Chapter 3

The constitution

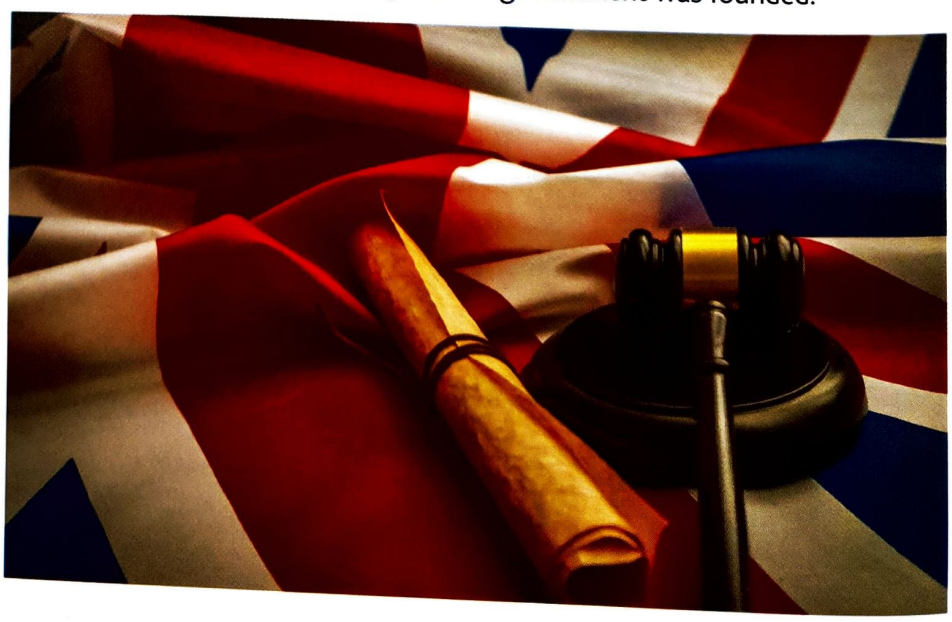
Key questions answered

- What is a constitution?
- What do we mean by uncodified and codified constitutions?
- What are the sources of the UK constitution?
- What key principles underpin the UK constitution?
- What are the strengths and weaknesses of the UK constitution?
- What constitutional reform has taken place since 1997 and how significant has it been?
- Should the UK adopt a codified constitution?

On Sunday 2 October 2016, the Prime Minister, Theresa May, announced that the government would be presenting a 'Great Repeal Bill' to Parliament. The purpose of such a bill, she indicated, would be to overturn the European Communities Act 1972 and, in so doing, remove the supremacy of European Union law over UK law that has existed since that Act incorporated the provisions of the Treaty of Rome into our legal framework. Whereas in most other western democracies such a fundamental change in the political landscape would require a formal constitutional amendment, the doctrine of parliamentary sovereignty and the supremacy of statute law in the UK means that it is just as easy to remove the UK from the direct jurisdiction of the EU as it was to submit to it back in 1972.

Such apparent flexibility in the UK's constitutional arrangements stems in large part from the uncodified nature of our constitution. However, the ability to change even the most central elements of our system by means of a simple Act of Parliament is a double-edged sword: while it enables our institutions and systems to respond to immediate threats and challenges without the need for arcane, multi-stage procedures, it can leave the system wide open to ill-conceived changes that threaten individual freedoms and undermine the very principles upon which our system of government was founded.

A constitution is a body of laws, rules and practices that sets out the way in which a state or society is organised



What is a constitution?

Key terms

Bill of Rights An authoritative statement of the rights of citizens, often entrenched as part of a codified constitution.

Constitution The House of Lords Select Committee on the Constitution (2001) defined a constitution as 'the set of laws, rules and practices that create the basic institutions of the state and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual' (www.tinyurl.com/grxnwu7).

Limited government A system in which the powers of government are subject to legal constraints as well as checks and balances within the political system.

A **constitution** is a body of laws, rules and practices that sets out the way in which a state or society is organised. A constitution establishes the relationship between the state and its citizens — and also between the various institutions that constitute the state. In this sense, the constitution provides a framework for the political system: establishing the main institutions of government, determining where decision-making authority resides and protecting the basic rights of citizens. This is often in a formal **Bill of Rights**.

In liberal democracies, the constitution provides an important defence against any abuse of power by the state, its institutions and its officials. It provides for a system of **limited government** under which a system of checks and balances serves to limit any danger of overmighty government and the rights of the citizen are protected from arbitrary state power. In many countries, the judiciary is empowered to use the constitution as a tool when deciding whether or not the state has acted in a manner which is lawful and legitimate (and therefore constitutional) and when it is has failed to do so (and therefore has acted unconstitutionally).

Constitutions should not be considered to be separate from normal political activity. Indeed, they are inherently political because of their impact upon day-to-day politics. Moreover, constitutions are not necessarily neutral because the framework that they provide (for example, the electoral system or the legislative process) may favour some actors at the expense of others.

In focus

Constitutionalism

This refers to the theory and practice of government according to the rules and principles of a constitution. A constitutional democracy is one which operates within the framework of a constitution that sets limits on the powers of government institutions and provides protection for the rights of citizens. A government or public authority acts in an unconstitutional manner when its actions are not in accordance with the principles and practices set out in the constitution.

Codified and uncodified constitutions

Key term

Codified constitution A single, authoritative document that sets out the laws, rules and principles by which a state is governed, and which protects the rights of citizens.

When comparing the constitutions of different nations, it is common to draw a distinction between those that are codified and those that remain uncodified. A **codified constitution** is one in which all of the fundamental rules that govern the operation of a given state and many, if not all, of the principles that underpin it, are set out in a single authoritative document. Codified constitutions, such as the US Constitution, can be described as constitutions with a capital 'C' because they assume an almost iconic position in the nation's psyche.

Key term

Uncodified constitution A constitution where the laws, rules and principles specifying how a state is to be governed are not gathered in a single document. Instead, they are found in a variety of sources — some written (e.g. statute law) and some unwritten (e.g. convention).

