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MARK ELLIOTT & ROBERT THOMAS

fifth edition

BEST-SELLING
PUBLIC LAW
TEXTBOOK

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Expert Commentaries

You will find an expert commentary at the end of almost all the chapters in the book. They are written by leading scholars in the field and are designed to give you an additional perspective on the topics covered in order to demonstrate the contested nature of public law as a subject.

2. Constitutions and Constitutional Law
Aileen McHarg, Professor of Public Law and Human Rights, University of Durham

3. Themes, Sources, and Principles
Aileen Kavanagh, Professor of Constitutional Governance, Trinity College Dublin

4. Separation of Powers—An Introduction
Nick Barber, Professor of Constitutional Law and Theory, University of Oxford

5. UK Central Government
Sir Jonathan Jones KCB KC, Visiting Professor, University of Durham, and a Master of the Bench, Middle Temple

6. The UK Parliament
Michael Gordon, Professor of Constitutional Law, University of Liverpool

7. The Judiciary
Graham Gee, Professor of Public Law, University of Sheffield

8. Devolution and the Territorial Constitution
Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh

9. The European Union and Brexit
Jack Williams, Barrister, Monckton Chambers

10. Good Governance—An Introduction
Jeff King, Professor of Law, University College London

11. Parliamentary Scrutiny of Central Government
Alison Young, Sir David Williams Professor of Public Law, University of Cambridge

12. Judicial Review—An Introduction
Joanna Bell, Associate Professor, Jeffrey Hackney Fellow and Tutor in Law, St Edmund Hall, University of Oxford

13. The Grounds of Judicial Review
Liz Fisher, Professor of Environmental Law, University of Oxford

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with our system of parliamentary democracy. Since then, referendums have been used on a number of occasions, but on an essentially ad hoc basis, and without any attempt to clarify their constitutional status. This issue came to a head with the 2016 EU referendum, in which a narrow majority voted to leave the EU—a result which 'Leave' voters might reasonably have expected to be decisive. Nevertheless, in *R (Miller) v Secretary of State for Exiting the European Union*,[69] the referendum result was described as merely advisory—its significance was political rather than legal—and therefore insufficient to entitle the government to notify the EU of the UK's intention to withdraw; to do so required a further vote in Parliament to confirm (or—potentially—override) the referendum result.

A third problem is that reform is often undertaken in the most minimal form necessary, sometimes without even changing the law. For instance, in order to protect the newly created devolved legislatures against encroachment by the UK Parliament—which due to the doctrine of parliamentary sovereignty may continue to legislate on devolved matters—the then Labour government simply announced that it expected a constitutional convention to develop whereby the UK Parliament would not legislate on devolved matters without the consent of the relevant devolved legislature (the 'Sewel Convention'). As a constitutional convention, however, this is not legally enforceable; the UK Parliament can ignore the consent requirement if it chooses, and has done so on a growing number of occasions since 2018.

In fact, parliamentary sovereignty is itself an obstacle to fundamental constitutional reform. This is partly because politicians are unwilling to agree to changes that curtail the flexibility that parliamentary sovereignty allows them, but also because the rule that Parliament may make or unmake any law it likes prevents a Parliament from binding its successors: any subsequent Parliament may simply repeal a rule it dislikes, even if it is expressed to be permanent or fundamental. For example, the enactment in the Scotland Act 2016 and Wales Act 2017 of statutory guarantees of permanence for the devolved institutions in Scotland and Wales, subject to abolition only following referendums in those territories, seems unlikely to have created any legally enforceable restrictions on the freedom of future Parliaments. Although, as the chapter acknowledges, some judges have in recent years speculated about the existence of limits on parliamentary sovereignty, since the 2016 EU referendum, the Supreme Court has strongly upheld—and indeed extended—the constitutional importance of the doctrine. Thus the effect of parliamentary sovereignty, while giving strong constitutional recognition to the principle of democracy as manifested in the UK Parliament, is to make it difficult to accord fundamental constitutional status to any other institutions or principles, no matter how important they may be.

Further reading

FELDMAN, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64
Critical reflection on the nature of the UK's constitutional settlement.

KING, *The British Constitution* (Oxford 2007)
A useful overview of the subject.

LOUGHLIN, *The British Constitution: A Very Short Introduction* (Oxford 2023)
A useful overview of the evolution and decline of Britain's traditional constitution.

RUSSELL and JAMES, *The Parliamentary Battle over Brexit* (Oxford 2023)
A fascinating account of how the Brexit process played out in Parliament.

[69] [2016] EWHC 2768 (Admin).

3

Themes, Sources, and Principles

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1. Introduction

We saw in Chapter 2 that constitutions tend to perform a number of different functions and to have certain characteristics. We also looked briefly, against that background, at the UK's constitutional arrangements. In this chapter, our focus switches more fully to those arrangements. In particular, we consider four important matters concerning the UK constitution of which it is necessary to be aware at the outset.

