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CONSTITUTIONAL AND ADMINISTRATIVE LAW

5th edition

Chris Taylor

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Introduction

Constitutional and Administrative Law is one of the core subjects required for a qualifying law degree and so is a compulsory part of undergraduate law programmes and graduate diploma in law programmes. It is, however, very different from many of the other core legal subjects as it concentrates less on legal rules than on the operation of the system itself, in particular, the operation of the state and the relationship between the state and the individual.

Constitutional law is often described as where law meets politics, and there are frequent references to the political process, which directly influences the law which is introduced. Much of the law we work with originates in Parliament in the form of statute, and so we must understand how Parliament works and how such statutes are produced. Similarly, in order to appreciate the role played by the common law, we must understand the position of the courts within the constitution. More importantly, constitutional law considers how power is exercised by the state and how those in power are held accountable. This includes the protection of civil liberties, and mechanisms for the individual to challenge the exercise of state power.

It is not uncommon to approach constitutional law for the first time with a certain amount of uncertainty, especially if politics is not your favourite subject, but don't worry. Almost all students find themselves enjoying the subject more than they expected and your knowledge of how 'the system' works will be invaluable in your other legal studies. The most important thing to remember is that, because we don't have a written constitution, there is no central set of rules which dictates how the state should operate. Instead, our constitutional system is a web of principles and customs which often appear outdated and vague, so don't worry if this subject seems disjointed when compared with other areas of law and don't assume that it is just you who doesn't understand – just remember the basic principles and take a little time to think about *why* the constitution has evolved into the system we have today.

Remember that this is a revision guide, not a core text, so it can never provide you with the depth of understanding which you will need to excel in examinations and it will be no substitute for structured reading around the various topics. What it can do, however, is to focus your revision on the key areas and highlight those additional points which examiners are looking for. The single most common failing in constitutional law examinations is that

students write ‘common sense’ answers, without sufficient reference to the cases and legal principles. We all know (or think we know) what government or Parliament are, but that is not enough – as in any other area of legal writing, you need to produce logical, reasoned arguments supported by relevant authorities if you are to achieve the highest grades.

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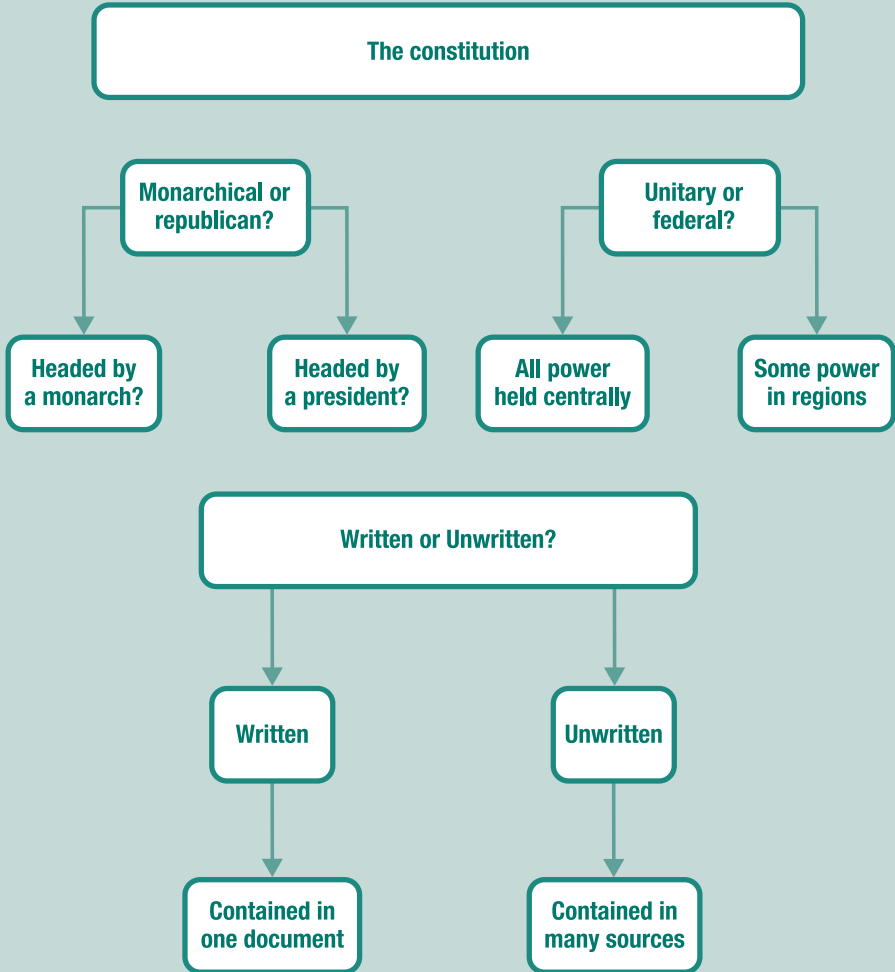
The constitution of the UK

Revision checklist

Essential points you should know:

- What is meant by the term 'constitution'?
- The difference between a written and an unwritten constitution
- The characteristics of both types of constitution
- The advantages and disadvantages of written and unwritten constitutions

■ Topic map



Introduction

What is a constitution anyway?

