

Constitutional Law Tutorial 1 Notes

The Nature and Sources of the Constitution

The British Constitution

- The UK does not have a written constitution in the sense of a single document entitled 'The Constitution' – it still has a constitution.
- A constitution anticipates issues that may arise and provides a mechanism by which such matters might be resolved.
- The function of a constitution is to allocate state power; the power to make laws (legislation), exercise governmental power (administer government programmes), determine disputes between people (judicial process).
- Constitutions divide power among different institutions of government along functional lines (legislative, executive, judicial); vertical dividing lines.
- Constitutions also allocate power to different tiers of government. In the UK, government power is shared between the EU, the UK government, governments of the devolved nations and local authorities; horizontal dividing lines.
- Constitutions also determine where government power stops and individual freedom begins. A government is limited by fundamental constitutional principles, also known as the rule of law. The constitution confers fundamental human rights on people and provides that the government must not interfere with those rights.
- A key purpose of a democratic constitution is accountability; to ensure that those entrusted with power exercise it responsibly and are called to account when they do not.
- A democratic constitution also allocates state power in a manner that is regarded as morally acceptable. This gives its arrangements popular legitimacy.
- Constitutions' purpose is to reflect fundamental principles that represent deep-seated consensus that limits the power of the government and protects the rights of the individual. Therefore, it should not be as easy to amend a constitution as a general statute. They should not be too easy to change (lose permanence) or too hard to change (live with past values).
- Constitutions tends to be drafted in unspecific terms, raising difficult questions without answering them. There is a debate as to who should decide what it means; judges or politicians.
- Constitutions often secure consensus by focusing on fundamental matters on which a natural consensus exists (uncontroversial e.g. the right to a fair trial).
- Some of the UK's arrangements have received popular endorsement through referendums (e.g. the UK's decision to leave the EU in 2016 and the devolution of power to Scotland, Wales and Northern Ireland in the late 1990s).
- Some arrangements have been put in place by Parliament and so can only be changed by Parliament (e.g. the Human Rights Act 1998 and guarantee of judicial independence under the Constitutional Reform Act 2005).
- A key difference with the UK's constitution is that it has no special legal status, meaning the law dealing with constitutional matters has the same status as other laws.

- There is no degree of permanence since the amendment procedure is the same as statutes. In the UK, lawmakers are legally capable of enacting legislation that conflicts with fundamental principles but generally chose not to because they are considered too important.
 - The 'regular' law does not exist in the shadow of 'constitutional' law.
 - Acts of Parliament are the highest form of law within the UK constitution and cannot be struck down by courts if they conflict with fundamental constitutional principles.
 - This is the doctrine of Parliamentary sovereignty under which Parliament has the absolute right to make or unmake any law at all. Thus, no Parliament can bind its successors.
 - The effect of parliamentary sovereignty is that it gives strong constitutional recognition to the principle of democracy but makes it difficult to accord fundamental constitutional status to any other institutions or principles.
 - However, other lawmakers, such as the legislatures of devolved nations and other parts of the government, such as local authorities, do not have the power of the UK Parliament.
 - Fundamental constitutional values do not constitute an absolute brake on government because they are not hierarchically superior. Therefore, the government, by causing legislation to be passed, can do anything even if it contradicts long standing constitutional principles.
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- The political party with a majority of seats in the House of Commons is asked by the Queen to form the government. The government's majority means that it is almost always assured of getting its proposals for new legislation through the Commons.
 - In most circumstances, the approval of the House of Lords is required for the proposed legislation to be passed.
 - In the House of Lords, most of its members are appointed on the recommendation of the leaders of the main political parties (none are elected). In recognition of its lack of democratic legitimacy, the House of Lords has limited powers (the most it can do is delay the enactment of legislation for one year).
 - The House of Lords was going to be replaced with a second chamber constituted on a popular rather than hereditary basis; a century later this has not happened.
 - In this sense, the executive can be in an extraordinarily powerful position.
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- The courts can attempt to interpret the law in a way that is consistent with fundamental constitutional principles.
 - However, if the law clearly affronts fundamental constitutional values, then the courts must apply the law envisaged.
 - The Human Rights Act 1998 authorises the courts, in cases where the legislation is incompatible with certain human rights, to issue a 'declaration of incompatibility.' (does not deprive the legislation of legal force- impact is political not legal)
 - While there are no legal limits that confine lawmakers' powers, there are considerable political limits. UK legislators are unlikely to enact oppressive laws since they are sensitive to public opinion and MP's may fear losing their seats.
 - Legal constitutionalism (courts) and political constitutionalism (political process) reflect two different views on how fundamental constitutional values should be upheld. UK tends to rely on political safeguards although there is far more constitutional law in the UK than before.
 - Judicial review addresses the executive bodies' power and whether they acted within that.