First, we set out the *three key themes* that, in our view, emerge from the study of contemporary UK public law. These themes reflect the dominant characteristics of and challenges faced by public law in the UK today. Being aware of them right at the beginning of our study of the subject is important. It will help us to understand their significance as we examine different topics during the course of the book. It will also, we hope, help to illustrate that while public law, like any branch of the law, consists of a good deal of technical, detailed material, it is also an area in which big ideas and broad narratives are to be found. Public law is also a subject that invites debate and disagreement—much of which, as we will see, centres upon the themes around which this book is based.

Second, we examine the *sources of the UK constitution*. We have already said that the UK does not have a 'written constitution' in the sense of a constitutional text with superior legal status. Where, then, do we look if we wish to ascertain

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the constitutional arrangements applicable in the UK? As we will see, the UK constitution is to be found in a range of sources—written and unwritten, legal a political.

Third, we address a number of *principles that occupy a central role in UK public l*. Many of these principles are considered in greater detail in subsequent chapters, b it is necessary to be aware of them, at least in outline, at the outset, because of th pervasive relevance to the matters considered in this book.

Fourth, we consider whether the UK should adopt a *written, or 'codified', constitu*

2. Three key themes

2.1 The role of the executive and the importance of accountability

Our first theme concerns *the central role occupied in the UK constitution by the execu tive branch of government*, and the fundamental importance of *ensuring that the exec utive is effectively held to account*. We saw in Chapter 2 that Parliament is all-powerf in that it can enact any law that it wishes, but it is nevertheless the executive branch central government—the Prime Minister, other Ministers, their government depa ments, and civil servants—that is in the driving seat. It is, for instance, the executi branch that formulates a programme for government and then seeks to implement including by getting Parliament to enact legislation. If the executive government whether it is formed of a single political party or, as in the 2010–15 Parliament, a co lition of parties—has a clear majority of MPs in the House of Commons, it will lik be strongly placed to get legislation enacted. The House of Lords is ultimately obstacle, since while it can (in most cases) delay legislation, it cannot block it enti It follows that, because the courts are subservient to Parliament (in that they cann strike down the laws that it enacts) and because Parliament is, in a sense, subser ent to the executive (for the reasons just given), the executive finds itself in a ve powerful position. This, in turn, means that one of the central challenges that aris in relation to the UK constitution is to make sure that the executive is properly hel to account for its actions and decisions, and its policies and their implementation. A we saw in Chapter 2, Parliament's capacity to hold the government to account wa particularly tested in relation to Brexit.

We explore the concept of accountability in detail in Chapter 11. For now, it suffic to say that holding the government to account involves requiring it to explain what is doing and to justify why it is doing those things. In addition, holding the gover ment to account may involve corrective or punitive action when things have go wrong. Holding government to account in these ways goes hand in hand with th notion of democracy. After all, in a democracy, government is supposed to act as th servant, as opposed to the master, of the people. To perform the many tasks deeme necessary in modern society, the people collectively delegate their power to gover ment so that it can act on their behalf. However, human nature being what it is, the is always the risk that government may exceed the limits of its powers, betray the tru of the people, or be incompetent. It is therefore necessary for the people to be able t call the government to account.

General elections are the ultimate form of accountability. But they are a blunt instrument. They enable the electorate to render a single judgement on the government's overall performance over a period of several years. Yet given the enormous amount and diversity of the tasks undertaken by governments, there is a clear need for a more granular form of scrutiny and oversight. Elections therefore have to be supplemented by other accountability processes, such as parliamentary and judicial scrutiny. Their effectiveness is one of the main issues that falls to be examined in this book.

2.2 Legal and political constitutionalism

The second of our key themes, concerning the *shift from a more political to a more legal form of constitutionalism* in the UK, is closely connected to our first theme. Holding government to account involves ensuring that it behaves constitutionally—that is, in accordance with the requirements and values of the constitution—and taking appropriate action when it does not. But how is this to be achieved? It is in relation to this question that the distinction between legal and political constitutionalism emerges. Each is a theory—a set of views—concerning how, in practice, constitutional behaviour should be promoted and unconstitutional conduct dealt with. Legal and political constitutionalists might, therefore, have very different views about whether the UK Supreme Court acted appropriately when, in the *Miller II* case,[1] it intervened in relation to the government's prorogation of Parliament for a five-week period at a crucial point in the Brexit process.[2]

Advocates of *political constitutionalism* put their faith in the political process. Simply put, political constitutionalists hold two core views. First, the constitution is a product of a set of political relationships between the different institutions of the state—Parliament, government, and the courts. As these political relationships develop and change, so too do constitutional rules and practices. The basic point is that the practices governing the exercise and distribution of government power are determined not by *legal rules*, but by a set of *political understandings*.

