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Union: co-legislator, coordinator, and executive power' p.102; L. van Middelaar and U. Puetter, 'The European Council - the Union's supreme decision-maker' p. 75.

Oxford University Press Journals: extracts from Jo Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29 OJLS 3, 430–2, 454–5; Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' [2006] Oxford Journal of Legal Studies 26(1): 179; M. Sunkin, L. Platt, T. Landman, and K. Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales' (2010) Journal of Administration Research and Theory, 20:I, 243–i260.

Palgrave Macmillan: extracts from S.L. Greer, 'Whitehall', in R. Hazell (ed.) *Constitutional Futures Revisited: Britain's Constitution to 2020* (2008, Basingstoke: Palgrave Macmillan), ch. 8, p. 125; A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885; 10th edn 1959, London: Macmillan & Co), pp. 406–10 (Chapter XIII 'Relation between Parliamentary Sovereignty and the Rule of Law').

Policy Exchange: extracts from the Judicial Power Project. London, 2019: John Finnis, The unconstitutionality of the Supreme Court's prorogation judgment; Martin Loughlin, The Case of Prorogation, The UK Constitutional Council's ruling on appeal from the judgment of the Supreme Court. London, 2016: Graham Gee: extracts from G. Gee, 'A Tale of Two Constitutional Duties: Liz Truss, Lady Hale, and Miller'.

Public Law Project: extracts from R. Thomas and J. Tomlinson, 'The Digitalisation of Tribunals: What we know and what we need to know' [2018] Public Law Project.

Thomson Reuters (Professional) UK Limited: extracts from N.W. Barber, 'Laws and constitutional conventions' (2009) 125 Law Quarterly Review 294, 294; Richard Rawlings, 'Concordats of the Constitution' (2000) 116 Law Quarterly Review 257, 258, 279; Jeffrey Jowell, 'Parliamentary sovereignty under the new constitutional hypothesis' [2006] Public Law 562, 578; Eric Barendt, 'Separation of powers and constitutional government' [1995] Public Law 599, 603–4; Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, *de Smith's Judicial Review* (2007, London: Sweet & Maxwell), paras 5-044–5-045; Rodney Brazier, '"Monarchy and the Personal Prerogatives": a personal response to Professor Blackburn' [2006] Public Law 45, 45–6; Robert Hazell, 'Time for a new convention: parliamentary scrutiny of constitutional bills 1997–2005' [2006] Public Law 247, 246; D. Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] Public Law 219, 219–20, 226–7; David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Public Law 323, 324–7; Ann Abraham, 'The ombudsman and "paths to justice": a just alternative or just an alternative?' [2008] Public Law 1, 2–3; Nick O'Brien, 'Ombudsmen and social rights adjudication' [2009] Public Law 466, 468–9; Robert Thomas, 'Administrative Justice, Better Decisions, and Organisational Learning' [2015] Public Law, 111, at 112–114 and 131–133; D. Mead, 'Outcomes aren't all: Defending process-based review of public authority decisions under the Human Rights Act' [2012] *Public Law* 61, 76–8.

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INTRODUCTION TO CONSTITUTIONAL FUNDAMENTALS

CENTRAL ISSUES

1. The question 'What is a constitution?' can be answered in different ways. In many countries, the constitution is a *text* of fundamental importance, setting out the rules for how the country is to be governed.
2. The term 'constitution' is also used to describe how the *system* of government operates in practice. Modern democracies require a system that (a) has institutions carrying out executive, legislative, and judicial functions; (b) regulates relations between different state institutions; and (c) defines, protects, and encourages a culture of respect for fundamental freedoms.
3. The United Kingdom does not have a codified, written constitutional text in the first sense; but clearly it has a constitutional system. A notable feature of the system is its extreme flexibility. Radical changes can be made by ordinary legislation made by the UK Parliament without the need for a special process of constitutional amendment.
4. An historical explanation for the United Kingdom's exceptional situation of having no codified constitutional text is the country's stability since the eighteenth century. Democracy was established by an evolutionary process rather than by revolution. A political explanation is the consensus between the two main UK-wide political parties (the Conservatives and Labour) that the 'unwritten' constitution serves the country's needs well. Not everybody accepts this view.

1.1 WHAT IS A CONSTITUTION?

This book is about the constitution of the United Kingdom of Great Britain and Northern Ireland (to give the country its full but rarely used official name, the country is often referred to as Great Britain or just Britain); but from time to time, including in this Chapter, we'll need to stand back and compare the rather unusual British constitution with those of other countries. So, the first question we need to ask and begin to answer is: what is a constitution?

