

The rule of law in UK public law textbooks: from critique to acceptance?

Crack open almost any UK public law textbook nowadays and readers are likely to find an expansive chapter on the rule of law. This makes sense, given its historical origins and Dicey's recognition of the concept as one of the two main constitutional principles in his celebrated text, *The Law of the Constitution*. However for virtually all of the twentieth century, the rule of law did not feature heavily in most public law textbooks. Often texts gave it marginal coverage, grouping it with other constitutional principles such as the separation of powers or constitutional conventions. Other texts openly and adamantly disparaged it. This piece seeks to shed light on this fact, incorporating a brief survey of public law textbooks in the twentieth century, including a few contemporary texts that traversed the turn of the century.

My survey focused exclusively on public law (i.e., constitutional and administrative law) textbooks. Thus, prominent monographs or edited collections on the UK constitution are not included (neither are "introductions" to constitutional law). Also public law casebooks, which are designed to introduce a wide range of material to the reader (e.g., journal articles, judicial speeches, etc.), are generally not included in this analysis.¹ Due to time constraints, space limitations, and access to resources, the survey below is far from comprehensive, so apologies from the outset if certain books or particular editions are not covered. I have, however, attempted to use examples from a variety of texts, not merely what could be considered the "leading texts" of every generation or particular decade. In doing this I have attempted to incorporate a variety of publishers (university and commercial) and authors (Scotland and regional England) within the UK. Finally, it should be noted that this is certainly not some type of "naming and shaming" exercise: it is a historical inquest in an attempt to understand the evolution of a major UK constitutional principle.

Although the "old guard" may be quite familiar with much of what is presented below, younger academics, students and others may be surprised by the curt and dismissive coverage rule of law has received not only historically, but also in some relatively modern public law textbooks. Front-end, expansive chapters on the topic—now very much the norm—were relatively uncommon even a couple decades ago.

Disillusioned with Dicey: 20th century constitutional and administrative law texts

A highly influential and long-running textbook is E.C.S. Wade and G. Godfrey Phillips' *Constitutional Law*. I was able to go back to the 2nd edition (1935).² The rule of law is covered in Chapter 5: "The Supremacy of Law, or the Rule of Law".³ Most of the discussion here focuses on Dicey's conception of the rule of law, and the authors provide a critical tone throughout. Early on they state, "Nowadays it is idle to pretend that we have not also a Public Law which is concerned less with protecting liberty than restricting it in the interests of various public social services, and what is unlawful for the private citizen is frequently lawful for a public body or its officers".⁴ Wade and

¹ One book examined below transformed from a traditional textbook into a casebook.

² E.C.S. Wade and G. Godfrey Phillips, *Constitutional Law* (2nd ed)(London: Longmans, 1935).

³ Wade and Phillips, *Constitutional Law* (1935), pp. 92-102.

⁴ Wade and Phillips, *Constitutional Law* (1935), p. 93.

Phillips conclude by noting that, “So far as these immunities enable a person in authority to be a law unto himself, the rule of law as seen by Dicey may be negated, except in the sense that every act must have the authority of law behind it; in such a sense the rule of law may be said to be a feature of every Constitution and in no way peculiar to this country”.⁵

Thirty years later, the 7th edition (1965) slightly expands coverage of the rule of law.⁶ Although still primarily focused around Dicey, sections on the “Modern Conception of the Rule of Law” and “Universal Application” allow the authors to examine the principle in both a UK and wider context.⁷ In terms of the latter, they note that the concept is “now considered as a basic idea which can serve to unite lawyers of many differing systems, all of which aim at protecting the individual from arbitrary government. In this way the rule has come to be identified with the concept of the rights of man”.⁸ Concluding on how it operates in the British context, Wade and Bradley note that, “Since Parliament is supreme, there is no legal sanction to prevent the enactment of a statute which violates the principle of the rule of law. The ultimate safeguard then is to be found in the acceptance of the principle as a guide to conduct by any political party which is in a position to influence the course of legislation”.⁹

