contempt of court. Also, advise him on any possible defences available to him and of their likelihood of success.

Contempt of court might arise here under sections 1 and 2 of the Contempt of Court Act 1981 (CCA) which makes it a contempt of court for a publication to create a substantial risk that the course of justice in legal proceedings will be seriously impeded or prejudiced. The offence is a strict liability offence, which means that it is committed regardless of whether the author or publisher of a publication intended to seriously impede or prejudice the course of justice. However, under section 2(3) the offence may only be committed if the proceedings in question are active. Under Schedule 1 of the CCA, criminal proceedings, such as those against PC Muir, become active when: there is an arrest without warrant; a warrant is issued for an arrest; a summons is issued; or an individually is charged, orally, with an offence. Criminal proceedings stay active until there is an acquittal, sentence or a discontinuance of the proceedings.

It seems that in the present case there is a, prima facie, contempt of court under section 2 CCA. First, the proceedings against PC Muir are active. Second, the article is published on the third day of Muir’s trial and it names him directly in the context of an argument about the way in which officers convicted of the offence for which he is on trial should be treated. It is suggested that a reader of this piece would be left with the impression that Muir is certainly guilty of the offence for which he is on trial. For these reasons, it is clear that the article is capable of creating a substantial risk that the course of justice in the proceedings against Muir may be seriously prejudiced. The only question is whether Alex has a defence.

There are three defences provided by the CCA. Under section 3, a person will have a defence if they did not know, and had no reason to suspect, that proceedings were active. This is unlikely to be the case here; Alex’s naming of Muir suggests that he was aware of the details of the case and this, in turn, suggests that he was aware that proceedings were active.

Under section 4 a person is not guilty of contempt if they produce a fair and accurate report of proceedings held in public as long as the report is contemporaneous and published in good faith. Alex’s article does not amount to such a report. It does not appear to be an attempt to give a fair and accurate account of the progress of the

...
case against Muir. Indeed, there is no indication in the facts given that the article makes reference to the course of the trial at all. Rather, Alex's article seems to be an opinion piece expressing the author's personal view about how police officers convicted of corruption should be treated.

Under section 5 of the CCA, a person will not be guilty of contempt of court if their publication makes or is part of a discussion in good faith about public affairs or other matters of public interest and where the risk of prejudice or impediment is incidental to that discussion. This is the defence that is most likely to be of use to Alex. Indeed, at first sight, Alex's position seems very similar to the situation in Attorney General v English (1983). In that case, an article was written in support of Mrs Carr, a parliamentary candidate’s campaign; the campaign and the article condemned the alleged practice whereby new-born disabled babies were left to die. The article was published on the third day of trial for murder of a paediatrician who was accused of allowing a baby with Down’s syndrome to die of starvation. The court held that the article was capable of creating risk of prejudice but that the risk was incidental to the discussion in the piece. Lord Diplock stated: 'To hold otherwise would have prevented Mrs Carr from putting forward and obtaining publicity for what was a main plank in her election programme and would have stifled all discussion in the press upon the wider controversy about mercy killing [during the period of the trial]' .

There is, though, a significant difference between the present case concerning Alex's article and the position in the English case. In the present case, Alex names PC Muir directly. For this reason, it cannot be said that the risk of prejudice is merely incidental to the discussion. Indeed, in this regard, the position is analogous to that which pertained in Attorney-General v Random House Group Ltd (2009). There, part of a book published by a former police officer detailed the events for which people were on criminal trial and, therefore, it could not be said that the risk of to the legal proceedings was simply incidental to the discussion in the book. That is, in both the Random House case and Alex's situation, the publication made direct reference to the subject matter of the trial and so, in both, the discussion cannot be said to be merely incidental to the risk of prejudice or impediment that it causes.

In summary, the publication by Alex is capable of amounting to a contempt of court under sections 1 and 2 of the CCA because it creates a substantial risk that the legal proceedings against Muir will be seriously impeded or prejudiced. Further, Alex would not be able to rely on the defence under section 5 because the risk is not merely incidental to the discussion in the article.