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CONSTITUTIONAL AND ADMINISTRATIVE LAW

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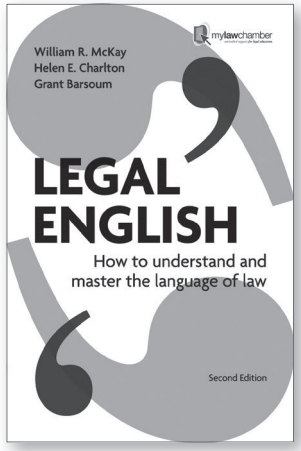

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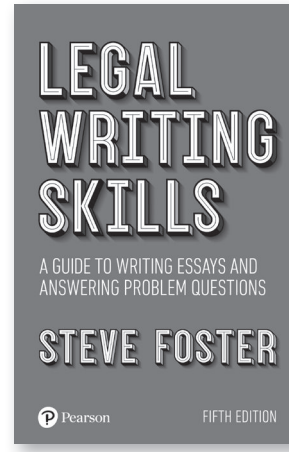

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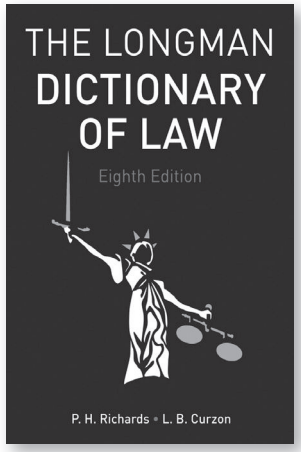

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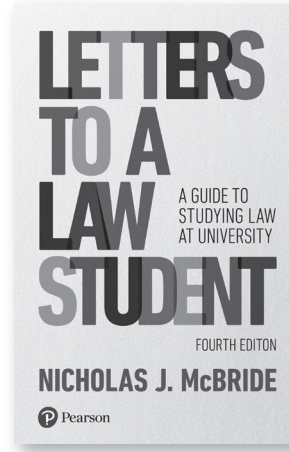

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Loveland points out that there is little,[6] if any, academic support for the suggestion that there can be entrenchment of any substantive law. He argues that the position in respect of legislation affecting the parliamentary process can be distinguished and considerable support can be found for the 'manner and form' arguments here, with the work of Jennings being foremost (Loveland, 2012, p. 35).[7] Jennings argues that while Dicey was correct to state that there are no limitations on the subject matter that can be addressed by legislation, the doctrine of implied repeal is open to challenge. He acknowledges that the courts will defer to Parliament, but states that as the rule of recognition is a common-law concept and that statute is legally superior, a statute must be able to change the rule of recognition and protect some acts from implied repeal.[8] There does seem to be great logical force to his suggestion that 'its power to change the law includes the power to change the law affecting itself' (Jennings, 1959a, p. 149).

Adherents to the 'manner and form' argument, then, maintain that Parliament is able to entrench statutes that alter its own composition or the law-making process. While we may point to examples such as the Reform Act of 1832, or the Acts of Union, these do not provide irrefutable support because, arguably, while there may be strong political constraints to consider, there is no legal reason[9] why the franchise could not be withdrawn or the union dissolved. Jennings pointed to three cases in support of his position: ***Attorney-General for New South Wales* v *Trethowan*** (1931) 44 CLR 394, ***Harris* v *Donges (Minister of the Interior)*** (1952) 1 TLR 1245 and ***Bribery Commissioner* v *Ranasinghe*** [1965] AC 172. Each of these cases concerned countries that had previously been British colonies.[10] In each instance, a parliamentary attempt to alter an aspect of the constitution was overruled by the court. The problem with taking these as evidence that constitutional statutes enjoy special protection is that the constitution of each territory was created by the UK Parliament, which continued to exist as a source of 'higher' law.

Wade (1955) argues that the 'manner and form' argument was wrong and that the traditional position was more logical. He maintains that the supremacy of the legislature is self-evident: the rules setting out what constitutes an Act of Parliament are 'a political fact' that cannot be altered by any legal authority – whether by Parliament itself or the courts. Wade does accept that change could be envisaged, but that

[6] Students are sometimes cautious about referencing the views of numerous academics in their work because they feel that it then looks as if they are not able to think for themselves. When answering this kind of discursive question, this perception is completely wrong. Marks will be awarded to students who demonstrate familiarity with a number of academics and who are able to analyse a variety of arguments.

[7] You must refer to Jennings in your answer, as the 'manner and form' argument is drawn mainly from his work.

[8] Again, these are complicated arguments, so make sure that, before you enter the exam room, you have considered how you are going to articulate them clearly.