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1.1.1 THE CONSTITUTION AS A TEXT

A distinction can be drawn between countries that have a single text called something like 'The Constitution' or 'The Basic Law' (almost all countries of the world) and the tiny group of countries that have no such text (the United Kingdom) or a text that is not comprehensive (New Zealand and Israel). Historian Linda Colley describes how 'single document constitutions', which sought to constrain government and protect rights, 'proliferated exponentially and in connected waves across multiple frontiers' with a surge after the First World War (1918) and even more after the Second World War (1945).[1]

We'll see in Chapter 2 that academics disagree over how fundamental the difference is between countries with a single text and those that do not have one. For practical lawyers, one difference is in the methods we must use to find the main rules of the constitutional system. In countries which have 'The Constitution', that document systematically sets out basic rules for how the country is governed. Most can be printed as a booklet, slim enough to be slipped comfortably into a pocket. Many of these codified constitutional texts share similar headings: typically, there are sections on the executive (which may include a president, prime minister, monarch, emperor, governor-general, the cabinet, etc), the legislature (which may be called a chamber of deputies, a senate, a parliament, etc), the judiciary (which may include a supreme court, a constitutional court, etc), and on the fundamental rights of individuals (for example, freedom of expression, the right to fair trials, etc).

EXERCISE

Go to the Constitute project website www.constituteproject.org, which sets out in English the constitutions of 201 countries. Select two of the constitutional texts (avoiding the United Kingdom, New Zealand, and Israel). Compare and contrast what the texts say about (a) the executive, (b) the legislature, (c) the judiciary, and (d) people's basic rights.

The life cycle of a codified constitutional text includes its birth, amendment, and death. The birth of a constitutional text may be stimulated by a variety of different factors including: when a colony achieves independence;[2] when a country splits into two independent countries;[3] after a global war;[4] after a civil war;[5] and the end of a political regime.[6] A country may adopt a new constitution at different points in its history: for example, the current constitution of France is the 'Fifth Republic' (adopted in 1958). The average lifespan of codified constitutional texts is only 17 years,[7] though some have lasted for much longer (such as the Constitution of the USA dating back to 1789). The process of drafting a new constitution is typically carried out by a body known as a 'constituent assembly' or

[1] L. Colley, *The Gun, the Ship and the Pen: Warfare, Constitutions and the Making of the Modern World* (2021) p. 3.
[2] e.g. Jamaica (a former colony of the United Kingdom), Mozambique (a colony of Portugal).
[3] e.g. in 1993, Czechoslovakia separated into the Czech Republic and Slovakia, each of which required new constitutions; in 1905, the union between Norway and Sweden was dissolved.
[4] After the end of the Second World War in 1945, constitutions were adopted by Germany and Japan under strong international control.
[5] e.g. Rwanda adopted a new constitution in 2003 following the genocide in 1994.
[6] e.g. the end of Communism in Eastern Europe in 1989 required new democratic constitutions to be adopted in countries including Bulgaria, Poland, Hungary, Latvia, Lithuania, Estonia; the end of the Apartheid era in South Africa led first to an interim constitution in 1994, which was replaced by a final constitution in 1997.
[7] T. Ginsburg, Z. Elkins, and J. Melton, 'The Lifespan of Written Constitutions', www.law.uchicago.edu/alumni/magazine/lifespan.

a 'constitutional convention' that is dissolved once the text is agreed. Normally, the draft text is formally adopted as the country's constitution after it has been approved by the people in a referendum.[8]

The mid-life of a constitutional text may require it to be modified. This may be to bring the constitutional text into line with current social attitudes. For example, in May 2015 the Constitution of Ireland was amended to insert the following words: '*marriage may be contracted in accordance with law by two persons without distinction as to their sex*' (approved by 62 per cent of voters in a referendum); but voters decisively rejected a further proposal to reduce the age of eligibility to run for president from 35 to 21. A further amendment was made in 2018 (following a referendum) to allow laws to be made enabling women to have abortions; the text of the Irish Constitution prohibited such laws being enacted between 1983 and 2018. Amendments may be proposed to address technical issues to do with the relationship between state institutions or their powers or larger issues (for example, in 2012, the Constitution of Italy was amended to include a requirement for balanced budgets).

Codified constitutions contain rules about the amendment process. In some, the amendment may be made by a 'super majority' of the legislature (for example, two-thirds of representatives). In others, there may be a requirement for the proposed amendment to be approved by the people in a referendum. In federal countries made up of states or provinces, there may be a requirement that people or the legislatures in all or a proportion of states agree. Whatever the procedure, the general aim is to ensure that there is a sufficiently broad consensus about the modification, to 'entrench' the constitution against change by simple majority, and to remove the constitution from ordinary political debates and processes. Countries with particularly stringent amendment procedures can be described as having a 'rigid constitution'—the Constitution of Australia is often held up as a prime example of this: since 1900, there have been 44 proposed amendments but only eight have been approved (the last in 1977 to introduce 70 years as the retirement age for judges).

