

Part 1 Constitutional fundamentals

2 Characteristics of the UK constitution

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Introduction

A constitution is a set of rules, generally in written form, which identify and regulate the major institutions of the state and govern the relationship between the state and the individual citizen. In most countries the written constitution is the ultimate source of legal authority; all actions of government and the law-making body (the legislature) must conform to the constitution. In order to uphold and interpret the constitution there will be a Supreme Court. As the constitution is the ultimate authority, any action which contravenes the rules of the constitution will be both unconstitutional and unlawful. Written constitutions also contain procedural rules for the amendment of the constitution.

Constitutions, whether written or unwritten, will share common features. They will identify the principal institutions of the state – the executive, the legislature and the judiciary. In relation to each of these, the constitution will specify their functions and powers. In addition the constitution will identify the rights and freedoms of citizens, through a Bill of Rights which operates both to protect citizens and to restrict the power of the state.

In this chapter we consider the characteristics of the British constitution, and make brief comparisons with other constitutional arrangements.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- ▶ describe the principal forms that constitutions may take
- ▶ describe the distinction between a rigid and a flexible constitution
- ▶ evaluate the advantages and disadvantages of a largely unwritten constitution
- ▶ identify the essential features of the British constitution
- ▶ explain the scope and significance of the current constitutional reform programme
- ▶ briefly explain the historical forces that underlie the contemporary constitution.

Learning outcomes: what are these for?

Each chapter of your subject guide contains learning outcomes and reminders of learning outcomes.

Like the other features of your guide, they are there to help you.

See the section on 'Using your subject guides' in your *Learning skills for law* guide.

2.1 Constitutional forms

ESSENTIAL READING: READ THESE PAGES NOW

- Barnett, Chapter 1: 'Introduction: the scope of constitutional law', pp.7–15.

2.1.1 Written and unwritten constitutions

Constitutions may be 'written' or 'unwritten', and unlike the majority of states, the British constitution is largely unwritten and uncodified. Allied to their written or unwritten character, constitutions may also be classified as rigid or flexible. A **rigid constitution** is one in which amendment is very difficult, requiring special procedures to be employed before any changes can be made. By contrast, the British constitution is essentially **flexible**. Parliament – the supreme law-making body within the United Kingdom – may theoretically alter the constitution at will, although in practical terms this can only be done with the support of the people. Where constitutions were devised by their founders as a complete statement of arrangements for the future, it will generally be difficult to amend them. For example, in the USA, the constitution of 1787 requires that for any amendment, the proposal must have been made by a two-thirds majority vote in both houses of Congress (the Senate and the House of Representatives) and also approved by a three-quarters majority of all the State legislatures. For this reason it is particularly difficult to amend a written constitution: it is 'rigid', rather than 'flexible' in nature.

2.1.2 Republican and monarchical

Constitutions may be classified according to whether they are republican or monarchical. In republics, such as the USA, there will normally be a Head of State (usually designated a President) who is directly elected by the people. In Britain by contrast, the monarchy remains, with the Queen as Head of State and holding widespread formal powers (under the royal prerogative – see Chapter 6). In practice these powers are conventionally exercised by the elected government of the day which is headed by the Prime Minister.

2.1.3 Unitary and federal

Constitutions may also be unitary or federal. Under a written constitution, the constitution will define which powers are exercisable by the central federal government, and which powers are exercisable by the constituent parts of the federation – usually known as states. In a federal state power is diffused rather than concentrated in any one body. The constitution has overriding force and any conflicts between the federal government and state governments will be determined according to the constitution. For centuries, Britain has been a unitary state, with one Parliament having ultimate law-making power over all the constituent nations – England, Northern Ireland, Scotland and Wales. Where powers are devolved, to local government and now to the assemblies of Northern Ireland, Scotland and Wales, these powers remain subject to the United Kingdom Parliament's ultimate control.

2.1.4 Supreme and subordinate

A further classification explains whether a particular constitution is supreme or subordinate. A supreme constitution is not subject to any external superior force. A subordinate constitution is one where – as with former British colonies – the constitution is drafted and introduced in a country by an external sovereign power, and theoretically may be amended or repealed by that external power. In relation to this aspect of constitutions, much debate continues concerning the status of the British constitution following membership of the European Community (and now the European Union). The key question is: where does sovereignty lie? From the standpoint of the European Court of Justice of the Community, the treaties that establish and define the Community and Union are supreme, and sovereign. Thus the sovereignty of all EU member states is limited by membership. From the standpoint of the British judges, however, the sovereignty of the British Parliament remains intact: we voluntarily accept Union law because an ordinary Act of Parliament – the European Communities Act 1972 – provides for its reception and enforcement within the domestic courts of law.