The 9th edition was solely taken over by A.W. Bradley (the 8th edition was Wade’s last as author).¹⁰ Here the depth of discussion on the principle is slightly curtailed from the 7th edition.¹¹ After examining the historical origins of the rule of law and Dicey’s conception (including leading criticisms of this conception), the book goes on to make three assertions about the principle: (1) law and order is better than anarchy; (2) government must operate through law; and (3) in order to be meaningful, the rule of law must go beyond the principle of legality.¹² And yet, Bradley eventually notes that, “It is not possible to formulate a simple and clearcut statement of the rule of law as a broad political doctrine”.¹³

Contemporary editions of this text have not changed radically. The most recent 16th edition authored by Bradley, Ewing & Knight (2015), spends about the same amount of time on the rule of law as earlier editions.¹⁴ Additionally, the three major assertions noted above regarding the practical relevance of the rule of law are still included. The text does ask some intriguing rhetorical questions as regards the principle’s significance, such as, “Is the rule of law ... too subjective and uncertain to be of any value? Would discussion of changes in the law be clearer if the ‘rule of law’ were excluded from the vocabulary of debate?”.¹⁵ Ultimately, however, the authors do see wide value in the concept, and conclude by stating that “no government should suppose that new areas of public action ... can be insulated from the scope of law and subjected only to administrative or political controls”.¹⁶

⁵ Wade and Phillips, *Constitutional Law* (1935), p 102.

⁶ E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law* (7th ed)(London: Longmans, 1965), pp. 60-76.

⁷ Wade and Bradley, *Constitutional Law* (1965).

⁸ Wade and Bradley, *Constitutional Law* (1965), pp. 72-73.

⁹ Wade and Bradley, *Constitutional Law* (1965), p. 75. A similar statement is also seen in the 16th edition, p. 84.

¹⁰ A.W. Bradley, *Constitutional Law* (9th ed)(London: Longman, 1979).

¹¹ Bradley, *Constitutional Law* (9th ed).

¹² Bradley, *Constitutional Law* (9th ed).

¹³ Wade and Phillips, *Constitutional Law* (9th ed), p. 95.

¹⁴ A.W. Bradley, K.D. Ewing and C.J.S. Knight, *Constitutional and Administrative Law* (16th ed)(London: Pearson, 2015), pp. 75-88.

¹⁵ Bradley, Ewing and Knight, *Constitutional and Administrative Law* (2015), p. 85.

¹⁶ Bradley, Ewing and Knight, *Constitutional and Administrative Law* (2015), p. 88.

Another prominent 20th century constitutional text was O. Hood Phillips' *Constitutional and Administrative Law*, of which I was able to get back to the 3rd edition (1962).¹⁷ Here rule of law is introduced at the end of Chapter 1 in a section on "The rule of law and fundamental rights".¹⁸ This section considers the American and French experience with fundamental rights and also analyses post-WWII efforts to "give material content" to the expression.¹⁹ A lengthier section on the concept in Chapter 2 analyses its historical origins and discusses Dicey's approach. In summarising the principle's use to lawyers, Hood Phillips writes that the rule of law could be useful in three ways: (1) it "influences legislators"; (2) it "provide[s] canons of interpretation which" ... can "give an indication of how the law will be applied and legislation interpreted"; and (3) it is "a rule of evidence: everyone is *prima facie* equal before the law".²⁰ Outside of these three factors, the most revealing line is that the "Rule of Law, therefore, precludes arbitrary action on the part of the Crown or members of the Government—although as a matter of fact the Government can generally secure the passing by Parliament of such laws as it wants".²¹

The 5th edition of Hood Phillips' textbook (1971) warms slightly to the rule of law.²² Introducing the concept, it acknowledges that, "The 'rule of law' is an ambiguous expression, and may mean different things for different writers".²³ But this edition ends the rule of law section with a remark that was not present in the 3rd edition, as Hood Phillips declares: "[t]he most valuable version of 'the rule of law' so far is that formulated by the International Commission of Jurists at Delhi in 1959".²⁴ Given the wide conception of the rule of law that the International Commission took (i.e., applying it not merely to the judiciary, but to all branches of government, and including the legal profession), that statement is certainly significant. The 7th edition of Hood Phillips' *Constitutional and Administrative Law* text (1987), supplemented by Paul Jackson, takes a more critical approach to the subject, noting: "The 'rule of law' is an ambiguous expression, and may mean different things for different writers. Only when it is clear in what sense the phrase is being used is there any value in asking whether the rule of law exists in a particular legal system".²⁵ This focus on the malleability of the concept, and especially in terms of how its use can justify a wide variety of means, can be seen in many twentieth century texts.

