

The British Constitutional System

Introduction to the UK Constitution:

General objectives

- (1) History and Sources
- (2) Constitutional Principles
- (3) Democracy and the constitution: elections
- (4) The role of Parliament
- (5) The PM and the executive
- (6) Devolution and the Territorial Division of Power
- (7) Administrative state and administrative remedies
- (8) Judicial review and the constitutional protection of rights

Lecture 1: History and Sources

Focus of this lecture:

Historical background

Qualifying the power of the monarchy

Reviewing the sources of the unwritten constitution

The notion of constitutional statutes

Definition of conventions and their constitutional role.

Feudal Monarchy

- Legacy of Roman Britain e.g. towns and roads
- Invasion by Angles, Saxons and Vikings most buildings destroyed and few stone buildings
- Scotland, Wales and Ireland separate nations e.g. Hadrian's wall.
- Norman Conquest in 1066. Domesday Book [1085] transformed the administrative state on feudal basis. Inventory of settlements, formed the basis for taxation. Beginning of the great Romanesque and Gothic building. Feudal service established.
- Feudal system still the basis of property law.

Origins of modern legal system

Henry II established many features of common law, jury trial, legal uniformity by judicial circuits.

New remedies available in his own courts and abolition of trial by ordeal.

This common law is enforced throughout the land by itinerant justices, professional administrators of the law, all trained in one school.

1215: Signing of Magna Carta

Magna Carta sealed by King John. This set the founding principles for parliament and constitution. It defined some rights, legal practices (fair trial) and 'good lordship' - Set out what subjects could expect from their monarch and superiors.

It was forced on the monarch by the barons/lords

It placed real limitations on Royal Authority.

A committee of barons could overrule the King.

Due process of law is recognised from King downwards

Granted rights to London and other towns.

Henry VIII and the English Reformation

- Failure to lawfully divorce Catherine of Aragon
- Following ex-communication by the Pope the Act of Supremacy 1534 made him supreme head of the Church of England;
- Nationalisation of the church was followed by the dissolution of the monasteries, with ecclesiastical income redirected for the benefit of the Crown.
- Religion became a central question for next two hundred years. Act of Uniformity 1559 established common prayer book and compulsory church attendance.

Elizabeth I

- She had powerful ministers e.g. Burghley and Walsingham but still ruled in the sense of being final decision maker. She personally appointed military commanders e.g. Lord Howard and Drake to defeat Spanish Armada 1588.
- Parliament already important for legislation and taxation but only sat for a total of 3 of the 45 years of her reign. Legislation could be vetoed and bills often failed to become laws because of lack of agreement between: commons, lords and Queen.

The English Revolution and the Path to Democracy

Parliament had increased importance, especially for taxation

Charles I tried to raise taxation without Parliament e.g. Ship Money. This attempt to rule without summoning parliament failed and led to national bankruptcy

Imposition of new prayer book in Scotland sparked rebellion and he eventually had to summon Parliament for the funds to raise an army. When Parliament refused he attempted to arrest 5 members during a sitting of the House of Commons.

Divine right of Kings called into question but he confronted Parliament rather than being prepared to negotiate.

Charles I executed in 1649.

Oliver Cromwell becomes Lord Protector.

Parliamentary privilege

The result of this clash is that Parliament has the right to regulate its own proceedings. The Speaker symbolically claims these privileges from the monarch at each opening of Parliament.

1660 restoration of monarchy under Charles II

James II once again attempted to undermine the authority of Parliament with disastrous consequences.

English Bill of Rights

- William III and Mary II offered the throne in 1689 but with strict conditions attached:
- No army could be raised without parliamentary approval;
- Taxation required parliamentary approval;
- no special courts for political ends;
- freedom of petition guaranteed;
- free elections and annual parliaments;
- freedom of speech inside Parliament;
- protestant monarchy guaranteed, reinforced by Act of Settlement 1701.

Why does the UK have an uncoded constitution?

The British Constitution is not contained in any one document nor is there such a thing as higher order law, entrenchment.

The Constitution evolved over time and this evolution was first about qualifying the absolute power of the King.

Magna Carta 1215 imposed limitations on Royal power.

Bill of Rights 1689 laid out basic rights but mainly recognised the shift of power from the King to Parliament. No taxation, army etc. without Parliament.

Great Reform Act 1832 important step in redistribution of seats and the grant of the right to vote.

Parliament Acts 1911 and 1949 imposed limitations on the powers of the House of Lords.

Sources of the Constitution

If we wanted to describe the UK constitution it would consist of a range of different sources.

Statute law: some are of central significance, see below

Common law e.g. ***Entick v Carrington*** [1765]

European Union law since 1973 – Multi-Layered

European Convention on Human Rights since HRA 1998 in force since October 2000.

Legal treatises e.g. works of Dicey/Bagehot etc.

Law and custom of Parliament, which regulates itself but is outside the jurisdiction of the courts

Royal Prerogative powers of the monarch, now normally exercised by ministers

Constitutional conventions of special importance to flesh in the missing bits.

What are constitutional statutes?

