7. THE CONSTITUTIONAL LAW*

1. Definition and Scope of The Constitutional Law

1.1. What Is a Constitution?

Applied to the system of law and government by which the affairs of a modern state are administered, the word constitution has two meanings. The narrower meaning of the word will be considered first. In this sense, a constitution means a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government within the state, and declares the principles by which those organs must operate. In those countries in which the constitution has overriding legal force, there is often a constitutional court which applies and interprets the text of the constitution in disputed cases. Such a court is the Supreme Court in the USA or the Federal Constitutional Court in the Federal Republic of Germany. In these countries, legislative or administrative acts may be held by the constitutional court to be without legal force where they conflict with the constitution.

* Excerpts from "Constitutional and Administrative Law", by E.C.S. Wade and A.W. Bradly, 9th ed., Longman Publications; and "The Closing Chapter", by A. Denning, 1983, Butterworths Publications.

In this sense of the word, the United Kingdom, for instance, has no constitution. There is no single document from which it derived the authority of the main organs of government, such as the Crown, the Cabinet, Parliament and the courts of law. No single document lays down the relationship of the primary organs of government with one another, or with the people. But the word constitution has a wider meaning. As Bolingbroke stated in 1733.

> "By constitution, we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived form certain fixed principles of reason... that compose the general system, according to which the community has agreed to be governed."[1]

Or, in more modern words, constitution in its wider sense refers to the whole system of government of a country, the collection of rules which establish and regulate or govern the government.[2] In this sense, the United Kingdom has a constitution since it has a complex and comprehensive system of government. This system is founded partly on Acts of Parliament and judicial decisions, partly upon political practice, and partly upon detailed procedures established by the various organs of government for carrying out their own tasks, for example the law and custom of Parliament.

The wider sense of the word constitution includes a constitution in the narrower sense. In countries like Canada, the USA and states of Western Europe, the written constitution occupies the primary place amongst the "assemblage of laws, institutions and customs" which make up the constitution in the wider sense. However, undue emphasis can be placed on the possession of a written constitution. No written document alone can ensure the smooth working of a system of government.

A written document has no greater force than that which persons in authority are willing to attribute to it. Around a written constitution will evolve a wide variety of customary rules and practices which attune the operation of the constitution to changing conditions. These customary rules and practices will usually be more easily changed than the constitution itself and their constant evolution will reduce the need for formal amendment of the written constitution.

Nor can a written constitution contain all the detailed rules upon which government depends. Thus the rules for electing the legislature are usually found not in the written constitution but in ordinary statutes enacted by the legislature within the limits laid down by the constitution. Such statutes can when necessary be

1- From A Dissertation Upon Parties (1733), quoted in K.C. Wheare, Modern Constitutions, p. 2.
2- Wheare, op.cit., p. 1.

amended by the ordinary process of legislation whereas amendments to the constitution may require a more elaborate process, such as a special majority in the legislature or approval of a referendum.

1.1.1. The Making of Written Constitutions

It was in the late 18th century that the word constitution first came to be identified with a single document, mainly as a result of the American and French Revolutions. The political significance of the new concept of constitutions was stressed by the radical Tom Paine:

> "A constitution is a thing **antecedent** to a government, and a government is only the creature of a constitution... A constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without a right."

In the modern world, the making of a constitution normally follows some fundamental political event – the conferment of independence on a colony; a successful revolution; the creation of a new state by the union of states which were formally independent of each other; a major reconstruction of a country's institutions following a world war. A documentary constitution normally reflects the beliefs and political aspirations of those who have framed it.

1.1.2. Legal Consequences of the Unwritten Constitution

Where there is a written constitution, the legal structure of government may assume a wide variety of forms. Within a federal constitution, the tasks of government are divided into two classes, those entrusted to the federal (or central) organs of government, and those entrusted to the various states, regions or provinces which make up the federation. Thus in countries such as Canada, Australia or the United States, constitutional limits bind both the federal and state organs of government, which limits are enforceable as a matter of law. It may be desired to place certain rights of the citizen beyond reach of the organs of government created by the constitution; these fundamental rights may be entrenched by the device of requiring a special legislative procedure if they are to be amended, or even by rendering them unalterable, as in the Federal Republic of Germany. Again, many written constitutions seek to avoid a concentration of power in the hands of any one organ of government by adopting the principle of separation of powers, vesting

legislative power exclusively in the legislature, executive power in the executive and judicial power in the courts.