Before you can discuss the operation of the constitution, you need to know what we mean by the term and the answer to this is not as easy as it might first appear. The UK is different from almost every other country in the world in that we do not have a written constitution. Instead, our constitution is a web of mainly unwritten rules and this has serious implications for the way in which 'the system' works.

ASSESSMENT ADVICE

Essay questions

Essay questions on the unwritten constitution are an old favourite of examiners. Often, questions will ask you to compare and contrast our unwritten constitution with the more common written constitution (as found in countries such as the USA). Alternatively, an essay question may ask you to consider the extent to which the constitution provides protection for an individual's civil liberties in the UK. Both types of question are fairly straightforward if you appreciate the main differences between the unwritten and written systems, and it is possible to achieve high marks by making sure that you not only describe the constitution, but also offer some analysis or criticism of how it operates.

Problem questions

Problem questions on the constitution are fairly uncommon, although the way in which the unwritten constitution influences the operation of the state can be mentioned in almost any public law question. More likely is a question which may be posed as a scenario but which is, in reality, more of an essay question and simply requires you to address the same material as you would in an essay question (see example).

Sample question

Could you answer this question? Below is a typical essay question that could arise on this topic. Guidelines on answering the question are included at the end of this chapter, whilst a sample problem question and guidance on tackling it can be found on the companion website.

ESSAY QUESTION

'The fact that the UK does not have a written constitution is of no practical significance to the individual'. Discuss.

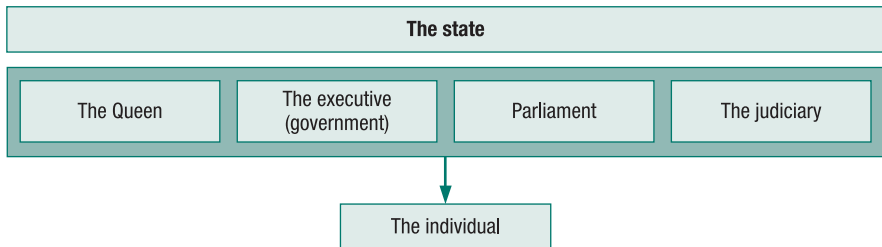
What is a constitution?

A '**constitution**' simply means a system of rules. Many organisations and clubs have constitutions which set out how people are appointed to run the club and the rules which affect the club's members. In the same way, the constitution of a country sets out how power is held by the state and how that power relates to the citizen. In this way, the constitution can be said to define both a *horizontal* relationship (between the various institutions of state) and a *vertical* relationship (between the state and the individual).

KEY DEFINITION: Constitution

The framework of rules which dictate the way in which power is divided between the various parts of the state and the relationship between the state and the individual.

Figure 1.1



In most other countries, this system of rules is contained in a single document which is called 'the constitution', and this illustrates that there are two ways in which the term 'constitution' can be interpreted: first, as a system of rules; and, second, as a piece of paper which sets out that system of rules. This is an important distinction when comparing the unwritten constitution of the UK with other countries (such as the USA) which have a written constitution.

 EXAM TIP

When answering questions, make the distinction between the constitution as an 'abstract' term (i.e. a set of rules) and the 'concrete' constitution (an actual document which contains those rules).

Types of constitution

Before considering the differences between the unwritten constitution of the UK and the written constitutions of most other countries, it is also possible to identify other ways in which constitutions can be classified:

Monarchical and republican constitutions

Under a **'monarchical' constitution**, the head of state is a king or queen and state powers are exercised in their name. In this way, although the majority of power in the UK now resides with Parliament and the government, the Queen remains the head of state.

By contrast, a **'republican' constitution** has as its head of state a president, who has far more power than the current Queen. Such powers are justified on the basis that the president is elected and so accountable to the people, unlike a monarch, who is head of state simply by birth.

KEY DEFINITION: Monarchical and republican constitution

A monarchical constitution is based on the historical power of a monarch who acts as head of state and in whose name power is exercised by the government.

A republican constitution has an elected president as the head of state, who exercises power in the name of the state.

Federal and unitary constitutions

In some countries, state powers are divided into those exercised by central government and those exercised by the states or regions. This results in a **'federal' constitution**.

For example, in the USA, central government (also known as the 'federal' government) retains the most important powers relating to matters such as defence, whereas the individual 'states' have powers on a local level and have their own constitutional status.

1 THE CONSTITUTION OF THE UK

By contrast, the UK has a **'unitary' constitution** where all power resides in the central state institutions. We do have local government, in the form of local councils, but these can be altered (or even abolished) by the central government at any time.

KEY DEFINITION: Federal and unitary constitution

A federal constitution has a division of powers between the central government and the governments of individual states or regions.

A unitary constitution has power concentrated in central government. Local government may exist but not with the constitutional status of the states under a federal constitution.