J.D.B. Mitchell's *Constitutional Law* (1964) was also consulted. Although it takes the principle seriously as a constitutional concept, the book largely provides a critical perspective on it.²⁶ Mitchell notes that "the real importance of the principle in constitutional law is to be found in its application to the regulation of activities of the state".²⁷ Touching on points made by other authors as regards the principle's uncritical acceptance, he chides that "altered conditions [within states] raise new problems of the application of legal controls. Such statements assume that the establishment of the rule

¹⁷ O.H. Phillips, *Constitutional and Administrative Law* (3rd ed)(London: Sweet & Maxwell, 1962).

¹⁸ Phillips, *Constitutional and Administrative Law* (1962), pp. 19-22.

¹⁹ Phillips, *Constitutional and Administrative Law* (1962), p. 21.

²⁰ Phillips, *Constitutional and Administrative Law* (1962), p. 41.

²¹ Phillips, *Constitutional and Administrative Law* (1962), p. 36.

²² O.H. Phillips, *Constitutional and Administrative Law* (5th ed)(London: Sweet & Maxwell, 1973).

²³ Phillips, *Constitutional and Administrative Law* (1973), p. 31.

²⁴ Phillips, *Constitutional and Administrative Law* (1973), p. 36. This conception is detailed on pp. 17-18.

²⁵ O.H. Phillips and P. Jackson, *Constitutional and Administrative Law* (7th ed)(London: Sweet & Maxwell, 1987), p. 33.

²⁶ J.D.B. Mitchell, *Constitutional Law* (Edinburgh: W. Green & Son, 1964).

²⁷ Mitchell, *Constitutional Law* (1964), p. 39. This same line is repeated in the 2nd edition (1968).

of law is advantageous. That belief underlies most assertions on the subject”.²⁸ He further notes that “Sir Ivor Jennings was inclined to dismiss the rule of law as an unruly horse, either being merely synonymous with law and order...or to be merely a phrase distinguishing democratic or constitutional government from dictatorship”.²⁹ Mitchell goes on to say that “the principle must be wider in its application than appears from Dicey’s formulation”, and it may “be nothing more than an alternative expression of the results of the application of other principles, such as that of the separation of powers”.³⁰ Bradley, Ewing & Knight’s text (2015), covered above, still groups the two principles in one chapter.³¹ In closing the section, Mitchell provides a somewhat damning conclusion, claiming that “any general rule purporting to govern all relationships of government bodies is likely to be either misleading or to be so hedged with qualifications that its usefulness is restricted”, and that the doctrine “can only be accepted as an indication that governmental bodies should be subject to law”.³²

Mitchell’s second edition just four years later expands on the subject,³³ but many of the same views are preserved. There are, however, slight alterations in presentation. He acknowledges early on that “the whole of government activity cannot be regulated by law and by law alone”, thus stressing the need for constitutional conventions.³⁴ In an explicit challenge to the courts, Mitchell declares that “within the confines of the United Kingdom, the role of the courts in establishing many of the fundamental rules in modern constitutional law can be greatly exaggerated”.³⁵ This statement is intriguing, especially given how contemporary authors cover the subject, as will be seen below. In a slight alteration to the closing of his first edition, Mitchell states that, “No solution can be found, at this stage, by the formulation of a general code of rules purporting to govern all relationships of governmental bodies. Such a code would be impossible to draw”.³⁶

