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Palgrave Law Masters

Constitutional and Administrative Law

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Preface

As in previous editions, the aims of the book are, first, to explain the main principles of United Kingdom constitutional law in the context of the political and legal values that influence their development and, second, to draw attention to the main controversies. The book is intended as a self-contained text for those new to the subject and a starting point for more advanced students.

The major change in this new edition is that Keith Syrett is now the co-author of this book. In this edition Keith is responsible for Parts I, II, IV and V, while John Alder is responsible for Parts III and VI.

While statutory changes have been more limited than in the previous edition, there has been considerable material from the Supreme Court, notably generated directly and indirectly by the adventures of the UK government overseas, and revealing substantial disagreement at the top of the judicial hierarchy. The reach of the Human Rights Act 1998 (HRA) has been extended and the courts have been asked to delve back many years in pursuit of violations of the European Convention on Human Rights (ECHR), but the future of the Act remains unclear. The June 2016 referendum result in favour of leaving the EU has produced (and continues to produce) considerable constitutional uncertainty, including issues as to the role of Parliament, and problems relating to Scotland and Northern Ireland.

The structure of the text remains similar to previous editions. Part I concerns general principles. These include basic constitutional concepts and issues (Chapter 1), a broad account of the political ideals that have influenced the constitution (Chapter 2), and the sources of the constitution (Chapter 3). Chapter 4 provides a brief account of some constitutional landmarks. Chapter 5 provides an overview of the main institutions of government, the most important aspects of which are expanded in later chapters. In Part II, Chapters 6, 7 and 8 concern the underlying legal principles of the rule of law, the separation of powers and parliamentary sovereignty.

Part III concerns international aspects of the constitution. Chapter 9 explains the various ways in which international requirements are filtered into domestic law, the position of dependent territories, expulsion from the UK and the responses of the courts to international issues. Chapter 10 discusses the most important international influence – namely, the EU – which is firmly anchored into domestic law. There is also a discussion of 'Brexit', albeit at this stage there is more heat than light on the matter.

Part IV is concerned with the main legislative and executive institutions, and the relationship between them. (The judiciary does not have its own chapter but is discussed in various contexts, especially that of separation of powers.) Chapter 16, 'Devolution', has been substantially revised to take account of developments following the referendum on Scottish independence in September 2014 and increasing powers for the Welsh Assembly, as well as events in England.

Parts V and VI deal with the rights of the individual against government. Part V concerns judicial review of government action, the core of administrative law, and includes methods of challenging government action within the government structure.

Part VI, which has been substantially revised, deals with the fundamental rights of the individual. Chapter 21 concerns human rights under the ECHR. Chapter 22 relates these to the HRA. Chapters 23 to 25 focus on human rights issues of particular importance to the constitution. Chapter 23 deals with freedom of expression, focusing on press freedom where recent developments include official intrusion. Chapter 24 deals with government secrecy. Chapter 25 discusses special powers, including emergency powers, interception and surveillance, and anti-terrorist measures. Recent cases have grappled with the very broad definition of terrorism.

As regards further reading, references to books and articles in the text are to writings that expand on the point in question. The 'Further reading' at the end of each chapter discusses fundamental and controversial general issues for those who require greater depth, or more ideas and points of view. These readings have been fully updated for this new edition. Readings considered particularly accessible to and/or significant for students are marked *. Short references within the text are to the 'Further reading'.

Unless otherwise stated, the main classical works cited throughout are as follows:

Bagehot, *The English Constitution*, ed. Crossman (8th edn, Fontana/Collins 1963)
Dicey, *An Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915, referenced as last edition for which Dicey was himself responsible); (10th edn, Macmillan 1958, ed. Wade)
Hobbes, *Leviathan*, ed. Minogue (Dent 1973)
Locke, *Two Treatises of Government*, ed. Laslett (Cambridge University Press 1960)
Mill, *Utilitarianism, On Liberty and Considerations of Representative Government*, ed. Acton (Dent 1972)
Montesquieu, 'L'Esprit des Lois', extracted in Stirk and Weigall (eds), *An Introduction to Political Ideas* (Pinter 1995)
Paine, *The Thomas Paine Reader*, ed. Foot and Kramnick (Penguin 1987)

Sincere thanks are due for the contributions and help of Professors Dermot Cahill, Barry Hough, Richard Mullender and Dr Rhiannon Talbot in respect of previous editions, and John Coombes and Chris Handy in respect of this edition. We have updated this edition on the basis of material available on 7 February 2017. Further updates can be found on the companion website: www.palgravehighered.com/law/conadminlaw11e

John Alder, Keith Syrett
February 2017

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Part I

The framework of the constitution

Chapter 1

Introduction: constitutional structures

1.1 The nature of the constitution: general issues

A constitution provides the governing framework of an organisation. Any organisation might have a constitution; for example, most golf clubs do so. In our case the organisation is the state. A state is a geographical territory with a government that has effective control over that area.

A constitution has three purposes: first, to enable the organisation to run effectively; second, to define the powers of those in charge of the organisation; and third, to protect members of the community against the abuse of those powers. Thus, the late Lord Bingham, a leading judge, suggested that 'any constitution, whether of a state, a trade union, a college, a club or other institution seeks to lay down and define … the main offices in which authority is vested and the powers which may be exercised (or not exercised) by the holders of those offices' (*R v Secretary of State for Foreign and Commonwealth Affairs, ex p Quark Fishing Ltd* [2006] 1 AC 529, at [12]).

Friedrich (*Limited Government* (Prentice Hall 1974) 21) displays a romantic approach to the idea of a constitution that stresses the (assumed) consent of the community: '[A] constitution is the ordering and dividing of the exercise of political power by that group in an existent community who are able to secure the consent of the community and who thereby make manifest the power of the community itself.' However, it is fanciful to assume that there is a necessary connection between the securing of power and community consent unless we consider 'consent' to include acquiescence in the sense of the absence of resistance to whoever is in power by a subservient community.

Constitutional law deals with the following matters:

- the choosing and removing of rulers;
- the relationships between the different branches of the government;
- the accountability of the government;
- the dividing up of powers geographically, for example the relationships between the central United Kingdom government and the devolved governments of Scotland, Wales and Northern Ireland, and those between the state and overseas bodies;
- the rights of the citizen in relation to government.

There is no hard and fast distinction between constitutional law and administrative law. Administrative law deals with particular government functions such as immigration, taxation and the work of the numerous regulators, special tribunals and inquiries that decide disputes involving government action. The administrative lawyer is especially concerned to ensure that officials keep within the powers given to them.

This book does not attempt to cover administrative law comprehensively since the subject has its own separate texts. Chapters 17, 18 and 19 on judicial review of administrative action deal with the core of administrative law, which is the legal accountability of the government. Other matters relating to administrative law such as 'regulation', tribunals, public inquiries and ombudsmen are discussed in Chapter 20.

In almost all countries the constitution comprises a special document or set of documents set above the ordinary law. This is called a written constitution, a codified constitution or a Basic Law. In addition to setting out the main principles of the government structure and sometimes a list of individual rights, a written constitution may proclaim, usually in a preamble, some grand vision or moral message about the nature and purposes of the society (e.g. the US Constitution seeks to 'secure the blessings of liberty to ourselves and our posterity'). Importantly, a written constitution usually has a status superior to the rest of the law, in the sense that it can be altered only by an extraordinary procedure such as a public referendum or a special vote in the legislature, a device known as 'entrenchment'. The courts may have the power to set aside a law that conflicts with the constitution. Such a constitution is therefore protected against manipulation by the government of the day.