In contrast, an **uncodified constitution** has no single source for the rules and principles that govern the state — rather, they are found in a number of different places. The UK constitution is the prime example of this type of constitution. Although it is frequently described as 'unwritten', the term is misleading. For while it is true that the nation's constitutional practices and principles are not gathered in a single authoritative document, many are 'written' in common law (the decisions of the higher courts) and others can be found in statute law (Acts of Parliament) or other historical documents (see Table 3.1).

Table 3.1 Six key historical documents

Act or measure	Date	Significance
Magna Carta	1215	Guaranteed the right to a swift and fair trial
		Offered protection from arbitrary imprisonment
		Placed limitations on taxation
Bill of Rights	1689	Placed limitations on the power of the monarch
		Enhanced the status of parliament
		Prohibited cruel and unusual punishment
Act of Settlement	1701	Barred Roman Catholics, or those married to Roman Catholics, from taking the throne
		Resulted in the House of Hanover assuming the English throne
		Said to have paved the way for the Acts of Union (1707)
Acts of Union	1707	United the Kingdoms of England and Scotland to form Great Britain, governed from Westminster
Parliament Acts	1911/1949	Removed the power of the House of Lords to block money bills by imposing a maximum 2-year delay
		Reduced the power of the House of Lords to delay non-money bills by reducing the time limit to 1 year
European Communities Act	1972	The Act of Parliament that formally took the UK into the European Economic Community (EEC)
		Incorporated the Treaty of Rome into UK law, thus making European Law superior to domestic law

Although the difference between codified and uncodified constitutions is at the heart of many of the issues that we will be discussing in this chapter, the distinction is not as clear-cut as it might at first appear. In reality, no codified constitution could hope to spell out each and every practice, or cover every eventuality. In this sense, a codified constitution is not a detailed blueprint but a reference point for an evolving political system; a skeletal framework upon which other, lesser, rules can be neatly hung. Similarly, no constitution, however uncodified, could ever be entirely unwritten. In short, all constitutions must inevitably contain a mixture of written and unwritten elements.

Activity

Undertake some research on the US Constitution and one other codified constitution of your choice. Look at the kind of provisions that they include. What features do they share in common? In what ways do they differ?

Features of codified constitutions

Codified constitutions are generally produced at a critical juncture in a nation's history, most commonly in the wake of:

- newly found independence, e.g. the US Constitution of 1789
- a period of authoritarian rule, e.g. the Spanish Constitution of 1978
- war and/or occupation, e.g. West Germany's Basic Law of 1949

Key terms

Entrenched Difficult to change (literally 'dug in'); often requiring supermajorities — or approval by popular referendum.

Fundamental law Constitutional law that is deliberately set above regular statute in terms of status, and given a degree of protection against regular laws passed by the legislature.

In such situations, the political institutions established are explicitly granted their authority by the new constitution and a codified constitution is afforded the status of **fundamental law**, or higher law, placing it above ordinary law made by the legislature (or parliament). Under such a system, a constitutional court (or supreme court) is generally given the job of holding other key players, whether individuals or institutions, accountable to this supreme law.

Entrenchment and amendment

The provisions of codified constitutions are invariably **entrenched**, meaning that special procedures are needed for amendment. Whereas regular laws are generally enacted on the basis of a simple majority vote in the legislature, amending a codified constitution will generally require a supermajority far in excess of 50% in the legislature and/or approval by national referendum.

Their entrenched nature means that codified constitutions are often characterised as rigid, while uncodified constitutions are seen to be more flexible. However, degrees of flexibility are also evident in codified constitutions. For example, while the 1958 constitution of the French Fifth Republic has been amended 17 times in 50 years, there have been only 17 amendments to the US Constitution since the first ten amendments — known collectively as the Bill of Rights — were ratified in 1791.

The UK's uncodified constitution

The absence of any properly entrenched and superior fundamental law in the UK means that our constitution can be amended by a simple Act of Parliament. Moreover, the doctrine of parliamentary sovereignty holds that parliament has legislative supremacy, enabling it to pass laws on any matter of its choosing and to overturn any existing law. There are no constitutional no-go areas into which parliament cannot step. As the eighteenth-century constitutional lawyer William Blackstone once put it, 'Parliament can do everything that is not naturally impossible.'

Distinguish between

Codified and uncodified constitutions

Codified constitution

- The rules and principles governing the state are collected in a single authoritative document: the constitution.
- It has the status of fundamental law and is superior to all other law.
- It is entrenched, with special procedures for its amendment that make it difficult to change.
- The courts, particularly a constitutional court, use the constitution to determine whether the actions of other key players are constitutional.

Uncodified constitution

- There is no single authoritative document. Instead, the rules and principles governing the state are found in a number of sources, both written and unwritten.
- Constitutional laws have the same status as regular statute; there is no hierarchy of laws and no fundamental law.
- It is not entrenched so can be amended in the same way as ordinary law.
- Judicial review is limited because there is no single authoritative document that senior judges can use to determine whether or not an act or action is unconstitutional.

The sources of the UK constitution

As we have seen, uncodified constitutions tend to draw on a range of sources — some written and some unwritten. In the case of the UK constitution it is possible to identify five such sources:

- statute law
- common law
- conventions
- authoritative works (or 'works of authority')
- European Union law and treaties

Statute law

Key term

Statute law Law derived from Acts of Parliament and subordinate legislation.

Statute law is law created by parliament. Acts of Parliament have to be approved by the House of Commons, the House of Lords and the monarch before they are placed on the statute books, at which point they have the force of law. They are then implemented (or executed) by the executive and enforced by the courts. Not all Acts of Parliament are of constitutional significance because not all Acts have a bearing on the fundamental relationship between the state and the people or between the institutions that make up the state. The 1991 Dangerous Dogs Act, for example, can hardly be considered constitutional. That said, statute law is the supreme source of constitutional law in the UK because parliament is sovereign.

