

Part 1 Constitutional fundamentals

3 Sources of the constitution

Contents

	Introduction	32
3.1	Acts of Parliament	33
3.2	Common law	34
3.3	European sources	35
3.4	Non-legal sources	36
3.5	Ministerial responsibility	38
	Reflect and review	41

Introduction

Although the British constitution is usually characterised as ‘unwritten’ there are in fact numerous written sources which can clearly be identified as constitutional. Accordingly, it is strictly speaking more accurate to describe the constitution as **not codified**. By this is meant that not all the rules, written or unwritten, have ever been consolidated into a single document which we can refer to as ‘the constitution’. In this chapter we look in outline at the differing sources in order to get an overview of the constitution. You will be able to add detailed examples of each of these as you progress through the course.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- ▶ state the statutory sources of constitutional law
- ▶ state the common law sources of constitutional law
- ▶ explain the meaning and scope of the non-legal sources of the constitution – constitutional conventions.

ESSENTIAL READING: READ THIS CHAPTER NOW

- Barnett, Chapter 2: ‘Sources of the Constitution’.

You will need to re-read some parts of this chapter later.

3.1 Acts of Parliament

An Act of Parliament is the highest form of law within the United Kingdom. Over the centuries there have been many Acts of Parliament which have been of fundamental constitutional importance. These include:

- ▶ **Magna Carta 1215**[†] which aimed to protect citizens against arbitrary power and guaranteed the right to a fair trial and trial by jury.
- ▶ **The Petition of Right 1628** which prohibited the raising of taxes without Parliament's consent.
- ▶ **The Bill of Rights 1689** which set the terms on which William and Mary came to the throne. It prohibited the Crown from raising taxes without Parliament's consent, or from executing or dispensing with law without Parliament's consent, and prohibited the raising and keeping of an army in peace time without Parliament's consent. It also provided for freedom of speech in Parliament (see Chapter 12).
- ▶ **The Act of Settlement 1700** provided that succession to the Crown was limited to adherents of the Protestant faith and excluded Roman Catholics or those married to Roman Catholics. It also provided for security of tenure for senior judges, who can only be dismissed on an Address by both Houses of Parliament to the Crown.
- ▶ **The Acts of Union 1706 and 1707** which united England and Scotland under a single Parliament.
- ▶ **The Parliament Acts 1911 and 1949** which formalised the supremacy of the elected House of Commons over the unelected House of Lords.
- ▶ **The European Communities Act 1972** which provided for the reception and enforcement of Community law in the United Kingdom.
- ▶ **The Representation of the People Act 1983**, as amended, which regulates election matters.
- ▶ **Local Government Acts** which define the functions, scope and powers of local authorities.
- ▶ **The Northern Ireland Act 1998, Scotland Act 1998 and Government of Wales Act 1998** which devolved power to national assemblies. See also the Greater London Authority Act 1998, which establishes a London-wide form of devolved government.
- ▶ **The Human Rights Act 1998** which incorporates most of the rights and freedoms guaranteed under the European Convention on Human Rights into domestic law.
- ▶ **National security and Terrorism Acts, Police Acts, Public Order Acts and other Acts** which regulate state power and define the scope of civil liberties.
- ▶ **The Constitutional Reform Act 2005** which reforms the office of Lord Chancellor and provides for the establishment of a Supreme Court separate from Parliament.

We could also include – depending on our definition of what is a ‘constitutional Act’ – Acts which regulate the right to trial by jury, provide for judicial review of actions of public authorities, and regulate the court system. Further, we could include Acts such as the British Nationality Act 1981 and the Immigration and Asylum Acts, which regulate citizenship and the right to enter and remain in the United Kingdom.

[†] Magna Carta is considered a ‘statutory source’ although it was not, as such, an Act of Parliament.