The United Kingdom has no written constitution of this kind and no grand vision about the nature of its society. Our constitution, such as it is, is composed of numerous ordinary laws and other rules and practices which have emerged over many centuries to deal with particular issues. Both in its legal and its political aspects, the constitution relies on precedent in the sense of appealing to past decisions and practices. Its *legal* principles and rules, if written down at all, are to be found in the same documents as the sources of any law, namely:

- Acts of Parliament (statutes) passed by Parliament at the instigation of the regime in power at the time. Thus constitutional statutes are scattered throughout the centuries, each dealing with a particular concern of the day (for examples see Section 3.2). The constitution also evolves through the accumulation of many pieces of detailed legislation about particular topics, for example, electoral law.
- Cases decided by the courts (common law). Again these are scattered, dealing with specific matters and focusing narrowly on individual disputes which can arise in many and various contexts. The constitution therefore has to be pieced together by imaginative interpretation of a vast heap of particular rules and decisions.

Rules from these two sources are set out and can be changed in the same way as any other law. In other words they are constitutional only because of the matters they deal with. How do we know what counts as constitutional? The question arises mainly because constitutional matters are sometimes given special treatment (see Section 8.4.3). Any guidance can only be vague and general. For example, Laws LJ said that a matter is constitutional if it 'conditions the legal relationships between citizen and state in some general overarching manner, or enlarges or diminishes the scope of what are now regarded as fundamental rights' (*Thoburn v Sunderland City Council* [2002] 4 All ER 156, [62]–[64]).

Craig ([2014] PL 373, 389) refers to horizontal, territorial and vertical dimensions of constitutions. Horizontally, a constitution sets up the main organs of government and distributes their powers; territorially, it divides powers geographically; and vertically, it governs the relationship between citizen and state. However, as Craig points out, a constitutional rule must also be especially important, thus introducing a vague subjective element (how do we define what is 'especially important'?) (see e.g. Section 1.4.1 Box).

The United Kingdom is probably unique in not having any written constitution. New Zealand is also said to have an unwritten constitution, but the New Zealand

Constitution Act 1986, although it is an ordinary statute, sets out the basic structure of its government. Israel is said to have no written constitution, but has an organised collection of legislation recognised as constitutional by the Supreme Court. The constitution of Saudi Arabia is the Koran.

It is sometimes said that our constitution is 'part written'. While literally correct – in that our constitutional laws are written down in the same way as any other laws – this description seems unhelpful since it ignores the fact that we have no special constitutional document with a higher status than other laws.

There are also many rules, practices and customs which are not 'law' at all. They get their force only because they are consistently obeyed as established practices. The most important of these are known as 'constitutional conventions'. Many basic constitutional arrangements rely on conventions; for example, the selection of, and most of the powers of, the prime minister. Unlike laws, conventions are not directly enforced by the courts (Section 3.4.4). Some, although not all, are also unwritten.

There is no authority empowered to determine whether a convention exists and what it means. This depends entirely on general acceptance by the politicians and officials who run the government and those from whom they choose to take advice. There is no shortage of people who wish to give their opinions on constitutional matters and it is easy for the constitution to be influenced by networks of people having personal connections with those in power. Thus, Hennessy ((1995) 15–30) describes the UK Constitution as generated by a circle of 'insiders' comprising senior officials, their friends and their academic and professional acolytes. He recounts the Victorian conceit that conventions embody 'the general agreement of public men' about 'the rules of the game' ((1995) 36, 37).

Our constitution is often described as 'organic', meaning that it develops naturally in the light of changing circumstances. We should not therefore expect the constitution to be straightforward and logical. It is a product of historical development and practical compromises generated by rival groups of power-hungry persons. In another metaphor, the common law UK Constitution is sometimes compared to a ramshackle old house under constant repair and renovation and made of numerous bits and pieces. It has also been compared, with the implication that it is 'sound and lasting', to the work of bees making a honeycomb (see *Jackson v Attorney General* [2006] 1 AC 262, at [125] (Lord Hope)). Thus constitutional change may be disguised under the cloak of continuity, taking place in relatively small steps, in the interests of those in power at the time, without adequate scrutiny, and perhaps eventually changing the nature of the 'house'. Consider, for example, the progress of devolution of powers to Scotland, Wales and Northern Ireland and the series of anti-terrorism measures introduced in recent years.

It has often been suggested that we do not have a constitution in any meaningful sense. The democratic activist Thomas Paine (1737–1809) labelled the British government as 'power without right'. In *The Rights of Man*, Paine asserted that without a written constitution authorised directly by the people there was no valid constitution (first published 1791, ed. Foot and Kramnick (Penguin 1987) 220–21, 285–96). Similarly, Ridley (1988) claims that the United Kingdom has no constitution since he believes that constitutions must be superior to the government of the day and not changeable by it. The UK seems to fail this test. Insofar as any rules have a special status, this is based on no more than self-restraint founded upon respect for principles that are regarded by those in power as fundamental or 'constitutional'.

1.1.1 Constitutionalism

However, whether or not we have a constitution in a strict sense, the term 'constitutionalism' applies to the UK as a widely shared belief in favour of limited and accountable government. It includes the rule of law, which requires limits on government policed by independent courts, and 'responsible government', which requires government officials to be accountable for their actions to an institution representing the people.

Constitutionalism also favours separation of powers between different governmental organs. For example, in *R (Evans) v Attorney General* [2015] UKSC 21, the Supreme Court was highly critical of the statutory power of the executive to veto a tribunal decision to require publication under the Freedom of Information Act 2000 (Section 24.2.1). This was described by Judge LJ in the High Court as a constitutional aberration ([2013] EWHC 1960 (Admin), at [1]).

It requires openness in government decision-making and open justice in the courts (*A v BBC* [2014] 2 All ER 1037, [27]). It also includes the protection of rights such as access to the courts and freedom of expression, described as inherent and fundamental to democratic civilised society (see Baroness Hale in *Seal v Chief Constable of South Wales Police* [2007] 4 All ER 177, at [38]–[40]).

1.2 The foundations of a constitution

A constitution can, of course, adopt any form of government. The most widely accepted explanation of the foundations of a constitution is a 'positivist' one. According to this theory, a constitution is valid or 'legitimate' if enough of the people whom it concerns, both officials and the public, accept it so as to make it broadly effective, irrespective of the motivations for such acceptance. Thus the foundations of the law depend on a political state of affairs. UK law takes this pragmatic view in the context, for example, of recognising the legality of a rebellion (see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645: takeover of a British colony by a group of white settlers held not valid because they were not yet fully in control).

'Legitimacy' might also refer to an external standard that can be used to assess the constitution. The problem here of course is to identify what this external standard is. Lawyers, for example, might refer to 'the rule of law', meaning widely accepted but vague values, such as justice, as identified by themselves. Related to this are 'natural law' theories in which a constitution is valid only if it conforms to a set of objective moral principles. Apart from the question of who determines what these principles are, it may be preferable to treat moral principles as a standpoint for critiquing a constitution and proposing changes to it, rather than confusing this with questions of its legal validity.

1.3 Basic constitutional concepts

Three related ideas have dominated many modern constitutions, including our own. These are 'sovereignty', the rule of law, and the separation of powers. Sovereignty means ultimate power without limit. Some, such as Hobbes (Section 2.3.1), argue that there must always be a 'sovereign' capable of having the last word in any conceivable

dispute, particularly in an emergency. In any constitution it might be difficult to locate sovereignty since government power is usually divided up. The sovereign need not be a single person: if it is not, rules are needed to ensure that its components can reach agreement. This raises problems as to whether the sovereign can change those rules and, if not, who can? In an extreme emergency, such as a threat of immediate attack, sovereign power might be exercised by a single person.