- Bill of Rights 1689 - limited powers of monarchy
- Act of Settlement 1700 - protestant succession
- Act of Union with Scotland 1707
- Reform Acts of 1832/1918 right to vote
- Parliament Act 1911 restricted powers of House of Lords
- Statute of Westminster 1931
- European Communities Act 1972
- Devolution legislation e.g. Scotland Act 1998
- Human Rights Act 1998 incorporated ECHR

Thoburn v Sunderland City Council [2003]

Laws LJ : 'In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental ... And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes'.

Recent constitutional statutes

Constitutional Reform Act 2005 consolidated separation of powers, created a Supreme Court for the UK and transformed the system of judicial appointments.

Constitutional Reform and Governance Act 2010 put some prerogative powers e.g. the ratification of treaties and the management of the civil service on a statutory footing.

Further implications

There is a debate as to whether such clauses as a referendum requirement included in an act of Parliament as a condition for amendment or repeal would be binding in practice (manner and form argument). There is no conclusive evidence to support this proposition.

In other words even constitutional statutes are not entrenched and can easily be amended or repealed e.g. Government of Ireland Act 1800 with the division of Ireland including the Republic as a separate nation, Government of Wales Act 1998 modified by the Government of Wales Act 2006.

Constitutional conventions

Conventions according to Dicey are:

customary rules which determine how the discretionary powers of the state were exercised:

‘...the “conventions of the constitution”, consists of maxims or practices which, though they regulate the ordinary conduct of the Crown, of ministers, and of other persons under the constitution, are not in strictness laws at all’, in particular, conventions unlike laws are not enforceable in the courts.

Conventions often determine the conduct of the political actors e.g. Crown, PM, ministers, civil servants, judges.

How to determine whether there is a convention

Jennings - 3 tests for recognising valid convention: (used in Re Canada below)

(1) is there a precedent? (vague - political rules not like legal precedents) How often and how consistently has the practice been observed before? E.g., PM from majority party;

(2) Do those operating the constitution accept conventions as binding. Do they feel under an obligation to act - Ministerial responsibility? In other words conventions depend on consent.

(3) is there a good *political* reason for the convention? Deference of House of Lords to Commons (Jennings, pp 136-9).

Also Jennings pointed out that the only real way of knowing if a convention applied is by the conduct of the constitutional actors.

WHY CONVENTIONS EMERGE

Development of *unwritten* rules often one brought about by *evolution / adaptation* - most created after 1688.

E.g., last time PM came from Lords in 1902. But after the right to vote had been extended to most of the population, legitimacy crucial.

The Royal assent last refused in 1708 (Queen Anne & refusal of Scottish militia) - creation Cabinet / PM. The *problem* here is to know when a *practice* has hardened into a *rule*.

WHY ARE CONVENTIONS SO IMPORTANT?

- ◉ Royal assent to legislation is never denied. It recognises the Act of Settlement limiting the powers of the monarchy.
- ◉ If government loses its majority in the House of Commons it will resign and call an election. Because it can no longer legislate.
- ◉ PM and Chancellor of the Exchequer must be members of House of Commons i.e. answerable to the elected house
- ◉ Other ministers must be members of House of Commons/House of Lords - leading ministers
- ◉ Cabinet speak with a single voice i.e. collective responsibility
- ◉ After an election leader of largest party will be invited by the Queen to form a government and become PM. Acknowledgment of the democratic process. But this assumes a majority in House of Commons.

FAILURE TO FOLLOW CONVENTIONS

For Dicey because failure to obey will lead to *legal* difficulties - e.g. Parliament has to assemble each year because financial resolutions are essential for the budget to pass. Yet if peers took part in judicial function of Lords, no legal sanction.

Rather, for Jennings *political* difficulties if conventions not enforced it is not legal but a political crisis which will occur.

For example, the Parliament Act 1911 followed the 1909 budget clash with the House of Lords. The Lords breached the convention re financial matters prompting the crisis. The effect of the Parliament Act is to give what was the convention legal force.

CHARACTERISTICS OF THE CONSTITUTION

- ◉ The historical constitution which developed incrementally through each of the events (and many more) mentioned here. Many of these aspects were enacted in statutory form.
- ◉ Heavy reliance on constitutional conventions, these are established rules of constitutional practice that determine conduct of the Queen, PM, ministers, civil servants and Parliament.
- ◉ Constitutional monarchy - the powers of the King or Queen have been qualified since Magna Carta. Now the role of the Queen is governed mainly by conventions e.g. Royal Assent to legislation guaranteed.
- ◉ Common law is a constitutional source. Where there is no other authority judge made law sets precedents that taken together form major parts of our law. Judges especially of the highest courts play a crucial role interpreting and applying the law, but there is no constitutional court.

CHARACTERISTICS OF THE CONTEMPORARY CONSTITUTION

- ◉ EU law an important new source of law and increasingly influential;
- ◉ Human Rights Act 1998 effectively incorporates European Convention on Human Rights into domestic law as a surrogate British Bill of Rights;
- ◉ Devolution of power to Scotland, Wales and Northern Ireland with their own parliament or assembly;
- ◉ Higher judicial profile and greater separation of powers with the introduction of a Supreme Court to replace the House of Lords but no constitutional court;
- ◉ Freedom of Information Act and general trend towards codification.