Examples of statute law that have been of historical importance in constitutional terms include:

- Great Reform Act 1832, which extended the franchise
- Parliament Acts 1911 and 1949, which established the House of Commons as the dominant chamber in our bicameral parliament
- European Communities Act 1972, by which the UK joined the European Economic Community (EEC) and incorporated the Treaty of Rome (1958) into UK law

More recent examples include:

- Scotland Act 1998, which created a Scottish Parliament
- Human Rights Act 1998, which incorporated the rights set out in the European Convention on Human Rights (ECHR) into UK law
- Fixed-term Parliaments Act 2011, which established fixed, 5-yearly elections to the Westminster Parliament

Common law

Key terms

Common law Law derived from general customs or traditions and the decision of judges.

Judicial review In the UK context, the power of senior judges to review the actions of government and public authorities and to declare them unlawful if they have exceeded their authority.

Common law includes legal principles that have been discovered, developed and applied by UK courts. Senior judges in the UK's higher courts use their power of **judicial review** to clarify or establish a legal position where statute law is absent or unclear. This case law forms a body of legal precedent that serves to guide both the lower courts and future lawmakers. However, one should remember that parliamentary sovereignty and the supremacy of statute law mean that the government of the day can always overturn such common law precedent by means of an Act of Parliament. It is for that reason, along with the absence of a superior fundamental law, that UK courts can never really be said to have declared the government's actions unconstitutional — only unlawful, or incompatible with the Human Rights Act.

Key term

Royal prerogative Discretionary powers of the Crown that are exercised by government ministers in the monarch's name.

Although the phrase 'common law' is normally taken to refer to the kind of judge-made law detailed above, it also includes customs and precedents that, unlike regular conventions, have become accepted as legally binding. A good example of this is the **royal prerogative** — the powers exercised in the name of the Crown. The Crown retains a number of formal powers that date back to the period before the UK began to morph into a constitutional monarchy in the late seventeenth century.

The royal prerogative

The Crown's prerogative powers traditionally included the right to:

- appoint ministers and choose the prime minister
- give royal assent to legislation
- declare war and negotiate treaties

Although held formally by the monarch, many of these powers came to be exercised by government ministers in the name of the Crown. Significantly, the first two decades of the twenty-first century saw a number of measures designed to limit the royal prerogative and enhance the role of parliament. For example, the prerogative power to dissolve parliament was ended by the Fixed-term Parliaments Act 2011 — just as the Constitutional Reform and Governance Act 2010 put the parliamentary scrutiny of treaties on a statutory basis. In spite of these changes, however, papers released in 2013 revealed that the monarch has been specifically asked to approve bills relating to prerogative powers and was advised by the government to withhold consent to a 1999 private members' bill which sought to transfer the power to declare war from the monarch to parliament. The royal prerogative is explored further when the powers of the prime minister are set out in Chapter 6.

Conventions

Key term

Conventions Established norms of political behaviour; rooted in past experience rather then the law.

Conventions are rules or norms of behaviour that are considered to be binding. Although they are neither codified nor legally enforceable, the 2011 Cabinet Office Manual sought to bring together many of these conventions in a single document, adding yet another written source to the UK constitution.

It is their very usage over an extended period of time that gives conventions their authority. For example, the monarch, by convention, must give their assent to Acts of Parliament. No monarch has refused to give their assent since 1707, when Queen Anne refused to approve the Scottish Militias Bill. Thus if the monarch were to refuse a bill today, there would be a constitutional crisis.

While conventions may fall into disuse over time, new conventions can also be established. For example, during his short tenure as prime minister, Gordon Brown announced that the UK would not declare war without a parliamentary vote.

Authoritative works (or 'works of authority')

When commentators speak of 'works of authority' they are generally referring to a handful of long-established legal and political texts that have come to be accepted as the reference points for those wishing to

know precisely 'who can do what' under the UK constitution. While these texts hold no formal legal status, they do have 'persuasive authority'. They can therefore be helpful in identifying, interpreting and understanding the core values that underpin the constitution — while also shedding light on the more obscure areas of constitutional practice.

Such works of authority include the following:

- Erskine May's *A treatise on the law, privileges, proceedings and usage of Parliament* (1844) is regarded as the bible of parliamentary practice, providing a detailed guide to its rules and practices.
- Walter Bagehot's *The English Constitution* (1867) sets out the role of the cabinet and the prime minister, describing the former as the 'efficient secret of the English constitution' and the latter as 'first among equals'.
- A. V. Dicey's *An Introduction to the Study of the Law of the Constitution* (1885) focused on parliamentary sovereignty and the rule of law (Dicey's 'twin pillars of the constitution'). It described a system of responsible cabinet government in a parliamentary democracy, with a constitutional monarchy.

European Union law

Following the European Communities Act 1972, the UK became a member of the European Economic Community (EEC) on 1 January 1973. The EEC was later renamed the European Community (EC) and then, after the Maastricht Treaty (1991) came into force in 1993, the European Union (EU). The treaties establishing the European Union, legislation emanating from the EU, and judgments of the European Court of Justice have all become a part of the British constitution. This is because under the 1958 Treaty of Rome, which was incorporated into UK law at the time of our joining the EEC, European law takes precedence over UK law.

Key term

Unitary state A unitary state is one in which sovereignty is located at the centre. Central government has supremacy over other tiers of government, which it can reform or abolish. A unitary state is a centralised and homogeneous state — political power is concentrated in central government and all parts of the state are governed in the same way.

Brexit and the status of EU law and treaties

Although UK referendums can only ever be advisory in nature due to parliamentary sovereignty, victory for the 'Leave' campaign in the 2016 EU referendum raised the possibility that the UK could leave the EU. Such an eventuality would naturally remove the UK from the control of EU law — thereby also removing this fifth source of the UK constitution. It should be noted, however, that Theresa May's proposed Great Repeal Bill would incorporate all existing EU law into UK statute law, at the same time as repealing the European Communities Act 1972. The status of EU law is dealt with more comprehensively in Chapter 8, when we consider the UK and the EU.

Key principles that underpin the UK constitution

Four key principles are said to underpin the UK constitution:

- parliamentary sovereignty
- the rule of law
- a **unitary state**
- parliamentary government under a constitutional monarchy

Key terms

Devolution The process by which a central government delegates power to another, normally lower, tier of government, while retaining ultimate sovereignty.

Parliamentary sovereignty The doctrine that parliament has absolute legal authority within the state. It enjoys legislative supremacy: parliament may make law on any matter it chooses, its decisions may not be overturned by any higher authority and it may not bind its successors.