The death of a constitution may occur for various reasons. A new ruler may illegitimately seize government power, against the terms of the constitution, and declare the constitution to be suspended.[9] Some terminations have been more legitimate: for example, in 1958, the Fourth Republic of France was dissolved following a referendum.

One other feature of codified constitutions needs to be highlighted. Most of them have the status as the highest form of law in their country. The supremacy of a constitution may be emphasized symbolically, for example the words of oaths sworn by new citizens and holders of public office may include words such as '*I will support and defend the constitution*' and by having a national public holiday on 'Constitution Day' as an annual commemoration of the date on which the constitution was adopted. A constitution's status as the supreme law in a country also has legal and political significance. Typically, it means that the legislature of a country does not have unlimited powers but may legislate only within the framework established by the constitution. A court, either the supreme court or a specialist constitutional court, is given the task of adjudicating whether the constitution has been breached. If legislation is contrary to the constitution (for example, because it breaches the constitutional right to freedom of expression set out in the constitution), the court rules that the legislation is invalid.

The constitution therefore both establishes the powers of the main institutions of government and limits their powers. All institutions of the country—the executive, legislature, and judiciary—are confined by the terms of the constitution. This idea is generally referred to as *constitutionalism*. We explore British understandings of this term in Chapter 2.

[8] Definition: a national or regional vote on a single question.
[9] e.g. in 1967, a military junta took control of the Greek government, leading to seven years of military rule. A new constitution was adopted in 1975.

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1.1.2 THE CONSTITUTION AS A SYSTEM

There are differences between a country's written constitution and how the constitutional arrangements operate in practice. This is a really important point. The codified constitutional text may not be a complete account of how the constitutional order—the *system*—actually works. The text may not be comprehensive; it may omit significant rules.[10] The text may not match how the constitutional system works in reality.[11] To fully understand a country's constitution, it is therefore necessary to look beyond the codified text to the *system* as a whole. This includes, for example, reading the (often voluminous) case law of the court with ultimate responsibility for adjudicating disputes about the constitution. Some significant constitutional rules may be set out in ordinary legislation rather than in the codified constitution. And political practices also need to be observed and understood.

In thinking about a constitution as a system, we can identify several basic functions that are needed in modern, democratic countries.

The system should provide institutions of the state. Typically, these fall into the categories of executive (government), legislature, and judiciary. We explore the separation of powers in Chapter 5.

- The system should define the relationship between institutions. For example, where there is a bicameral legislature, we need to know about the respective powers of the upper and lower chambers. Another example is the power of the judiciary: does it have authority to invalidate laws made by the democratically elected legislature that contravene the constitution? Almost all the chapters in this book consider constitutional relationships. Professor Anthony King draws a useful distinction between two types of institutional relationships. Some constitutions tend towards 'power sharing', with 'pluralist and fragmented' layers of government, proportional electoral systems, governments by coalitions of political parties based on negotiated compromises, and a constitutional court empowered to strike down legislation. 'Power hoarding' systems are characterized by single party 'winner takes all' governments, weaker local and regional layers of government, and less powerful constitutional courts.[12]
- The system should define, protect, and encourage a culture in which people's basic rights are respected. This upholds individual human dignity and is an important way in which the power of state institutions is limited. Most countries with codified constitutions list the 'constitutional', 'basic', or 'fundamental' rights. We explore rights protection in Chapter 4, as an aspect of the Rule of Law.

Taking stock, we can say that the term 'constitution' is capable of being used in different ways, as Dr Geoffrey Marshall (1929–2003) explains:

G. Marshall, 'The Constitution: Its Theory and Interpretation', in V. Bogdanor (ed.) *The British Constitution in the Twentieth Century* (2004, Oxford: OUP for the British Academy), ch. 2, p. 31

Four distinguishable senses of 'constitution' [. . .] would be:

(a) the combination of legal and non-legal (or conventional) rules that currently provide the framework of government and regulate the behaviour of the major political actors;

[10] Famously, the Constitution of the USA adopted in 1789 does not explicitly state that the US Supreme Court has power to invalidate laws made by Congress that breach the constitution. The Court held that it had a power of judicial review of legislation in 1803 in *Marbury v Madison*, 5 US 137.

[11] e.g. Art. 1 of the Constitution of Cyprus stipulates 'the State of Cyprus is an independent and sovereign Republic with a presidential regime, the President being Greek and the Vice-President being Turk elected by the Greek and the Turkish Communities of Cyprus respectively'. The post of vice-president has been vacant since 1974 because of the political division of the island.

[12] A. King, *Does the United Kingdom Still Have a Constitution?* (2001) p. 7–12.