Finally, a constitution may be classified according to whether the powers and functions of the principal institutions of the state – the executive, legislature and judiciary – are separated or not. Under the United States' constitution for example:

- ▶ Article 1 of the Constitution vests executive power in the President
- ▶ Article 2 vests legislative power in the Congress and Article 3 vests supreme judicial power in the Supreme Court
- ▶ the President is elected separately from Congress and may not be a member of Congress
- ▶ the President may veto legislation passed by Congress, but his or her veto may be overridden by a two-thirds vote in the Senate
- ▶ the President appoints Supreme Court judges
- ▶ the Supreme Court has the power to declare acts of the President, Acts of Congress or of state legislatures unconstitutional and therefore unlawful.

As will be seen more fully in Chapter 4, in the United Kingdom there is no such clear separation of powers.

ACTIVITY 2.1

State what advantages you think there are in a federal as opposed to a unitary constitution.

Activities

You will find learning activities throughout your subject guide.

Most people learn more by **doing** – in this case, doing means thinking and writing – than just by **reading**:

- ✓ The tasks in the activities will help you **understand** the topics.
- ✓ Doing them helps you **remember** what you have done.
- ✓ They give you opportunities to **think more widely** about the subject.
- ✓ Writing down your answers to the activities helps you improve your English language skills.

You will find feedback on the activities at the end of the guide.

Do not look at the feedback until you have written down your answers to the activities.

See the section on 'Learning activities' in the *Learning skills for law* guide.

2.2 The unwritten nature of the British constitution

Only three countries today have constitutions which are not entirely written – Britain, Israel and New Zealand.

Britain's largely unwritten constitution is the product of history. Most countries have experienced an event which marked a clear break with history and provided the opportunity to codify their constitutional arrangements. Britain is exceptional in this respect, and the constitution is the result of gradual evolution rather than any conscious effort to design a complete system of constitution and government. The British constitution – while by no means totally unwritten (see Chapter 3 on 'sources') – has never been defined through a basic constitutional document. Nevertheless, it is clear that Britain has a constitution which identifies rules and procedures relating to the principal institutions of the state. There are numerous rules which we can identify as 'constitutional', although there are areas of law about whose status we may be uncertain. It is a first principle of the constitution that Parliament is supreme in its law-making power, and that accordingly there can be no limit as to the matters on which Parliament may legislate. We can also be clear that Acts of Parliament which:

- ▶ define the membership of Parliament (e.g. the House of Commons (Disqualification) Act 1975)
- ▶ provide for national representative assemblies (see the Northern Ireland Act 1998, Scotland Act 1998, Government of Wales Act 1998)
- ▶ enable the reception of European Community law into domestic law (see the European Communities Act 1972)
- ▶ protect civil and political rights (e.g. the HRA 1998)

are constitutional statutes. In theory, however, none of these has a formal constitutional status: they can be amended at Parliament's will without any special procedure. In 1885, A.V. Dicey described a flexible constitution as:

one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body. (Dicey, 1885)

In practice, as opposed to legal theory, it would be difficult for Parliament to amend or repeal such statutes without the clear consent of the people. Beyond the core of statutes which we commonly regard as constitutional, there are areas of doubt. For example, we may commonly regard the right of a worker to withdraw his or her labour as a basic constitutional right: but does this mean that statutes which regulate employment matters are constitutional in nature?

ACTIVITY 2.2

- a Write a brief sentence summarising the characteristics of the British constitution.
- b Explain the essential differences between a written and an unwritten constitution.
- c What advantages and disadvantages, if any, flow from an unwritten constitution?

Summary

Constitutions – written or unwritten – identify and regulate the major institutions of the state and govern the relationship between the state and the individual citizen. Only three countries have constitutions which are not formally written (Britain, Israel and New Zealand). The 'unwritten' British constitution displays the following characteristics: it is monarchical, largely unitary and has a supreme Parliament.



2.3 The evolution of the British constitution

ESSENTIAL READING: READ THIS CHAPTER NOW

- Barnett, Chapter 3: 'The evolution of the structure of the United Kingdom'.

SUPPLEMENTARY READING: PUBLIC LAW STUDY PACK

- Barnett, 'The UK constitution – a very brief history' in the *Public law study pack*.

A basic knowledge of constitutional history helps to explain the constitution as it exists today (see Maitland (1908) and Lockyer (1985)). Of particular importance are the Tudor and Stuart periods (particularly from 1530 to 1700). In the reign of King Henry VIII (1509–1547), the King broke the allegiance of the country to Roman Catholicism and established the Church of England, under his sovereign authority. That action was to have lasting consequences which involved conflict between the Crown and the House of Commons and ultimately resulted in Civil War breaking out in 1642. That conflict ended with the execution of Charles I in 1649 and the abolition of the monarchy, the House of Lords and the established Church of England.