Sovereignty Legal supremacy; absolute law-making authority that is not subject to a higher authority.

Parliamentary sovereignty

Parliamentary sovereignty is the cornerstone of the UK constitution. **Sovereignty** means legal supremacy, so the doctrine of parliamentary sovereignty holds that the Westminster Parliament is the supreme law-making body. This legislative supremacy is constructed around three interconnected propositions:

- Parliament can legislate on any subject of its choosing.
- Legislation cannot be overturned by any higher authority.
- No parliament can bind its successors.

Parliamentary sovereignty holds that the Westminster Parliament is the supreme law-making body

Case study

Parliamentary sovereignty in practice

Parliamentary sovereignty is a legal theory which holds that the supreme law-making authority in the UK is held by the Westminster Parliament. However, EU membership, **devolution** and the use of referendums raise questions about how meaningful this doctrine is in practice.

- Under the European Communities Act 1972, parliament effectively agreed to make itself subservient to European law.
- New Labour's devolution programme saw the Scottish Parliament being granted tax-varying powers and primary legislative control over many areas of government operation.
- Although UK referendums are technically only advisory in nature, their increased use since 1997 could be said to have transferred a degree of legislative power from parliament back to the people.

There is also a gap between 'legal theory' and 'political reality', for no institution has absolute power to do as it wishes. Although William Blackstone's view that 'Parliament can do anything that is not naturally impossible' is regularly cited when explaining the doctrine of parliamentary sovereignty, the reality is that parliament is constrained in a number of other ways — not least the desire of MPs to be re-elected and the need for tax revenues to cover the costs of any policies implemented.

Questions

- How could recent developments be said to have undermined parliamentary sovereignty?
- What is the difference between 'legal theory' (i.e. *de jure*) and 'political reality' (i.e. *de facto*)?

We will revisit parliamentary sovereignty and the constraints acting on it in Chapter 5.

The rule of law

Key term

Rule of law A legal theory holding that the relationship between the state and the individual is governed by law, protecting the individual from arbitrary state action.

The **rule of law** defines the relationship between the state and its citizens, ensuring that state action is limited and responsible. According to A. V. Dicey (1885), the rule of law has three main strands:

- No one can be punished without trial.
- No one is above the law, and all are subject to the same justice.
- The general principles of the constitution, such as personal freedoms, result from judge-made common law, rather than from parliamentary statute or executive order.

What does all of this mean in practice?

- Everyone is equal under the law. Individuals charged under the law are entitled to a fair trial and should not be imprisoned without due regard for the legal process.
- The courts can hold government ministers, police officers and public officials accountable for their actions if they have acted outside the law or been negligent in their duties.
- Laws passed by parliament must be interpreted and applied by an independent judiciary, free from political interference. The rights of citizens are thus protected from arbitrary executive action.
- Citizens can take the government or a local authority to court if they feel they have been treated improperly.

Key term

Civil liberties Fundamental individual rights and freedoms that ought to be protected from interference or encroachment by the state.

The rule of law is an essential feature of a liberal democracy. Although parliamentary sovereignty theoretically enables parliament to abolish these rights, any sustained effort to overturn the key elements of the rule of law would be seen as illegitimate and anti-democratic, making it untenable. As we will see in Chapter 9, the Human Rights Act 1998 gives further protection to basic **civil liberties**.

A unitary state

Constitutions may be classified according to whether they concentrate political power at the centre or divide it between central and regional tiers of government. In this context, there is an important distinction to be made between unitary constitutions and federal constitutions. The traditional British constitution is a unitary constitution. Although the United Kingdom consists of four component nations — England, Scotland, Wales and Northern Ireland — it has been a highly centralised state in which legal sovereignty is retained by the Westminster Parliament.

In a unitary constitution:

- Subnational institutions do not have autonomous powers that are constitutionally safeguarded.
- Regional government may be weak or non-existent.
- Local government has little power.

In a federal constitution, such as in Germany or the USA, power is shared between national (federal) and regional (state) governments. Each tier of government is given specific powers and a significant degree of autonomy. Moreover, no single tier of government can abolish any other tier.

A 'nation of nations'?

Although the UK has traditionally been described as a unitary state, the label does not reflect fully its multinational character. An alternative is to see the UK as a union state or a 'nation of nations', as Professor Vernon Bogdanor has put it. A unitary state exhibits a high degree of both centralisation and standardisation: all parts of the state are governed in the same way and share a common political culture. In a union state, by contrast, important political and cultural differences remain.

These asymmetries reflect the different ways in which parts of the state were united. The component nations of the UK came together in different ways: Wales was invaded by England, Scotland joined the union through an international treaty, and Northern Ireland remained part of the UK after the establishment of the Irish Free State. Political and cultural differences survived. Scotland kept its own legal system, Wales retained its own language and Northern Ireland maintained its separate institutions and political parties. By the second half of the twentieth century, the interests of each nation were represented in London by a government department headed by a cabinet minister, but these departments were relatively weak and political power was concentrated at the centre. As we will see later in this chapter, it could be claimed that the devolution programme launched by the Labour government in the wake of the 1997 general election has raised further questions about the UK's status as a unitary state.

Distinguish between

Unitary, union and federal states

Unitary state

- A highly centralised state in which political power is concentrated at the centre.
- Central government has ultimate authority over subnational institutions.
- The centre dominates the political, economic and cultural life of the state.
- All areas of the state are governed in the same way and there is a very high degree of administrative standardisation.

Union state

- A state whose component parts have come together through a union of crowns or by treaty.
- There is a high degree of administrative standardisation but the component nations retain some of their pre-union features (e.g. separate churches or legal systems).
- Political power is concentrated at the centre but the component nations have some degree of autonomy (e.g. through devolution).

Federal state

- A state in which the constitution divides decision-making authority between national (federal) and regional (state) tiers of government.
- The different tiers of government are protected by the constitution: one tier cannot abolish the other.
- The regions within the state have a distinctive political, and often cultural, identity.

Activity

Using the UK material provided in the section above and examples of other countries from your own research, explain why one could argue that the UK is no longer a unitary state. Then explain why one should not see the UK as a truly federal state.