(b) a single instrument promulgated at a particular point in time and adopted by some generally agreed authorisation procedure under the title 'constitution' (or equivalent rubric such as 'basic law');

(c) the totality of legal rules, whether contained in statutes, secondary legislation, domestic judicial decisions or binding international instruments or judicial decisions, that affect the working of government;

(d) a list of statutes or instruments that have an entrenched status and can be amended or repealed only by a special procedure.

These are not mutually exclusive definitions: a country may have a constitution in some or all of these senses. The United Kingdom has a constitution in meanings (a) and (c), but not (b) and (d). Some scholars are sceptical whether it makes much difference whether or not there is a 'single instrument' (or 'capital C' constitution), as Anthony King argues:

A. King, *Does the United Kingdom Still Have a Constitution?* (2001, London: Sweet & Maxwell), p. 3

Constitutions [. . .] are never—to repeat, *never*—written down. They might possibly in principle be written down, but in practice they never are. There are, of course, written documents called Constitutions—with a capital 'C'—but they are never, ever coextensive with all of a country's most important rules regulating the relations between different parts of government and those between the government and the people. Constitutions as defined here ['*A constitution is the set of important rules that regulate the relations among the different parts of the government of a given country and also the relations between the different parts of the government and the people of the country*'] and the written documents called Constitutions overlap to a greater or lesser degree. Of course they do: all capital-C Constitutions have at least *some* bearing on how the countries that have them are actually governed. But capital-C Constitutions and small-c constitutions are never the same thing, and sometimes the relationship between the two is quite tenuous (even if, in a given country, the capital-C Constitution is taken seriously).

1.1.3 CONSTITUTIONS ABOVE AND BELOW THE NATION STATE

So far, we have assumed that constitutions are for countries—'nation states'. Many countries have subnational units, each of which has its own constitution. In the USA, for instance, there is a constitution for the whole country (the federal constitution)[13] and each of the 50 states have constitutions too. Canada (with ten 'provinces'), Australia (with six 'states' and 10 'territories'), and Germany (with 16 'Bundesländer') are further examples of multi-tier countries. An important function of the national constitution in these countries is to regulate the relationship between the federal level (the whole state) and the component parts.

Other countries—France, Greece, the People's Republic of China, and Japan are examples—are unitary states with a single constitution.

We'll see in Chapter 5 that the arrangements in the United Kingdom have changed since 1998, with increasingly wide powers 'devolved'[14] by the UK Parliament to legislative and executive institutions in

[13] Definition: 'federal' refers to a system of government in which several states form a unity but remain independent in internal affairs. The government of the whole country is referred to as 'the federal government'.

[14] Definition: 'devolution' refers to the transfer of power from the central state to regional governments and legislatures.

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the three smaller parts of the country (Scotland, Wales, and Northern Ireland). The United Kingdom is neither a federation nor a unitary state.

1.2 BRITISH EXCEPTIONALISM

The United Kingdom is one of a tiny number of countries that have not adopted a codified *constitutional text* of the sort described earlier in this Chapter. Sometimes it is described as having 'an unwritten constitution'. In Chapter 2, we will see that in fact many of the significant constitutional rules are written down (for example, in Acts of Parliament and judgments of the UK courts). Some constitutionally important rules are also in the form of 'constitutional conventions', which are non-legal rules that (probably) cannot be enforced by the courts. But even these are mostly written down in official documents, for example *The Cabinet Manual*. A better description is therefore to say that the UK constitution is 'uncodified'. But the United Kingdom clearly has a constitutional *system* (in the sense discussed earlier): it is a mature democracy with long-established state institutions.

1.2.1 WHY HAS THE UNITED KINGDOM AVOIDED CODIFICATION?

British lawyers have over a long period been involved in drafting single document codified constitutions. As Linda Colley puts it, '*During the centuries in which they invested in overseas empire, powerful and exploratory Britons regularly drafted constitutions for different groups of settlers and colonised peoples, a habit that continued until the 1970s, when there seemed no one left to write for*'.[15]

One Englishman who had an instrumental role in developing the practical idea of the constitution as a text was Thomas Paine (1737–18009). Through his cultivation of political contacts and his powerful writing, he was involved in both the American and French revolutions, which installed new forms of government in those countries under the frameworks of codified constitutions. Paine rejected the legitimacy of monarchical government altogether. For him, '*all hereditary government is in its nature tyranny*'. In his writings, Paine shared the assumption of many Enlightenment[16] thinkers and other radicals that men had universal and inalienable rights—including political equality, free speech, and freedom from arbitrary arrest. Paine supported the revolutions in America and in France. His influential pamphlet *Rights of Man* (1791–2), dedicated to the first president of the USA, George Washington, was a polemical reply to attacks on the French Revolution made by the member of Parliament (MP) and writer Edmund Burke (1729–97). In it, Paine explains how the USA came to adopt a constitution—in the sense of a higher order of law, codified into a single document.

