

# Chapter 2: The Creation of Law

Outline	2.1	Introduction	2.4	The Human Rights Act 1998
	2.2	The elements of the UK constitution	2.5	Delegated legislation
	2.3	Acts of Parliament	2.6	Summary



## Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the CILEx syllabus:

- 2 Understand what the organs of government are
- 3 Understand how an Act of Parliament is created
- 4 Understand the meaning of delegated legislation
- 8 Understand the relevance of the **European Convention on Human Rights**

## 2.1 Introduction

In this chapter we will consider the three key elements of the UK constitution and the political theory known as “the separation of powers”. These three elements are sometimes referred to as the “organs of government”.

In addition, we will also consider how some of the most important areas of law, Acts of Parliament, and statutory instruments (regulations, rules and orders) are created.

## 2.2 The elements of the UK constitution

In many countries, including the United States and the Irish Republic, there is a single written document which attempts to set out the key institutions of the state and the relationships between them. These documents matter not only to lawyers and politicians but also to the general population who see them as fundamental to their nation’s sense of identity.

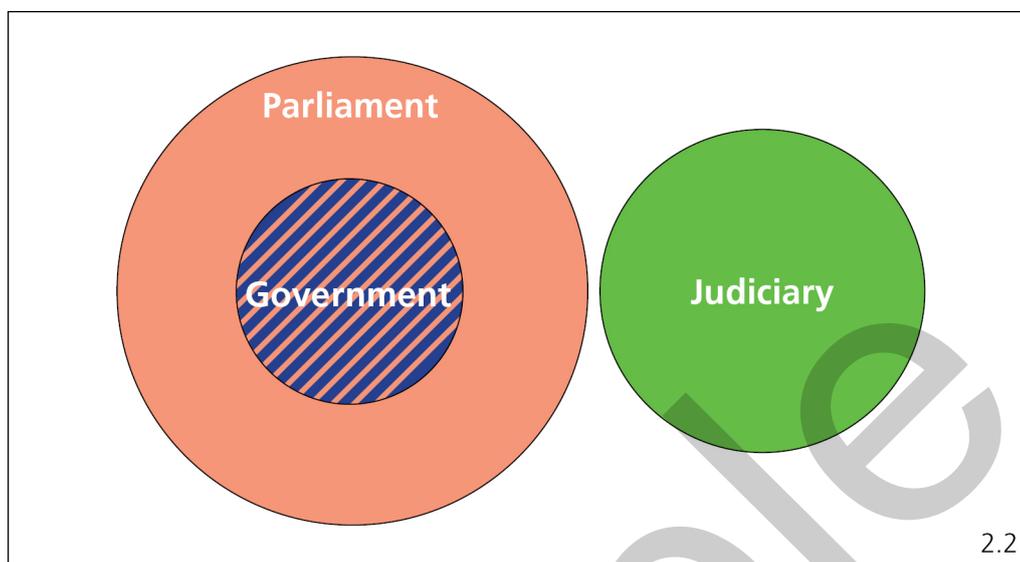
The United Kingdom does not have any single document labelled “The Constitution”, although the institutions and rules governing their relationships are set out in a number of historical and more recent documents.

The political theory known as the “separation of powers” was very influential on the United States constitution amongst others. It identifies three basic elements to a constitution:

- the legislature (Parliament);
- the executive (the government);
- the judiciary (judges).

According to this theory there is a threat to liberty if the three types of function, legislative, executive and judicial, are not carried out by separate institutions.

Students should note that the UK constitution does **not** maintain this strict separation. In particular, the legislature and the executive overlap, although the judicial function is separated out.



### 2.2.1 The legislature (Parliament)

The key function of the legislature is to make laws. The UK Parliament in Westminster, London passes laws which affect all four countries in the UK: England, Wales, Scotland and Northern Ireland. The Scottish Parliament, National Assembly for Wales and the Northern Ireland Assembly have the power to pass their own laws where the Westminster Parliament has **devolved** limited areas of policy.

The UK Parliament consists of two "Houses" of Parliament: the House of Commons and the House of Lords. In addition, the head of state, the Queen, plays an important formal role in the institution of Parliament.

