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constitutional and administrative law

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Preface

As in previous editions, the aims of the book are firstly to explain the main principles of United Kingdom constitutional law in the context of the political and legal values that influence their development and secondly to draw attention to the main controversies. The book is intended as a self-contained text for those new to the subject and a starting point for more advanced students.

The main legislative developments since the previous edition weaken the rule of law in favour of the executive. They include the Crime and Courts Act 2013 and the Criminal Justice and Courts Act 2014 which weaken judicial review of governmental action. The Immigration Act 2014 restricts appeals and access to public services by immigrants, and the Justice and Security Act 2013 introduces secrecy in civil cases. The Data Retention and Investigatory Powers Act 2014, which was rushed through Parliament in two days without detailed discussion, reinforces government power to obtain personal information.

On the other hand the Crime and Courts Act 2013 strengthens the separation of powers by transferring the Lord Chancellor's role in junior judicial appointments to the Lord Chief Justice and enhances freedom of expression by abolishing the old offence of 'scandalizing the judiciary'. The Defamation Act 2013 restricts jury trial but on the whole reinforces the right to freedom of speech.

The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 makes some inroads upon the culture of petty corruption in public affairs by making professional lobbying of government more transparent, but places new restrictions on volunteer political campaigners during elections. In relation to the more archaic aspects of the constitution, the Succession to the Crown Act 2013 removes some discriminatory disqualifications from the monarchy, and the House of Lords Reform Act 2014 makes much needed albeit peripheral reforms which may help the House of Lords to salvage its tawdry reputation by exercising greater control over the conduct of its members.

The cases continue to raise important constitutional issues notably in respect of democracy, parliamentary supremacy, parliamentary privilege, devolution, voting rights, open justice and freedom of information. In relation to judicial review and human rights there are new cases on fairness, fettering discretion, deprivation of liberty, freedom of religion, freedom of expression, the authority of Strasbourg cases and the Declaration of Incompatibility.

The Political and Constitutional Reform Select Committee of the House of Commons has published its report on the case for a written constitution: *A New Magna Carta?* (July 2014). This provides a useful summary of constitutional principles. There is also a report from the Joint Committee on Parliamentary Privilege providing an overview of the topic but without recommending major changes.

Part I concerns general principles. These include basic constitutional concepts and issues (Chapter 1), a broad account of the political ideals that have influenced the constitution (Chapter 2), and the sources of the constitution (Chapter 3). Chapter 4 (history) has been revised so as to relate more closely to contemporary issues.

Chapter 5 provides an overview of the main institutions of government, the most important aspects of which are expanded in later chapters. Chapters 6, 7 and 8, all of which are substantially revised, concern the underlying legal principles of the rule of law, the separation of powers and parliamentary sovereignty. In particular there is increased material on judicial accountability and independence.

Part III concerns international aspects of the constitution. Chapter 9 explains the various ways in which international requirements are filtered into domestic law, the position of dependent territories, expulsion from the UK, and the responses of the courts to international issues. Chapter 10 (substantially revised) discusses the most important international influence, namely the EU, which is firmly anchored into domestic law.

Part IV is concerned with main legislative and executive institutions, and the relationship between them. (The judiciary does not have its own chapter but is discussed in various contexts especially that of separation of powers.) Chapter 16, Devolution, includes the possible constitutional unravelling in the wake of the referendum on Scottish independence in September 2014.

Parts V and VI deal with the rights of the individual against government. Part V concerns judicial review of government action, the core of administrative law, and includes methods of challenging government action within the government structure. Part VI, which has been substantially revised, deals with the fundamental rights of the individual. Chapter 21 concerns human rights generally. Chapter 22 relates these to the Human Rights Act 1998. Chapters 23 and 24 focus on human rights issues of particular importance to the constitution. In Chapter 23 there is a new section, 'Open Justice', in connection with freedom of the press and government secrecy: The Counter Terrorism and Security Bill (2014–5) is included as it stood when it left the Commons in January 2015.