Thomas Paine, *Rights of Man* (1791)

That men mean distinct and separate things when they speak of constitutions and of governments, is evident; or why are those terms distinctly and separately used? A constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without a right.

[15] L. Colley, *The Gun, the Ship and the Pen: Warfare, Constitutions and the Making of the Modern World* (2021) p. 212.
[16] Definition: the Enlightenment was an intellectual movement in the eighteenth century based on the ideals of liberty, tolerance, and reason.

All power exercised over a nation, must have some beginning. It must either be delegated or assumed. There are no other sources. All delegated power is trust, and all assumed power is usurpation. Time does not alter the nature and quality of either.

[Paine goes on to describe the constitution-making process in the USA.]

This convention, of which Benjamin Franklin was president, having met and deliberated, and agreed upon a constitution, they next ordered it to be published, not as a thing established, but for the consideration of the whole people, their approbation or rejection, and then adjourned to a stated time. When the time of adjournment was expired, the convention re-assembled; and as the general opinion of the people in approbation of it was then known, the constitution was signed, sealed, and proclaimed on the authority of the people and the original instrument deposited as a public record. The convention then appointed a day for the general election of the representatives who were to compose the government, and the time it should commence; and having done this they dissolved, and returned to their several homes and occupations.

In this constitution were laid down, first, a declaration of rights; then followed the form which the government should have, and the powers it should possess—the authority of the courts of judicature, and of juries—the manner in which elections should be conducted, and the proportion of representatives to the number of electors—the time which each succeeding assembly should continue, which was one year—the mode of levying, and of accounting for the expenditure, of public money—of appointing public officers, etc., etc., etc.

No article of this constitution could be altered or infringed at the discretion of the government that was to ensue. It was to that government a law. But as it would have been unwise to preclude the benefit of experience, and in order also to prevent the accumulation of errors, if any should be found, and to preserve an unison of government with the circumstances of the state at all times, the constitution provided that, at the expiration of every seven years, a convention should be elected, for the express purpose of revising the constitution, and making alterations, additions, or abolitions therein, if any such should be found necessary.

Here we see a regular process—a government issuing out of a constitution, formed by the people in their original character; and that constitution serving, not only as an authority, but as a law of control to the government. It was the political bible of the state. Scarcely a family was without it. Every member of the government had a copy; and nothing was more common, when any debate arose on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed constitution out of their pocket, and read the chapter with which such matter in debate was connected.

Closer to our own time, British lawyers also had a leading role in writing the European Convention on Human Rights, which enumerated fundamental rights and freedoms for people across more than 40 countries after the Second World War. But what the United Kingdom has avoided is adopting a codified constitution for its own territory.

There are several points in British history where the country might have adopted a written constitution. Magna Carta, a charter of liberties signed by King John in 1215 under threat from noblemen, is often regarded with reverence as one of the earliest attempts to constrain royal power—as Nicholas Vincent says, '*The merest glance at the newspapers or at modern political debate reveal the semi-mythical status that Magna Carta still commands in England and the English-speaking world*'.[17] Fragments of the 1297 version of Magna Carta remain on the statute book (look it up on legislation.gov.uk) but these are rules for a feudal society, not a comprehensive code for modern government. The English Civil War (1642–51), which pitched supporters of monarchy against those favouring parliamentary

[17] See N. Vincent, *Magna Carta: A Very Short Introduction* (2012) p. 2.

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power, might have led to a codified constitution—but after 11 years of republican rule, the monarchy was restored to power in 1660. In England and Wales, the Bill of Rights 1688, 'An Act declaring the rights and liberties of the subject and settling the succession of the crown', provided a set of legal constraints on King William III and Queen Mary (the country's new monarchs invited to England from Holland) and their successors; Geoffrey Lock argues that the Bill of Rights '*is the prime candidate for being regarded as the basic constitutional document of the United Kingdom, in so far as there is one*' but is not a comprehensive code of constitutional rules for modern times.[18] At the same period in Scotland, the Claim of Right 1689 was enacted stating that the monarch is bound by the law and setting out some fundamental principles of due process;[19] but again it is not a comprehensive code and it contains some anti-Catholic provisions that are not acceptable today.

In the nineteenth century, the working-class Chartist movement demanded a new system of government; had they been successful in overthrowing established power and establishing a more democratic system of government, a codified constitution might have resulted.[20] But the movement was supressed and instead a series of evolutionary reforms designed to create representative democracy gradually unfolded. The first was the Representation of the People Act 1832 (the 'Great Reform Act'), which abolished the 'rotten boroughs' and extended the right to vote to men of property who did not own substantial freehold land. In 1867, by the Second Reform Act, many working-class men in towns were enfranchised and, in 1884, so were male agricultural labourers. Women in the propertied classes were able to vote in local elections from 1869 and—after a political struggle by the suffragettes—in 1928, there was universal suffrage for women on the same basis as men in parliamentary elections. Democracy came to Britain slowly.