From its inception, the wildly successful S.A. de Smith’s *Constitutional and Administrative Law* was deeply critical of the rule of law. The 2nd edition (1973), essentially provides the concept only one genuine paragraph of discussion in a section on “The rule of law and the separation of powers”, and that paragraph is undoubtedly harsh. Dicey’s ideas on the rule of law are said to amount to “Whiggish libertarianism” and “no longer warrant detailed analysis”.³⁷ It goes on to note, “Nor would it be justifiable to examine the general concept of the rule of law at length in this book. The concept is one of open texture: it lends itself to an extremely wide range of interpretations”.³⁸ de Smith further disparages it, remarking, “The concept has an interesting characteristic: everyone who tries to redefine it begins with the assumption that it is a good thing, like justice or courage. When Communist theoreticians extol the merits of ‘socialist legality’ they could simply substitute the term ‘rule of law’, though their conceptions of what it connoted would differ from those of liberal democratic ideologists”.³⁹ Converting to discussion on the separation of powers, the author

²⁸ Mitchell, *Constitutional Law* (1964), p. 40. Footnotes omitted. In 1968 edition, p. 52.

²⁹ Mitchell, *Constitutional Law* (1964), p. 42. In 1968 edition, p. 54.

³⁰ Mitchell, *Constitutional Law* (1964), p. 45. In 1968 edition, p. 57.

³¹ Bradley, Ewing and Knight, *Constitutional and Administrative Law* (2015).

³² Mitchell, *Constitutional Law* (1964), p. 48. In 1968 edition, p. 62.

³³ J.D.B. Mitchell, *Constitutional Law* (2nd ed.)(Edinburgh: W. Green & Son, 1968), pp. 50-62.

³⁴ Mitchell, *Constitutional Law* (1968), p. 51.

³⁵ Mitchell, *Constitutional Law* (1968), p. 54.

³⁶ Mitchell, *Constitutional Law* (1968), p. 62.

³⁷ S.A. de Smith, *Constitutional and Administrative Law* (2nd ed)(London: Penguin, 1973), p. 38.

³⁸ de Smith, *Constitutional and Administrative Law* (1973), p. 38.

³⁹ de Smith, *Constitutional and Administrative Law* (1973), p. 38.

grumbles, “whereas commentators are almost unanimous that the rule of law (whatever it may mean) is splendid, the virtues of the separation of powers do not evoke so enthusiastic a response”.⁴⁰ Even in the 8th edition of de Smith and Brazier’s *Constitutional and Administrative Law* (1998), on the cusp of the Human Rights Act (HRA) 1998 being passed, those same lines challenging the concept are present.⁴¹

A principle blooms? Textbooks initiated near the turn of the century

Even into the early 1990s, brevity on the topic was common. Brian Thompson’s *Textbook on Constitutional and Administrative Law* (1993) gave terse attention to the rule of law as a fundamental principle of the UK constitution, providing it only a page and a half of discussion.⁴² Thompson begins by noting, “The rule of law has a comforting ring to it. If we are concerned about restraining government then the idea of government by laws rather than men seems to be helpful, until we realise that laws are made by men and women”.⁴³ The author goes on to discuss legality and the idea of rule of law as a political doctrine. However the section ends with harsh language about the principle, as Thompson remarks that, “The rule of law is not a robust check upon government. There is government according to law but the law can indemnify past illegalities and take retrospective effect. These are not everyday occurrences but they show that whatever is the check upon government is not law”.⁴⁴

John McEldowney’s *Public Law* (1994) took the concept more seriously. Here the rule of law is coupled with constitutional conventions (Chapter 4: “Conventions and the Rule of Law”).⁴⁵ Conventions take up the majority of the chapter, while the rule of law receives a little over seven pages of discussion. Acknowledging that “great significance” has been given to the rule of law in the UK,⁴⁶ in this edition McEldowney primarily analyses the Diceyan conception of it, stating that it is “synonymous with equality before the law and the protection of civil and religious liberty”, and can act as “a restraint on power and its abuse”.⁴⁷ McEldowney also notes, however, that the “rule of law is subject to a number of different meanings often based on value judgements. In its broadest sense it may be viewed as a general political doctrine”.⁴⁸ He goes on to classify it as “descriptive and prescriptive”.⁴⁹ The author ends discussion of the topic by noting that “Dicey helped promote the idea that law, politics and the outcome of legal rules should be separated from the legal rules themselves”.⁵⁰

In the 4th edition of McEldowney’s text (2016) the order of the chapter title has flipped, and now reads: “The Rule of Law and Constitutional Conventions”; a palpable sign of what gets more attention nowadays.⁵¹ Introducing the chapter, the author acknowledges the 800th anniversary of the Magna Carta, and emphasises how the rule

⁴⁰ de Smith, *Constitutional and Administrative Law* (1973), p. 38.