Second, political constitutionalists argue that, in a democracy, the political process is the most legitimate means of guarding against unconstitutional behaviour by those in authority. The role of the courts in scrutinising government ought to be limited because judges lack any democratic legitimacy. For political constitutionalists, then, it is the political process that deters politicians from doing unconstitutional things and provides a corrective if such things are done. This is not to suggest that political constitutionalists think that regular elections are sufficient to secure accountability. However, for political constitutionalists, more nuanced accountability devices—such as public inquiries and investigations by parliamentary committees—are ultimately oriented towards equipping parliamentarians and the public to be in the best possible position to judge whether the government is behaving acceptably. The ultimate focus, therefore, remains on the ballot box.

[1] *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373.
[2] For discussion, see Chapter 2, section 3.2.2.

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Unsurprisingly, the emphasis of those who advocate *legal* constitution[...] different. They prefer to put their faith in the judicial, not the political, system[...] philosophical and pragmatic arguments underpin this view. In philosophical [...] it is said that there are certain moral principles—principles of 'natural law' or '[...] law'—that are so fundamental as to be immutable. A 'law' that contradicts such p[...] ciples cannot be a genuine law at all and should not be enforced by courts. This [...] that, in practice, courts are ultimately responsible for ensuring that politician[...] not overstep the mark. There are also practical reasons why it might be thought [...] courts should have such a role in the UK. The most obvious is that the execu[...] influence over Parliament means that there is, in effect, a fusion of power between [...] legislature and executive—a phenomenon that leads some to argue that there must [...] a *separate* body, such as the judiciary, capable of ensuring that the political branch[...] of government act constitutionally.[3] For reasons that we explain in Chapter 4, co[...] fidence in the ability of the political branches to regulate themselves and each o[...] has declined in recent years, adding impetus to the view that courts should be able [...] step in when things go wrong.

A further argument advanced in favour of legal constitutionalism is that while re[...] ance on the political process is likely to result in the interests of the majority be[...] adequately looked after, the same might not be true of minorities of various s[...] The majority, acting through political institutions such as Parliament, might [...] inclined to do things—such as locking up suspected foreign terrorists without cha[...] or trial[4]—that serve their own interests at the expense of unpopular, marginalis[...] groups. In order to prevent this from happening, it is necessary to empower judge[...] whose independence allows them to be uninfluenced by public opinion—to prote[...] the constitutional rights of *everyone*, even if that means curbing the self-serv[...] instincts of the majority.

To this suggestion, political constitutionalists retort that giving judges such po[...] overlooks the fact that 'law is not and cannot be a substitute for politics'.[5] Th[...] Waldron, a leading critic of US judges' capacity to strike down unconstitutional le[...] islation, argues that giving courts such powers 'disenfranchises ordinary citizens an[...] brushes aside cherished principles of representation and political equality in the fi[...] resolution of issues about rights'.[6] The argument against giving judges extensive po[...] ers of this nature may be thought to be stronger still in the UK, given that no pop[...] larly endorsed text lays down what the fundamental principles of the constitution a[...] Giving judges such powers, it has been said, 'would arguably be tantamount to th[...] abdication of democracy in favour of a system of democracy layered with aristocra[...] (the decisions of the elite)'.[7]

[3] This argument is put forward by several commentators in different ways and with different empha[...] For leading examples, see Allan, *Constitutional Justice* (Oxford 2001); Woolf, '*Droit Public*: English St[...] [1995] PL 57; Laws, 'Law and Democracy' [1995] PL 72.
[4] See Chapter 2, section 3.1.
[5] Griffith, 'The Political Constitution' (1979) 42 MLR 1, 16.
[6] Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346, 1353.
[7] Poole, 'Dogmatic Liberalism? TRS Allan and the Common Law Constitution' (2002) 65 MLR 463, [...] See further Poole, 'Questioning Common Law Constitutionalism' (2002) 25 LS 142.

Although it is helpful to be aware of the broad distinctions between legal and political constitutionalism, neither is a monolithic concept—there are many different views about precisely what each concept should mean. And, in any event, it is simplistic to suppose that a given constitutional system must opt for one or other of those two models. The UK constitution, like all developed constitutions, relies upon both legal and political processes for the purpose of encouraging and enforcing compliance with constitutional principles. The question, therefore, is not whether we should put our faith in the legal *or* political process, but what *balance* should be struck between those two means of securing constitutional governance.

In recent years, that balance has shifted in the UK in favour of legal forms of control. Legislation such as the Human Rights Act 1998 (HRA) has been a major driver of this trend, by authorising and requiring courts to scrutinise both government decisions and legislation on human rights grounds. Thus the second of our three key themes is that the direction of constitutional travel in the UK is towards a more legal form of constitutionalism. We will see several examples of this phenomenon throughout the book; as we encounter them, we will need to think critically about whether it is wise to place growing reliance on the legal system in this regard. One prominent critic of this trend, for example, has argued that, to the extent that such reliance is motivated by dissatisfaction with the political process, strengthening that process would be preferable to leaving it to courts to step in.[8]

Q Which of the two schools of thought outlined above—'legal constitutionalism' and 'political constitutionalism'—do you find more appealing? Do you agree that each has strengths and weaknesses and, if so, can you think of ways in which the best features of the two systems might be combined?