So far in the twenty-first century, adoption of a written constitution is not on the political agenda. The two largest UK political parties—the Conservatives[21] and Labour[22]—have not been attracted by the idea. British politicians like the extreme flexibility of the uncodified constitution as it provides minimal constraints on their power. Two of the smaller UK political parties, the Liberal Democrats[23] and the Greens,[24] support the idea of a codified constitution.

In the 2010–15 Parliament, the House of Commons Political and Constitutional Reform Committee (consisting of 12 backbench[25] MPs from the main parties) carried out a long inquiry into the benefits and disadvantages of adopting a codified constitution. As we will see in Chapter 2, their report was inconclusive and had little impact.

1.2.2 WHAT ARE THE CONSEQUENCES OF THE LACK OF A CODIFIED CONSTITUTIONAL TEXT?

As we explore the British constitution from a legal perspective in the book, bear in mind the consequences that follow from the lack of a codified constitutional text. Compared to other constitutions around the world, the British constitutional system is unusual in several respects.

[18] See G. Lock, 'The 1689 Bill of Rights' (1989) XXXVII *Political Studies* 540.
[19] See D. Edward, 'Scotland's Magna Carta: the Claim of Right and the common law' (2015) 6 *The UK Supreme Court Yearbook* 8.
[20] See J. Gibson, 'The Chartists and the constitution: revisiting British popular constitutionalism' (2017) 56 *Journal of British Studies* 70.
[21] A right-of-centre party. Conservative leader Rishi Sunak has been Prime Minister since October 2022. At that date, the Conservatives (often referred to as 'Tories') had 357 MPs, a working majority over other parties of 71.
[22] A left-of-centre party. It formed governments from 1997 to 2010 under Prime Ministers Tony Blair and Gordon Brown. In September 2022, Labour had 200 MPs.
[23] A centrist party, with 14 MPs in September 2022.
[24] The Greens had one MP in September 2022.
[25] Definition: a member of the House of Commons who (if in the governing party) has not been selected to be a minister by the prime minister or (if in an Opposition party) has not been selected to be a spokesman for that party.

First, there is no national law with a higher status than Acts of Parliament. This is generally referred to as the principle of parliamentary supremacy.[26] There is, however, a school of thought that judge-made common law might in exceptional circumstances empower judges to question the validity of an Act of Parliament but this has not been tested in modern times.

Second, there is no formal or special process for amending the constitutional system. The British constitution is characterized by extreme flexibility. Fundamental changes can be achieved by Acts of Parliament—for example, the United Kingdom leaving the European Union ('Brexit') in 2019, creating a UK Supreme Court in 2005,[27] and devolution of powers to new institutions in Scotland, Wales, and Northern Ireland in 1998.[28] On one view, this is a great advantage of the UK system as it enables decisive changes to be achieved quickly. A disadvantage is that it can lead to ill-considered proposals.

Third, the British constitution has become rather unstable.[29] A wide range of reforms were introduced, in an uncoordinated way, by the Labour governments in power from 1997–2010. These changes included devolution, which far from settling the question of decentralization has led to constant demands for greater powers in Scotland and Wales, culminating in a referendum on Scottish independence in September 2014. The majority of voters in Scotland favoured remaining part of the United Kingdom but the campaign for independence remains active. The Human Rights Act 1998, incorporating rights from the European Convention on Human Rights in the United Kingdom's legal system has come to be unloved by successive governments; in July 2022, the Conservative government sought to repeal and replace the Human Rights Act.

1.3 SHOULD THE UNITED KINGDOM ADOPT A WRITTEN CONSTITUTION?

As mentioned above, during the 2010–15 Parliament, the House of Commons Political and Constitutional Reform Committee undertook an inquiry into the pros and cons and implications of codifying the British constitution. The committee worked closely with academics at King's College London to develop proposals, held several oral evidence sessions, and consulted on different options. In their Second Report, the committee set out a short summary of the case for change and the case for retaining the status quo, written by Professor Robert Blackburn.

House of Commons Political and Constitutional Reform, *A New Magna Carta?*, Second Report of 2014–15 (HC 463), pp. 19, 24

The case for a written constitution—stated generally

The case for a written constitution is that it would enable everyone to know what the rules and institutions were that governed and directed ministers, civil servants and parliamentarians in performing their public duties. The sprawling mass of common law, Acts of Parliament, and European treaty obligations, surrounded by a number of important but sometimes uncertain unwritten conventions, is impenetrable to most people, and needs to be replaced by a single document of basic law dictating the working and operation of government in the United Kingdom easily accessible for all. Furthermore, it has become too easy for governments to implement political and constitutional reforms to suit their own political convenience, and entrenched procedures to ensure popular and parliamentary consent are required that necessitate a written constitution. The present 'unwritten constitution' is an

[26] See Chapter 3. [27] See Chapter 17. [28] See Chapter 6.
[29] See further N. Walker, 'Our constitutional unsettlement' [2014] Public Law 529.