[9] It is important to note the distinction between political and legal possibilities, as this is one of the strongest counter-arguments to the 'manner and form' argument.

[10] The facts of these cases are rather complicated, but there is no need to give any details, as long as you show that you know why ex-colonies are in a peculiar position.

this would require a revolution and could not be achieved by Parliament. In later years, faced with the reality of the European Communities Act 1972 and in the wake of the ***Factortame*** legislation, Wade (1996) suggests that there has been a 'technical revolution', which implies acceptance of the 'manner and form' argument.[11]

The most potent support for the 'manner and form' argument, arguably, is found in the judgment of ***Jackson* v *Attorney General*** [2005] UKHL 56.[12] The House of Lords considered the argument that the Hunting Act 2004 was invalid, as it was made using the procedure set out in the Parliament Act 1949. The contention was that the 1949 Act was itself invalid, as it was an ultra vires use of the Parliament Act 1911. It was argued that the 1911 Act had granted the Commons the power to make only delegated legislation and certainly did not authorise the use of the Act to extend its legislative competence. The 1911 legislation did not alter the fact that an Act of Parliament requires the consent of the Commons, the Lords and the Queen, and so the 1949 Act could not be lawful. The House of Lords rejected this claim and accepted that the 1911 Act had created a new procedure for making an Act of Parliament.

The judgments in ***Jackson*** demonstrate a degree of judicial acceptance of the 'manner and form' argument, although it was directly referenced by only Lords Steyn and Hope. Parliament may have always been constrained by political reality, but the case seems to demonstrate that Jennings' analysis was correct and the constitution has evolved to include some legal limitations on sovereignty.[13]

[11] Always remember the question that you are being asked and ensure that you show how the points you make help reach a conclusion. The main reason for discussing Wade is to show how academic theory appears to have shifted towards acceptance of the argument.

[12] As the question quotes from this case, you cannot avoid discussing the judgment. It was very complicated, so, again, make sure that you are able to set out the key issue succinctly.

[13] Do not forget to return to the question and to provide a direct answer in your conclusion.

✓ Make your answer stand out

- By including reference to a wider range of academic theorists. This is a topic that has engendered an enormous amount of debate, so you should read as widely as possible. Additional sources could include: Bradley, A. (2011) The sovereignty of parliament – form or substance? in J. Jowell and D. Oliver (eds), *The Changing Constitution* (7th edn). Oxford: Oxford University Press; and Elliot, M. (2007) Bicameralism, sovereignty and the unwritten constitution. *Int'l J Const,* 5: 370.
- Consider the judgments in *Jackson* in more detail. The Lords were not in complete agreement in this case, and it would be useful to explore the different approaches adopted in detail.

! Don't be tempted to . . .

- Spend time discussing each of Dicey's three propositions. Students who revise parliamentary supremacy often do so, assuming that any question will require consideration of the orthodox view, and then attempt an answer following that structure.
- Attempt this question without knowing the arguments set out by a reasonable number of academic theorists. Failure to engage with the academic debate will make it impossible for you to obtain high marks.

Question 4

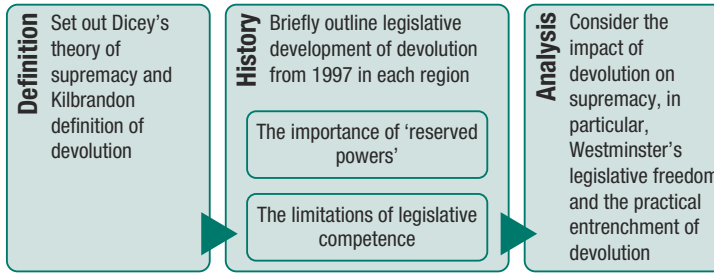
'Now that devolution has allowed the genie of self-government out of the bottle, it would be nigh on politically impossible to put it back in.' (Elliot, M. and Thomas, R. (2014) *Public Law* (2nd edn). Oxford: Oxford University Press, p. 290)

Discuss the impact of devolution on parliamentary supremacy.

Answer plan

- Define 'devolution' and explain how the devolution settlements attempted to preserve parliamentary supremacy.
- Describe the growth in devolved powers to the regions, and the independence referendum.
- Consider the status of the Sewel convention.
- Assess the potential impact of the 'Brexit' process.

Diagram plan



A printable version of this diagram plan is available from **www.pearsoned.co.uk/lawexpressqa**

Answer

[1] This definition, from the Kilbrandon report, is a good starting point for a discussion.