Within the United Kingdom, there is no written constitution which can secure these objects or which can serve as fundamental law. In the absence of a constitution to serve as the foundation of the legal system, the vacuum is filled by the legal doctrine of the legislative supremacy of parliament.

This has a sharp effect upon the sources of constitutional law. Instead of the constitution being the formal source of all constitutional law, much greater importance attaches to Acts of Parliament (statute law) and judicial decisions, which settle the law on matters such as police powers of search and entry that have never been the subject of comprehensive legislation by Parliament. Some major institutions, like the Cabinet, do not derive their authority from the law; many important constitutional rules are not rules of law at all. To summarize, the absence of a written constitution means that a constitution depends far less on legal rules and safeguards and relies much more upon political and democratic principles.

1.1.3. Constitutionalism

According to the principle of constitutionalism as it has developed in the western tradition, one primary function assigned to a written constitution is that of controlling the organs of government. "Constitutions spring from a belief in limited government." As it has been rightly remarked:

> "Western institutional theorists have concerned themselves with the problems of ensuring that the exercise of governmental power, which is essential to the realisation of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote."

It would be unfortunate if the absence of a written constitution were to suggest that no restraints or limits upon government were required. The absence of a written constitution makes the more necessary the existence of a free political system in which official decisions are subject to open discussion and scrutiny by Parliament. The experience of many countries has shown that a written constitution alone is no guarantee against internal tyranny or external domination.

1.2. Scope of Constitutional Law

1.2.1. What Is Constitutional Law?

There is no hard and fast definition of constitutional law. According to one very wide definition, constitutional law is that part of the law which relates to the system of government of the country. It is more convenient to define constitutional law as meaning those laws which regulate the structure of the principal organs of government and their relationship to each other and to the citizen, and determine their main functions. Where there is a written constitution, emphasis is naturally placed on the rules which it contains and on the way in which they have been interpreted and applied by the highest court with constitutional jurisdiction. Without knowledge of these rules and practices, knowledge of the legal rules alone is incomplete and sometimes misleading. In the past this has often been thought to be a problem peculiar to constitutional law. Today, it is increasingly recognized that in most branches of law, the purpose and operation of legal rules can be understood only with a knowledge of the social background against which the legal rules operate: legal procedures for the resolution of disputes arising within a family, a trade union or a limited company are an incomplete guide to the role of these institutions in society.

1.2.2. Constitutional Law and Administrative Law

In certain countries there is no precise demarcation between constitutional and administrative law. Administrative law may be defined as the law which determines the organization, powers and duties of administrative authorities. Like constitutional law, administrative law deals with the exercise and control of government power. A rough distinction may be drawn by suggesting that constitutional law is mainly concerned with the structure of the primary organs of government, whereas administrative law is concerned with the work of official agencies in providing services and in regulating the activities of citizens.

1.2.3. Constitutional Law and Public International Law

Public international law is that system of law whose primary function is to regulate the relations of states with one another. The system presupposes the state, a territorial unit of greater power, possessing within its own sphere the quality of independence of any superior, a quality which we are accustomed to call sovereignty

and possessing within that sphere the power and right to make law not only for its own citizens, but also for those of others.

International law thus deals with the **external** relations of a state with other states; constitutional law deals with the legal structure of the state and its **internal** relations with its citizens and others present on its territory. Both are concerned with the problem of regulating by legal process and values, the great power which modern states wield. In principle, the systems of national and international law operate at two distinct levels, but one important branch of constitutional law is the national law relating to a government's power to enter into treaties with other states and thus to create new international obligations. For example, the procedure of extradition, by which a criminal who escapes from one state to another may be sent back to the state in which his crime was committed, operates both in international and in constitutional law: the government of a state which is party to an extradition treaty must equip itself with the powers necessary in national law if the state is to be able to fulfil its treaty obligations. In this century, the nature of international relations has changed. International organizations have established new forms of cooperation between states and have set standards of conduct for the international community. Increasingly international law has become concerned with the treatment of minority groups and individuals by states. These developments make it necessary to reconsider the nature of internal sovereignty which the national system of constitutional law ascribes to the state.