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anachronism riddled with references to our ancient past, unsuited to the social and political democracy of the 21st century and future aspirations of its people. It fails to give primacy to the sovereignty of the people and discourages popular participation in the political process. A written constitution would circumscribe the boundaries of the British state and its relationship with Europe and the world. It would become a symbol and expression of national identity today and a source of national pride.

The case against a written constitution—stated generally

The case against a written constitution is that it is unnecessary, undesirable and un-British. The fact that the UK system of government has never been reduced to a single document is an indication of the success of the Westminster system of parliamentary democracy and the stability it has brought to the country. This is in contrast to most other countries whose written constitutions were the product of revolution or independence. The unwritten nature of the constitution is something distinctively British, it reminds us of a great history, and is a source of national pride. Contrary to claims that it is out of date, it is evolutionary and flexible in nature, more easily enabling practical problems to be resolved as they arise and individual reforms made, than would be the case under an entrenched constitutional document. While some are concerned about the supposed existence of an "elective dictatorship" and inadequate checks and balances in the political system, there is in fact a wide range of considerable pressures exerted upon ministers seeking to make controversial changes. A written constitution would create more litigation in the courts, and politicise the judiciary, requiring them to pass judgement on the constitutionality of government legislation, when the final word on legal matters should lie with elected politicians in Parliament, not unelected judges. There are so many practical problems inherent in preparing and enacting a written constitution, there is little point in considering the matter. As a public policy proposal it lacks of [sic] any depth of genuine popular support and, especially given the massive amount of time such a reform would entail, it is a very low priority even for those who support the idea. An attempt to introduce one would be a distraction and might well have a destabilizing effect on the country.

The Committee also outlined three 'illustrative blueprints' or 'basic models' for a written constitution. These usefully show that the options are more nuanced than 'written' or 'not written'.

House of Commons Political and Constitutional Reform, *A New Magna Carta?*, Second Report of 2014–15 (HC 463), p. 7

(a) Constitutional Code—a document sanctioned by Parliament but without statutory authority, setting out the essential existing elements and principles of the constitution and workings of government.

(b) Constitutional Consolidation Act—a consolidation of existing laws of a constitutional nature in statute, the common law and parliamentary practice, together with a codification of essential constitutional conventions.

(c) Written Constitution—a document of basic law by which the United Kingdom is governed, including the relationship between the state and its citizens, an amendment procedure, and elements of reform.

In March 2015, the committee published a final report.

House of Commons Political and Constitutional Reform, *Consultation on a New Magna Carta?*, Seventh Report, Session 2014–15 (HC 599)

55. In our original report we presented the arguments for and against constitutional codification and a written constitution, to assist those considering the matter to make up their minds one way or the other. While the balance of views expressed to us favours some form of codification in general, and a written constitution in particular, we do not propose here to endorse or to amend one particular model or blueprint. Our purpose has been to set out the arguments and to illustrate how codification might be achieved.

56. As Professor Blackburn has made clear in his paper on the design and implementation of a codified constitution, the initiative for codification lies with the executive. The involvement, for the first time, of a parliamentary committee in inquiring into the basis of the UK's constitutional arrangements and illustrating options for codification has received a broad welcome. The practical illustrations we have provided, together with the informed commentaries on the exercise, should serve as a resource for an incoming administration which has constitutional codification as a policy priority: much of the practical work of examination and description of the existing constitutional arrangements has been achieved.

57. As vital as the debate about whether and how to codify the constitution is the debate about what constitutional arrangements it is desirable to codify. The three illustrations of models of codification which we published have been grounded in practical politics and the maintenance, as far as possible, of the status quo: where the written constitution blueprint described elements of reform, it did so on the basis of existing proposals for reform. We deliberately did not set out to propose constitutional codification allied with radical constitutional reform, but we recognise that an element of constitutional change may well be necessary in any process of codification. Moreover, we recognise that the broadest possible public debate about constitutional alternatives must form the basis of any process of large-scale constitutional change which genuinely seeks the engagement and consent of the public.

QUESTION

Do you favour codification of the British constitution? If so, which of the models for codification suggested by the House of Commons Political and Constitutional Reform Committee do you prefer?

FURTHER READING

Jeff King, 'The democratic case for a written constitution' (2019) 72 Current Legal Problems 1.