In the United Kingdom, the conventional view is that the sovereign is Parliament, as a combination of the monarch, the House of Lords and the House of Commons. However, the legal sovereign is not necessarily the political sovereign. For example, although Parliament has legal power to make any law, politically it is unlikely to be able to make a law to which the international money markets would seriously object.

The primary meaning of the rule of law is relatively uncontroversial – namely, that it is desirable to have rules known in advance which are binding on government and governed alike. This helps the organisation to run effectively by keeping order and producing certainty. However, this formal meaning of the expression 'rule of law' ignores the content of the rules themselves, whether they are morally good or bad, and the question of who makes them. For example, a concentration camp might be subject to the rule of law in this sense. A wider or 'substantive' version of the rule of law (Section 6.3) invokes certain moral and political ideas which are claimed to be especially associated with law. These include above all the notion of open justice policed by independent courts resisting the natural tendency of government towards secrecy (Section 23.3.4).

The separation of powers requires that government be divided up into different branches of equal status and importance. From both a political and a legal perspective this is to prevent any one branch of government having dominant power. Each branch can restrain the others since any major decision would require the cooperation of all branches. Governments usually comprise three primary branches. The legislature is the primary lawmaker, the judiciary settles disputes about the meaning and application of the law, and the executive carries out all the other government functions, implementing and enforcing the law. The difference between the three functions is hazy at the edges, but the basis of them is widely recognised. In contemporary society the executive is likely to be the most powerful branch because it controls the resources, both physical and financial, of the state. Crucially, it is the executive that proposes most new laws to the legislature and appoints to the most important public jobs. Different countries have reached different conclusions as to the extent of the separation of powers since there is a trade-off between the interests of government efficiency (which points away from a separation) and the desire to prevent abuse of power. For example, the United States has a strict separation, but in the United Kingdom separation is more limited. In the United States, a member of the executive headed by the president cannot be a member of the legislature, but in the UK, ministers who head the executive must (by convention) be Members of Parliament (MPs). We seem to prefer strong government to limited government.

Some constitutions make grandiose claims to shared ideals and purposes. For example, the Constitution of Ireland refers to 'seeking to promote the common good with due observance of Prudence, Justice and Charity so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored and concord established with other nations' (Preamble). The French Constitution

famously refers to 'the Rights of Man' and the 'equality and solidity of the peoples who compose [the Republic]' (Art 1). The UK Constitution makes no such claims, at least explicitly.

Many constitutions contain a list of basic rights of the citizen; those of Germany and the USA are prominent examples. These rights vary, reflecting the political culture of the state in question. Constitutions also vary in the extent to which the courts may police these rights. In the family of liberal democratic states to which the United Kingdom belongs, these rights are primarily 'negative' rights in the sense of rights not to be interfered with by the state. They include the right to life, the right to personal freedom, the right to a fair trial, the right to privacy and family life, the right to freedom of expression, the right to assembly and association, the right to freedom of religion and the right to protection for property. 'Positive rights', such as those to housing and medical care, might be regarded as equally important, but because these require hard political choices between priorities and large-scale public expenditure they are generally regarded in the UK as matters for the ordinary political process rather than as firm legal rights. Enforcement by a court would be practically impossible. Nevertheless, positive rights appear in many constitutions, for example those of Poland, Portugal and South Africa. Some constitutions, for example that of Switzerland, also impose particular duties on citizens, such as military service and voting.

1.4 Written and unwritten constitutions: advantages and disadvantages

As we have seen, the constitutions of most countries are set out in a single document or related group of documents. These are generally superior to all other kinds of law in that laws which conflict with the constitution can be struck down by the courts. They also often contain entrenched provisions that protect the constitution from being changed by the government of the day, for example a referendum of the people or a two-thirds majority of the lawmaking assembly.

Even a written constitution will not include all the rules needed for governing the country. The precise contents vary considerably between different states. For example, the methods of voting are important by any democratic standards, but they do not feature in many constitutions other than as general requirements of fairness and equality. Some constitutions, such as that of the United States, are relatively short and expressed in general terms. Others, like that of Portugal, run to hundreds of detailed pages.

1.4.1 The merits of a written constitution

There is no consensus as to whether it is preferable to have a written constitution, although proposals to create one are regularly heard. The main purpose of a written constitution seems to be to usher in a new regime or to signify a 'constitutional moment' or change of direction for a state as a result of revolution, grants of independence or domestic catastrophe. The device of a written constitution became widely used for these purposes from the late eighteenth century.

Since the late seventeenth century, the United Kingdom has not experienced such a constitutional moment. Constitutional changes have been gradual and evolutionary and the seventeenth-century 'constitutional moment' involved the assertion of

an all-powerful Parliament, so making a written constitution pointless at the time (Section 4.5.1).

To mark the 800th anniversary of the Magna Carta, the Political and Constitutional Reform Committee of the House of Commons engaged in an extensive consultation as to whether the UK should have a written constitution, and what it should look like. While it acknowledged that the initiative for codifying constitutional rules should come from the executive branch, the Committee tentatively supported the creation of a written constitution on the basis that 'the public is entitled to know the processes by which it is governed and the fundamental rules on which the constitution is based' (HC 2014–15, 599, [58]): to which end it produced its own draft accessible summary constitution, with options for reform (ibid., Annex A). In its original consultation document (HC 2014–15, 463), the Committee set out the main advantages and disadvantages of adopting a written constitution as follows:

Advantages

- Publicity and accessibility: matters of such importance should be codified for all to see and understand.
- Democracy: the present unwritten rules are controlled by the elite and were appropriate to the deferential and class-ridden society of the past but not to today's more equal society. Constitutional changes can now be pushed through by governing parties to benefit themselves. Entrenched procedures that ensure parliamentary and popular support for constitutional changes are desirable.
- Sovereignty: the current fundamental principle that Parliament is supreme is unsuited to a modern democratic society in which the people should be sovereign. The people should therefore have a role in deciding what the constitution should include.
- Education: the absence of constitutional teaching in our schools makes it all the more important to have a single document. This would have great symbolic importance.
- Certainty: some of our unwritten constitution is highly uncertain and some of its rules existing outside the law have dubious status. The uncertainty over the question of whether Parliament is sovereign (Section 8.5) is a conspicuous example, as is the question of the status of constitutional conventions (Section 3.4).
- Value: the special nature of constitutional principles makes it desirable to distinguish them from ordinary law. Thus in *Cullen v Chief Constable of the RUC* [2004] 2 All ER 237, at [46], Lord Hutton referred to a right which a democratic assembly representing the people has enshrined in a written constitution, the written constitution being 'clear testimony that an added value is attached to the protection of that right'. An example of the risks inherent in our unwritten constitution is the creeping erosion of individual freedom when restrictive legislation is continually added to (e.g. Sections 23.7 and Chapter 25).
- Protecting weaker arms of government: parliamentary supremacy means that local government is not protected against central government other than by political influences. The devolved governments of Scotland, Wales and Northern Ireland are also relatively unprotected. A written constitution would protect local government and also strengthen the separation of powers between the three branches of government whereas, at present, the executive dominates.