2. Sources and Nature of the Constitution

2.1. The Legal Rules of the Constitution

Where a country possesses a written constitution, the main rules of constitutional law are contained within it. Alterations to these rules are made from time to time by the procedure laid down for amendment of the constitution. In all probability, Parliament is authorized to make detailed provision for such matters as the machinery of elections and the structure of the courts. If a court exercises the function of interpreting and applying the constitution in disputed cases, its decisions are authoritative indication of the meaning of the constitution. The sources of constitutional law therefore comprise: (a) the constitution itself, and amendments made to it; (b) Acts of Parliament dealing with matters of constitutional importance; (c) judicial decisions interpreting the constitution. By the word "source" is meant the formal origin of a rule which confers legal force upon that rule. The word source may also be used in other senses: thus the historical sources of a written constitution include both the immediate circumstances in which it was framed and

adopted, and also the long-term factors which influenced its making. In this section we are concerned solely with the formal sources of the legal rules of constitution. Constitutional rules which do not have the force of law are discussed in the next section.

2.1.1. Sources of Legal Rules

In the absence of a written constitution, therefore, the two main sources of legal rules of the constitution are:

(a) Legislation (or enacted law) i.e. Acts of Parliament; legislation enacted by other bodies and authorities upon whom Parliament has conferred power to legislate.

(b) Judicial precedent (or case law) i.e. the decisions of the superior courts expounding the law or interpreting legislation.

Under the doctrine of precedent, or **stare decisis**, these decisions are binding on inferior courts and may, according to the relative status of the courts in question, bind other superior courts. Judge-made law takes two principal forms:

(I) The law proper:

This consists of the laws and customs which have from early times been declared to be law by the judges in their decisions in particular cases coming before them. In the reports of these cases are to be found authoritative expositions of the law relating to the ordinary remedies of the subject against illegal acts by public authorities and officials , and the writ of habeas corpus, which in common law protects against unlawful invasion of personal liberty.

An example of judicial decision in English law is **Conway v. Rimmer**, which held that the courts had power to order the production of documents in evidence for which Crown privilege had been claimed by the Home Secretary.[3] As it illustrates, by judicial decision there may be declared rules of constitutional law which are of utmost importance both to the citizen and to the Executive and which might well not have been enacted in that form by Parliament.

(II) Interpretation of statute law:

According to orthodox doctrine the courts have no authority to rule on the validity of an Act of Parliament (although they have such authority in the case of subordinate legislation), but they have the task of interpreting enacted law in cases where the correct meaning of an Act is disputed. This applies to constitutional

3- (1968) A.C. 910.

statutes no less than to Road Traffic or Income Tax Acts. Important issues of public law may arise out of the interpretation of statutes. In **Liversidge v. Anderson** the court had to interpret a war-time regulation empowering the Home Secretary to detain without trial persons whom he had reasonable cause to believe were of hostile origins and associations. By a majority of four to one, the House of Lords held that the regulation did not require the Home Secretary to disclose to a court the reasons for a detention order.[4]

Since most powers of government are derived from statute, the judge-made law which results from the interpretation of statutes is of much greater importance in public law generally, and administrative law in particular, than the common law proper. As the volume of legislation increases, so the courts come increasingly to be concerned with its interpretation. Yet experience has shown how difficult it is not only to draft clear, accurate and intelligible legislation, but also to interpret the result. The experience of the courts in this task has led to the growth of principles of statutory interpretation, which may guide the judges. Unfortunately, these principles are seldom conclusive and indeed may often contradict one another. Two general approaches are intermittently followed by the courts. The literal approach to interpretation is based on the principle "that a court's duty is to ascertain the true meaning of the words used by Parliament, and that the policy of the Act and the intentions of Parliament are irrelevant except in so far as they have been expressed in the words so used. In support of this approach it is often said that it is not for the court to usurp the function of Parliament by speculating how Parliament might have intended to deal with the problem before the court. the second general approach is based on the principle that a court should endeavour to give effect to the policy of a statute and to the intentions of those who made it.

However difficult the task of statutory interpretation may be, it is an essential principle of the concept of law that enacted laws should be interpreted by judicial bodies independent of the legislature which made the law: statutory provisions authorising the Government to define the meaning of terms used in an Act of Parliament are contrary to basic legal principles.