The Royal Commission on the Constitution defined devolution as 'the delegation of central government powers without the relinquishment of sovereignty'[1] (Cmnd 5460, London: HMSO, 1973). Despite the consideration given by the Commission to the possible models of devolution, the process did not begin until 1997, as part of a programme of constitutional reform instigated by the new Labour administration. The nature and extent of devolution in the UK has been described as 'asymmetrical' (Elliot, M. and Thomas, R. (2014) *Public Law* (2nd en). Oxford: OUP, p. 274) and has occurred incrementally. The 2014 referendum on Scottish independence raised the real possibility of the dissolution of the union. In the wake of the 2016 referendum concerning the UK's membership of the European Union, questions remain regarding the future relationship between Westminster and the devolved powers. Arguably, the delegation of power has led to an irreversible relinquishment of sovereignty. Dicey set out three aspects to Parliamentary supremacy: first, that Parliament is free to legislate on any subject; secondly, that no Parliament can be bound by a predecessor or bind a successor; and, lastly, that no person or body can challenge the validity of an Act of Parliament. The devolution settlements raise questions about the continued applicability of this definition.[2]

[2] You need to be able to explain what is meant by 'parliamentary supremacy' in order to be able to assess the extent to which devolution has had an impact. Take care to do this briefly, however, as the question is not asking you to engage in a lengthy discussion of the doctrine.

Devolution of government power to Scotland, Wales and Northern Ireland followed referenda in each region. Each region did vote in favour of some degree of devolution, but in Wales only a small majority voted for a fairly limited scheme. This difference was reflected in the types of settlements that followed. The Scotland Act 1998 established the Scottish Parliament, and conferred on it the power to make primary legislation in areas encompassed by the Act. Westminster explicitly reserved certain policy areas, including matters of defence, and created exceptions to legal competence (for example, the Scottish Parliament may not legislate in contravention of the European Convention on Human Rights). The Northern Ireland Assembly was given a similar type of legislative competence. The Welsh Assembly was initially given far more limited powers, and legislative competence stretched only to delegated legislation.[3]

[3] You should note the difference between the settlements made to each region, but again, keep this brief to avoid your answer becoming overly descriptive.

In each case, the legislation expressly preserved the supremacy of the Westminster Parliament. Devolution has occurred only through

an Act of Parliament, and could be reversed in the same way.[4] The Northern Ireland Assembly has been suspended on four separate occasions, including a five-year period of direct rule from Westminster between 2002 and 2007. This should be placed within the context of the historical conflict in Northern Ireland, which created particular tensions in respect of power-sharing between the Unionist and Republican parties. Devolution illustrates the difference between legal possibility and political reality: it is difficult to imagine any government seeking to abolish the regional assemblies and return all the legislative power to Westminster.[5] In fact, since 1997, Parliament has ceded additional power to the devolved administrations. In 2006, the Government of Wales Act granted the Welsh Assembly additional powers and included the possibility of a future extension to include the power to make primary legislation if voted for in a referendum. In 2011, a referendum was held and a majority voted in favour of the extension of power. In 2013, the First Minister for Wales stated in an interview that it was no longer acceptable to rely upon understanding and conventions, and suggested that it was time to enact legislation to confirm that Westminster will not take back powers that have been devolved (*The Independent,* 26/12/13). The Wales Act 2017 extended the legislative competencies of the Assembly and recognised the permanence of the institutions.[6]

The Scotland Act 2012 gave further powers to the Holyrood Parliament, including an increased ability to set taxes. In 2014, the referendum on independence was held. Although a majority rejected independence, this was achieved only with a promise of increased devolution being made by all three main political parties. The resulting legislation, the Scotland Act 2016, acknowledged the permanence of the Scottish institutions and formally recorded the Sewel convention in statute. Any doubt as to the constitutional significance of this change, however, was decisively removed by the decision in ***R (Miller)* v *Secretary of State for Exiting the European Union*** [2017] UKSC 5. Although there was dissent on the question of the scope of ministerial power to trigger the withdrawal process, all 11 judges agreed that the wording of the amended Scotland Act does nothing to alter the legal position that the convention remains legally unenforceable.[7] The acknowledgement of the understanding that Westminster will not 'normally' legislate on behalf of the regions is, then, nothing more than a political gesture, and a rather empty one at that.

[4] Make sure that you do reference the statute here, as this shows that you understand how Parliament has sought to protect sovereignty.

[5] This is a key point to highlight, as the suggestion that Parliament retains only nominal supremacy over the devolution process is central to the argument.

[6] Try not to give too much detail, but the proliferation of extensions to the initial devolution settlements needs to be highlighted.

[7] This is a key point, and you must reference the *Miller* litigation here. The decision on the status of the Sewel convention provides some evidence to support the view that Parliament can – and will – exert legal control.