- National identity: a written constitution becomes a symbol of national identity and national pride (as in the USA, but not universally true).
- Coordination: constitutional reforms in the unwritten constitution are uncoordinated.
- Modernisation: 'The present "unwritten" constitution is an anachronism riddled with references to the past and unsuited to the social and political democracy of the 21st Century.'

Disadvantages

- It is 'unnecessary' because our constitution has proved stable and successful without the revolutionary 'constitutional moment' that calls for a written constitution (above). It might be, however, that current political agitation concerning claims to transfer power away from the central government to the regions (notably Scotland, notwithstanding the outcome of the referendum on independence in September 2014), coupled with the divisions and uncertainties caused by the popular vote to leave the European Union in June 2016, amount to such a 'moment'.
- It is flexible and evolutionary so as to respond to changing circumstances, enabling practical problems to be dealt with as they arise; (see Lord Bingham in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, at [12]). This might be regarded as not wholly desirable depending on who deals with the problems.
- It reflects our 'British' character (although the committee does not say what this is: possibly deference to a ruling elite).
- It enables decisions to be made by elected politicians rather than unelected judges. A written constitution would politicise the judiciary by requiring it to pass judgment on legislation and would increase politically motivated litigation and expand judicial review of government action. (This is sometimes also claimed as an advantage of a written constitution.)
- There is already a wide range of pressures on ministers which serve as controls on their actions, decisions and policies. These include the opposition in Parliament, party backbenchers, departmental select committees, the House of Lords, the EU, the devolved governments, the media and the voter. (Objectors might claim that these are significantly weak.)
- The unwritten constitution enables the executive to act quickly and flexibly 'to meet citizens' needs' (or to protect itself against criticism).
- A written constitution would diminish the significance of the monarchy (arguably desirable).
- There are so many practical problems in deciding what to put into a written constitution that it is not worth bothering to do so since the matter is of low priority, carries little popular support and risks distracting and destabilising the country.

A written constitution will almost certainly be drafted in vague general language which must be interpreted in the light of the politics of the day and will thus change its meaning from time to time, allowing judges considerable freedom in applying it. For example, in *Plessy v Ferguson* 163 US 537 (1896), the US Supreme Court held that racial segregation was constitutional under the 14th Amendment of the Constitution ('equal protection of the law') and in *Brown v Board of Education* 347 US 483 (1954) that it was

not. Similarly, in *Lochner v New York* 198 US 45 (1905) the Supreme Court held that it was unconstitutional under the same provision for the law to regulate the relations between employer and employee, but in *West Coast Hotels v Parrish* 300 US 379 (1937), at a time of depression, the court upheld a law protecting women's wages.

However, because judges take differing approaches to interpreting the law, it is sometimes said that a written constitution could also encourage the use of abstract, linguistic, legalistic techniques at the expense of the underlying political realities and human concerns. In the United States there is continuing debate as to whether the constitution should be interpreted in the light of changing values, or restricted to the inferred intentions of its eighteenth-century founders. The 'right to keep and bear arms' in the Second Amendment is a particular, and hugely controversial, focus for this (see e.g. *McDonald v Chicago* 561 US 742 (2010)). Closer to home, the notion that the European Convention on Human Rights (ECHR) is a 'living instrument' that can be interpreted flexibly has caused resentment in some UK political circles and seems likely to result in future repeal of the Human Rights Act 1998 (HRA), which gives the convention effect in domestic law (Section 22.10).

A possible advantage of a written constitution is that it encourages a rationalistic process of constitutional design which ideally creates a constitution as a logical scheme in which inequality is relatively difficult to engineer. On the other hand, it can be argued that, in a matter as large and as open to disagreement as a constitution, human beings are not capable of sensible grand designs and that the flexible trial and error approach favoured in the United Kingdom is preferable. Edmund Burke (1729–97), a prominent parliamentarian and conservative thinker, claimed that the constitution has special status by virtue of its being rooted in long-standing custom and tradition. Burke regarded attempts to engineer constitutions on the basis of abstract reason as ultimately leading to tyranny. This is because he believed that humans, with their limited understanding and knowledge, are inevitably at the mercy of unforeseen events, and that reasoning based on abstract general principles, by trying to squeeze us into rigid templates, is a potential instrument of oppression:

> The age of chivalry is gone … . That of sophisters, economists and calculators has succeeded; and the glory of Europe is extinguished for ever. (Burke, *Reflections on the Revolution in France* (1790))

It is also argued, from a somewhat sanctimonious perspective, that the United Kingdom does not need a 'paper constitution' because our constitutional values such as individual rights are entrenched in the culture of the community itself and so support peace and stability. The fact that the United Kingdom invariably imposed written constitutions on its colonial territories was explained on the basis of their supposed immaturity. This attitude was influenced by the experience of the many revolutions in continental Europe during the late eighteenth and early nineteenth centuries, most importantly the French Revolution and its series of regime changes from 1789 onwards. The then novel notion of a written constitution was associated with bloodshed, chaos and radical propaganda. For example, it was claimed in the House of Commons that 'we owe our superiority, in a great measure, to the freedom of our government and the blessings of our constitution' (HC Deb 8 November 1814, vol 29, col 39). Furthermore, Dicey, a leading jurist of the Victorian era whose analysis of the constitution has (as we will see) proved highly influential, thought it an advantage that

much of our constitution is embedded in the fabric of the common law made by the courts which gets its strength from practical issues generated from below rather than being imposed from above in a document that can be torn up at the whim of a transient political majority in Parliament.

However, there does not seem to be hard evidence that the relative stability of the United Kingdom was due to our unwritten constitution as opposed to political and economic factors – not least the prosperity exacted from the British Empire of the nineteenth century and the ability of the ruling aristocracy to manage dissent by a mixture of repression and rewards (Sections 4.6 and 4.7). Conversely, the record of countries with written constitutions is mixed. The original US Constitution of 1788 has survived until the present day although it has been amended sparingly from time to time. Argentina (1853), Belgium (1831), Luxembourg (1868) and Tonga (1875) have long-standing constitutions, but the first two have not had particularly stable governments. Switzerland is a highly stable country, but its constitution (most recent 1999) has been changed many times. Whether a regime is stable and whether a constitution is easily changed may well depend more on cultural and political factors rather than legal devices.

Moreover, it is questionable whether an unwritten constitution can meet all the problems of today. Firstly, the population is much larger and more diverse (ethnically, religiously, culturally) than was the case for much of the nineteenth and early twentieth centuries, when, although democracy was increasing, most political influence lay with native-born male property owners with strong common interests. Secondly, it is not obvious that an unwritten constitution meets the needs of what is often called our 'multi-layered' constitution where important powers are exercised by supranational bodies such as the European Union (EU) and by the devolved bodies in Scotland, Wales and Northern Ireland as well as by the traditional Parliament and courts. Coordination between these bodies is important. These matters may call for clearer principles than are possible with an unwritten constitution.

Even in the absence of a written constitution, there are devices within UK law capable of limiting the ability of governments to make constitutional changes.