(more recently renamed Unlock Democracy) to put forward the case for wholesale constitutional change. Although the Labour Party had traditionally viewed constitutional reform as an unwelcome distraction from its main goal of improving conditions for the working class, the party came to embrace the need for wholesale constitutional change during an 18-year spell in opposition (1979–97).

Members of Charter 88 show their support for reforming the House of Lords

New Labour and constitutional reform, 1997–2010

The constitutional reforms introduced by the Labour governments (1997–2010) are discussed in their proper context in other chapters. Here, the main reforms are outlined (see Table 3.3) and their significance is assessed.

Labour emerged victorious from the 1997 general election after promising a programme of constitutional reform that was driven by four interlocking themes:

- **Modernisation.** Institutions such as parliament, the executive and the civil service were using outdated and inefficient procedures that demanded reform.
- **Democratisation.** Participation in the political process would be encouraged through electoral reform and greater use of referendums.
- **Decentralisation.** Decision-making powers would be devolved to new institutions in Scotland and Wales, with the role of local government also being enhanced.
- **Rights.** The rights of citizens would be strengthened and safeguarded.

Most of the key reforms that followed were introduced by Tony Blair's first administration (1997–01), although the Constitutional Reform Act 2005 that followed later also brought significant changes to the UK judiciary. While constitutional reform appeared to be an early priority for Gordon Brown's government (2007–10), the impact of the global economic crisis that coincided with Brown's short tenure in office meant that little of note was achieved in the field of constitutional affairs during that period.

Table 3.3 New Labour's constitutional reforms, 1997–2010

Area	Reforms
Rights	The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law The Freedom of Information Act 2000 gives greater access to information held by public bodies
Devolution	A Scottish Parliament with primary legislative and tax-raising powers A Northern Ireland Assembly with primary legislative powers A Welsh Assembly with secondary legislative powers A directly elected mayor of London and a London Assembly Elected mayors in some English authorities
Electoral reform	New electoral systems for devolved assemblies, for the European Parliament and for elected mayors
Parliamentary reform	All but 92 hereditary peers are removed from the House of Lords Limited reforms to the workings of the House of Commons
Judiciary	The Constitutional Reform Act 2005 Supreme Court started work in October 2009 New judicial appointments system Changes to role of lord chancellor

Rights

The Human Rights Act (HRA, 1998) enshrined most of the provisions of the European Convention on Human Rights (ECHR) in UK law. The rights protected by the convention include:

- the right to life
- the right to liberty and personal security
- the right to a fair trial
- respect for private and family life
- freedom of thought and expression
- freedom of peaceful assembly and association
- the right to marry and start a family
- freedom from torture and degrading treatment
- freedom from discrimination

The HRA requires the British government to ensure that legislation is compatible with the ECHR. All bills introduced at Westminster or in the devolved assemblies are reviewed by lawyers with a view to ensuring that they are 'HRA-compliant'. Before the HRA came into force, cases were heard by the European Court of Human Rights (ECtHR) in Strasbourg. Although UK courts can now hear cases under the ECHR, they cannot automatically overturn legislation that they deem to be incompatible with its provisions: it is up to ministers to decide whether or not to amend or repeal the offending statute.

It is important to remember that signatories to the ECHR have the right to request a derogation (a temporary exemption) from its provisions where they are facing a crisis that threatens the security of the nation. Thus it was that in the wake of 9/11, the UK government forced a derogation from Article 5 of the ECHR (the right to liberty and security) in order to allow for the detention of foreign nationals suspected of terrorist activity.

Devolution

Devolution involves the transfer of certain executive and legislative powers from central government to subnational institutions. In 1999, power was devolved to new institutions in Scotland, Wales and Northern

Key terms

Asymmetric devolution A form of devolution in which the political arrangements are not uniform, but differ from region to region.

Quasi-federalism Where the central government of a unitary state devolves some of its powers to subnational governments. It exhibits some of the features of a unitary state and some of a federal state. In legal theory there is one supreme legal authority located at the centre, as in a unitary state. But in practice the centre no longer makes domestic policy for some parts of the state and it would be difficult politically for the centre to abolish the subnational tier of government. Different policy frameworks operate within the state. Senior judges rule on questions concerning the division of competences.

West Lothian Question Originally posed by Labour MP Tam Dalyell in a Commons debate back in 1977, the West Lothian Questions asks 'Why should Scottish MPs be able to vote on English matters at Westminster, when English MPs cannot vote on matters devolved to the Scottish Parliament?'

Ireland, following 'yes' votes in referendums in each nation. The new system was one of **asymmetric devolution**, rather than following a standardised blueprint; the devolved bodies have different powers and distinctive features. Devolution has been a process rather than an event, with further powers devolved since 1999.

The Scottish Parliament was given primary legislative powers across a range of policy areas at the time of its creation, along with tax-varying powers. Subsequent reforms have seen the parliament's legislative primacy extended into a wider range of policy areas, and the Scotland Act 2012 granted the parliament tax-raising powers. Together with the Scottish government, it now has sole responsibility for policy on issues such as education, health and local government. Granting such wide-ranging powers to the Scottish government while still allowing Scottish MPs at Westminster to vote on laws that no longer directly affected their constituents, brought the so-called '**West Lothian Question**' into sharp focus.

The National Assembly for Wales, commonly referred to as the Welsh Assembly, was initially weaker than the Scottish Parliament. It had secondary legislative and executive powers but no primary legislative authority. This meant that it could only fill in the details of, and implement, legislation passed by Westminster in policy areas such as education and health.

The Northern Ireland Assembly was granted legislative powers over a similar range of policy areas to the Scottish Parliament but does not have tax-raising powers. Special procedures were established in the assembly to ensure cross-community support.

These changes clearly did not turn the UK into a federal system but, for the reasons identified earlier in this chapter, some used the term '**quasi-federalism**' when seeking to attach a label to the state of affairs that resulted from New Labour's devolution programme.

Regional and local government

Tony Blair's governments also made changes to local government in England, most notably in the capital where a new directly elected mayor of London was granted significant power in areas such as environment and transport. The latter resulted in the introduction of a congestion charge for motorists entering central London. These changes also saw the creation of a London Assembly, a body tasked to scrutinise the mayor's actions.