As regards further reading, references to books and articles in the text are to writings that expand on the point in question. The Further Reading at the end of each chapter discusses fundamental and controversial general issues for those who require greater depth or more ideas and points of view. Readings considered particularly accessible to students are marked *. Short references in the text are to the Further Reading.

Unless otherwise stated, the main classical works cited throughout are as follows:

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Dicey, *An Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915, referenced as last edition for which Dicey was himself responsible); (10th edn, Macmillan 1958, ed. ECS Wade)

Hobbes, *Leviathan*, ed. Minogue (Dent 1973)

Locke, *Two Treatises of Government*, ed. Laslett (Cambridge University Press 1960)

Mill, *Utilitarianism, On Liberty and Considerations of Representative Government*, ed. Acton (Dent 1972)

Montesquieu 'L'Esprit des Lois', extracted in Stirk and Weigall (eds), *An Introduction to Political Ideas* (Pinter 1995)

Paine, *The Thomas Paine Reader*, eds Foot and Kramnick (Penguin 1987)

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John Alder
January 2015

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Part I

The framework of the constitution

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Chapter 1

Introduction: constitutional structures

1.1 The nature of the constitution: general issues

A constitution provides the governing framework of an organisation. Any organisation might have a constitution; for example, most golf clubs do so. In our case the organisation is the state. A state is a geographical territory with a government that has effective control over that area.

A constitution has three worthy purposes: firstly to enable the organisation to run effectively; secondly to define the powers of those in charge of the organisation; thirdly to protect members of the community against the abuse of those powers. Thus, the late Lord Bingham, a leading judge, suggested that 'any constitution, whether of a state, a trade union, a college, a club or other institution seeks to lay down and define … the main offices in which authority is vested and the powers which may be exercised (or not exercised) by the holders of those offices' (*R v Secretary of State for Foreign and Commonwealth Affairs, ex p Quark Fishing Ltd* [2006] [12]).

Friedrich (1974, 21) displays a romantic approach to the idea of a constitution that stresses the (assumed) consent of the community: 'a constitution is the ordering and dividing of the exercise of political power by that group in an existent community who are able to secure the consent of the community and who thereby make manifest the power of the community itself.' It is fanciful to assume a necessary connection between the securing of power and community consent unless consent includes acquiescence in the sense of the absence of resistance by a cowed community to whoever is in power.

Constitutional law deals with the following matters:

- the choosing and removing of rulers;
- the relationship between the different branches of the government;
- the accountability of the government;
- the dividing up of powers geographically, for example, the relationship between the central government and the devolved governments of Scotland, Wales and Northern Ireland; by those with a taste for jargon this is sometimes called 'multi-layered' constitutionalism;
- the relationship between the state and overseas bodies;
- the rights of the citizen in relation to government.

There is no hard and fast difference between constitutional law and administrative law. Administrative law deals with particular government functions such as immigration or taxation or the work of the numerous regulators, special tribunals and inquiries that decide disputes involving government action. The administrative lawyer is especially concerned to ensure that officials keep within the powers given to them.

This book does not attempt to cover administrative law comprehensively since the subject has its own separate texts. Chapters 17, 18 and 19 on judicial review of administrative action deal with the core of administrative law, which is the legal accountability

of the government. Other matters relating to administrative law such as 'regulation', tribunals, public inquiries and ombudsmen are discussed in Chapter 20.

In almost all countries the constitution comprises a special document or set of documents set above the ordinary law. This is called a written constitution, a codified constitution or a Basic Law. In addition to setting out the main principles of the government structure and sometimes a list of individual rights, a written constitution may proclaim, usually in a preamble, some grand vision or moral message about the nature and purposes of the society (e.g. the US Constitution 'secure the blessings of liberty to ourselves and our posterity'). Importantly, a written constitution usually has a status superior to the rest of the law, in the sense that it can be altered only by a special procedure such as a public referendum or a special vote in the legislature, a device known as 'entrenchment'. The courts may have the power to set aside a law that conflicts with the constitution. Such a constitution is therefore protected against manipulation by the government of the day.