- It is arguable that a statute could 'entrench' a special rule by providing that the rule could be changed only by a special process such as a referendum (Section 8.5.3).
- The courts may give special weight and 'close scrutiny' to matters that they regard as constitutional (*R (Evans) v Attorney General* [2014] EWCA Civ 254: executive veto over court decision (Section 24.2.1)). It has been suggested that certain statutes are 'constitutional statutes' and that certain rights, such as freedom of speech, are constitutional rights that require the lawmaker to use very clear language to repeal or override (Sections 6.6 and 8.4.3). In *R v Secretary of State for the Home Dept, ex p Simms* [2000] 2 AC 115, at 131 (right of a prisoner of access to the press), Lord Hoffmann stated that we apply 'principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document'. Lord Steyn has remarked that to classify a right as constitutional strengthens its value in that the court is virtually always required to protect it (quoted by Cooke, 'The Road Ahead in the Common Law', in Andenas and Fairgrieve (2009) 691).
- However, there may be disagreement as to what statutes or rights are 'constitutional'. Thus, in *Watkins v Secretary of State for the Home Dept* [2006] 2 All ER 353 (a prisoner's

access to a lawyer), the House of Lords held that, in the absence of a written constitution, the notion of a constitutional right is too vague. (See also *A-G v National Assembly for Wales Commission* [2013] 1 AC 792, at [80]: too uncertain.) In *R (Chester) v Secretary of State for Justice* [2014] 1 All ER 683, at [35], [137], the Supreme Court held that the question of voting rights was not a fundamental feature of UK law.

- It has even been suggested that the courts could refuse to apply a statute that violates a fundamental constitutional principle (Section 8.5.6).
- The House of Lords Constitution Committee examines the constitutional aspects of bills and reviews constitutional developments (see HL 2001–02, 11; see Caird [2012] PL 4). The House of Commons Public Administration and Constitutional Affairs Committee considers general questions of constitutional reform.
- Proposed legislation that Parliament regards as 'of first-class constitutional importance' is examined by a committee of the whole House rather than by the normal 'standing committee' (Section 13.3.1).
- There is authority that compensation can be awarded against a public official who violates a 'constitutional right' even where no loss or damage has occurred (*Ashby v White* (1703) 2 Lord Raym 938: right to vote).

The argument about a written constitution therefore reflects deeper disagreements about whether public officials can be trusted and whether democracy should be the ultimate principle of our society (Section 2.8). On balance, it may well be that contemporary changes in political society and institutional arrangements in recent years, coupled with a governmental system about which there is often considerable popular scepticism and disenchantment, make it desirable to make a break with the past and to establish a written constitution using a method that ensures the collaboration of the whole community.

1.5 The legal and the political constitution

Constitutional law depends heavily on its political context. Thus, the late Professor Griffith famously described the UK Constitution as a 'political constitution'. He remarked that 'the constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also' ((1979) 19). Griffith seems to have meant that the constitution is the ever-changing interaction of the formal rules and the persons who interpret and operate them from time to time, all of whom have their own attitudes and prejudices.

Although our primary concern in this book is with law it is therefore necessary to relate this to its political context. For the purposes of studying constitutional law, it is useful to attempt to distinguish between law and politics.

Unfortunately, there is no agreed meaning of 'politics' or of 'law'. For now it is enough to say that 'law' means rules, principles and standards that are enforced ultimately by the physical force of the state and, in our case, policed by independent courts. Laws are recognised solely because they are made by designated procedures (in the UK by the courts and Parliament). In a broad sense, 'politics' means the struggle for power between different interest groups, and in this sense law is a distinctive aspect of

politics in that it depends on, and is influenced by, political forces, and there is potential for conflict between the courts and the other branches of government.

Law can be distinguished from other aspects of politics in at least the following respects:

- It relies on impersonal and usually written sources of authority in the form of binding general rules.
- It emphasises the desirability of certainty, coherence and impartial and independent public procedures such as courts for settling disputes.
- Politics is concerned primarily with outcomes, for which law is only one among several instruments, and is more willing than law to use emotions, personal relationships, rewards and compromises in order to achieve those outcomes.

A useful way of framing the political context is the metaphor derived from Harlow and Rawlings (2009), of 'red light' and 'green light' theories. Red lighters emphasise the role of law as controlling government in the interests of individual rights and the protection of autonomy. Green lighters favour the collective goals of society, which they believe are best carried out by the government through democratic mechanisms. They therefore see the role of law as being primarily to enable government to effectively achieve important public goals, such as education, health care and social welfare. Green light theory does not of course deny the importance of the individual, but emphasises collective and community means of protecting the individual and of preventing the abuse of government power. However, in reality, the approach taken by the law might be seen as a form of compromise or, in Harlow and Rawlings's terms, 'amber light'.

The legal and the political constitution are interrelated in various ways. For example:

- Politics provides the purposes and values that underpin the constitution and give the law its content.
- Law operates as a delivery mechanism for particular political policies written into legislation.
- The accountability of government – constitutionalism – is both legal and political and each acknowledges the other (e.g. Section 18.1). There is legal accountability to the courts through the courts' powers of judicial review of government decisions to ensure that they comply with the law. There is political accountability to Parliament in the form of the concept of 'responsible government', which requires the government to justify its actions to Parliament. However, for several reasons, including the domination of Parliament by the executive and limited resources, political accountability is weak. Other than the right to vote periodically for individual MPs there is no direct accountability to the people.
- Conversely, values especially concerned with the legal process in the courts, which can be summarised as fairness and justice, feed into the political process. For example, how far should anti-terrorist policies be subject to the right to a fair trial (Section 24.6)?
- Within the law itself there is disagreement between different judges and groups of lawyers about political values. Because the limits of human competence mean that rules can never be entirely clear or complete, judges may be unconsciously

influenced by their political beliefs in deciding between competing arguments. The best we can expect is an open and self-aware mind. Endless disagreement underlies both law and politics, and dissents are commonplace in judicial decisions. This is one reason why a diverse judiciary may be desirable.

- Politics determines the actual power relationship between the different branches of government: lawmaker, executive, judges, military and so on. For example, even if in law Parliament as the lawmaker is supreme, if MPs are weak, self-seeking and subservient the executive is likely to be dominant.

Griffith's view was that constitutional decisions should be (and, traditionally, were) made by political actors rather than unelected judges, and that political means of holding government to account (e.g. through a duty placed upon ministers to explain their actions and decisions in Parliament) were preferable to accountability through the courts. He took this view because he regarded these actors and mechanisms as inherently more democratic, and also because he felt that the judiciary was more liable to be susceptible to implicit political bias (of a right-wing character) as a consequence of its class and educational background. However, there has been a perceptible trend towards a legal constitution in recent years. The growth of judicial review, coupled with the enactment of the HRA (Chapters 17–19 and 22) and the impact of the law of the European Union (Chapter 10), has meant that legal mechanisms are now much more frequently invoked in order to render government accountable in the UK than was the case half a century or so ago.

1.6 The dignified and efficient constitution: deceiving the people?

It is often said that the glue that holds the unwritten UK Constitution together is the propensity of the British people to subservience and deference to officialdom. Writing in the mid-nineteenth century, Walter Bagehot ((1902) see Preface) regarded social class deference and superstition as the 'magic' ingredients that animated the constitution. Bagehot had a pessimistic view of the political sophistication of ordinary people and thought that government could only work effectively if its authority was buttressed by traditional institutions which commanded people's imagination and made them deferential to the rulers.

Bagehot distinguished between what he called the 'dignified' and the 'efficient' parts of the constitution. The dignified parts give the constitution its authority and encourage people to obey it. They involve the trappings of power, notably the monarchy that underpins the central government (Section 14.6) and the mystique of ceremony and ritual. Bagehot thought that it would be dangerous to shed the light of reality upon the monarchy since doing so would expose it as a sham. The efficient part of the constitution, which Bagehot located primarily in the Cabinet (although today this is less convincing, Section 15.4), carries out the working exercise of power behind the scenes. The distinction between the dignified and the efficient performs a useful function in a democracy by preventing working politicians from claiming to embody the state, a technique adopted by tyrants throughout history. For example, the monarch and Parliament have authority, the latter because it is elected, while the government has power without authority in its own right. It gets its authority only from Parliament.