3.2 Common law

The decisions of judges through the interpretation of statutes or through development of the common law are a source of constitutional law where they affect the powers of the state, the relationship between institutions of the state and the protection of citizens' rights and freedoms. Of particular relevance are:

- ▶ those cases that uphold the sovereignty of Parliament (see Chapter 7)
- ▶ cases that define the scope of the royal prerogative (see Chapter 6)
- ▶ cases that rule on the legality of actions of public bodies through judicial review (see Chapter 18)
- ▶ cases that define civil liberties (see Chapter 16)
- ▶ decisions made under the Human Rights Act 1998 (see Chapter 15)

3.2.1 The law and custom of Parliament

Parliament as a sovereign body claims for itself certain rights and immunities which are not only enjoyed by the Houses of Parliament collectively but also confer rights and immunities on individual Members of Parliament. These are the privileges of Parliament, which are discussed in Chapter 12. Parliamentary privilege is a unique form of common law, peculiar to Parliament and enforced by Parliament. If an issue of parliamentary privilege is raised before a court of law, the judges can determine whether the matter is one of parliamentary privilege but will decline jurisdiction to rule upon the merit of a claim. This is an illustration of the separation of powers, with the judges declining to regulate a matter which is regarded as falling within Parliament's domain.

3.2.2 The royal prerogative

The royal prerogative is the collection of rights and immunities which belong to the Crown. They represent the residue of common law powers enjoyed by the Crown before the settlement of 1689. No new prerogatives may be created, but a prerogative power may be reinterpreted by the courts to give it a contemporary meaning. As will be seen in Chapter 6, the royal prerogative covers a range of disparate matters relating to domestic and foreign affairs. For example, the Prime Minister and other ministers are appointed under the prerogative and Parliament is summoned and prorogued (suspended) under the prerogative. In relation to foreign affairs, declarations of war and peace fall under the prerogative, as does control of the armed forces in overseas operations. International treaties are signed under the prerogative.

The prerogative has the status of common law and is recognised as a source of legal power by judges. As with parliamentary privileges, the judges have jurisdiction to rule on the existence and scope of a prerogative power. As we shall see, however, the judges exercise self-restraint in relation to the prerogative, which covers many areas of high policy that the courts regard as more appropriately regulated by the executive in the name of the Crown.

Note that the government is proposing to surrender or limit some of its prerogative powers under its 2007 constitutional reform proposals (see page 28 of this guide).

3.3 European sources

There are two principal forms of European law which are sources of the constitution. It is important to understand that these are **separate and distinct** forms of law with differing origins and aims and having separate institutions and personnel.

3.3.1 The European Convention on Human Rights

The European Convention was drafted by the Council of Europe after the Second World War in order to provide European-wide protection of citizens' civil and political rights against encroachment by state authorities. The Convention is discussed in detail in Chapter 15. For present purposes there are several main points to emphasise. The first is that the Court of Human Rights in Strasbourg (France) has the ultimate jurisdiction to rule on the meaning and scope of rights. States that have become signatories to the Convention undertake to respect and abide by the decisions of the Court. Accordingly, where there has been a violation of a Convention right, the victim sues his or her own government and, if successful, the government must propose and Parliament pass legislation which remedies the offending law. Where rights have been violated through policies rather than law, there is a corresponding obligation to amend the practice.

The Human Rights Act 1998 now enables most Convention rights to be enforced within the domestic legal system rather than in Strasbourg. The Act requires that domestic courts take into consideration the case law and opinions of the Court of Human Rights in giving judgment.

3.3.2 The law of the European Community and Union

Like the Convention on Human Rights, the original three European Communities – now known as the Community and a part of the wider European Union – were products of World War II. They were designed in this case to impose supra-national controls over the raw materials of war and to provide for a common market for the free movement of goods, services, capital and workers. It was to be 1973 before Britain became a member of the Community. Membership requires that states comply with the whole body of Community law as comprised in the Treaties and as defined by the Court of Justice, which sits in Luxembourg. Accordingly, Parliament may not pass laws which violate Community law, and must amend the law in line with the requirements of the Court of Justice's interpretation of the law. On the question of sovereignty see Chapters 2, 7 and 14.