(c) Secondary sources:

One such source of legal rules is custom, i.e. rules of conduct based upon social or commercial custom which are recognized by judicial decision as having binding force. In modern times when new customary rules are recognized, they usually apply only to a particular locality. For this reason custom is not today an important source of constitutional law. But many non-legal rules of the constitution are based on the customary usages of various organs of Government. In a number of countries Parliament has inherent authority to regulate its own internal affairs. In the said countries the "law and custom of Parliament" (**lex et consuetudo**

4- (1942) A.C. 206.

Parliamenti) is therefore an important source of constitutional rules and practice to which the distinction normally drawn between the legal and non-legal rules of the constitution is not applicable.

Another secondary source of constitutional law is to be found in the opinions and conclusions of writers of books of authority.

2.2. Non-Legal Rules of the Constitution

Many important rules of constitutional behaviour, which are observed by the Sovereign, the Prime Minister and other ministers, members of Parliament, judges and civil servants, are expressed neither in Acts nor in judicial decisions. It is to be noted that disputes which arise out of these rules rarely lead to action in the courts and that judicial sanctions are not applicable if the rules are broken. Constitutional writers have applied a wide variety of names to these rules: the positive morality of the constitution,[5] the unwritten maxims of the constitution,[6] and "a whole system of political morality, a whole code of precepts for the guidance of public men."[7] Dicey referred to them as:

> "Conventions, understandings, habits or practices which, though they may regulate the conduct of several members of the sovereign power... are not in reality laws at all since they are not enforced by the courts."

Under Dicey's influence, the most common name given to this phenomenon is constitutional convention.

This use of the word convention is quite different from its use in international law, where a convention is a synonym for a treaty, or binding agreement between states. But the notion of conventional conduct does include a strong element of what is customarily expected, in the sense of ordinary or regular behaviour. In common speech a person may be described as conventional or unconventional, depending on his capacity for conforming to or departing from accepted patterns of social behaviour and opinion. Most discussion of constitutional conventions has gone beyond description of conduct which is merely a customary practice and has suggested that conventions give rise to binding rules of conduct. Conventions have been described as:

5- J. Austin, The Province of Jurisprudence Determined, p. 259.
6- J.S. Mill, Representative Government, ch. 5.
7- E.A. Freeman, Growth of the English Constitution, p. 109.

> "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..."

In order to illustrate, one example of non-legal rules of the constitution in a country which has no written constitution may be given. Although, in Britain, the conduct of a general election is governed by detailed statutory rules, there is no statutory rule which regulates the conduct of the Prime Minister when the result of the election is known. But there is a conventional rule that the Government shall resign if it does not have the confidence of a majority in the Commons. Therefore it is now expected that, when it is clear from the election results that the Prime Minister on whose advice the election had been called has lost the election, he should resign immediately without, as formerly, waiting for the newly elected Parliament to meet. Where however the result of the election gives no party an overall majority in the House of Commons, the Prime Minister may continue in office for such period as is necessary to discover whether he is able to form a coalition or to govern with the support of other parties.

2.2.1. Why Are Conventional Rules Observed?

Dicey, writing as a lawyer in a period dominated by Austinian jurisprudence according to which laws were observed because they could be enforced against the citizen by the coercive power of the state, said:

> "The sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the courts and the law of the land."[8]

To support this view, Dicey argued that Parliament meets at least once a year because the Government would be compelled to act unlawfully if this did not happen. This argument has been shown to be much weaker than Dicey has supposed.[9] In any event, the rule which the supposed legal sanction supports is antiquated.

8- Dicey, pp. 445-6.
9- E.G. Jennings, Law and Constitution, pp. 128-9.

It is much nearer the mark to say that conventions are observed because of the political difficulties which arise if they are not. As these rules regulate the conduct of those holding public office, for such a person possibly the most acute political difficulty which can arise is that he should be forced out of that office. It does not, of course, follow that every event which gives rise to political difficulties (for example an unpopular Bill) is a breach of a non-legal rule of the constitution.