On the other hand, the dignified element can reinforce tyranny by hiding reality. The 'noble lie' postulated by Plato in his *Republic* is designed to keep people happy with their designated roles: when humans were formed in the earth the rulers had gold mixed with them, the military silver and the workers lead. Even Plato's pupils found this hard to swallow, but they considered that it is sometimes right to lie in the interests of the state. There is similar thinking evident today. In *McIlkenny v Chief Constable of the West Midlands Police* [1980] 2 All ER 227, at 239–40, Lord Denning MR took the view that it was better for the 'Birmingham Six' to remain wrongly convicted than to face the 'appalling vista' of the police being found to be guilty of perjury, violence and threats. The Scott Report into the sale of arms to Iraq (*Report of the Inquiry into the Export of Defence Equipment and Dual Use Goods to Iraq and Related Prosecution* (HC 1995–96, 115)) revealed that ministers and civil servants regarded it as being in the public interest to mislead Parliament, if not actually to lie, over government involvement in arms sales to overseas regimes. The Constitutional Reform and Governance Act 2010 prevents disclosure under the Freedom of Information Act 2000 of all correspondence between the Prince of Wales and ministers on the ground that it would weaken public confidence in the monarchy if people knew that the heir to the throne attempted to influence government (Section 24.2.1).

1.7 Types of constitution

There are several traditional ways of classifying constitutions. It must be emphasised that these are ideals or models and there is no reason to assume that any particular constitution fits neatly within any single category. The types are:

Federal and unitary. In a federal state (such as the USA, Germany or Canada) the various powers of government are divided between different geographical units and a central government. Each level is equal and independent and can exercise the powers given to it without the interference of the other level. In a unitary state, ultimate power is held by a single central government although there may be subordinate units of local government with powers given and taken away by the centre. In law, the United Kingdom is strictly a unitary state with the central authority, Parliament, having absolute power.

How powers are allocated within a federation varies according to the history and political concerns of the state in question. There is usually a single citizenship of the central state which is the internationally recognised entity. The federal government is usually responsible for foreign affairs, defence and major economic matters, while private law is usually the responsibility of the states. Criminal offences, social regulation and public services may be allocated to either level. Usually particular matters are given to the federal level, with the residue left with the states: the 'reserved powers' model. Switzerland provides an extreme example where the powers of the federal government are severely limited in favour of the autonomy of the cantons. The converse 'conferred powers' model is less common (e.g. Canada). The relative political power of each level depends on the circumstances of each country and cannot necessarily be discovered from the law itself.

There may be demarcation problems to be resolved by the courts, so federal constitutions have a strong legalistic element. Each level might have its own courts, although in Germany, for example, there is a single court system. (In civil law countries such as

Germany where the law, being codified, is more uniform, there may be less need for separate courts at each level than in a common law country such as the USA.)

Federalism is practicable where the component units have enough in common economically and culturally to enable them to cooperate, while at the same time each unit is sufficiently distinctive to constitute a community in its own right but not sufficiently powerful to aspire to a role on the international stage. Thus, a delicate balance must be struck. The United States and Australia are relatively successful federations, whereas Canada with its split between English-speaking and French-speaking regions has sometimes been less stable. Yugoslavia, with its many ethnic tensions, was tragically unsuccessful once Soviet control was removed.

Dicey ((1915) 171) strongly opposed federalism, claiming that it tends towards conservatism, creates divided loyalties and elevates legalism to a primary value, making the courts the pivot on which the constitution turns and perhaps threatening their independence.

In 1973, the Royal Commission on the Constitution (Cmnd 5460) argued against a federal constitution for the United Kingdom. It argued firstly that there would be a lack of balance since the units are widely different in economic terms, with England being dominant since it includes about 84 per cent of the population of the UK. There is a need for central and flexible economic management since the resources of the United Kingdom are unevenly distributed geographically, with much of the UK comprising thinly populated hills. Secondly, echoing Dicey, the Commission argued that a federal regime would be contrary to our constitutional traditions in that it would elevate the courts over political machinery. It may be best to think of federalism as a loose notion, a matter of degree comprising a range of relationships, rather than as a simple uniform model. From this perspective the United Kingdom may be regarded as a state with certain federal features. In particular, EU membership (for the present) has arguably introduced a federal element (Section 10.4). The devolved governments for Scotland, Wales and Northern Ireland within the United Kingdom are not strictly federal but in some respects have political and legal protection akin to federalism (Section 16.1). From the strictly legal perspective, the principle that Parliament is sovereign preserves the unitary nature of the constitution. However, the Scottish referendum of 2014 revealed considerable tension within the devolved structure not least because of the anomalous position of England, which lacks its own powers or legislative assembly (Section 16.6). That tension seems set to persist as two of the constituent parts of the UK (Scotland and Northern Ireland) voted to remain in the European Union in the referendum of 2016, while the other two (England and Wales) voted to leave.

Note that federalism can be distinguished from 'confederation'. A confederation exists where independent units agree to share some governmental institutions. Canada and the United States were once confederations. There are no modern instances, although the EU is sometimes regarded as a confederation. Thus, the two notions shade into each other, reinforcing the point that federalism is a loose notion.

Rigid and flexible. This concerns whether it is easy for those in power to change the constitution. In legal terms a rigid constitution is where a special process, such as a referendum of the people is required to change it. In a legal sense the UK Constitution is flexible since it can be changed in the same way as any other law. However, whether a constitution is easy to change depends more on politics than on law. In a political

sense the status quo is not easy to change in the UK since those in power are likely to benefit from it.

Parliamentary and presidential. The United Kingdom has a parliamentary system. In such a system, as applies to many western European countries, the people choose representatives who form the legislature, Parliament. The head of government is the prime minister (the chancellor in Austria and Germany), chosen by the Parliament. The prime minister chooses and removes ministers, who are the leaders of the executive government. Sometimes, as in the United Kingdom, these must also be members of the legislature. Parliament scrutinises government activities, consents to laws and provides the government with finance. It can ultimately dismiss the executive by withdrawing its support. Parliamentary government therefore looks strong and accountable. However, in practice the executive is likely to be dominant, if only because of the human tendency to defer to leaders.

In a parliamentary system there is usually a separate head of state who might be a hereditary monarch, as in the United Kingdom, or elected by the people, as in Ireland. The head of state formally represents the state and is the source of its authority but has little political power, except perhaps as a safety mechanism in the event of a serious political breakdown.

In a presidential system such as that of the United States, the leader of the executive, the president, is elected directly by the people independently of the legislature and holds office for a fixed period, subject (in some countries) to dismissal by the legislature. The president is usually also the head of state. Presidential government therefore gives the voter a greater choice. On the other hand, without a strong input from the legislature, accountability might be weak and when the legislature and president represent different political parties it might be difficult for the government to work effectively since its proposed laws may be blocked by the legislature. The device of a separate head of state in the parliamentary system has the advantages of separating the authority of the state from its political powers. In a parliamentary system the prime minister and other members of the executive are merely government employees who cannot (or, at least, should not) identify themselves with the state as such and so cannot claim reflected glory and immunity from criticism. The head of state has a symbolic role and also ensures continuity in the constitution. For example, if the government were to collapse it would be the responsibility of the head of state to ensure that government continued. Apart from this exceptional situation the Queen has little personal political power (Section 14.4), so that any respect due to her as representing the state does not carry the risk of tyranny.