The United Kingdom has no written constitution of this kind and no grand vision about the nature of our society. Our constitution, such as it is, is composed of numerous ordinary laws and other rules and practices which have emerged over many centuries to deal with particular issues. Both in its legal and its political aspects, the constitution relies on precedent in the sense of appealing to past decisions and practices. Its legal principles and rules, if written down at all, are to be found in the same documents as the sources of any law, namely:

- Acts of Parliament (statutes) made by the regime in power at the time. Thus constitutional statutes are scattered throughout the centuries each dealing with a particular concern of the day (for examples see Section 3.2). The constitution also evolves through the accumulation of many pieces of detailed legislation about particular topics, for example electoral law.
- cases decided by the courts (common law). Again these are scattered, deal with specific matters focusing narrowly on individual disputes which can arise in many and various contexts. The constitution therefore has to be pieced together by imaginative interpretation of a vast heap of particular rules and decisions.

Rules from these two sources are set out and can be changed in the same way as any other law. In other words they are constitutional only because of the matters they deal with. How do we know what counts as constitutional? The question arises mainly because constitutional matters are sometimes given special treatment (e.g. Section 8.4.3). Any guidance can only be vague and general. For example Laws LJ said that a matter is constitutional if it 'conditions the legal relationships between citizen and state in some general overarching manner, or enlarges or diminishes the scope of what are now regarded as fundamental rights' (*Thoburn v Sunderland City Council* [2002] 4 All ER 156 at [62]–[64]).

Craig ([2014] PL 373 at 389) uses the concepts of horizontal, territorial and vertical dimensions. Horizontally a constitution sets up the main organs of government and distributes their powers, territorially it divides powers geographically, and vertically it governs the relationship between citizen and state. However, as Craig points out, a constitutional rule must also be especially important thus introducing a vague subjective element (see e.g. Section 1.4.1 Box).

The United Kingdom is probably unique in not having any written constitution. New Zealand is also said to have an unwritten constitution but the New Zealand Constitution Act 1986, although it is an ordinary statute, sets out the basic structure of

its government. Israel is said to have no written constitution but has an organised collection of legislation recognised as constitutional by the Supreme Court. The Canadian Constitution is partly written with some entrenched provisions. The constitution of Saudi Arabia is the Koran.

It is sometimes said that our constitution is 'part written'. This seems unhelpful since it ignores the fact that we have no special constitutional document and means only that our constitutional laws are written down in the same way as any other laws.

There are also many rules, practices and customs which are not law at all. They get their force only because they are consistently obeyed as established practices. The most important of these are known as 'constitutional conventions'. Many basic constitutional arrangements rely on conventions; for example, the selection of, and most of the powers of, the prime minister. Unlike laws, conventions are not written down in any authoritative way and are not directly enforced by the courts (Section 3.4.4).

Indeed there is no authority empowered to determine whether a convention exists and what it means. This depends entirely on general acceptance by the politicians and officials who run the government and those from whom they choose to take advice. There is no shortage of people who wish to give their opinions on constitutional matters and it is easy for the constitution to be influenced by networks of people having personal connections with those in power. Thus, Hennessy (1995, 15–30) describes the UK Constitution as generated by a circle of 'insiders' comprising senior officials, their friends and their academic and professional acolytes. He recounts the Victorian conceit that conventions embody 'the general agreement of public men' about 'the rules of the game' (1995, 36, 37). Similarly Bogdanor described the UK Constitution as 'a very peculiar constitution which no one intended whereby the government of the day decides what the constitution is' (ibid., 165).