2.3 The multilayered nature of the modern UK constitution

The UK has traditionally been a highly centralised state. Executive and legislative power was, until comparatively recently, largely concentrated at the centre: the UK executive government was responsible for the running of the whole country, while the UK Parliament made law for the whole of the UK. Local government has long existed alongside central government, and it fulfils many important functions, but it only has the powers given to it via law made by the UK Parliament. Over recent decades, central government has tended to restrict and confine local government, which, in turn, has often come to be seen, to some extent, as an offshoot of central government—an implementer of the latter's policies—rather than a constitutionally separate branch of government with its own independent area of authority.[9]

[8] Tomkins, *Our Republican Constitution* (Oxford 2005), ch 4.
[9] See further Chapter 8.

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However, this picture—of a system in which central government has a mono[...] of real power—has changed markedly in recent decades. There has been a clear s[...] from a system in which power is concentrated almost wholly in central governme[...] one in which power is shared by a number of different levels of government.

This shift to a system of *multilayered governance* is the third of our three [...] themes. The drivers of this change have been threefold: the UK's period of me[...] bership of the European Union; the devolution of power to Scotland, Wales, a[...] Northern Ireland; and, most recently, what has been branded, perhaps a little op[...] mistically, 'devolution' to English regions.[10] The result is that power has been d[...] persed to an unprecedented extent, and this means that we must confront questi[...] that previously just did not arise. For example, once power is shared between diffe[...] levels of government, questions of demarcation must be confronted:

- Does a given function fall to be performed at the local, devolved, or nation[...] level?
- What are the powers of the different governments in relation to one another?
- Who has the last word in the event of a disagreement?
- What should be the role of the courts in attempting to resolve such disputes?

Once we start to think about issues of this nature, we are also forced to conside[...] whether certain long-established constitutional principles remain relevant. F[...] example, as we saw in Chapter 2, the traditional principle is that the UK Parliame[...] can make any law that it wishes. But can this orthodoxy withstand devolution? In particular, is the UK Parliament free to make laws that cut across the pow[...] ers of devolved institutions—by, for example, repealing a Scottish law with whic[...] it disagrees? We consider the answer to that question—and other challenges t[...] orthodoxy raised by devolution—later in the book. However, it is important from the outset to bear in mind that the multilayered nature of the modern constitu[...] tion forces us to think afresh about long-held principles such as parliamentary sovereignty.

2.4 Conclusion

It would be misleading to suggest that the whole of the subject matter of this boo[...] could be organised meaningfully around these three key themes. But that is not th[...] point of identifying those themes. Rather, the point is that they reflect three of th[...] major characteristics of, and issues faced by, UK public law today. It is in relation to our three key themes—the need to hold the executive to account, the balance betwe[...] legal and political forms of constitutionalism, and the implications of distributing power among several tiers of government—that many of the most important, diffi[...] cult, and pressing questions in modern UK public law arise.

[10] See Chapters 9 and 8 respectively.

3. Sources of the constitution

3.1 Introduction

No constitution is to be found in a single document; even 'written constitutions' are only a starting point. For reasons considered in Chapter 2, such documents are likely to contain only a statement of the most fundamental principles—which might well be expressed in vague language that leaves many questions unanswered. In systems based on written constitutions, such texts must therefore be supplemented and fleshed out. This is likely to happen in three ways.

First, *ordinary legislation* will make detailed provision in relation to matters referred to in the constitution. For example, the constitutional text might say that free and fair elections to the national legislature must be held at reasonable intervals, while leaving the detailed arrangements—exactly how regularly must elections be held, who is entitled to vote, and so on—to be set out in a statute.

Second, it will often be necessary for courts to *interpret* the constitutional text; in this way, a body of judicial precedent will develop that itself can properly be regarded as a source of constitutional law. For example, if the constitution says that elections must be held 'at reasonable intervals', and the legislature passes a law providing for elections every ten years, a court might well be called upon to decide whether such relatively infrequent elections meet the constitutional requirement that they be held at reasonable intervals.

Third, there may be certain matters in relation to which no provision is made, either in the constitutional text itself or in ordinary legislation. When issues arise that have not been anticipated by any law, one possibility is that those involved might arrive at an informal resolution. If it proves satisfactory, and the relevant parties appear willing to adhere to it, it might be felt that there is no need to enshrine it in law; rather, a political precedent or *constitutional convention* with which future parties will be expected to comply will arise. Table 3.1 sets out examples of constitutional conventions that form part of the UK's constitutional arrangements.[11]

Except for the absence of a written constitution, the position in the UK is essentially the same as that which is set out in the preceding paragraphs. The sources of the UK's constitutional arrangements are therefore to be found in a combination of ordinary law (including legislation, international treaties, and common law), judicial precedent (eg concerning the interpretation of legislation), and political precedent.

3.2 Legislation

A great deal of constitutional legislation—that is, legislation dealing with constitutional matters—exists in the UK. Indeed, there is so much legislation that it could be argued that it is misleading to say that the UK lacks a *written* constitution. A large proportion of its constitutional arrangements *are* in fact written down in statutes; it

[11] See also section 3.5.2.