Unicameral or bicameral. A unicameral constitution has a single lawmaking assembly. A bicameral constitution has two assemblies, each of which operates as a check on the other, the balance between them depending on the circumstances of the particular country. In the United States, for example, the Senate, the upper house, represents the states which comprise the federal system, with the legislature of each state, irrespective of its size, choosing two members, whereas Congress, the lower and larger house, is elected by the people generally, each state being represented according to the size of its population. Some European constitutions, such as those of Denmark, Sweden and Greece, are unicameral, and in most European constitutions the upper house cannot override the lower house. It is questionable whether an upper house serves a useful

purpose other than in a federal system in the US model, where each house can check the other from importantly different perspectives.

The UK Constitution is bicameral. The lower house, the House of Commons, with 650 members, is elected from the UK as a whole. The upper house, the House of Lords, with more than 800 members, is mainly appointed by the prime minister, which contrasts with other European countries where the upper houses are mainly elected. The House of Lords cannot override the Commons but serves as a revising chamber to scrutinise and amend legislation proposed by the lower house, thus providing an opportunity for second thoughts.

Monarchical or republican: monarchy, aristocracy and democracy. In a tradition dating back at least to Aristotle, there are three fundamental types of government: monarchy, or rule by one person; aristocracy, literally rule by a group of the 'best' people; and democracy, rule by the many or the people as a whole. According to Aristotle, each form of constitution has its virtues but also corresponding vices or deviations. The virtues exist when the ruler rules for the benefit of others; the vices when the ruler rules for the benefit of him or herself. According to Aristotle, the main merit of monarchy is its authority and independence since monarchs have a quasi-godlike status. The corresponding defect is despotism. The merit of aristocracy is wisdom; its defect is oligarchy, rule by a selfish group. The merit of democracy is consent of the community; its defect is instability leading to mob tyranny. Aristotle postulated a vicious cycle in which a monarch becomes a despot, is deposed by an aristocracy, which turns into an oligarchy and is overthrown by a popular rebellion. The ensuing democracy degenerates into chaos, resolved by the emergence of a dictator, who takes on the characteristics of a monarch, and so on. Aristotle therefore favoured what he called 'polity', a 'mixed government' combining all three (but loaded in favour of the middle classes) and with checks and balances between different branches of government.

In those European countries where monarchy remains, the powers of the monarch are invariably limited, in some cases being purely ceremonial. The monarchy in these countries is hereditary within a family and thus relatively independent of political pressures. The UK has a 'constitutional monarchy', meaning that the monarch cannot make law or exercise executive or judicial powers. In this way the risk of dictatorship is reduced and the monarchy serves as a harmless symbol representing the nation.

In 'republican' states the head of state is elected either by the Parliament or by the people. As we shall see (Section 2.5), the notion of republicanism amounts to rather more than this. It embraces democracy in a wide sense requiring equality in all aspects of government and, as such, has been of limited influence in the United Kingdom.

The United Kingdom retains an aristocratic element in the form of the House of Lords, one of the two parts of Parliament. The House of Commons, the members of which are elected as representatives of the people, is the more powerful part of Parliament.

Monist and dualist. This concerns how far the constitution is receptive to international law in the form, for example, of treaties between nations or resolutions of the United Nations (UN). In a monist state a treaty once ratified (confirmed) by the state is automatically part of that state's domestic law. For example, the Basic Law of the German Federal Republic, Article 25, states that the general principles of international law take precedence over domestic law and directly create rights and duties. The United Kingdom is a dualist state, in which international law is not binding in domestic law unless it has been adopted as part of our law usually by an Act of Parliament.

The UK Constitution could be summarised as:

- uncodified;
- with an incomplete separation of powers: the judiciary being independent but the executive and legislature partly combined;
- based on the rule of law and accountable government;
- unitary with federal aspects;
- legally flexible;
- a constitutional monarchy;
- parliamentary;
- a representative democracy with an aristocratic element;
- bicameral;
- dualist.

1.8 Public and private law

Constitutional law is the most basic aspect of 'public law'. Broadly, public law governs the relationship between the government and individuals and that between different governmental agencies. Private law concerns the relationship between individuals and also deals with private organisations such as companies. For reasons connected with a peculiarly English notion of the rule of law (Section 6.4) the distinction between public law and private law is less firmly embedded here than in the continental legal systems that inherited the distinction from Roman law. It was believed by the likes of Dicey that the liberties of the individual are best secured if the same law, broadly private law, governs officials and individuals alike so that officials have no special powers or status.

Attractive though this may be in certain respects, it is both unrealistic and arguably undesirable, given the huge powers that must be vested in the state to meet public demand for large-scale public services and government controls over daily life and the movement of the population.

Some writers have rejected the distinction between public and private law, at least on the level of fundamental principle, arguing that the same basic values and concepts pervade all law and that any given function could be carried out by the state or a private body (Section 19.5). It is difficult to deny that values such as fairness and openness are common to the private and public sectors, and that organisations such as charities that carry out functions for the benefit of the public on a non-profit basis have elements both of the public and of the private. This is particularly important today, when it is politically fashionable to entrust public services to profit-making private bodies. Moreover, there are numerous bodies not directly connected with the government that exercise vast powers over individuals, such as sporting and professional disciplinary bodies, trade unions and financial bodies. Beyond the core functions of keeping order and defence, there is no agreement in the United Kingdom as to what the proper sphere of the state is and which bodies are subject to public law.

Conversely, the Crown has the same legal powers as a private person, so government makes extensive use of private law in the contexts, for example, of contracts for the procurement of goods and equipment, employment and property. In this context

the government's economic power is so great (e.g. the purchase of NHS medicines) and its activities so wide-ranging that it might be argued that these 'soft' powers should be treated as having a distinctive public law character.

There are important distinctions between public law and private law. These include:

- The government represents the whole community, and its officials (at least in principle) have no self-interest of their own. By contrast, a private company and an individual both have a legitimate self-interest, including the profit motive. It follows that government should be accountable to the community as a whole for its actions. By contrast, in the case of a private body, accountability might be regarded as an unacceptable intrusion on its freedom.
- Arguably, private law is fundamentally different from public law in that it concerns the voluntary interaction of individuals, calling for compromises, recognition of agreed solutions and concessions to vulnerability, whereas public law calls predominantly for general principles designed to structure and contain power. For example, in private law a promise made is normally binding, whereas this is not usually the case in public law (Section 17.6.3).
- The government has the ultimate responsibility to protect the community against disruption and external threats. For this purpose it must be entrusted with special powers to use force. As we shall see in Chapter 25, concerning emergencies, it may be difficult or impossible to reconcile this with our belief that all power should be curbed by law.
- The distinction between public and private law has particular implications in two main contexts. Firstly, there is the question of the scope of judicial review of decisions made by powerful bodies. This is limited to 'functions of a public nature' (Section 19.5). Secondly, the protection of the HRA applies mainly against public bodies and against bodies certain of whose functions are public functions (Section 22.5). A similar approach is taken in both contexts, the matter depending upon the extent to which the body in question is linked to the central government, for example, whether the body in question has special powers, whether it is controlled or financed by the government and the public importance of its functions.