⁴¹ S. A. de Smith and R. Brazier, *Constitutional and Administrative Law* (8th ed)(London: Penguin, 1998), p. 17-18.

⁴² B. Thompson, *Textbook on Constitutional and Administrative Law* (London: Blackstone, 1993).

⁴³ Thompson, *Textbook on Constitutional and Administrative Law* (1993), p. 56.

⁴⁴ Thompson, *Textbook on Constitutional and Administrative Law* (1993), p. 57.

⁴⁵ J. McEldowney, *Public Law* (London: Sweet and Maxwell, 1994), pp. 93-109.

⁴⁶ McEldowney, *Public Law* (London: Sweet and Maxwell, 1994), p. 103.

⁴⁷ McEldowney, *Public Law* (1994), p. 109.

⁴⁸ McEldowney, *Public Law* (1994), p. 105. This statement is also present in the 4th edition (2016).

⁴⁹ McEldowney, *Public Law* (1994), p. 105. This statement is also present in the 4th edition (2016).

⁵⁰ McEldowney, *Public Law* (1994), p. 109.

⁵¹ J. McEldowney, *Public Law* (16th ed)(London: Sweet & Maxwell, 2016).

of law is built on “principles of liberty and justice”.⁵² In another noteworthy sign of how things have transformed in just over two decades, the rule of law section begins not with Dicey, but with discussion of Lord Bingham, the Constitutional Reform Act 2005 and Jeffrey Jowell. The section ends with a discussion on the HRA 1998 and discussion of writings by T.R.S. Allan and Martin Loughlin.⁵³ However there is a critical tone in some of the author’s statements. McEldowney notes that “the pivotal role of the Court depends on the sensitive exercise of discretion, and the hope is that the rule of law will ultimately mean not just justiciable rights but improvements in the policy implementation of decision-makers”.⁵⁴ The author ends this section by stating that the “Courts certainly have a part to play in developing the fundamental values in society but it may be peripheral and spasmodic rather than pivotal and predictable”.⁵⁵

A notable difference to McEldowney’s fourth edition is the addition of Section D to this chapter: “Contemporary Debate on Judicial Discretion, the Rule of Law and the Sovereignty of Parliament”. This juxtaposition, in terms of focusing on the rule of law in *competition* with parliamentary sovereignty—as opposed to the two principles *complementing* each other—is probably the most significant development amongst contemporary textbooks.⁵⁶ The section includes wide-ranging discussion of a number of important topics,⁵⁷ such as the validity of constitutional review, judicial deference, and legal “blockbusters” such as *Jackson*⁵⁸ and *Thoburn*.⁵⁹ The wide array of topics certainly displays the breadth that rule of law has obtained in contemporary times.

The rule of law was given relatively short shrift in the first edition of Carroll’s *Constitutional and Administrative Law* (1998), being introduced in Chapter 2: “Characteristics of the Constitution”.⁶⁰ In presenting the concept Carroll notes that “This is neither a rule nor a law. It is now generally understood as a doctrine of political morality which concentrates on the role of law in securing the correct balance of rights and powers between individuals and the state in free civilised societies”.⁶¹ However the author does acknowledge that the principle means “more than simply government according to law”, and goes on to state that, “Despite any imperfections the importance of the rule of law is that it is a doctrine of considerable intellectual pedigree”, and represents “an ideological framework for the legislature and those who have to interpret the law”.⁶²

Carroll’s 9th edition (2017) features the rule of law much more frequently than the 1998 version.⁶³ It also noticeably changes the wording when introducing the subject. This version states: “At the outset, and for the sake of clarity, and to avoid confusion, it should be understood that the Rule of Law is not simply a legal rule or principle. Nor is its content limited to the proposition that each individual should at all times obey the

⁵² McEldowney, *Public Law* (2016), p. 189.