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Table 3.1 Constitutional conventions

Convention	Precedent	Evidence that relevant parties feel bound	Constitutional reason
Legally, a Bill approved by Parliament can become law only if the monarch assents to it, and the monarch is under no legal duty to do so. However, by convention, the monarch always assents.	No monarch has withheld royal assent to a Bill for over 300 years.	It is highly unlikely that every monarch since the early 1700s has agreed with every Bill. This strongly suggests that monarchs feel obliged to grant assent whatever their personal views.	Today, Parliament is a democratic institution. It would be fundamentally undemocratic for an unelected monarch to thwart the wishes of the elected legislature.
On being appointed, judges sever any ties they have had with political parties.	Appointees who are affiliated to political parties habitually end such affiliations upon appointment.	The Judges' Council, the judges' representative body, accepts and stipulates that political ties must be severed.	The law must be applied by independent and impartial judges without reference (or the appearance of reference) to extrinsic factors such as party politics.
The Prime Minister and other Ministers regularly appear in Parliament to answer questions from MPs or peers (depending on which chamber they belong to).	The Prime Minister and Ministers habitually do this.	There are often occasions (eg when a Minister is embroiled in personal or political controversy) when it may be advantageous to the Minister not to appear in Parliament; but Ministers do appear even in such circumstances.	It is important that the government is held to account for its policies and their implementation; this is a way of doing so.
The monarch retains certain 'prerogative' powers (eg to declare war and to sign international treaties) but only, and always, exercises them on the advice of the government.	There are no modern examples of monarchs exercising these powers of their own accord, or of refusing to exercise them when advised to do so by the government.	Consistent compliance with the convention implies that monarchs accept that their only role in this area is to do as the government advises.	In a democracy, it would be inappropriate for major policy decisions to be taken by an unelected head of state.

Table 3.1 (*Continued*)

Convention	Precedent	Evidence that relevant parties feel bound	Constitutional reason
Although senior Ministers can be members of the House of Lords, the King will only appoint as Prime Minister someone who is a member of the House of Commons.	It is more than 100 years since a Prime Minister served without being or becoming a member of the House of Commons.	When Alexander Douglas-Home was appointed Prime Minister in 1963, he renounced his peerage and became a member of the House of Commons by winning a by-election.	As the most senior member of the government, it would be undemocratic for the Prime Minister not to be a member of and directly accountable to the elected chamber.
Under the 'Sewel Convention', the UK Parliament will not normally legislate for parts of the country with devolved governments on matters within the competence of the latter without the prior consent of the relevant devolved legislature.	This convention has been respected almost without exception since devolution; but since devolution only began in 1999, there is not a long precedent.	The UK government has publicly stated that it accepts this convention and usually adheres to it.	Underlying devolution is acceptance of the principle that certain parts of the country should, within certain limits, be able to govern themselves. Unwanted interference by the UK legislature would contravene that principle.

is just that those arrangements (or at least the fundamental principles underpinning them) have not been codified into a single text called 'The Constitution'.[12]

But because statutory constitutional law is to be found in regular legislation rather than in a separate constitutional text, there is no straightforward, formal way of identifying such legislation. In other words, constitutional law is not contained in statutes that are labelled 'constitutional'. Instead, we can only say that a statute deals with constitutional law if it seems that, in substance, the statute concerns constitutional matters.[13] It is helpful, in this regard, to distinguish between the two principal types of such matters.

First, constitutional law is concerned with the *organisation of, and the allocation of power to, the institutions of government*. A good deal of legislation deals with such

[12] See eg Bogdanor, *The New British Constitution* (Oxford 2009), pp 8–9. But this point should not be overstated. However much constitutional legislation there is in the UK, it is still only legislation: it is not constitutional law that has a higher legal status in the sense discussed in Chapter 2.

[13] See further House of Commons Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation* (HC 85 2013–14), [43]–[45].

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matters.[14] Prominent examples include the legislation that provides for the devolution of executive and lawmaking power to the Scottish, Welsh, and Northern Irish governments and legislatures.[15] Similarly, legislation was enacted when the UK joined the EU in order to make provision for (among other things) EU law to take effect in the UK and to be enforceable by national courts[16] and also when the UK left the EU.[17] A great deal of legislation exists concerning the role and functions of local government and its relationship with central government.[18] Meanwhile, important issues concerning the UK Parliament itself—including the limitation of the powers of the House of Lords,[19] eligibility for membership of Parliament,[20] elections to the House of Commons,[21] and the frequency of elections[22]—are dealt with by legislation. There is also legislation concerning the judicial system:[23] the UK Supreme Court was, for example, created by an Act of Parliament.[24] Indeed, the creation of the UK itself is attributable in part to legislation, the joining of England and Wales with Scotland and Ireland having been effected by statute.[25]