Jo Eric Khushal Murkens, 'A written constitution: A case not made' (2021) 41 Oxford Journal of Legal Studies 965.

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2

THE CONSTITUTIONAL RULEBOOK

CENTRAL ISSUES

1. In the United Kingdom, the important rules setting out the structure and powers of government and people's freedoms and rights are found in several different sources, including Acts of Parliament, the common law, constitutional conventions, and international law.
2. There is a battle between two broad schools of thought regarding what should provide legitimacy in the UK constitution. For 'political constitutionalists', it is the political process, Parliament, and the principle of parliamentary supremacy that should be central. 'Legal constitutionalists' contend that the judiciary should have a greater role, with power to strike down Acts of Parliament that are contrary to fundamental rights or constitutional principles.

2.1 INTRODUCTION

We can define 'a constitution' of a country as: a set of the most important rules about the structure and powers of government and of people's most basic freedoms and rights. Constitutional arrangements are often controversial.

In this Chapter, we start to look at the constitution of the United Kingdom to understand its function as a *rulebook*: for constitutional arrangements to work well, people need to know what the rules are and there also needs to be broad consensus that the rules are right. We explore the *sources* of the rules in the United Kingdom's famously 'unwritten' constitution: these include Acts of Parliament, the common law, and constitutional conventions. We consider the question: *who* makes the rulebook? To answer this, we must engage with a debate about the respective roles of politicians and judges (called 'political constitutionalism' and 'common law constitutionalism'). Finally, we explore a reform issue: should the United Kingdom adopt a codified constitution? Around the world, almost all countries have a single constitutional rulebook that sets out systematically the basic institutions of the state, lists people's fundamental rights, and prescribes how the

constitution can be amended.[1] What would be the advantages and disadvantages of the United Kingdom adopting this type of constitution?

2.2 THE RULEBOOK'S MULTIPLE SOURCES

Every country has its own mix of rules leading to their own distinctive constitutions. At a very general level, most constitutional frameworks share similar characteristics. There is an institution or set of public office-holders that is the government, responsible for carrying out the many executive actions needed in a well-ordered society.[2] There is an institution described as a legislature, which is responsible for producing laws in accordance with its powers; these days, most legislatures consist of elected representatives chosen in periodic elections.[3] Additionally, constitutional frameworks generally create a role for judges.[4] As well as setting out institutional arrangements, constitutions also typically contain statements of people's basic rights and freedoms, such as freedom of expression, freedom of assembly, rights to privacy, and prohibitions on unjustified discrimination.

Pausing here: one of the questions law students ask most often during the first week of studying constitutional law is: 'What is the difference between "government" and "parliament"?' or (the same thing in more abstract terms) 'What is the relationship between "the executive" and "the legislature"?' in the United Kingdom. Let's deal with that here, keeping things as simple as possible for now. General elections are normally held to the House of Commons every four to five years to elect a Member of Parliament (MP) for each of the 650 constituencies; the last one was in December 2019 and the next one will be before the end of January 2025, in accordance with the Dissolution and Calling of Parliament Act 2022. The political party that wins the most seats forms the new government, with the leader of that party becoming the Prime Minister (PM). If the largest party does not have a working majority over all other parties, the PM may form a 'minority government' (which risks having its legislations voted down)[5] or form a coalition government with one or more other parties.[6] The PM selects his or her team of ministers: the Chancellor of the Exchequer (the finance minister) and about 20 Secretaries of State and other senior ministers who give political leadership to departments (the Department of Health, the Home Office, the Ministry of Justice, etc). Collectively, those senior ministers are known as 'the Cabinet'. Each department will have, in addition to the Secretary of State, a small team of more junior ministers. A fundamental rule is that all ministers must either be members of the House of Commons (MPs) or of the unelected second Chamber (the House of Lords). By law, the PM is restricted to having a maximum of 95 ministers in the House of Commons and no more than 109 paid ministers in total (see Figure 2.1). *So: (a) all ministers are drawn from the members of the governing party in Parliament but (b) only a minority of members of the governing party will be chosen to be ministers and the others (who will outnumber the ministers) are called 'back benchers'.*[7] Ministers, like other parliamentarians, take part in the daily work of Parliament and have offices in the Palace of

[1] For an online collection of every constitution, see www.constituteproject.org/.
[2] See Part II of this book. [3] See Part III of this book. [4] See Part IV of this book.
[5] There was a minority Conversative government from June 2017 to December 2019, led first by Theresa May then by Boris Johnson as PM.
[6] There was a coalition between the Conservatives and Liberal Democrats throughout the 2010–15 parliament, with David Cameron as PM and Nick Clegg as Deputy PM.
[7] Because they sit on the back benches in the Commons and Lords chambers; ministers sit in the front row.

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