Outside of London, all local authorities were obliged to reform their political management, with the government keen to extend the elected mayor model beyond London. However, by 2016 there were only 17 such mayors nationwide.

Electoral reform

Labour's record on electoral reform between 1997 and 2010 was a mixed one. The 1998 Jenkins Report, the product of the Independent Commission on the Voting System established by the Labour government a year earlier, had recommended replacing the first-past-the-post (FPTP) system used in elections to the Westminster Parliament, with a hybrid system known as alternative vote plus (AV+). This system would have combined the majoritarian AV system with a proportional list-based 'top-up'. Despite establishing the commission, Labour singularly failed to act on its central recommendation.

Although no change was made to the system used in elections to the Westminster Parliament, other systems were adopted for the new devolved institutions and for some other elections (see Table 3.4).

UK electoral systems and the debate over electoral reform are dealt with more comprehensively in Chapter 10.

Table 3.4 The main electoral systems in use in the UK, 2016

Institution	Electoral system	System type
Westminster Parliament	First-past-the-post (FPTP)	Simple plurality
English and Welsh local elections	First-past-the-post (FPTP)	Simple plurality
Directly elected mayors	Supplementary vote (SV)	Majoritarian
London Assembly	Additional member system (AMS)	Hybrid/mixed
Scottish Parliament	Additional member system (AMS)	Hybrid/mixed
Scottish local government	Single transferable vote (STV)	Proportional
Welsh Assembly	Additional member system (AMS)	Hybrid/mixed
Northern Ireland Assembly	Single transferable vote (STV)	Proportional
European Parliament	Regional party list	Proportional

Parliamentary reform

The House of Lords Act 1999 abolished the right of all but 92 hereditary peers (those who inherited their titles) to sit and vote in the upper house. This was intended as the first stage of the reform process. The Lords now comprised mainly life peers and no political party had an overall majority. But the Labour governments made little progress with the second stage of the reforms, which would have settled the final composition and powers of the reformed House of Lords. Although various papers and a number of bills were brought forward for debate, there was a fundamental division between the Commons and the Lords on how reform should progress, with the Commons generally favouring a partially or entirely elected second chamber and the Lords favouring an appointed model.

Labour's initiatives to reform the House of Commons were similarly unconvincing. Changes to Prime Minister's Question Time and the working hours of the Commons, for example, were significant if unspectacular. Gordon Brown's 2010 'Governance of Britain' Green Paper aimed to limit the powers of the executive and make it more accountable to parliament but tangible progress stalled in the face of the global financial crisis.

The recommendations of the 2009 Reform of the House of Commons Committee, chaired by Tony Wright, came into force in the wake of the 2010 general election but once again the changes made could hardly be considered of great constitutional significance:

- chairs of select committees to be elected by backbenchers
- a backbench business committee to determine the business of the House of Commons for 1 day each week
- a petitions committee to select issues for debate that have been suggested by the public via e-petitions

Key term

Barnett formula A mechanism devised in 1978 by the then chief secretary to the Treasury, Labour MP, Joel Barnett. This formula translates changes in public spending in England into equivalent changes in the block grants for Scotland, Wales and Northern Ireland, calculated on the basis of population. Under the formula, these nations had higher public spending per person than England.

Moreover, although the controversial **Barnett formula** has been left in place in the wake of these and earlier reforms, English MPs have now been given special privileges in respect of those matters affecting England alone (a form of 'English votes for English laws'), as promised in the Conservative manifesto.

'English votes for English laws'

The 2013 report of the Commission on the Consequences of Devolution for the House of Commons (aka the McKay Commission) recommended that only English MPs should be allowed to vote on measures which were identified as affecting only England. Changes to House of Commons standing orders made in the wake of the 2015 general election mean that this form of 'English votes for English laws' is now in place. The new system was used for the first time in January 2016, when only those MPs representing English constituencies were permitted to vote on some elements of a Housing and Planning Bill.

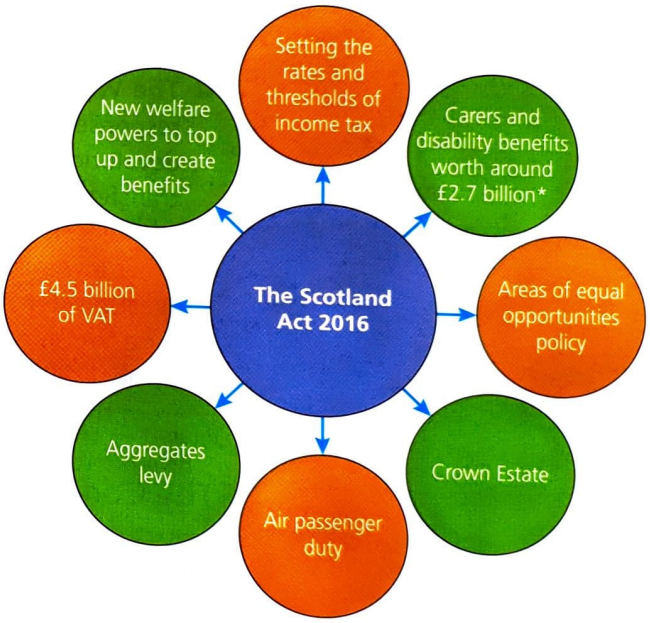
Case study

The implications of the Scotland Act 2016

The Scotland Act 2016 put into place many of the recommendations of the Smith Commission, the latter having been established in the immediate aftermath of the clear 'No' vote in the 2014 Scottish independence referendum. The Act made a number of significant changes (see Figure 3.1):

- Devolved institutions were granted new powers over taxation, being allowed to set the rates and thresholds for income tax as well gaining control of 50% of VAT levies.
- These changes meant that, for the first time, the Scottish government was responsible for raising more than 50% of the money that it spends.
- The Scottish Parliament was given legislative power over a range of new areas — including road signs, speed limits and some welfare benefits.
- The Scottish government was given control over its electoral system, although a two-thirds supermajority in the Scottish Parliament was required for any changes to be made.