Second, there is a good deal of legislation concerning the other main aspect of constitutional law: *the regulation of the relationship between the individual and the state*. Formal statements setting out important rights and interests to be respected by the state are not a modern innovation. Consider, for example, Magna Carta 1215, which (among other things) made provision concerning the liberty of the individual and the right to trial by jury. Also noteworthy is the Bill of Rights 1689, parts of which remain in force today: Art 9, for example, lays down the principle of parliamentary privilege, whereby things said in Parliament cannot be the subject of legal proceedings (eg for defamation), thus ensuring that parliamentarians are free to express their views uninhibited by the threat of litigation. Today, the most significant legislation concerning the rights of the individual vis-à-vis the state is the HRA.[26]

Legislation dealing with fundamental constitutional matters is, ultimately, still only regular legislation; it can therefore be amended or even repealed simply by enacting a further piece of such legislation. This absence of hierarchy in UK statutory law—the notion that all laws are equal—was vividly captured by the Victorian scholar Dicey, who remarked that 'neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be considered a supreme law'.[27]

[14] The examples of such legislation discussed in this section are considered in more detail in the relevant chapters of this book.
[15] Scotland Act 1998, Government of Wales Act 2006, Northern Ireland Act 1998.
[16] European Communities Act 1972.
[17] European Union (Withdrawal) Act 2018; European Union (Withdrawal Agreement) Act 2020.
[18] See in particular Local Government Act 1972, Local Government Act 2000, Localism Act 2011, Cities and Local Government Devolution Act 2016.
[19] Parliament Acts 1911–49.
[20] House of Lords Act 1999, House of Commons Disqualification Act 1975.
[21] eg Representation of the People Act 1983.
[22] Dissolution and Calling of Parliament Act 2022.
[23] eg Senior Courts Act 1981; Tribunals, Courts and Enforcement Act 2007; Constitutional Reform Act 2005.
[24] Constitutional Reform Act 2005.
[25] Union with Scotland Act 1706; Union with Ireland Act 1800.
[26] See section 5.11.
[27] Dicey, *An Introduction to the Study of the Law of the Constitution* (London 1959), p 145.

However, this view has been questioned in recent times. In *Thoburn v Sunderland City Council*, it was suggested by Laws LJ that '[w]e should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes'.[28] The latter category, he said, included legislation that 'conditions the legal relationship between citizen and state in some general, overarching manner' or that affects individuals' fundamental rights.[29] Importantly, Laws LJ's argument was that this distinction should be one to which legal significance attaches. The general principle, as we will see in Chapter 6, is that whenever two pieces of legislation conflict, the courts will prioritise the more recent one: even if the later Act does not explicitly say that it is overriding the earlier one, it will have that effect. However, in *Thoburn*, Laws LJ said that this doctrine of 'implied repeal' should not apply to *constitutional* statutes. On this view, legislation dealing with constitutional matters can still be repealed or amended simply by Parliament enacting another piece of legislation—but only if, in that legislation, Parliament specifically says that it intends to override an earlier piece of constitutional legislation.

Laws LJ's analysis in *Thoburn* received some support from the Supreme Court in the *HS2* and *Miller I* cases.[30] However, even if constitutional statutes are legally acknowledged in this way, the upshot is relatively modest. Technically, it means that there is now a special category of *harder*-to-amend constitutional legislation in the UK. But such legislation is still not particularly *hard* to amend: all that is needed is express words of repeal. It therefore remains the case that the UK lacks a hierarchy of statutory law that invests fundamental constitutional arrangements with any great degree of legal permanence.

Q Do you agree that constitutional law should be more difficult to amend than other forms of law? If so, how difficult? If not, why not?

3.3 Judge-made law and common law

The principal role of courts is to decide disputes between litigants by resolving disagreements about the facts and then applying the law to the facts. It may be thought that this is a mechanical process whereby the court simply decides whether the facts fit whatever test is laid down in the statute. The reality, however, is more complex and, in many situations, courts end up *making* law—and, in cases with a constitutional dimension to them, making *public law*. It follows that judicial precedent—that is, the body of decisions made by courts when deciding cases—itself constitutes an important source of public law. This is so in three senses.

[28] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151, [62].
[29] ibid at [62]. Much, or even all, of the legislation mentioned earlier would fall into the category of 'constitutional legislation'.
[30] *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

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In the meantime, there is extensive discussion about electoral reform and whethe not FPTP should be retained.[48]

Q Which voting system do you prefer, and why? Which system do you think would be capable of reinvigorating democracy in the UK and enhancing public trust in poli cians and the political process?

A further issue concerns whether voters can 'recall' their MP, that is, to force a by-election because of the sitting MP's corrupt or unethical behaviour, so maki possible to sack the MP *between* general elections. This idea rose to prominence lowing the 2009 MPs' expenses scandal. In an attempt to restore faith in the poli process, the coalition government proposed a process by which an MP could lose or her seat in the House of Commons if the MP was guilty of serious wrongdoing if 10 per cent of voters in the constituency signed a petition.[49] This would trigge by-election in which the ousted MP could stand as a candidate.