⁵³ McEldowney, *Public Law* (2016), p. 208.

⁵⁴ McEldowney, *Public Law* (2016), p. 208.

⁵⁵ McEldowney, *Public Law* (2016), p. 208.

⁵⁶ Other contemporary texts do this as well. See, e.g., I. Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (7th ed.)(Oxford: Oxford University Press, 2015), pp. 76-77.

⁵⁷ McEldowney, *Public Law* (2016), pp. 209-215.

⁵⁸ *R (Jackson) v Attorney General* [2005] UKHL 56.

⁵⁹ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

⁶⁰ A. Carroll, *Constitutional and Administrative Law* (Financial Times, 1998).

⁶¹ Carroll, *Constitutional and Administrative Law* (1998), p. 34. This same placement and wording is present in the 7th edition (Pearson, 2009).

⁶² Carroll, *Constitutional and Administrative Law* (1998), p. 38.

⁶³ A. Carroll, *Constitutional and Administrative Law* (9th)(Pearson, 2017).

law regardless of its requirements”.⁶⁴ It continues by saying, “Rather, it is a doctrine of political morality formulated or originating from what have been referred to as ‘western liberal democracies’ and which seeks to identify the minimum standards and requirements of civilised government in a genuinely free society”.⁶⁵ These statements represent a distinct departure from the language of Carroll’s earlier editions.

The first edition of Le Sueur and Sunkin’s *Public Law* (1997) grouped rule of law with other constitutional principles, providing it a section of Chapter 6: “Principles of Limited Government”.⁶⁶ Here the authors noted that:

“The idea of the rule of law is part of the stock in trade of lawyers, politicians and theorists. What does this idea mean? No single answer can be given to this question: the rule of law has been (and is) defined and used in many different ways to serve many different purposes. The only common feature is that governmental powers should, in some broad sense, be exercised in accordance with law”.⁶⁷

Three significant factors are then discussed: compliance with the law; the requirement of rationality; and the rule of law and fundamental rights. The section on Fundamental Rights goes on to discuss “The New Orthodoxy: the rule of law to control Parliament”, which examines arguments about the rule of law put forward by T.R.S. Allan, John Laws and Stephen Sedley.⁶⁸ Here, however, the authors note that, “despite the rhetoric of the common law, judges are not always able to ensure that the outcomes of their decisions are to protect liberty”.⁶⁹

The 3rd edition of this text (2016) displays a significant evolution of the principle, featuring a standalone chapter on “The Rule of Law” (Chapter 3).⁷⁰ No longer constrained as a section, the chapter is wide-ranging, providing perspectives from both advocates and sceptics of the rule of law, and also includes discussions on constitutionalism in the UK and Parliament’s role in upholding the rule of law. The chapter is almost forty pages long, which at least in some superficial sense displays its significance (to put it in perspective, the parliamentary sovereignty chapter is only 31 pages). After a balanced presentation of the concept within the UK constitution, the authors conclude by remarking, “there is no doubt that a broad idea of the rule of law has become implanted in British constitutional thinking and practice”.⁷¹

Hilaire Barnett’s *Constitutional and Administrative Law* has always displayed deep consideration for the rule of law. That being said, the fourth edition (2002) opens describing the concept as “challenging”, “capable of different interpretations”, and “elusive”.⁷² Although acknowledging such issues, Barnett declares “it is more important to recognise and appreciate the many rich and varied interpretations which have been given to it, and to recognise the potential of the rule of law for ensuring limited governmental power and the protection of individual rights, than to be able to

⁶⁴ Carroll, *Constitutional and Administrative Law* (2017), p. 48.

⁶⁵ Carroll, *Constitutional and Administrative Law* (2017), p. 48.

⁶⁶ A. Le Sueur and M. Sunkin, *Public Law* (London: Longman, 1997), pp. 141-158.

⁶⁷ Le Sueur and Sunkin, *Public Law* (1997), pp. 141-42.

⁶⁸ Le Sueur and Sunkin, *Public Law* (1997), pp. 153-55.