2.2.2. The Meaning of "Unconstitutional"

Where a written constitution ranks as fundamental law, legislative or executive Acts which conflict with the constitution may be held unconstitutional and thus illegal. Otherwise, "unconstitutional" has no defined legal content. The 19th century jurist, Austin, suggested that within a state the sovereign was acting unconstitutionally when he infringed the maxims of government which with popular approval he generally observed – but by definition the Austinian sovereign could not act illegally. For Freeman, unconstitutional conduct was conduct contrary to "the undoubted principles of the unwritten but universally accepted constitution".[10] A Canadian political scientist has commented that "for the Americans, anything unconstitutional is illegal, however right or necessary it may seem; for the British, anything unconstitutional is wrong, however legal it may be.[11]

While conduct may be unconstitutional without being illegal, illegal acts may also be unconstitutional. British politicians who instigated or covered up criminal offences for political ends would be in breach of the code of behaviour recognized by public opinion, as well as being in breach of the criminal law. Government departments are restrained from exceeding their powers not only by likelihood of legal sanctions but also by the constitutional obligation on government to conduct its affairs according to law.

It is not however always easy to determine whether the boundary between constitutional and unconstitutional conduct has been crossed, especially where there turns out to be no universally accepted rule of conduct. Different politicians may well take opposing views of the constitutional propriety of the acts of a government. Lawyers should be slow to condemn proposals for new legislation as unconstitutional – not only so that the coinage of constitutional debate should not be debased, but also because lawyers are seldom unmoved by other political considerations. But there is no doubt that a Bill which sought to destroy essential features of the electoral system could rightly be described as unconstitutional.

10- Freeman, op.cit., p. 112.
11- J.R. Mallory, The Structure of Canadian Government, p. 2.

2.2.3. Consequences of a Breach of Conventional Rule

Various consequences may follow the breach of non-legal rules of the constitution. Loss of office or departure from public life would be the severest consequence, but the force of public opinion or political controversy may simply force the offender to think again: thus the Scottish judge who in 1968 joined a committee established by the Conservative Party decided to resign rather than prejudice the work of the committee. In these instances, the outcome reinforces the established rule. A less serious consequence would be a reprimand or a reminder not to act similarly in the future, given by someone in a position to enforce the rule. In November 1974, for instance, the British Prime Minister reprimanded 3 leading ministers who had supported a motion passed by the National Executive of the Labour Party sharply criticising the Government's policy on South Africa. If no adverse consequences follow, the matter becomes more open. Is it simply that it was politically expedient that, for example, the Prime Minister should turn a blind eye to the acts of his colleagues, or has the application of the rule been modified or the rule itself abandoned?

As conventional rules often give rise to reciprocal obligations, one consequence of a breach may be to release another office-holder from the normal constrains that would otherwise bind him. For example, when Smith the Prime Minister of Rhodesia (as it was known), unilaterally declared Rhodesia's independence, the immediate response of the British Government, conveyed through the Governor General of Rhodesia, was the dismissal of the entire Cabinet. In the event this dismissal proved purely nominal. Somewhat more significantly, the Southern Rhodesia Act 1965 was passed by the British Parliament to give the Government full power to legislate for the domestic affairs of Rhodesia, thus overriding the previous convention that the British Parliament would not exercise its sovereignty in such matters except with the agreement of the Rhodesian Government.

Another consequence may be the passing of legislation to avoid a similar breach in the future. When in 1909 the House of Lords in Britain rejected the Government's Finance Bill, the crisis was resolved only by the Parliament Act 1911, which removed the power of the Lords to veto or delay money Bills. The 1911 Act contained other provisions intended to place the relationship between the Two Houses of Parliament – the House of Lords and the House of Commons – on a new footing. These provisions led in turn to new conventional doctrine regarding the use by the House of Lords of its residual powers.

2.2.4. Should All Constitutional Rules Be Enacted as Law?

In theory, all the non-legal rules of the constitution could be enacted in legal form by one or more Acts of Parliament. Written constitutions in the Commonwealth have adopted various means of incorporating conventions: express enactment of the main rules, wholesale adoption by reference to practice and so on.

While enactment might well be useful in the case of particular rules that need to be clarified, there is nothing to be said for "codifying" the non-legal rules of the constitution. They cover so diverse an area, and they differ so much in character, that they could not sensibly be included within a single code. Even if the attempt were made, it would be impossible to stop the process by which formal rules are gradually modified by non-legal rules, principles and practices from starting over again.