There are three alternative conditions for the opening of a recall petition: the is convicted of an offence and receives a custodial sentence; following a report the Committee on Standards, the MP is suspended from the Commons for at le ten sitting days; or the MP is convicted of providing false or misleading informa for allowances claims. This was criticised for being too restrictive—consti themselves would not be able to initiate a recall petition—and it would therefore unlikely to increase public confidence in politics.[50] Moreover, existing democr and legal processes worked well by removing MPs guilty of serious wrongdo during the expenses scandal. Nonetheless, the recall mechanism—described by government as 'a modest innovation to fill a gap in the regulatory oversight of who have demonstrably committed wrongdoing' but who ignore public pressure remain as MPs[51]—was subsequently enacted.[52] The recall mechanism was used in 2019 following the convictions of two MPs for perverting the course of justice submitting a false expenses claim. It was used again in 2023 after an MP broke Co lockdown rules.

3.2.6 Political parties

Political parties play a particularly important role in politics. Most politic tend to behave tribally, expressing views and voting in ways that toe the party l

[48] See eg Miles, 'Accountability and Electoral Reform' in Johnson and Zhu (eds), *Sceptical Perspecti the Changing Constitution of the United Kingdom* (Oxford 2023); Institute for Government, *Electoral and the constitution. What might a different voting system mean for the UK?* (2023), https://www.inst forgovernment.org.uk/sites/default/files/2023-07/electoral-reform-and-the-constitution.pdf.

[49] HM Government, *Recall of MPs Draft Bill* (Cm 8241 2011).

[50] House of Commons Political and Constitutional Reform Committee, *Recall of MPs* (HC 373 2012 See also Judge, 'Recall of MPs in the UK: "If I Were You I Wouldn't Start from Here"' (2013) 66 Parliam Affairs 732.

[51] Deputy Prime Minister, *Government Response to the Report of the Political and Constitutional Re Committee on the Draft Recall of MPs Bill* (Cm 8640 2013), [4].

[52] Recall of MPs Act 2015.

The House of Commons does not consist of 650 independent representatives who speak their own minds. In practice, it consists of two opposing sides—the government and the opposition parties. This is reflected in the architecture of the House of Commons: government MPs sit on one side; opposition MPs on the other.

Much of British political life is dominated by what amounts, in practice, to a perpetual election campaign between the main political parties. Political parties structure the policy choices presented to voters. They select the candidates who become MPs and the leaders who become either Prime Ministers or leaders of the opposition. They also exert an enormous influence over how the government is both run and held to account. Within this system, people are unlikely to get anywhere in politics unless they ally themselves with a party. Independent candidates do occasionally succeed, but are the exception.[53]

This is unsurprising. Political parties are both inevitable and desirable. It is in the nature of like-minded people to gravitate together. Such behaviour is both instinctive and purposeful, in that it enables such people to achieve more collectively than they could achieve individually. It is for precisely such reasons that political parties are formed. Political parties are also desirable because, at least in parliamentary democracies, they provide voters with a meaningful way of influencing membership of the government.

If people simply voted for independent MPs, then the nature of politics would be rendered largely unpredictable and ineffectual.[54] It is only through organised political parties that the public can be reassured that the democratic mandate given to politicians at an election will in fact be put into practice by carrying out the policies that the public voted for. In a sense, then, the party system simply short-circuits, and makes rather more transparent, the sort of process that would have to precede the formation of a government: inevitably, each party is a reasonably 'broad church', encompassing people with a range of views, but before an election is held, each party, through its own internal processes, must decide on what its central policies and priorities will be. However, this conventional wisdom has now been called into question. For instance, many pro-European Conservative MPs in the 2015–17 and 2017–19 Parliaments objected to the substance and processes of Brexit and rebelled against the Conservative government. The Conservative Party had long included both pro-European and pro-Brexit members. However, in the 2019 general election, there was, in effect, a purge of pro-European Conservative MPs. Only pro-Brexit candidates were selected. Many long-established MPs were deselected. The Conservative Party, led by Boris Johnson, campaigned and won the 2019 election on the slogan of 'Get Brexit done'. Consequently, the Conservative Party became more of an English nationalist Brexit party. Therefore, the conventional narrative that the two large parties are both 'broad churches' encompassing a wide range of views has been somewhat weakened.

[53] As is conventional, the Speaker of the House of Commons stood, and was elected, as an independent candidate, but this is not a true exception: the Speaker had been a Conservative MP, and (again as is conventional) the main parties do not stand against the Speaker.

[54] For debate on this issue, see Tomkins, *Our Republican Constitution* (Oxford 2005), pp 136–9; Nicol, 'Professor Tomkins' House of Mavericks' [2006] PL 467.