Our constitution is often described as 'organic' meaning that it develops naturally in the light of changing circumstances. We should not therefore expect the constitution to be straightforward and logical. It is a product of historical development and practical compromises generated by rival groups of power-hungry persons. In another metaphor the common law UK Constitution is sometimes compared to a ramshackle old house under constant repair and renovation and made of numerous bits and pieces. It has also been compared, with the implication that it is 'sound and lasting', to the work of bees making a honeycomb (see *Jackson v Attorney General* [2006] 1 AC 262 [125] Lord Hope). Thus constitutional change may be disguised under the cloak of continuity, taking place in relatively small steps, in the interests of those in power at the time without adequate scrutiny and perhaps eventually changing the nature of the 'house'. This may apply for example to the progress of devolution of powers to Scotland, Wales and Northern Ireland and to the series of anti-terrorism measures introduced in recent years.

It has often been suggested that we do not have a constitution in any meaningful sense. The democratic activist Thomas Paine (1737–1809) labelled the British government as 'power without right'. In *The Rights of Man*, Paine asserted that without a written constitution authorised directly by the people there was no valid constitution (1987, 220–21, 285–96). Similarly, Ridley (1988) claims that the United Kingdom has no constitution since he believes that constitutions must be superior to the government of the day and not changeable by it. Without a written constitution the United Kingdom seems to fail this test. Insofar as the constitution has a special status, this is based on no more than self-restraint due to respect for principles that are regarded by those in power as fundamental or 'constitutional'.

1.1.1 Constitutionalism

However, whether or not we have a constitution in a strict sense, the term 'constitutionalism' applies to the UK as a widely shared belief in favour of limited and accountable government. It includes the rule of law, which requires limits on government policed by independent courts, and 'responsible government', which requires government officials to be accountable for their actions to an institution representing the people.

Constitutionalism also favours separation of powers between different governmental organs. For example in *R (Evans) v Attorney General* [2014] both the Court of Appeal [90] and the High Court [14] were critical of the statutory power of the executive to veto a tribunal decision to require publication under the Freedom of Information Act 2000 (Section 24.2.2). This was described by Judge LJ in the High Court as a constitutional aberration [1].

It requires openness in government decision-making and open justice in the courts (*A v BBC* [2014] 2 All ER 1037 [27]). It also includes the protection of rights such as access to the courts and freedom of expression, described as inherent and fundamental to democratic civilised society. (See Baroness Hale in *Seal v Chief Constable of South Wales Police* [2007] 4 All ER 177 [38]–[40].)

1.2 The foundations of a constitution

A constitution can of course adopt any form of government. The most widely accepted explanation of the foundations of a constitution is a 'positivist' one. According to this theory, a constitution is valid or 'legitimate' if enough of the people whom it concerns, both officials and the public, accept it so as to make it broadly effective. Thus the foundations of the law depend on a political state of affairs. UK law takes this pragmatic view in the context, for example, of recognising the legality of a rebellion (see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645: takeover of a British colony by a group of white settlers held not valid because they were not yet fully in control).

Possible reasons for the 'legitimacy' (acceptance) of a constitution such as love of power, fear, sycophancy, apathy, self-interest, ideological belief, herd instinct and so on are irrelevant to its legal validity. On the other hand a general belief among those with political influence that the constitution is morally good, or at least that it is in their interests, might help the rulers stay in power.

'Legitimacy' might also refer to an external standard that can be used to assess the constitution. The problem here of course is to identify what this external standard is. Lawyers, for example, might refer to 'the rule of law', meaning widely accepted vague values such as justice as identified by themselves. Related to this are 'natural law' theories in which a constitution is valid only if it conforms to a set of objective moral principles. Apart from the question of who decides what these principles are, it may be preferable to treat moral principles as a standpoint for criticising a constitution rather than confusing this with questions of legal validity.