Crucially, the Act also recognised the permanence of devolved institutions in Scotland and determined that a referendum would be required before either the Scottish Parliament or the Scottish government could be abolished.



*Based on 2014/15 spend in Scotland
Source: www.gov.uk/scotland-office

Figure 3.1 The Scotland Act 2016 in overview

Questions

- To what extent could the Scotland Act 2016 be seen to address the concerns of those who had voted in favour of Scottish independence in the 2014 referendum?
- How could the Act be said to have strengthened the case in favour of 'English votes for English laws' at Westminster?

Brexit

It is worth remembering that as well as delivering on its manifesto promises with regards to subnational government, the Conservative government has also delivered on an earlier promise to hold an 'in/out' referendum on the UK's membership of the EU. As we have already noted, the result of the referendum vote could have significant implications for the UK's constitutional arrangements.

Should the UK adopt a codified constitution?

The Labour governments' reforms between 1997 and 2010 resulted in a greater codification of the British constitution. The Human Rights Act 1998 and the Scotland Act 1998, for example, saw important constitutional principles written into statute law. Some scholars and judges even claim that such acts have *de facto* status as fundamental law or 'constitutional statutes'. But the Labour governments did not take their constitutional reforms to their logical conclusion — a codified constitution.

Although Labour and the Liberal Democrats proposed moves towards a codified constitution in their 2010 election manifestos, the Conservative–Liberal Democrat coalition agreement made no such commitment. Since 2015, the Conservatives, now in government alone, have given no indication that this is a route they wish to take.

Arguments in favour of a codified constitution

Supporters of a codified constitution claim that it would provide greater clarity on what is, and what is not, constitutional. The rules governing the British political system would be set out in an authoritative document, reducing the ambiguities that exist in the current uncodified constitution and its myriad of conventions. The rights of citizens would also be given further constitutional protection. A codified constitution would tackle the centralisation of power (and the potential for 'elective dictatorship') by setting limits on the power of the executive and introducing more effective institutional checks and balances. Local and subnational governments would enjoy constitutional protection.

In drawing up a codified constitution, politicians and the public would have to give greater thought to the core principles of the British constitution than was evident during Labour's reform programme. The process of drawing up the new constitution would also educate citizens and, proponents hope, provide the people with a greater sense of shared values and citizenship, while bestowing additional legitimacy on the political system.

Arguments against a codified constitution

Opponents argue that codification would remove the flexibility and adaptability that is often seen as a key strength of the existing uncodified constitution. The British constitution has endured because it has developed organically and been adapted when the case for change has been proven. A codified constitution may reflect the mood of the time when it was produced — although this may also be doubtful, given the difficulty of forging consensus — but values change and constitutional legislation often requires amendment within a few years because of unintended consequences or the emergence of new issues. Codified constitutions are rigid and not easy to

change. Codification, critics argue, would place too much power in the hands of judges because they would be called upon to determine whether laws and political processes are constitutional. A government acting on a popular mandate to introduce, say, stricter measures on law and order could find its legislation overturned by the courts. Judges would become more overtly political and this might reduce faith in the legal system.

A move to a codified constitution would bring about a fundamental change in the British political system and in the country's political culture. The traditional view is that a codified constitution would be incompatible with parliamentary sovereignty. Whereas codified constitutions set limits on the powers of the legislature and executive, the doctrine of parliamentary sovereignty gives Westminster supreme authority. A codified constitution could not be entrenched or have the status of fundamental law for so long as parliament retains the power to alter it at will.

An extensive national debate that produces elite and popular consensus on the guiding principles of the political system and authorising their codification might offer a way out of this conundrum. In such circumstances, parliament would be reluctant to counter the express will of the people. But disputes over the treatment of England in the post-devolution UK, reform of the House of Lords and the future of the Human Rights Act suggest that elite (and popular) consensus on the constitution is some way off.

Debate

Should the UK have a codified constitution?

Yes

- It is the logical conclusion of recent constitutional reforms.
- It would provide greater clarity on what is constitutional.
- It would be an authoritative reference point for the courts.
- It would set limits on the powers of the state and its institutions.
- It would provide greater protection for the rights of citizens.
- It would better inform citizens about the values and workings of the political system.

No

- Pragmatic adaptation has worked well and is preferable.
- There is no agreed process for establishing a codified constitution.
- There is no elite consensus on what a codified constitution should include.
- It would be rigid and difficult to amend.
- It would give judges, who are unaccountable, greater political power.
- There is no great popular demand and other issues are more important.

'Where next' for constitutional reform?

There is a remarkable degree of consensus regarding what needs to be done. The problem lies more in the areas of strategy and delivery. In common with so many 'new dawns', New Labour's constitutional reform programme ran aground long before the end of the party's first term in office. What followed between 2001 and 2016, under administrations of various political hues, was essentially piecemeal; a tinkering series of halfway houses and dead ends.

Aims of further constitutional reform

In 2013, the Electoral Reform Society published *Reviving the Health of Our Democracy*, in which they argued that the UK's constitutional arrangements should be remodelled with a view to delivering three clear outcomes:

Activist campaigning for voting reform, July 2015

- **active participation and engagement,** giving everyone the opportunity to shape the decisions that affect their lives
- **fair representation,** ensuring our institutions reflect the people they serve, their choices and identities
- **good governance** in the form, function and culture of democratic decision making

What might these headline goals mean in terms of making concrete changes to our constitutional arrangements — and how far down this road have we travelled since 2013?

Encouraging active participation and engagement

Many of the obvious changes that were suggested at the time of the 2013 paper have now been piloted in one form or another.

- **Simplifying voter registration.** The system was indeed changed from a household-based system of registration to individual voter registration. However, far from improving electoral participation, the result of this change was a fall in voter registration.
- **Lowering the voting age to 16.** Sixteen-year-olds were allowed to vote in the 2014 Scottish referendum but were not given a voice in the 2015 general election or in the 2016 UK-wide EU referendum.
- **Making wider use of e-democracy.** Online petitions, citizens' assemblies and citizens' juries have all been trialled.
- **Opening up candidate selection.** Although the major parties' dalliance with primaries, public hustings and one-member-one-vote offered the prospect of wider access to elected office, the reality is that in spite of a larger number of female MPs being elected, the socioeconomic profile of those elected to the Commons has not been radically altered.