3.4 Non-legal sources

3.4.1 Constitutional conventions

ESSENTIAL READING: READ THESE PAGES AGAIN NOW

- ▶ Barnett, Chapter 2: 'Sources of the constitution', pp.25–38.

SUPPLEMENTARY READING: PUBLIC LAW STUDY PACK

- ▶ Marshall, G. 'The theory of convention since Dicey'.

Constitutional conventions represent one of the most intriguing sources of the constitution. They are defined as being:

...rules of constitutional behaviour which are considered to be binding by and upon those who operate the constitution but which are not enforced by the law courts...nor by the presiding officers in the Houses of Parliament. (Marshall and Moodie (1971), pp.23–24)

An earlier definition by the nineteenth-century constitutional authority A.V. Dicey[†] described conventions as being:

...conventions, understandings, habits or practices which, though they may regulate the...conduct of the several members of the sovereign power...are not in reality laws at all since they are not enforced by the courts. (Dicey, 1885)

It is crucial to note that conventions are non-legal (and therefore cannot be enforced by courts of law), that they are binding (in that they impose obligations), and that they regulate the conduct of all actors on the constitutional stage – the Crown, Parliament, the executive and the judiciary. To breach a constitutional convention is to act unconstitutionally but not unlawfully, since these are non-legal rules. The paradox of conventions is that some are – despite their non-legal nature – more important than laws. Equally, an understanding of the legal or constitutional rules can only be complete when the operation of conventions is taken into account. Constitutional conventions underpin the idea of responsible government and the rule of law.

Go to your study pack and read 'The theory of convention since Dicey' from Geoffrey Marshall's *Constitutional conventions: the rules and forms of political accountability*.

[†] You can find Dicey's *Introduction to the study of the law of the constitution* at www.constitution.org/cmt/avd/law_con.htm

Building your vocabulary

In law texts you will frequently encounter English words with which you are unfamiliar (like 'paradox', perhaps) and words in legal language. Some of these will be:

- ✓ long and a little complicated, like 'derogation'
- ✓ technical, like 'immunity'
- ✓ words having both legal and ordinary meanings, like 'crown' and 'convention'.

For advice on building up your legal English and ordinary English vocabulary, see your *Learning skills for law* guide.

3.4.2 Conventions illustrated

You will discover a number of different conventions throughout the course of your study. The following are just a few examples:

In law

the Crown can appoint whomsoever the monarch wishes as Prime Minister

the Crown can dissolve Parliament at will

the Crown can refuse to grant the Royal Assent, which represents the final stage before an Act of Parliament comes into being

By convention

the Crown appoints the leader of the political party that wins the most seats in a general election as Prime Minister

Parliament will be dissolved at the request of the Prime Minister

the rules regulating Cabinet collective responsibility are conventions

the rules regulating ministers and their individual responsibility are a matter of convention

the Royal Assent will never be refused when a Bill has passed the Commons and Lords

judges must not play an active part in party politics

Members of Parliament must not criticise decisions of the judges

the government must resign if it loses the confidence of the House of Commons.

3.4.3 The differences between conventions and rules of law

Conventions and laws differ in several respects. Firstly, the origins of a law will be found either in an Act of Parliament or in a judicial decision. A convention, by comparison, comes into being at an undefined point in time at which a mere practice has hardened into an obligatory rule, breach of which attracts criticism. Secondly, while there is a vagueness in areas of law, there is what Professor H.L.A. Hart called a 'core of certainty' about legal rules. This feature is absent from many, but not all, conventions. You can compare the certainty surrounding the granting of the Royal Assent with the convention of ministerial responsibility – which is lacking in certainty – to understand this point. Thirdly, a change in a rule of law will be identifiable from statute or from judicial decisions. Again this is not so with conventions: they may be reinterpreted to meet a changed situation without there being any formality surrounding the change. Fourthly, to break a rule of law attracts a legal sanction. To breach a constitutional convention, by contrast, attracts no legal sanction but instead risks political repercussions. Finally, a serious breach of a convention may lead to its destruction or at least redefinition. The breaking of a rule of law, however, has no such effect on the law's validity or general effectiveness.

