

Public Law Essay Example (Discursive, OSCOLA)

The Constitutional Status of the Rule of Law

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Introduction

The rule of law is widely regarded as one of the fundamental principles of the United Kingdom's constitutional order. It underpins the legitimacy of governmental power, requires public authorities to act according to law, and seeks to protect individuals from arbitrary state action. Despite widespread agreement regarding its constitutional significance, considerable disagreement exists concerning its legal status and constitutional foundation. At the centre of this debate lies a broader disagreement concerning parliamentary sovereignty, judicial authority, and the nature of the UK constitution itself.

Two of the most influential constitutional theorists, Sir William Wade and Sir Ivor Jennings, offer sharply contrasting explanations of the constitutional basis of the rule of law. Wade argues that parliamentary sovereignty and the rule of law ultimately derive from judicial recognition through a political fact rather than legal enactment, whereas Jennings rejects the idea of judicial supremacy and instead maintains that constitutional principles emerge from political practice, democratic legitimacy, and parliamentary authority. More recent scholars, including Trevor Allan, Jeffrey Jowell, Paul Craig, and Mark Elliott, have expanded this debate by questioning whether the rule of law possesses substantive constitutional force capable of limiting Parliament itself.

This essay argues that the rule of law occupies a constitutional position that is stronger than Jennings acknowledged but weaker than the most expansive theories proposed by Allan. While the courts increasingly recognise the rule of law as a fundamental constitutional principle, the orthodox doctrine of parliamentary sovereignty remains formally intact. The modern constitution therefore reflects an evolving constitutional partnership between Parliament and the judiciary rather than judicial supremacy.

The Meaning of the Rule of Law

Before assessing its constitutional status, it is necessary to identify what is meant by the rule of law. The concept has never enjoyed a universally accepted definition.

The traditional account originates with A V Dicey, who described three central principles. First, no person should be punished except according to law administered through ordinary courts. Secondly, everyone is subject equally to the ordinary law regardless of status. Thirdly, constitutional rights arise from ordinary judicial

decisions rather than from a written constitutional document. Dicey's theory primarily sought to prevent arbitrary executive power rather than impose legal limits upon Parliament itself.

Modern scholarship distinguishes between formal and substantive conceptions of the rule of law. Formal theories emphasise legality, certainty, accessibility, and prospective legislation. Governments may enact harsh laws provided they do so through proper legal procedures. Substantive theories extend beyond procedural legality by incorporating fundamental rights, democracy, equality, and justice into the concept itself.

Paul Craig argues that these competing approaches demonstrate that the rule of law cannot simply be treated as a technical legal doctrine because every definition reflects deeper constitutional values. Consequently, disagreement over the constitutional status of the rule of law is also disagreement over the nature of the British constitution.

Wade's Constitutional Theory

Sir William Wade presents perhaps the most influential orthodox explanation of parliamentary sovereignty and the rule of law. According to Wade, Parliament's legislative supremacy cannot itself be created by statute because every statute already assumes Parliament possesses legislative authority. Instead, parliamentary sovereignty rests upon a judicially recognised constitutional rule accepted after historical constitutional developments such as the Glorious Revolution.

Wade famously described parliamentary sovereignty as the "ultimate political fact" recognised by the courts. Since judges recognise Parliament's authority through common law, the constitutional order ultimately depends upon judicial acceptance rather than statutory command.

This argument appears paradoxical. If judges recognise Parliament's authority, might judges also withdraw that recognition?

Wade rejected this conclusion. Although sovereignty depends upon judicial recognition, judges possess no ordinary legal authority to abolish parliamentary sovereignty because doing so would itself constitute a constitutional revolution rather than lawful legal development.

Nevertheless, Wade's theory indirectly elevates the constitutional importance of the judiciary. Since the courts determine the existence of constitutional fundamentals, principles such as the rule of law acquire constitutional significance beyond ordinary legislation.

This approach has influenced judicial reasoning in several important cases. In **R (Jackson) v Attorney General**, several members of the House of Lords questioned

whether parliamentary sovereignty remained entirely absolute. Lord Steyn stated that parliamentary sovereignty was no longer absolute, while Baroness Hale suggested that courts might refuse to recognise legislation undermining fundamental constitutional principles. Lord Hope went further by observing that the rule of law enforced by the courts ultimately controls the constitution.

Although these comments were strictly obiter, they reflect the increasing judicial willingness to characterise the rule of law as an independent constitutional principle.

Jennings' Alternative Constitutional Vision

Sir Ivor Jennings strongly criticised Wade's constitutional analysis. Jennings rejected the suggestion that constitutional authority ultimately depends upon judicial recognition. Instead, he argued that parliamentary sovereignty arises through constitutional practice, democratic legitimacy, and political acceptance.

For Jennings, constitutional law develops through conventions, institutions, and historical evolution rather than judicial declarations. Parliament remains legally supreme because the constitutional system has consistently recognised its authority, not because judges choose to recognise it.

Jennings therefore rejected any implication that judges possess ultimate constitutional authority. Courts interpret legislation but do not create Parliament's legislative competence. Their authority derives from Parliament rather than the reverse.

Under Jennings' approach, the rule of law undoubtedly remains an important constitutional principle. However, its authority depends upon Parliament's continued commitment to constitutional government rather than judicial enforcement against Parliament itself.