It will be evident that there is often a very indistinct borderline between conduct which is matter of habitual practice, and conduct which occurs as a result of what is felt to be constitutional obligation. Text-books on constitutional law often exaggerate the extent to which rules govern political life, failing to appreciate the real nature of the political system and failing to distinguish between rules, principles and practice.

2.2.5. The Attitude of the Courts

In this section it has been assumed that the rules under discussion are not capable of being enforced through the courts. If when a rule has been broken, a remedy is available in the courts for securing relief or imposing a sanction upon the wrongdoer, this would indicate that the rule has the quality of law. Where a non-legal rule has been broken, no remedy will be available in the courts. Often the citizen's only recourse will then be political action – a complaint to his member of parliament, a letter to the press, a public demonstration or protest. In view of the political nature of most conventional rules, the stress on political or parliamentary remedies is appropriate. Moreover, many conventional rules, for example, those relating to the cabinet system, do not affect a citizen's rights and interests closely enough for a personal judicial remedy to be justified.

It may however be necessary for a court to take into account the existence of a conventional rule in making its decision on a point of law. This is particularly likely to happen in administrative law cases where the court's decision on the extent of judicial control of an official decision may be affected by the doctrine of ministerial responsibility. The courts have taken judicial notice of the fact that civil servants customarily take decisions in the name of ministers and of the fact that ministers may be called to account by parliament for the decisions. In one case, for instance, the Australian High Court took account of the conventional rules which in practice restricted legislation by the U.K. Parliament for Australia before the rules were enacted in 1931 in the United Kingdom. But on an appeal from Rhodesia following the unilateral declaration of independence, the Judicial Committee,[12] referring to the former convention by which the United Kingdom would not legislate for Rhodesia except at the request of the Rhodesian Government, pointed out that the convention had no legal effect and that the Judicial Committee were concerned only with the legal powers of Parliament.

While non-legal rules are not directly enforceable by the courts, it should be remembered that some legal rules too are not directly enforceable in the courts.

2.3. Legal and Constitutional Literature

In common law, it is a general rule that no legal text-book has intrinsic authority as a source of law: the authority of the most eminent text-book is confined to the extent to which a court considers that it accurately reproduces the law as enacted by the legislature or decided by earlier courts. "Judges do not hesitate to differ from statements even in the most respected practice-books, if they consider them ill-founded."[13] Where a statute has not yet been judicially interpreted, or where no court has pronounced authoritatively on a matter of Common law, then the opinions of text-book writers and academic authors may be of great value to the legal profession, as well as to the court when a case arises for decision. Yet until quite recently, by "a well-known professional convention" living authors were not cited as authority. Today, however, the views of the best authors are more readily accepted.

3. A Constitutional Revolution

In recent years there has been a significant change in the constitutions of certain countries governed by Common law, notably England. It is in the relations between the public authorities and the citizen, and the emergence of a difference between public and private law.

12- The Judicial Committee of the Privy Council is the highest judicial authority for most of the Commonwealth countries.
13- C.K. Allen, Law in the Making, p. 279.

3.1. Dicey's Law of the Constitution

In early days Dicey's **Law of the Constitution** was regarded with much reverence. He wrote it in 1885 and declared that there is in Common law no difference between public and private law; and that Common law recognized no system of **droit administratif** as it exists in France. He said:

> "We mean, ... when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[14]

His views were repeated in Halsbury's **Law of England**. Under the title "Constitutional Law", it is said and still said:

> "Nevertheless the boundaries of constitutional law have never been satisfactorily defined, partly because there is no constitutional document possessing an extraordinary sanctity, partly because the constitutional rules are susceptible to change, and partly because there is no fundamental difference between public law and private law and it is not possible to assign exclusive provinces to each. Thus, generally speaking, the same courts of law have jurisdiction whether the case raises questions of public or private law."[15]

This is in conformity with the theory of John Austin who held that there is one sovereign who enacts the laws which all must obey.

3.2. The Law of the Roman Empire

This was in complete contrast to the law laid down by Justinian for the Roman empire and still prevailing in Europe today. In the very forefront of the **Institutes** of Justinian it is said that there is a fundamental difference between public law and private law.

14- 4th Edn, (1893) 183.

15- 4th Edn, (1974) para. 801.

"The precepts of the law are these: to live honestly, not to injure your neighbour, to render each man his due. This study is divided into two parts, public and private. The public part is that which relates to the nature of public authority in Rome: the private part is that which appertains to the affairs of individual persons."