Daintith and Page (1991, ch 1) classify those who attempt to understand our unwritten constitution as 'foxes', 'hedgehogs', 'rude little boys' and 'Humpty Dumpties'. A fox regards the constitution as no more than a collection of working practices developed by the government enterprise. A hedgehog looks for a single grand overarching principle such as 'the rule of law'. It is unlikely that in a matter as complex as government any single principle is credible. A rude little boy therefore asserts that

the emperor has no clothes, the constitution being a fiction disguising a power struggle. Humpty Dumpties, who probably include most academic commentators, seek to explain the constitution on the basis of theories of their own such as liberalism, fairness, social welfare and so on; sometimes claiming that these ideals are inherent in the rules. But theories risk collapse under the weight of inconvenient facts. We shall meet examples of each approach throughout this book.

1.3 Basic constitutional concepts

Three related ideas have dominated many modern constitutions including our own. These are 'sovereignty', the rule of law and the separation of powers. Sovereignty means ultimate power without limit. Some, such as Hobbes (Section 2.3), argue that there must always be a 'sovereign' capable of having the last word in any conceivable dispute, particularly in an emergency. In any constitution it might be difficult to locate sovereignty since government power is usually divided up. The sovereign need not be a single person but, unless it is, rules are needed to ensure that its components can reach agreement. This raises problems as to whether the sovereign can change those rules and, if not, who can? In an extreme emergency, such as a threat of immediate attack, sovereign power might be exercised by a single person.

In the United Kingdom the conventional view is that the sovereign is Parliament as a combination of the monarch, the House of Lords and the House of Commons. Moreover, the legal sovereign is not necessary the political sovereign. For example, although Parliament has legal power to make any law, politically it is unlikely to be able to make a law that the international money markets would seriously object to. The primary meaning of the rule of law is relatively uncontroversial, namely, that it is desirable to have rules known in advance which are binding on government and governed alike. This helps the organisation to run effectively by keeping order and producing certainty. However, this formal meaning of the expression 'rule of law' ignores the content of the rules themselves, whether they are morally good or bad, and the question of who makes them. For example, a concentration camp might be subject to the rule of law in this sense. A wider or 'substantive' version of the rule of law (coined by Paul Craig (Section 6.3) invokes certain moral and political ideas which are claimed to be especially associated with law. These include above all the notion of open justice policed by independent courts resisting the natural tendency of government towards secrecy (Section 23.3.4).

The separation of powers requires that government be divided up into different branches of equal status and importance. From both a political and a legal perspective this is to prevent any one branch of government having dominant power. Each branch can restrain the others since any major decision would require the cooperation of all branches. Governments usually comprise three primary branches. The legislature is the primary lawmaker, the judiciary settles disputes about the meaning and application of the law and the executive carries out all the other government functions, implementing and enforcing the law.

The difference between the three functions is hazy at the edges but the basis of them is widely recognised. In contemporary society the executive is likely to be the most powerful branch because it controls the resources both physical and financial of the state. Crucially it is the executive that proposes most new laws to the legislature and appoints to most important public jobs.

Different countries have reached different conclusions as to the extent of the separation of powers since there is a trade-off between the interests of government efficiency which points away from a separation and the desire to prevent abuse of power. For example, the United States has a strict separation but in the United Kingdom separation is more limited. In the United States, a member of the executive headed by the president cannot be a member of the legislature but in the UK ministers who head the executive must (by convention) be Members of Parliament. We seem to prefer strong government to limited government.

Some constitutions make grandiose claims to shared ideals and purposes. For example, the Constitution of Ireland refers to 'seeking to promote the common good with due observance of Prudence, Justice and Charity so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored and concord established with other nations'. The French Constitution famously refers to 'the Rights of Man' and the 'equality and solidity of the peoples who compose [the Republic]' (Art. 1). The UK Constitution makes no such claims, at least explicitly.