1.9 The direction of the constitution: reform

There is a widely shared belief that the constitution should not be subject to radical reforms but should evolve naturally, particular problems being dealt with as they arise. For example, there is strong resistance to altering the House of Lords on the basis that 'it works' (Section 12.3). This places constitutional reform at the mercy of the party politics of the day rather than subject to a special process designed to consider the long-term public interest. Ideally there should be a special independent process to consider the issues and validate the new constitution. The usual way of doing this is to hold a 'constitutional convention' composed of representatives of the main sectors of society. In a report issued in 2013 (HC 2012–13, 371), the Political and Constitutional Reform Committee of the House of Commons saw value in establishing such an institution to reflect upon the consequences of recent rapid constitutional changes, and the possible future of the United Kingdom. It is plausible that the continuing tensions between the parts of the UK which were exposed by the EU referendum in 2016 may strengthen

calls for the establishment of such a convention in the long run, but in the meantime most constitutional attention is likely to be exerted upon the process of withdrawal from the European Union.

Some commentators assert that there are general forces guiding the direction of the constitution. The 'Whig' view of history optimistically claims to find a progression from tyranny to democracy (Section 4.1). In this vein, Oliver (2009) suggests that four tendencies underlie constitutional reform. The first is towards 'principles'. These have been developed by the courts, for example, the 'legitimate expectation' (Section 18.3.1) and 'proportionality' (Section 18.1.1), and also from within government, for example, the 'Seven Principles of Public Life' (Section 5.9). The second tendency is towards 'governance', meaning reforming governmental processes. This would include, for example, the modernisation of parliamentary procedures. The third tendency, albeit perhaps hesitant and sporadic, is that of strengthening 'citizenship' in the sense of equality, for example the HRA. Oliver's fourth tendency is 'separation'. This would include devolution and the reforms to the court system made by the Constitutional Reform Act 2005, both of which enhance the separation of powers (Sections 7.5.3 and 7.6.2).

Bogdanor (2009) finds a tendency, albeit imperfect, towards dispersing power away from the centre and towards 'juridification' in the sense of using law rather than politics to make constitutional changes (see the discussion above on the 'political' and 'legal' constitution). There is also an increased reliance on written codes guiding the behaviour of politicians and officials. Some of these such as the *Ministerial Code* (Section 15.1) and the *Cabinet Manual* (Section 3.4.1) are not legally enforceable. Others, such as the provisions governing MPs' salaries and expenses (Section 11.7.2) are statutory. It may be that these practices reflect public distrust in the capacity of those in power to govern without external constraints (Section 5.9).

Contemporary issues have placed the traditional model of the constitution under strain. In particular, the authority of state constitutions is challenged by globalisation, which in this context includes:

- the commitment to free markets by the powerful countries who control the main international organisations (the UN, the International Monetary Fund and the World Bank);
- a commitment, albeit less concrete, to international human rights and environmental standards, and the bringing to justice of political leaders who engage in international crimes such as genocide and torture;
- the ease with which money can be moved around the world;
- the international nature of problems such as terrorism, environmental protection and financial failure. State laws are sometimes ineffective, for example in dealing with terrorism, human trafficking and financial corruption;
- the fact that individual countries are increasingly dependent on others for resources and security.

The constitution provides filter mechanisms which to a certain extent recognise and control the influences of international actions and relationships on our own law and vice versa (Section 9.5), but otherwise the law has not adapted to globalisation. International affairs are still based on seventeenth-century ideas of self-contained sovereign states.

Summary

- Having read this chapter, you should have a general idea of some basic constitutional concepts and how they relate to the UK. Constitutions deal with the fundamental framework of government and its powers, reflecting the political interests of those who design and operate them and providing mechanisms for the control of government. The UK Constitution does not adequately address the international dimension of modern government.
- The UK Constitution is unwritten in the sense that there is no special constitutional document giving it a status superior to the ordinary law. The UK Constitution is made up of many ordinary laws and political conventions. Any special status depends on courts and officials giving it special weight when making decisions.
- The aim of a constitution is to manage disagreement in circumstances where collective action on behalf of the whole community is required. The UK Constitution provides a framework for this purpose. In particular, the courts protect basic individual rights.
- There is an underlying dispute as to how far constitutional disputes should be settled by courts or by elected bodies.
- There is a tendency in any form of government for powers to gravitate towards a single group so that a primary concern of constitutional law is to provide checks and balances between different branches of government. We introduced the basic concepts of sovereignty, the rule of law, separation of powers and fundamental rights. However, the unwritten UK Constitution does not prevent power being concentrated in the hands of a wealthy minority.
- Political and legal aspects of a constitution should be distinguished, although the boundary between them is leaky and they have different perspectives. The legal aspects of the constitution are a distinctive part of the wider political context, each influencing the other. There are also important constitutional principles in the form of conventions and practices operating without a formal legal basis.
- The distinction between written and unwritten constitutions is of some but not fundamental importance. We compared the main advantages and disadvantages of written and unwritten constitutions without committing ourselves to one or the other since the matter is one for political choice. The UK Constitution is an untidy mixture of different kinds of law practices and customs and has a substantial informal element, which might lend itself to domination by certain networks or elites.
- We outlined the main categories of constitutions, emphasising that these are models and that actual constitutions need not closely correspond to any pure model. In particular we discussed 'parliamentary' and 'presidential' models, the former concentrating power, the latter splitting it up. The UK Constitution is strongly parliamentary with perhaps a tendency towards federalism.
- The distinction between public law and private law is important, particularly in the context of the HRA and of judicial review of powerful bodies. The courts have adopted a pragmatic approach to this question of classification.

Exercises

1.1 You are discussing constitutional law with an American legal expert who claims that the United Kingdom has no constitution. What does she mean and how would you respond?

1.2 Sir John Laws ('The Constitution, Morals and Rights' [1996] PL 622) described a constitution as 'that set of legal rules which govern the relationship in a state between the ruler and the ruled'. To what extent is this an adequate description of the UK Constitution?

1.3 How well does the UK Constitution fit the various methods of classifying constitutions mentioned in this chapter?

1.4 It is both a strength and a potential weakness of the British Constitution that, almost uniquely for an advanced democracy, it is not all set down in writing (Royal Commission on the Reform of the House of Lords, Cm 4534, 2000) (the Wakeham Report).

Discuss.

1.5 Should the courts have the power to overturn legislation?

1.6 Compare the merits of the parliamentary and presidential systems of government.

1.7 The government announces that in future all proposals for new laws will be scrutinised in private by a 'forum' comprising the chief executives of the main banks and representatives of companies who contribute to the governing party. Are there any constitutional objections to this? Is further information needed to enable you to decide?

Further reading

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*Harlow and Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) ch 1
*Hennessy, *The Hidden Wiring: Unearthing the British Constitution* (Gollancz 1995) Prologue, ch 1
Hickman, 'In Defence of the Legal Constitution' (2005) 55 U Toronto LJ 981
*Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Bloomsbury 2016)
*Loughlin, *The British Constitution: A Very Short Introduction* (Oxford University Press 2013)
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Loughlin, *Sword and Scales* (Hart Publishing 2005)
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*Munro, *Studies in Constitutional Law* (2nd edn, Butterworths 1999) ch 1
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Further reading cont'd

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*Qvortrup, 'Let Me Take You to a Foreign Land: The Political and the Legal Constitution' in Qvortrup (ed), *The British Constitution: Continuity and Change* (Hart Publishing 2013)

*Ridley, 'There Is No British Constitution: A Dangerous Case of the Emperor's Clothes' (1988) 41 Parl Aff 340

Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157

*Ward, *The English Constitution: Myths and Realities* (Hart Publishing 2004)