ACTIVITIES 3.1–3.2

3.1 Between 1909 and 1910 the House of Lords, in breach of convention, refused to agree to the government's budget. Parliament then passed the Parliament Act 1911 which laid down strict rules for the scrutiny of financial legislation by the House of Lords.

Had the House of Lords acted unlawfully in refusing to agree to the budget? Did the House of Lords 'break' the convention, or merely introduce an exception to it?

3.2 In 1975 during debates on Britain's continued membership of the European Community, the Prime Minister waived the convention of collective ministerial responsibility (see section 3.5.1) and permitted free debate. Following the decision to remain in Europe, the convention was restored.

Was there any unlawful or unconstitutional conduct on the part of the Prime Minister?

Was the convention of collective responsibility 'broken' or was an exception to it introduced?

Summary

The British constitution is made up of a number of formal written legal sources – Acts of Parliament and case law – and uncodified non-legal constitutional conventions. While conventions are not law, they are in many respects as important as law because they explain the manner in which the constitution actually operates.

3.5 Ministerial responsibility

ESSENTIAL READING: READ THESE PAGES NOW

Barnett, Chapter 11: 'Responsible government' pp.281–299.[†]

[†] See also Chapter 8 of this guide: 'The structure of government'.

Ministerial responsibility is designed to ensure that government acts in accordance with the principles of the constitution and is fully accountable to the electorate through Parliament. You need to study both of these aspects of ministerial responsibility.

3.5.1 Collective ministerial responsibility

In order that the government is seen to be united and strong, collective ministerial responsibility requires all ministers to support a policy once it has been adopted by the Cabinet (the inner core of government: see Chapter 8). If a government fails to maintain the support of Parliament, the opposition parties may call for a 'Vote of No Confidence' in government policy and if that vote is lost, by convention the government must resign. There are two aspects to the convention. The first is that all Cabinet discussions are, and must remain, absolutely confidential. The second rule is that once the decision is taken, every minister – even if he or she dissents or was not even party to the decision – must outwardly support that decision. The convention extends to Parliamentary Private Secretaries, the lowest rung on the ministerial ladder. Any expression of dissent calls for resignation or dismissal.

Holding ministers to a common position is not always easy. In times of disagreement over key issues it has been the practice, though it is rare, to waive or lift the convention to allow free debate. This occurred twice in the last century, once over the state of the economy in the 1930s and once in the 1970s over membership of the European Community. On both occasions, once there had been full public debate and a consensus formed, the convention was restored.

3.5.2 Individual ministerial responsibility

As with collective responsibility, there are two aspects to this concept. The first is that a minister is expected to conduct himself or herself in an appropriate manner. Any financial or sexual misconduct may lead to demands for resignation. You should be able to cite examples of where such conduct has led to resignations. The second aspect is that a minister is accountable to Parliament for the management of his or her government department. It used to be the case that any serious failures in policy or administration would result in a minister's resignation. You should consider the case of *Crichel Down* in 1954 as an illustration of this (see Barnett, p.286). However, the position is nowadays by no means clear-cut. The main reason for this is that a distinction has been developed between responsibility for policy failures and responsibility for operational matters, with ministers refusing to take the blame for administrative failures. Accordingly, the idea of ministerial responsibility has become divorced from the sanction of resignation for departmental failures and it is more accurate to speak of ministerial 'accountability' rather than 'responsibility', other than where a minister is personally at fault.