- Administrative law enables the government and other public bodies to operate and set limits upon governmental powers.
 - Public officials and civil servants who work in administrative agencies perform the operational tasks of government.
 - The business of Parliament as a legislature is to keep the administrative machinery of the state in working order.
 - Acts of Parliament are primary legislation whilst 'statutory instruments' are secondary legislation (much more secondary than primary).
 - Judicial review is a process where an individual can take the government agency concerned to a court to test the lawfulness of its decision.
 - An ombudsman is a specialist complaint-handling body that investigates complaints made against government bodies.
 - Tribunals enable individuals who have received a negative decision from a government body to appeal against that decision.
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- It is relatively easy for the government to reform the UK constitution.
 - The post 1997 constitutional reforms were not a programme of change in the sense of being a coherent package.
 - It is intrinsic in the UK's constitutional arrangements that we do not have special procedures for dealing with constitutional reform (Constitutional Reform Act 2005).
 - Constitutional reform is seen as an ongoing process making it possible to keep it under review and to react quickly when it is felt that things are not working well.
 - The fact that some issues, such as detailed, technical arrangements should be capable of being amended with relative ease, does not mean that all arrangements, including those pertaining to fundamental principles should be easily amended.
 - The Human Rights Act has been constantly criticised by UK politicians who have promised reforms.
 - There is a high degree of historical continuity in the UK constitution (e.g. key institutions such as the monarchy or Parliament).
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- In *R(Miller) v Secretary of State for Exiting the European Union* the referendum result in 2016 was described as merely advisory – its significance was political rather than legal – and therefore insufficient to entitle the government to notify the EU of Britain's intention to withdraw. To do so required a further vote in Parliament to confirm (or potentially override) the referendum result.
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- The executive branch of the central government includes the Prime Minister, other Ministers, their government departments and civil servants.
 - The executive branch formulates a programme for government and then seeks to implement it.
 - The courts are subservient to Parliament (cannot strike down the laws that it enacts) and Parliament is subservient to the executive (have a majority in the House of Commons and the House of Lords ultimately lacks the power to block legislation).
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- Due to the powerful position of the executive, accountability is important.
 - Generally elections, parliamentary and judicial scrutiny are ways in which the executive is held to be accountable.

- Political constitutionalists see the constitution as a product of a set of political relationships between the different institutions of the state – Parliament, government and the courts. As the political relationships develop and change, so too do constitutional rules and practices.
- In a democracy, the political process is the most legitimate means of guarding against unconstitutional behaviour.
- The role of the courts in scrutinising the government ought to be fairly limited because judges lack any democratic legitimacy.
- The political process deters politicians from doing unconstitutional things (public will vote for another party at a general election).
- Those who advocate legal constitutionalism argue that principles of ‘natural law’ are so fundamental as to be immutable. A law that contradicts such principles should not be enforced by courts.
- The executive’s influence over Parliament means that there is a fusion of power with the legislature; there must be a separate judicial body to ensure the political branches act constitutionally.
- Relying on the political process only serves the interests of the majority, whilst judges protect the constitutional rights of everyone.
- Yet, since the UK does not have a formal document, giving judges such power would taint democracy with aristocracy (decisions of the elite).
- The balance in the UK has shifted in favour of legal forms of control (e.g. Human Rights Act 1998).
- There has been a shift in the UK from a position of central power to a multi-layered governance.
- This change has been driven by the UK’s membership of the EU, the devolution of power to Scotland, Wales and Northern Ireland and devolution to English regions.

Sources of the constitution

- In a system based on written constitutions, such texts must be supplemented:
- Ordinary legislation (statutes) will make detailed provision in relation to matters in the constitution.
- Courts will interpret the constitutional text; judicial precedent will be regarded as a source of constitutional law.
- A political precedent or constitutional convention with which future parties will be expected to comply may arise. This arises from a matter in relation to which no provision is made in the constitutional text and so an informal resolution is reached. If this proves satisfactory and the relevant parties appear willing to adhere to it, there is no need to enshrine it in law.
- The sources of the UK’s constitution is found in a combination of ordinary law (legislation, international treaties and common law), judicial precedent (interpretation of legislation) and political precedent.
- A large proportion of the UK’s constitution is written in statutes but has not been codified.

- Constitutional law is concerned with the organisation of and allocation of power to the institutions of government and the regulation of the relationship between the individual and the state.
 - Magna Carta, 1215, made provisions concerning the liberty of the individual and the right to trial by jury.
 - Bill of Rights, 1689, lays down the principle of parliamentary privilege, whereby things said in Parliament cannot be the subject of legal proceedings.
 - As a general principle, whenever two pieces of legislation conflict, the courts will prioritise the most recent one, even if the later Act does not explicitly say that it is overriding the earlier one; doctrine of implied repeal.
 - Legislation dealing with constitutional matters can be amended or repealed only if the legislation specifically says that it intends to override an earlier piece of constitutional legislation.
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- Judicial precedent, the body of decisions made by courts when deciding cases, constitutes an important source of constitutional law.
 - Common law constitutional principles influence how courts interpret and apply existing legal rules (e.g. the principle of legal certainty).
 - Royal prerogative is part of the common law that authorises the executive branch of the government to do certain things such as declaring war and granting honours. Formally belonging to the monarch, such powers are generally exercised on her behalf by government ministers.
 - Courts are part of the constitution not referees.
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- International law can be seen as a source of UK constitutional law (European Communities Act 1972 and European Convention on Human Rights).
 - When the UK becomes party to a treaty it is often given effect in national law through the enactment of legislation.
 - Even where legislation is not enacted, there is a principle that national law should be interpreted where possible in conformity with treaties to which the UK is a party.
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- Constitutional conventions mean that legal freedom is constrained by political precedent.
 - Conventions used to be unwritten and implicitly agreed upon. However, they are increasingly recorded in an official form so as to prevent exploitation.
 - Conventions are legally unenforceable; their enforceability is derived from the political process.
 - Constitutional conventions are concerned with constitutional matters and so are distinct from social conventions.
 - Conventions operate in a manner that is supplementary to the law; they bound individuals but not legally.
 - Conventions are not created but develop over a period of time.
 - Conventions represent the morality of the constitution and so require a basis in fundamental constitutional principles.
 - The questions should be one of degree; how strong is the precedent, to what extent do the actors feel bound by it, how good is the reason?