A period of republican rule began, headed by Oliver Cromwell and maintained by military rule. By the time of Cromwell's death in 1659 the people had grown weary of the military and of the suppression of pleasures resulting from Cromwell's Puritan ethic. In 1660 the monarchy was restored under Charles II, as was the House of Lords and the Church. The original conflict between King Charles I and Parliament was caused by the King's abuse of the royal prerogative and fuelled by the suspicion that Charles was secretly a Roman Catholic. Such suspicions lingered, to come to the foreground when James II (who was openly a Catholic) succeeded to the throne in 1685. The fear that James might be succeeded by a Catholic heir who would restore the links with Rome caused parliamentarians to invite William and Mary of Orange to overthrow James. With knowledge of William's imminent arrival, James II fled the country.

William and Mary ruled jointly, but the power of the monarch was curtailed. The price for their Crown was the Bill of Rights settlement of 1689 which finally established the supremacy of Parliament over the Crown. The Act of Settlement 1700 clarified the supremacy of the Church of England, prohibiting any future monarch from being an adherent of Catholicism. The Act of Settlement also guaranteed the independence of the judiciary by providing that only an address to the Crown by both Houses of Parliament could remove a senior judge from office.

In 1706 centuries of conflict between England and Scotland ended with the Acts of Union 1706 and 1707 which united the two countries under a single Parliament of Great Britain. Union with Ireland took place under the Act of Union 1800, to be ended finally in 1921, with the independence of the Republic of Ireland (Eire) and the partition of Ireland with the six northern counties remaining united with Britain as the province of Northern Ireland.

From the reign of Elizabeth I (1558–1603) England steadily expanded its empire to the point where, by the nineteenth century, the British monarch was Head of State in countries spanning the globe. Although the American colonies were lost at the end of the eighteenth century, it was in the second half of the twentieth century that the empire was finally lost. Two world wars, in 1914–1918 and 1939–1945, ended British supremacy in the international arena forever. Nation after nation, previously part of the empire, established their independence. Many, however, remained members of the Commonwealth of Nations – the head of which is the Queen – which represents the formal ties between Britain and her former empire but is now based on equality among peoples and nations.

The twentieth century also saw the emergence of co-operation among continental European countries, originating with the Council of Europe in 1949 under whose auspices the European Convention on Human Rights was drafted and implemented. The predecessor to the European Union came into being with the establishment of the three original European Communities: the European Coal and Steel Community in 1951, the European Atomic Energy Community in 1957, and the European Economic Community in 1957. Britain stood aside, only to join the European Community as it is now known, with effect from 1 January 1973. 1992 saw the birth of the European Union, which expanded the original objectives of the Communities into such areas as a common currency, common policies on defence and security, and co-operation in police and judicial matters relating to crime.

Go to your study pack and read the article 'The UK constitution – a very brief history' by Hilaire Barnett.

On the domestic front, relations between the two Houses of Parliament were reorganised and formalised under the Parliament Acts of 1911 and 1949, which also reinforced the supremacy of the House of Commons over the House of Lords. Although there have long been plans to reform the unelected House of Lords, little progress was made until the election of the Labour government in 1997, on which see below.

2.4 Constitutional reform

The election in 1997 of the first Labour government for nearly 20 years ushered in a period of unprecedented constitutional reform. As we shall see in more detail in subsequent chapters, devolution to national assemblies has taken place. The Northern Ireland Act 1998 re-established the Northern Ireland Assembly; the Scotland Act 1998 established the Scottish Parliament, and the Government of Wales Act 1998 established the Welsh Assembly.

Reform of the House of Lords was also promised. The House of Lords Act 1999 removes the right of most hereditary peers to sit and vote and a second stage of reform is planned, although its final form remains unknown at the time of writing. The Human Rights Act 1998 has finally made the civil and political rights guaranteed by the European Convention on Human Rights enforceable in the domestic courts. Since the 1960s these rights could be protected, but only by making an application to the Court of Human Rights in Strasbourg, a slow process in which it could take up to five years to reach a decision. These rights can now be used against all public bodies in all tribunals and courts.

The government has also introduced reforms relating to political parties and elections. The Political Parties Elections and Referendums Act 2000 provides for the registration of political parties, states who may and may not make donations to political parties, and provides for a register of donations to be maintained. An Electoral Commission has been established to keep the electoral process under review.

The office of Lord Chancellor – which used to span all three major institutions of the state (the executive, legislature and judiciary) – has been reformed. Whereas previously the Lord Chancellor was always a member of the House of Lords, the Constitutional Reform Act 2005 provides that the office of Lord Chancellor can be filled by a member of either House of Parliament and need no longer be a lawyer. His former position as head of the judiciary has been reformed and the Lord Chief Justice now fulfils that function. The Lord Chancellor formerly filled the role of Speaker of the House of Lords. The Constitutional Reform Act 2005 now provides that the House of Lords will in future elect its Speaker from one of its members. The Act also provides for the establishment of a Supreme Court to take over the role of the highest domestic court. Formerly the Judicial Committee of the House of Lords, which hears appeals from both civil and criminal courts, was located in Parliament and the Lords of Appeal in Ordinary were also members of that House and could participate in the work of the House, including the scrutiny of legislation.

