

The rule of law

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Ian Yule explains how the rule of law works

Exam focus



This article is relevant to AQA A-level 3.1 (nature of law) and OCR A-level Unit 1 (legal system).



The rule of law is considered to be one of the fundamental doctrines of the UK constitution and recognised in section 1 of the **Constitutional Reform Act 2005**. The nineteenth-century political theorist A. V. Dicey identified three core elements of the concept:

- No person can be subject to punishment without breaking a law.
- The law should govern everyone irrespective of status, wealth or power.
- The rights of the individual are not secured by a written constitution but by the decisions of judges who created the common law.

This means that governments cannot exercise any power unless that power has been authorised by some specific law — one way of putting this is that we should have ‘government by law, not by men’.

How it works

Following on from the general principles outlined above, there are a number of specific rules which illustrate how the rule of law actually works in the UK:

Prospective law

All laws should be prospective, i.e. take effect after the passage of an Act of Parliament. There is a strong presumption against retrospective legislation. An example of a retrospective law is



the **War Crimes Act 1991**, which enabled persons who had carried out war crimes during the Second World War to be tried in the UK, and, if convicted, to receive heavy sentences of imprisonment. This Act was much criticised, but in the event, only one person was actually tried and convicted under it.

A common law example is the case of *R v R* (1991), where the defendant was convicted of marital rape, which was not recognised as a crime at the time when he raped his wife.

Clear and open

Laws must be clear and open. Parliamentary legislation is usually preceded by white and/or

green papers that publicise the reasons for this legislation and allow for substantial consultation by those bodies and individuals most likely to be affected by the new law. There is also the process of draft legislation being considered.

There remains the issue of delegated legislation (see A-LEVEL LAW REVIEW, Vol. 13, No. 3, pp. 24–26), which forms the majority of new legal rules created each year but does not receive the same amount of parliamentary scrutiny or publicity.

Rules of procedure

The making of new laws should be subject to strict rules of procedure, such as the parliamentary stages involving both Houses of Parliament and the monarch. Again, much delegated law-making could be challenged under this heading, as most such laws are subject only to the negative resolution procedure, which means they are subject to little or no scrutiny.

Equality before the law

The principle of equality before the law can be seen in the case of *R v Chaytor and others* (2010), where the UK Supreme Court ruled that three MPs accused of false accounting in relation to parliamentary expenses were subject to the ordinary criminal law. Their argument that their conduct was a matter governed by parliamentary privilege (immunity from the ordinary law) and should be dealt with by Parliament's internal procedures was rejected by the court.

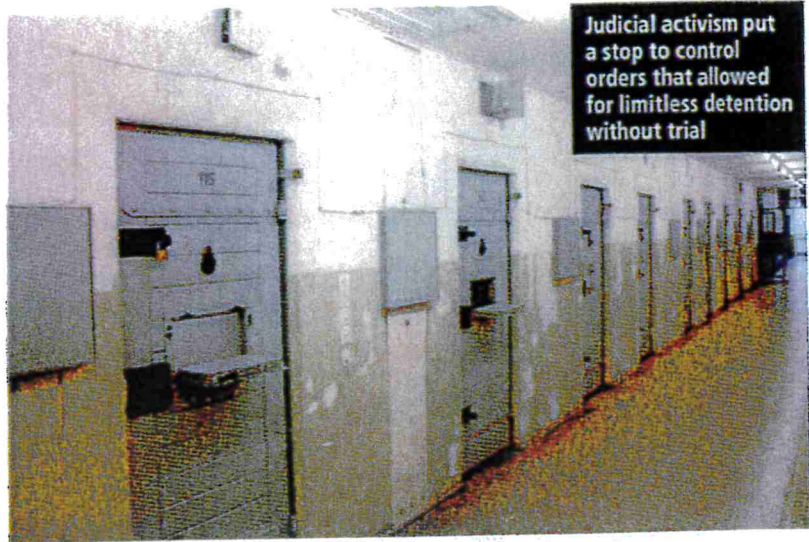
Another example is provided by the prosecution of Princess Anne in 2002, who was fined and ordered to pay compensation after one of her dogs attacked two children.

Judicial activism

As we live in a rights-based culture, it is not surprising that judicial activism has significantly increased in the UK. Through the means of judicial review, judges are more willing to examine actions and decisions of ministers and other public bodies. In *R v Home Secretary ex parte Fire Brigades Union* (1995), the home secretary made changes to the Criminal Injuries Compensation Scheme which were held to be *ultra vires* (beyond the powers provided in the Criminal Justice Act 1988).

A and others (2004)

Another case of judicial activism can be seen in *A and others v Secretary of State for the Home Dept* (2004). This case concerned foreign nationals resident in the UK, suspected of involvement in terrorism and detained under the Anti-terrorism, Crime and Security Act 2001. It also concerned the Human Rights Act 1998 (Designated Derogation) Order 2001 (the 'Derogation Order'), which enabled the government to side-step the



provisions of the European Convention on Human Rights, especially Article 5(1):

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases...

These legislative measures had been passed in the aftermath of terrorist attacks on the World Trade Center and Pentagon in the USA on 11 September 2001. Under the 2001 Act, the government had the power to detain suspected terrorists indefinitely without the need to put them on trial or to inform them of the allegations made against them.

The Court of Appeal had affirmed the lawfulness of the government's actions under the 2001 Act. However, the House of Lords (now the Supreme Court) unanimously allowed the appeals, holding that the government could not apply the derogation rule in this case, as there was no immediate national emergency. Also, the orders allowing for the limitless detention without trial of suspected terrorists were far too wide a power.

Lord Nicholls of Birkenhead stated in his judgment:

Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified.

A more robust defence of the rule of law and its application can hardly be envisaged.

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