Many constitutions contain a list of basic rights of the citizen; Germany and the USA are prominent examples. These rights vary, reflecting the political culture of the ruling group in question. Constitutions also vary in the extent to which the courts may police these rights. In the family of liberal democratic states to which the United Kingdom belongs these rights are primarily 'negative' rights in the sense of rights not to be interfered with by the state. They include the right to life, the right to personal freedom, the right to a fair trial, the right to privacy and family life, the right to freedom of expression, the right to assembly and association, the right to freedom of religion and the right to protection for property. 'Positive rights', such as housing and medical care, might be regarded as equally important, but because these require hard political choices between priorities and large-scale public expenditure they are generally regarded in UK law as matters for the ordinary political process rather than as firm legal rights. Enforcement by a court would be practically impossible. Nevertheless some positive rights appear in many constitutions, for example, those of Poland and Portugal. Some constitutions, for example that of Switzerland, also impose duties on citizens such as military service and voting.

1.4 Written and unwritten constitutions: advantages and disadvantages

As we have seen, the constitutions of most countries are set out in a single document or related group of documents. These are sometimes superior to all other kinds of law in that laws which conflict with the constitution can be struck down by the courts. They also often contain entrenched provisions that protect the constitution from being changed by the government of the day, for example, a referendum of the people or a two-thirds majority of the lawmaking assembly.

Even a written constitution will not include all the rules needed for governing the country but will include the most basic rules. These vary considerably between different states. For example, the methods of voting are important by any standards but do not feature in many constitutions other than as general requirements of fairness and equality. Some constitutions, such as that of the United States, are relatively short and expressed in general terms. Others, like that of Portugal, run to hundreds of detailed pages.

1.4.1 The merits of a written constitution

There is no agreement as to whether it is preferable to have a written constitution although proposals for one are regularly made. The main purpose of a written constitution seems to be to usher in a new regime or to signify a 'constitutional moment' or change of direction for a state as a result of revolution, grants of independence or domestic catastrophe. The device of a written constitution became widely used for these purposes from the late eighteenth century.

Since the late seventeenth century, the United Kingdom has not experienced such a constitutional moment. Constitutional changes have been gradual and evolutionary and the seventeenth century 'constitutional moment' involved the assertion of an all-powerful Parliament so making a written constitution pointless at the time (Section 4.5.1).

A recent report from the Political and Constitutional Reform Committee of the House of Commons, *A New Magna Carta*? (cm 2014/15, 3 July 2014) discusses the main advantages and disadvantages of a written constitution in the United Kingdom. The advantages seem to be vague and largely speculative. Indeed, unless the written constitution makes substantive changes designed to increase the democratic element of the constitution, the committee's suggestion that it is not worth bothering with has much to commend it. The committee's suggestions are summarised as follows.

Advantages

- Publicity and accessibility: matters of such importance should be codified for all to see and understand.
- Democracy: the present unwritten rules are controlled by the elite and were appropriate to the deferential and class-ridden society of the past but not to today's more equal society. Constitutional changes can now be pushed through by governing parties to benefit themselves. Entrenched procedures that ensure parliamentary and popular support for constitutional changes are desirable.
- Sovereignty: the current fundamental principle that Parliament is supreme is unsuited to a modern democratic society in which the people should be sovereign. The people should therefore have a role in deciding what the constitution should include.
- Education: the absence of constitutional teaching in our schools makes it all the more important to have a single document. This would have great symbolic importance.
- Certainty: the uncertainty of some of our unwritten constitution and the dubious status of some of its rules existing outside the law. The uncertainty over the question of whether Parliament is sovereign (Section 8.5) is a conspicuous example as is the question of the status of constitutional conventions (Section 3.4.3).
- Value: the special nature of constitutional principles makes it desirable to distinguish them from ordinary law. Thus in *Cullen v Chief Constable of the RUC* [2004] 2 All ER 237, 46, Lord Hutton referred to a right which a democratic assembly representing the people has enshrined in a written constitution, the written constitution being 'clear testimony that an added value is attached to the protection of that right'. An example of the risks inherent in our unwritten constitution is the creeping erosion of individual freedom when restrictive legislation is continually added to (e.g. Section 23.7, Section 24.3.4).
- Protecting weaker arms of government: parliamentary supremacy means that local government is not protected against central government other than by political