3.3. The Modern Approach

In the last few years Dicey's approach has been abandoned in favour of the Justinian. In **O'Reilly v. Mackman,**[16] it was said that:

"In modern times we have come to recognize two separate fields of law: one of private law, the other of public law. Private law regulates the affairs of subject as between themselves. Public law regulates the affairs of subject vis-a-vis public authorities."

3.4. The Reason for the Change

The reason for the change-over into two fields is because, during the last 30 years, Common law has established a comprehensive system of administrative law. It bears some little resemblance to the **droit administratif** of France in that it fulfils a dual purpose. On the one hand it gives the subject an efficient remedy against a public authority. On the other hand, it protects a public authority from being harassed by busybodies and cranks.

But it differs from the **droit administratif** in that it is all within the jurisdiction of the ordinary courts: whereas in France the distinction is so complete that there is a different hierarchy of courts. Private law culminates in the cour de cassation: public law in the **conseil d'Etat.**

3.5. A Spectacular Advance

It is in the realm of remedies that public law has made the most spectacular advance. In England, for instance, the Court of Appeal made a preliminary skirmish on 30 June 1982 in **O'Reilly v. Mackman.**[17] But the main result was made by the House of Lords in two cases decided on 25 November 1982. They are **O'Reilly v. Mackman**[18] and **Cocks v. Thanet District Council.**[19]

16- (1982) 3 WLR 604, 619.
17- (1982) 3 WLR 604.
18- (1982) 3 WLR 1096.
19- (1982) 3 WLR 1121.

3.6. The Old Remedies

In order to understand the significance of these two decisions, one should know that for 100 years before 1950 the only remedies in public law known to the English courts were the old prerogative writs of certiorari, mandamus and prohibition. These were of very limited scope and suffered from many procedural disadvantages.

After 1950 there were advances on two fronts. One advance was to extend the remedy by prerogative writs so as to cover many more misdoings by public authorities: such as errors of law on the fact of the record, and going outside their jurisdiction, and so forth. The other advance was to develop the remedy by ordinary actions so as to make the equitable remedies of declaration and injunction available against public authorities for breach of public law.

Each of these advances had its advantages and disadvantages. The complainant chose whichever suited him best. If he wanted to quash a decision of a public authority, he would go by certiorari. If he wanted to compel it to do its duty, he would ask for mandamus. If a declaration would suit his book – to declare what was its duty – he would issue a writ in an ordinary action. Likewise if he wanted an injunction to stop it breaking this duty, he would also issue a writ. Some of the most important cases in public law were decided in actions for declarations.

3.7. The Change

The procedures became so diverse that "a review of the existing remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure was thought necessary. This was achieved by a statute approved in 1981 by the British Parliament. It combined the former remedies into one proceeding called Judicial Review. At one stroke the courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction, and even damages. The procedure was much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given by affidavit. As a rule no cross-examination, no discovery, and so forth. But there were important safeguards. In particular, in order to qualify, the applicant had to get the leave of a judge.

The statute is phrased in flexible terms. For instance, the previous law as to who are – and who are not – public authorities, is not absolutely binding. Nor is the previous law as to the matters in respect of which relief may be granted. This means that the judges can develop the public law as they think best. That they have done and are doing.

3.8. What Are "Public Authorities"?

The first thing to notice is that public law is confined to "public authorities". What are "public authorities"? There is only one avenue of approach. It is by asking: what is the "nature of the persons and bodies against whom relief may be granted by such orders", that is, by mandamus, prohibition or certiorari?

These are divided into two main categories:

First, the persons or bodies who have legal authority to determine questions affecting the Common law or statutory rights or obligations of other persons as individuals.

Second, the persons or bodies who are entrusted by Parliament with functions, powers and duties which involve the making of decisions of a public nature. That goes back to the time of Chief Justice Holt who said in 1691:

> "This Court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to encroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here; to the end that this Court may see, that they keep themselves within their jurisdiction: and if they exceed it, to restrain them. And the examination of such matters is more proper for this Court."[20]

But those categories are not exhaustive. The courts can extend them to any other person or body of a public nature exercising public duties which is desirable to control by the remedy of judicial review.

20- R. v Inhabitants – in Glamorganshire (1691) 1 Ld Raym 580.