In July 2007 the Secretary of State for Justice and Lord Chancellor presented to Parliament the government's latest proposals for constitutional reform. In *The Governance of Britain*[†] the government proposes the following:

[†] CM 7170. www.official-documents.gov.uk/document/cm71/7170/7170.pdf

- ▶ to surrender or limit its prerogative powers to:
 - ▶ deploy troops abroad
 - ▶ request the dissolution of Parliament
 - ▶ request the recall of Parliament
 - ▶ ratify international treaties without decision by Parliament
 - ▶ determine the rules governing entitlement to passports
 - ▶ determine the rules for the granting of pardons
 - ▶ restrict parliamentary oversight of the intelligence services
 - ▶ choose bishops
 - ▶ have a say in the appointment of judges
 - ▶ direct prosecutors in individual criminal cases
 - ▶ establish the rules governing the Civil Service.
- ▶ The government will also:
 - ▶ work to increase parliamentary scrutiny of some public appointments
 - ▶ review the role of the Attorney General
 - ▶ develop further reforms for the House of Lords.

The government also plans to open a national debate on 'British values' and citizenship and to consider introducing a British Bill of Rights and Duties to supplement the Human Rights Act and to consider whether to introduce a written constitution. It is recognised by the government that this is a process which will require an extended period of consultation and debate.

SUPPLEMENTARY READING: PUBLIC LAW STUDY PACK

- Brazier, R. 'How near is a written constitution?'
- Bogdanor, V. 'Introduction' to *Constitutions in democratic politics*.
- Oliver, D. 'The project: modernising the UK constitution'.

Go to your study pack and read the items by Brazier, Bogdanor and Oliver.

ACTIVITIES 2.3–2.4

2.3 Is it possible to distinguish between ordinary law and constitutional law? How would you do so?

2.4 Consider the following issues and explain whether or not these should be classified as 'constitutional', giving reasons for your answer:

- a the right to strike
- b the right to abortion
- c the right to produce and publish pornographic materials.

SELF-ASSESSMENT QUESTIONS

- 1 Define the word 'constitution'.
- 2 Outline the matters that an ideal constitution should cover.
- 3 What is meant by a 'rigid' constitution?
- 4 Give two examples of the 'separation of powers' under the US constitution.
- 5 Which Act of Parliament incorporates EC law into UK law?
- 6 Which parts of the UK now have their own parliaments/assemblies?

Self-assessment questions

These will help you test your memory of what you have read in this chapter. Ask a fellow student or a family member to test you on them. We do not provide feedback, because you can easily find the answers by re-reading part of the chapter.

Summary

The British constitution is the product of history: a slow and largely peaceful (apart from the seventeenth century) process of evolution. Change has been brought about on the basis of experience rather than by some conscious 'grand design'. The 1997 election, however, ushered in a government with an agenda for significant constitutional change, much of which has been achieved. The evolution of the constitution and the current reform programme illustrate the flexible nature of the constitution.

References

Barnett, H. *Britain unwrapped: government and constitution explained*. (Harmondsworth: Penguin, 2002) [ISBN 978-0140291704].

Dicey, A.V. *Introduction to the study of the constitution*. [1885] (Last published by Liberty Find Inc. (1992)) [ISBN 978-0865970038].

Lockyer, R. *Tudor and Stuart Britain 1471–1714*. (London: Longman, 2004) third edition [ISBN 978-0582771888].

Maitland, F.W. *The constitutional history of England*. (Cambridge: Cambridge University Press, 1920) [ISBN 978-0521091374].

Reflect and review

Look through the points listed below:

Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the principal differing forms that constitutions may take.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can describe the distinction between a rigid and a flexible constitution.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can evaluate the advantages and disadvantages of a largely unwritten constitution.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can explain the scope and significance of the current constitutional reform programme.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can identify the essential features of the British constitution.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can briefly explain the historical forces which underlie the contemporary constitution.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

	Must revise	Revision done
2.1 Constitutional forms	<input type="checkbox"/>	<input type="checkbox"/>
2.2 The unwritten nature of the British constitution	<input type="checkbox"/>	<input type="checkbox"/>
2.3 The evolution of the British constitution	<input type="checkbox"/>	<input type="checkbox"/>
2.4 Constitutional reform	<input type="checkbox"/>	<input type="checkbox"/>



Reflection

We live in an age of reflection which simply means thinking about, or contemplating, what we are doing in order to help ourselves do it better.

For more guidance on this, see the section on reflection in your *Learning skills for law* guide.



Note down in your Skills portfolio how useful you found this reflect and review page.