Make your answer stand out

Examiners will expect to see a discussion of the differences between written and unwritten constitutions. It is less common for students to mention the other ways in which constitutions may be categorised, and so mentioning these will make your answer stand out from the crowd. You could include the example of the abolition of the Greater London Council by the government in 1985 as an example of the power remaining with central government under a unitary constitution (the federal government of the USA could not abolish one of the states in this way under the federal system), and you could also discuss whether it is preferable to have an elected president, under a republican constitution, or an unelected monarch, as in the UK.

Written and unwritten constitutions

The most important way to classify constitutions is between 'written' and 'unwritten'.

Written constitutions

As has already been mentioned, almost every country apart from the UK has a written constitution which contains the main rules governing the power of the state and the relationship between the state and the individual in a single document. For the citizens of the country, the constitution is an enormously important document because it prevents the state from abusing its powers and safeguards the rights of the individual.

Changing a written constitution

In order to protect the citizen against the state, the constitution has to be strong (otherwise the government will simply change it), but if it is too strong, then it cannot be amended to

reflect changes in society. For example, the original US constitution included the right to own slaves, which was later removed when the majority recognised this as unacceptable. This requires a delicate balance between a constitution which is rigid and entrenched and one which is sufficiently flexible to reflect changes in society.

Key provisions of the Constitution of the United States of America

Article 1: establishes the first branch of government – the legislature.

Article 2: establishes the second branch of government – the executive.

Article 3: establishes the third branch of government – the judiciary.

Article 4: provides that all states must honour the laws of the other states.

Article 5: outlines the procedure for amending the constitution.

EXAM TIP

Make sure to point out that many written constitutions are produced after a revolution, where the citizens rise up against what they see as an oppressive state. In this way the US constitution was written after the War of Independence from Britain, and the French constitution was produced after the French Revolution. You can also make the point that, although most countries have a written constitution, the UK is not the only country without such a document. Both New Zealand and Israel also have unwritten constitutions.

Unwritten constitutions

By contrast, countries such as the UK with an unwritten constitution have no single document which sets out power relationships within the state. Instead, we have many sources, both written and unwritten, which combine to provide the rules regulating the state. These sources are discussed in the next chapter.

REVISION NOTE

The unwritten constitution of the UK can be brought into every topic within constitutional and administrative law. For example, examiners will frequently set questions on specific sources of the constitution, such as **royal prerogative** or **constitutional conventions**, but always remember to discuss these in the context of the unwritten constitution and emphasise that you understand that such sources are important because they operate as part of the unwritten system. Examiners will give you credit for making such connections between different parts of the syllabus.

Rights and the constitution

One of the most important aspects of a written constitution is that it provides protection for individual rights. For example, the US constitution specifically lists a number of rights as amendments to the constitution (e.g. the First Amendment – the right to freedom of speech). Such rights cannot be taken away by the state. Under an unwritten constitution, the state can take away individual rights at any time because they are not protected by the constitution.



Make your answer stand out

As an example of the protection of rights under a written constitution and the vulnerability of rights under the unwritten system of the UK, cite the ease with which the government was able to drastically reduce gun ownership in the UK by means of the Firearms (Amendment) Act 1997 following the Dunblane massacre of the previous year. By contrast, the right to bear arms is enshrined in the US constitution and, as a consequence, has proved almost impossible to restrict.



EXAM TIP

In considering the status of individual rights in the UK, remember that, although the unwritten constitution does not protect rights, we now have the European Convention on Human Rights, as implemented by the Human Rights Act 1998, which does provide greater protection for certain rights. Impress the examiner by making a brief comparison between the protection afforded to individual rights under the European Convention and the more entrenched protection provided by a written constitution.

■ Characteristics of written and unwritten constitutions

Almost all exam questions on the unwritten constitution will ask you to outline the key characteristics of both written and unwritten constitutions and to compare their strengths and weaknesses. This type of comparison demonstrates the analytical skills which examiners want to see in answers.

Written constitutions

Advantages	Disadvantages
All key provisions are contained in a single document.	Requires one document to encompass the regulation of the entire constitution.
Provides a clear statement of how the state should operate with no uncertainty over words. Everyone can read and agree what it says.	May lead to litigation over the precise meanings of the terms used, particularly if the language is outdated.
Protects the individual from abuses by the government of the day.	May be difficult to amend if the provisions become outdated (e.g. the USA and slavery).
Provides clear protection of individual rights.	May be inflexible and unresponsive to change.

Unwritten constitutions

Advantages	Disadvantages
Flexible and responsive to changing circumstances.	Can appear vague and uncertain. No single agreed source of constitutional law.
Leaves the state free to develop the law for the benefit of citizens.	Leaves the state free to abuse its powers and develop laws which act against its citizens.
Encourages the evolution of the constitution.	Provides no protection for individual civil liberties.

■ Could the UK ever have a written constitution?

Demands for a written constitution in the UK are not new and regularly appear in the press and in Parliament. It should be recognised, however, that producing such a document would be an enormous task which would be sure to encounter fierce opposition from those who value the unique flexibility of the existing system. In addition, a public debate on the wording of a possible constitution would draw attention to the relationship between the UK and Europe, which none of the main parties is likely to welcome, particularly with the imminent referendum on EU membership.