#### (1) The House of Commons

The territory of the United Kingdom has been divided into **650** separate areas of land reflecting a roughly even split of the population. Each area of land is known as a "constituency". At a General Election each constituency elects a Member of Parliament (MP) using a voting system called "first past the post". Essentially, whichever candidate has the highest number of votes in each constituency becomes its MP. Most MPs belong to the major political parties, the Conservatives, Labour Party and the Scottish Nationalists.

### When will the next General Elections take place?

Under the **Fixed-term Parliaments Act 2011** a General Election must take place every five years. The next General Election was due on May 2020.

**s2**, however, provides that a General Election may take place earlier provided two-thirds or more of MPs (434+ out of 650) vote in favour of an earlier date.

**NB** No vote is required by the House of Lords.

On 19 April 2017 the House of Commons voted in favour of a motion under **s2** and a General Election was held on **8 June 2017**.

The next General Election will take place in June 2022 (unless there is another vote under **s2**).

On 1 October 2018 the map of parliamentary constituencies will be re-drawn (see **s6 Electoral Registration and Administration Act 2013**) so that the 2022 General Election will take place with only 600 constituencies electing 600 MPs.

### (2) The House of Lords

The House of Lords has approximately 787 members who are commonly referred to as "peers". The majority are appointed for life and are known as "life peers". They are appointed formally by the Queen on the recommendation of the Prime Minister or the other party leaders. Some are appointed by the independent House of Lords Appointments Commission. There are also 92 "hereditary peers" who have inherited their aristocratic titles such as "Earl" or "Baron" from their fathers (only one of the hereditary peers is a woman). In addition, 26 senior bishops of the Church of England are also members.

The House of Lords is an undemocratic institution whose membership will carry on increasing until it and the House of Commons can agree on reforms.

### (3) The Monarch

Queen Elizabeth II is the head of state of the United Kingdom and became queen following the death of her father, King George VI. Her eldest son, Prince Charles, will become king on her death under the hereditary principle.

Her role is now largely symbolic and ceremonial. She will formally open Parliament and give the Royal Assent to all Acts of Parliament.

### 2.2.1.1 The doctrine of parliamentary sovereignty

This is a fundamental principle of the UK constitution. It states that Parliament has absolute power and that no Parliament may make any law which limits the law-making powers of **future** Parliaments. Some politicians and legal writers have argued in the past that the principle has been breached by the **Human**

**Rights Act 1998** and the effects of membership of the European Union (though the **European Union (Notification of Withdrawal) Act 2017** triggering UK withdrawal from the European Union (see **4.5**) has undermined this argument).



## Self-assessment Questions

- (1) Name two categories of members of the House of Lords.

### 2.2.2 The executive (government)

The role of the executive, or government, is to govern the country.

The Queen, as head of state, will ask the leader of the political party which has won the largest number of seats (constituencies) in the House of Commons at a General Election to form a government. If the largest political party does not have an absolute majority of seats (more than half i.e. at least **326**), the leader of that party may seek to form a coalition government with another political party. In 2010 the Conservative Party was the largest party in the House of Commons following the General Election but did not have enough seats for a majority. Its leader, David Cameron, formed a coalition government with the Liberal Democrats. The Queen then appointed David Cameron as Prime Minister. In May 2015 the Conservatives formed a government on their own after winning 331 seats, an absolute majority.

Following the General Election on 8 June 2017, the Conservative Party remained the largest party in the House of Commons with 318 seats but did not have enough seats for a majority. The Democratic Unionist Party, based in Northern Ireland, has agreed to support the Conservative government on a "confidence and supply" basis. This means supporting the government in votes on the Budget and other major legislation, particularly in relation to Brexit.

The Prime Minister, currently Theresa May, will then select her government ministers from members of her own party who are MPs in the House of Commons or peers in the House of Lords.

The most senior ministers are known as Secretaries of State and include the Chancellor of the Exchequer who is responsible for the nation's finances. They are assisted by Ministers of State, Parliamentary Secretaries and Whips (government business managers). The Prime Minister is assisted in leading the government by a committee of about 22 senior ministers who are known as the **Cabinet**.

Each minister is allocated to a different department with, for example, the Secretary of State for Defence having responsibility for the Ministry of Defence. The ministers are assisted by civil servants who are required to be politically neutral. Ministers are able to make many decisions on their own about the activities and spending priorities of their departments, taking advice from their civil servants. In some cases they are able to make law in the form of **delegated legislation** (rules and regulations).

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