⁶⁹ Le Sueur and Sunkin, *Public Law* (1997), p. 155.

⁷⁰ A. Le Sueur, M. Sunkin and J. Murkens, *Public Law* (Oxford: Oxford University Press, 2016). Jo Murkens was added as an author to the 2nd and 3rd editions; also, both the 2nd and 3rd editions do appear more like casebooks than a traditional textbook.

⁷¹ Le Sueur, Sunkin and Murkens, *Public Law* (2016), p. 123.

⁷² H. Barnett, *Constitutional and Administrative Law* (London: Cavendish, 2002), p. 73.

offer an authoritative, definitive explanation of the concept”.⁷³ She further notes that the “rule of law underlies the entire constitution and, in one sense, all constitutional law is concerned with the rule of law”.⁷⁴

Barnett’s 11th edition (2016) does not depart significantly from previous versions. Much of what she covers, from Marxism, Dicey, Fuller, Raz and Dworkin remains similar to previous versions, although there is a new section on “Bingham and the Rule of Law”.⁷⁵ But perhaps the 11th edition’s rule of law chapter is most notable for what it lacks, rather than what it contains: unlike some texts noted above, there is no section on the rule of law in competition with parliamentary sovereignty. In fact, parliamentary sovereignty is barely mentioned at all throughout the chapter. Nevertheless, the chapter on parliamentary sovereignty does contain a section on “Shared, or Bi-Polar Sovereignty?”, which is written within the context of current challenges to parliamentary sovereignty.⁷⁶ This seems a more fitting placement for such discussion.

Conclusion

For many public law textbooks throughout the twentieth century, coverage of the rule of law was not only uncommon, but taboo. A number of texts—even those published in the 1990s—either disparaged the concept or gave it fleeting attention.⁷⁷ And yet, in the twenty-first century coverage of the rule of law changed dramatically. Comprehensive, in-depth chapters on the principle are more common than ever.⁷⁸

Whether this transformation occurred because of influential writers such as T.R.S. Allan, John Laws, Stephen Sedley, Tom Bingham and others, or because of the enactment of statutes such as the Human Rights Act 1998 and the Constitutional Reform Act 2005, or because of the judiciary becoming more vocal in cases such as *Thoburn*,⁷⁹ *Jackson*,⁸⁰ and *Evans*,⁸¹ or because of the wide international support and push for this principle after WWII, or because of frustration or disillusionment with other UK constitutional principles such as parliamentary sovereignty, or because of a combination of such factors, is certainly beyond the scope of this piece. It is important that we acknowledge that today’s students (i.e., tomorrow’s lawyers and judges) are encountering this concept much more frequently—both in terms of the prominence in which it is displayed and the depth of discussion on the topic—than students did even two decades ago. What is crucial, however, is that academics and students recognise the variety of perspectives on the rule of law—both historical and modern—and that we appreciate the greenness of the post-Diceyan conception of it within UK constitutional and administrative law textbooks. Whatever the reasons for the expanded coverage may be, many of the criticisms noted in twentieth century texts (e.g., vague, malleable, misleading, etc.) are falling by the wayside, as any reproach of the concept, however justified, becomes increasingly taboo.

⁷³ Barnett, *Constitutional and Administrative Law* (2002), p. 73.

⁷⁴ Barnett, *Constitutional and Administrative Law* (2002), p. 73.

⁷⁵ H. Barnett, *Constitutional and Administrative Law* (Abingdon: Routledge, 2016), pp. 67-69.

⁷⁶ Barnett, *Constitutional and Administrative Law* (2016), pp. 142-45.

⁷⁷ See, e.g., de Smith and Brazier (1998) or Thompson (1993).

⁷⁸ Some contemporary texts, such as Elliott & Thomas (2017) or Carrol (2017), may appear like outliers, as they include the rule of law as a section within a major a major chapter. And yet, from a historical perspective this corresponds with the vast majority of UK public law textbooks.

⁷⁹ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

⁸⁰ *R (Jackson) v Attorney General* [2005] UKHL 56.

⁸¹ *R (on the application of Evans) v Attorney General* [2015] UKSC 21.

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