This account arguably better reflects the traditional constitutional settlement. Parliament enacted the Human Rights Act 1998, the Constitutional Reform Act 2005, and the devolution statutes because elected legislators chose to do so. Parliament likewise retains legal authority to amend or repeal those statutes.

Jennings therefore preserves democratic legitimacy by locating constitutional authority primarily within representative institutions rather than unelected judges.

Judicial Development of the Rule of Law

Modern judicial decisions demonstrate that the constitutional position of the rule of law has evolved beyond both Dicey's original theory and Jennings' constitutional orthodoxy.

In **R v Secretary of State for the Home Department, ex p Pierson**, Lord Steyn described the rule of law as one of the fundamental principles upon which the constitution rests. Courts should therefore presume that Parliament does not intend to legislate contrary to fundamental rights unless expressed in unmistakably clear language.

This approach developed further through the principle of legality established in **R v Secretary of State for the Home Department, ex p Simms**. Lord Hoffmann held that Parliament must use explicit language if it intends to override fundamental constitutional rights. General statutory wording will not suffice.

Importantly, this doctrine does not invalidate legislation. Instead, it imposes a demanding interpretative standard requiring Parliament to confront constitutional consequences openly.

The Supreme Court reinforced the constitutional significance of the rule of law in **R (UNISON) v Lord Chancellor**. The Court invalidated employment tribunal fees because they effectively prevented access to justice. Lord Reed emphasised that access to courts constitutes an essential component of the rule of law and therefore cannot be undermined without clear legal justification.

Perhaps the clearest judicial affirmation occurred during **R (Miller) v Prime Minister**, where the Supreme Court declared the prorogation of Parliament unlawful. The Court reasoned that executive action frustrating parliamentary accountability violated fundamental constitutional principles rooted in parliamentary sovereignty and the rule of law.

These decisions demonstrate that the rule of law increasingly functions as an operative constitutional principle rather than merely a political aspiration.

Academic Disagreement Beyond Wade and Jennings

Modern constitutional scholarship extends the disagreement between Wade and Jennings.

Trevor Allan argues that parliamentary sovereignty itself should be understood through constitutional principles enforced by the courts. According to Allan, the rule of law provides the moral foundation for legislative authority. Parliament enjoys constitutional legitimacy only because it legislates consistently with fundamental constitutional values. If Parliament enacted legislation destroying democracy or abolishing judicial independence, courts could legitimately refuse to enforce such legislation.

Allan therefore transforms the rule of law into the ultimate constitutional principle.

By contrast, Mark Elliott argues that while the rule of law unquestionably possesses constitutional significance, courts should avoid claiming authority to invalidate Acts of

Parliament. Judicial legitimacy depends upon respecting Parliament's democratic mandate while ensuring legality within constitutional limits.

Jeffrey Jowell similarly recognises the rule of law as a constitutional principle requiring accountability, fairness, and legality but stops short of endorsing unlimited judicial supremacy.

Paul Craig adopts an intermediate position. He accepts that substantive constitutional values increasingly influence judicial reasoning but cautions against assuming that courts possess unrestricted constitutional authority absent clear constitutional reform.

These differing perspectives illustrate that academic disagreement concerns not the importance of the rule of law itself but rather who ultimately defines and enforces it.

Critical Evaluation

Neither Wade nor Jennings entirely captures the contemporary constitutional position.

Jennings underestimates the constitutional transformation brought about by judicial review, human rights jurisprudence, constitutional statutes, and Supreme Court jurisprudence. Courts now openly invoke constitutional principles when reviewing executive action and interpreting legislation.

However, Wade's theory also faces significant limitations. Although judges recognise constitutional fundamentals, no UK court has yet invalidated an Act of Parliament solely because it violated the rule of law. Judicial dicta questioning parliamentary sovereignty remain speculative rather than authoritative constitutional doctrine.

Instead, the modern constitution reflects constitutional dialogue. Parliament remains legally sovereign, but courts increasingly require Parliament to legislate explicitly when departing from constitutional fundamentals. Judicial interpretation therefore protects constitutional values without directly challenging legislative supremacy.

This balanced constitutional relationship is visible through constitutional statutes, the principle of legality, declarations of incompatibility under the Human Rights Act, and judicial review of executive action. Rather than replacing parliamentary sovereignty, the rule of law increasingly shapes how sovereignty is exercised.

The constitutional significance of the rule of law therefore lies less in judicial supremacy than in constitutional accountability.

Conclusion

The constitutional status of the rule of law remains one of the most contested questions in British public law. Wade's theory highlights the judiciary's foundational constitutional role, whereas Jennings insists upon Parliament's democratic supremacy and constitutional continuity. Modern judicial decisions suggest that neither theory fully explains contemporary constitutional practice.

The rule of law has evolved into a fundamental constitutional principle guiding statutory interpretation, judicial review, executive accountability, and access to justice. Nevertheless, courts have stopped short of asserting authority to invalidate Acts of Parliament. Parliamentary sovereignty therefore continues to exist alongside an increasingly robust constitutional commitment to legality.

Ultimately, the modern UK constitution should not be understood as choosing between Parliament and the courts. Rather, constitutional legitimacy depends upon an evolving balance between democratic law-making and judicial protection of the rule of law. This continuing dialogue explains both the enduring influence of Wade and Jennings and the persistent academic disagreement surrounding one of the constitution's most fundamental principles.

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