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the people, but in reality this conceals an executive power-grab and the weakening of effective accountability.[155]

The premiership of Boris Johnson is seen as the epitome of this approach as illustrated by Covid failures, the fast-tracking of Covid contracts, and 'Partygate', that is, the parties held in the centre of government when the rest of the country was subject to Covid lockdown rules.[156] Johnson was forced to resign by his own backbench MPs in 2022. Parliament also asserted itself through the House of Commons Privileges Committee. The Committee found that Johnson had misled Parliament when he said that the parties did not breach lockdown rules. Some of Johnson's supporters, fellow MPs, had sought to undermine the Committee. While Johnson has been the most obviously populist politician, he has not been the only one. His short-lived successor, Liz Truss, was Prime Minister for only a month. During that short period, Truss and her Chancellor, Kwazi Kwarteng MP, pursued a policy of introducing tax cuts for very high earners funded by government borrowing. In doing so, they deliberately evaded the normal checks and balances built into the government system. They sacked the top official in the Treasury because they knew he would advise against their policies. They also deliberately sidelined the Office for Budget Responsibility by preventing it from assessing the economic impact of their policies.[157] The result was an economic crisis. Truss and Kwarteng were forced out of office and their policies were reversed but at a considerable cost to the public through the increased the cost of living.

It is not possible here to do justice to the breadth of the wider discussion concerning the state of British democracy and society. There are also related developments, such as increasing social inequality and decreasing social mobility. However, the following points can be made.

First, it is abundantly clear that the powerful corporate and finance sectors exert far more influence upon government and politics than ordinary people. As Peston has noted, 'the voices of the super-wealthy are heard by politicians well above the babble of the crowd'.[158] Second, there has been a noticeable trend towards anti-politics, a kind of politics that is against 'the system'. There are many different strands to this trend from both the traditional left and right wings, new populist movements, and also environmentalist, anti-globalisation, and anti-corporate groups. Brexit was a major dividing line which has highlighted the UK's social, economic, and political divisions. Third, it is apparent that recent Prime Ministers have adopted a populist style of governing. This has involved making wide-ranging promises and pledges that they have failed to fulfil. Populist politics works on the basis of soundbites, personalities, and easy quick fixes. Some people may be attracted by political rhetoric and charismatic leadership. However, most of the public simply want competent and effective government.

[155] Young, 'Populism and the UK Constitution' (2018) 71 Current Legal Problems 17; Young, *Unchecked Power? How Recent Constitutional Reforms are Threatening UK Democracy* (Bristol 2023).

[156] Sanders, 'One Man's Damage: The Consequences of Boris Johnson's Assault on the British Political System' (2023) 94 Political Quarterly 166.

[157] Mabbett, 'A Hapless Government Produces an Unlikely Hero' (2022) 93 Political Quarterly 561.

[158] Peston, *Who Runs Britain?* (London 2008), p 346.

The key point here is that effective political leadership and the act of governing implies that politicians will seek to live up to high standards of office and this depends upon politicians internalising values and principles of good governance. Marquand, for instance, has argued for a new public philosophy grounded in the reinvigoration of the public realm; the development of open, tolerant, and accountable elites imbued with an ethic of civic duty and public services; and a conception of democracy as public reasoning.[159] There are many other contributions to this broader debate. Finally, it should never be forgotten that democracy has both formal and substantive dimensions; the formal structures of constitutional law can only be understood against the backdrop of day-to-day politics and how politics works in practice.

Overall, democracy is inevitably messy and imperfect. Nonetheless, as Winston Churchill once noted, 'Democracy is the worst form of government, except for all those other forms that have been tried from time to time.' Democracy is immensely important and it needs to be valued, improved, and enhanced.

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4. Parliamentary privilege

Parliamentary privilege is an integral aspect of the UK's constitutional arrangements. It is of ancient origin and an often overlooked and little understood part of the constitution.[160] It is also of vital importance to the constitutional status of Parliament, the nature of parliamentary democracy, and the relationship between Parliament and the courts. Parliamentary privilege protects those rights and immunities that Parliament needs in order to operate effectively and independently, and it does so by overriding ordinary legal rights as enforced by the courts. If Parliament possesses certain rights and immunities, then which institution—Parliament or the courts—should make and interpret the law concerning the ambit and scope of those rights and immunities? What is the acceptable boundary between Parliament's rights and immunities on the one hand and the rule of law and individual rights on the other?

These questions raise one of our themes: *the relationship between political and legal forms of constitutionalism*. If representative democracy as a value is prioritised, then this goes hand in hand with an emphasis upon political constitutionalism and an expansive conception of parliamentary privilege at the expense of judicially protected legal rights. Conversely, if the rule of law and judicial protection of legal rights are to be predominant, then this leads to an attenuated conception of parliamentary privilege. This tension underlies the operation and development of parliamentary privilege, but first it is necessary to define and examine it.

[159] Marquand, *Mammon's Kingdom*.

[160] Part of the difficulty may be that parliamentary *privilege* carries a connotation of benefit or advantage—eg that parliamentarians are above the law—unrelated to public need or duty. This is misleading. It is more appropriate to understand parliamentary privilege as comprising the rights and immunities that Parliament needs to perform its roles.