Delivering fair representation

- **Electoral reform.** Although there is general agreement that the first-past-the-post (FPTP) system used in elections to the Westminster Parliament is, at best, inequitable, there has been no tangible progress towards reform since the 2011 alternative vote (AV) referendum.
- **Redrawing electoral districts.** The Boundary Commissions have made proposals that would see a move towards more equal parliamentary constituencies ahead of the 2020 general election, with consultation on those proposals under way in 2016.

Providing for good governance and restoring trust

- **Completing Lords reform.** The second stage of Lords reform that was promised back in 1997, whereby the second chamber would become at least partly elected, is no closer to completion now than it was in the wake of the House of Lords Act 1999. As we have seen, the House of Lords Reform Act 2014 is barely worthy of such an impressive title.
- **Modernising the Commons.** Although there have been some efforts to regulate lobbying and reform party funding since 2013, there has likely been too little movement on this front to restore confidence in politics. The Recall of MPs Act 2015, which established a mechanism considerably weaker than that operating in many states in the USA, also fell short of expectations.

- **Enhancing local democracy.** Devolved institutions in Scotland and Wales have seen their powers extended, in both scope and depth, but local government has not enjoyed the kind of renaissance envisaged either by the Electoral Commission or by the main UK parties in their 2015 general election manifestos.

Ultimate destination uncertain; route unclear

Given that there is still some considerable debate over precisely where constitutional reform should be headed, it is perhaps no surprise that the route towards that final destination remains similarly unclear. Writers such as Vernon Bogdanor have suggested that one way out of this impasse might be to establish a US-style constitutional convention:

> It is becoming increasingly clear that our constitutional forms are relics of a previous era, and that we need to bring them into alignment with the social forces of the modern age. The task now is to channel the democratic spirit into constructive channels. That is the fundamental case for a constitutional convention, with popular participation, to consider the constitution as a whole. But, before such a convention sits, it needs to be preceded by a learning process. The best way of achieving this would be through a Royal Commission, or equivalent body, which would hold hearings in public in different parts of the country; hearings which would be highlighted in the media. The Commission would take on the task of collecting the thoughts of the interested public and providing options for the constitutional convention to consider.

Vernon Bogdanor (2015) *The Crisis of the Constitution: The General Election and the Future of the United Kingdom*

What you should know

- The British constitution is uncodified. The most important provisions are not gathered in one document, but are found in a variety of sources: Acts of Parliament, the common law, conventions, works of authority, and the treaties and law of the European Union. The uncodified nature of the British constitution means that it can be adapted to meet new political realities, but also that there is no definitive view of what is unconstitutional and that protection of individual rights is limited.
- Parliamentary sovereignty is the core principle of the British constitution. It establishes parliament as the supreme law-making body. But this legal theory has come under pressure given EU membership, the Human Rights Act 1998, devolution and the use of referendums. Political practice also differs significantly from legal theory. No institution has absolute power; all are subject to significant internal and external constraints. The UK, however, has been a highly centralised state.
- The constitution was changed significantly by the Labour governments between 1997 and 2010. Devolution, the Human Rights Act, new electoral systems and reform of the House of Lords changed the constitutional landscape. They provided greater protection for the rights of citizens and introduced more effective checks and balances and more democratic elements into the political system. The reforms have important implications for parliamentary sovereignty. Critics claim that the reform programme was incomplete and lacked a unifying vision.
- The new constitutional settlement continues to evolve. The Scottish Parliament and Welsh Assembly have gained more powers, and a form of 'English votes for English laws' came into play in 2015. Although the 2011 alternative vote (AV) referendum ended the immediate prospect of electoral reform, the coalition government was able to introduce fixed-term parliaments.
- Debates continue on reform of the House of Lords, the government of England, the Human Rights Act and codification of the constitution. The constitution is not above politics, but is an important political issue in its own right.

UK/US comparison

The UK and US constitutions

- Unlike the uncodified constitution under which the UK is governed, the US Constitution is codified. It was drafted by the Founding Fathers in 1787, 4 years after the former colonies had secured their independence from Britain.
- The US Constitution has seven articles, the first three of which set out the role and powers of (respectively) the legislature, the executive and the judiciary.
- In common with the UK, some important features of the US political system are not described in the constitution, but have emerged through case law or as conventions. These include, for example, the Supreme Court's power of judicial review.
- The US Constitution is entrenched. The constitution establishes special procedures for its amendment. Amendments must be approved by two-thirds of members in both houses of Congress and ratified by three-quarters of state legislatures in the 50 states. Since the first ten amendments were ratified as the Bill of Rights in 1791, 17 other amendments have been added, two of which (the 18th and 21st) cancel each other out. The UK constitution is not entrenched: there are no special procedures for its amendment.
- The Bill of Rights sets out the rights of individual US citizens and protects them from state encroachment. The Human Rights Act 1998 incorporated ECHR rights into UK statute law.
- The US Constitution is subject to extensive judicial review. The Supreme Court can declare Acts of Congress and the actions of the executive, as well as the actions of state legislatures and executives, to be unconstitutional and strike them down. Parliamentary sovereignty and the uncodified constitution mean that judicial review is far more limited in the UK.
- The US Constitution is a federal constitution. The 10th Amendment states that all powers not delegated to the federal government by the constitution, or prohibited by it to the states, are reserved to the states or the people. The UK has traditionally been seen as a unitary state, but has developed quasi-federal features since 1997.
- The US Constitution establishes a strict separation of powers. The executive, legislature and judiciary have different powers and personnel. Checks and balances prevent one branch of government becoming pre-eminent. The UK has a partial fusion of powers where the executive dominates the legislature.
- The US Constitution establishes a presidential system of government in which the head of the executive branch is directly elected, the executive and legislative branches have distinct membership and functions, and neither branch can dismiss the other. The UK has a parliamentary system in which the prime minister is the leader of the largest party in the House of Commons, the executive and legislative branches are fused, and the House of Commons can dismiss the government.

Further reading

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