3.5.3 Authoritative works

In addition to the above sources of the constitution, the writings of respected constitutional authorities such as Sir William Blackstone (right), A.V. Dicey and Sir Ivor Jennings may on occasion be relied on in courts of law to aid interpretation.

SELF-ASSESSMENT QUESTIONS

- 1 What are the principal sources of the constitution?
- 2 What is the essential characteristic of a source which is deemed constitutional? What, for example, distinguishes the status of the Act of Union with Scotland of 1707 from the Road Traffic Act 1983?
- 3 What is a 'constitutional convention'?
- 4 How can conventions be distinguished from understandings, habits, practices and legal rules?



5 Which Act of Parliament:

- a Prevents Roman Catholics from succeeding to the Crown?
- b United England and Scotland under a single parliament?
- c Incorporates the majority of substantive rights under the European Convention on Human Rights into UK law?

SAMPLE EXAMINATION QUESTIONS

Question 1 Should all or any of the conventions of the constitution be given statutory force?

Question 2 To what extent is it possible or desirable to define clearly the conventions of individual and collective ministerial responsibility?

Advice on answering the questions

Question 1 You will need to start with a definition of constitutional conventions and then give a few illustrations to show the scope of the topic and the way in which conventions pervade all aspects of the constitution. Having defined and illustrated, you could proceed to discuss the characteristics of conventions and the distinctions between rules of law and conventions. The role played by conventions is also important, so you should demonstrate how conventions supplement the legal rules (as for example with the royal prerogative on the Royal Assent, appointment of Prime Minister and the dissolution of Parliament) and also how they underpin the system of responsible government. Key conventions here are that a government must resign if it loses the confidence of the House of Commons and that ministers are collectively and individually responsible to Parliament.

The way the question is phrased suggests that there is 'something wrong' with the operation of conventions which requires clarity and certainty. Address this issue, showing that it is by no means simple and that some conventions are clear and certain (as with the Royal Assent) and others – such as ministerial responsibility – have an inherent vagueness and lack of clarity.

When arguing in favour of some form of 'codification' – a comprehensive code – you need to consider the differing forms that codification can take. It could be a legal code, as in a statute, or it could alternatively be an authoritative statement of the rules, as with the Australian example discussed in Barnett at p.38. Having done that, the next issue to address is the likely consequences of placing conventions on a more formal basis. The separation of powers is relevant here, for if conventions were placed on a statutory basis, judges would have the jurisdiction to rule on conventions. Would that be a desirable extension of judicial power or rather a dangerous step which would involve judges in matters of high policy? (On this last point note the concept of non-justiciability discussed at p.73 of this guide.)

And finally, reach a conclusion. Do not leave the discussion up in the air, a situation which invites the examiner to wonder what you do or do not think about the subject. As this is not a straightforward issue, it is quite acceptable to state '...on the one hand...but on the other hand...' and give an indication as to which of these alternative positions appears the most persuasive.

Question 2 The starting point for this question is again definition, but here you need to define not only ministerial responsibility and its different aspects but also constitutional conventions – of which ministerial responsibility is a key concept. Explain the constitutional reason for the concept, namely its role in ensuring government according to law and the principles of the constitution. Also discuss the fact that conventions allow for flexibility and adaptation of the rules in order to meet particular circumstances.

While the convention of collective responsibility is relatively clear, you also need to demonstrate your understanding of the uncertainties inherent in individual responsibility. Use some of the many illustrations discussed in the textbook, starting with the 'classic' position in *Crichel Down* and showing how over the decades the convention has been differently understood.

When reaching a conclusion, remember the constitutional implications of formalising the rules (discussed above). What would be the significance for the separation of powers if ministerial responsibility became enforceable by the courts? Consider also whether formalising the rules would lead to an undesirable rigidity in the constitution.

References

Dicey, A.V. *Introduction to the study of the constitution*. [1885] (Last published by Liberty Find Inc. (1992)) [ISBN 978-0865970038].

Marshall, G. and G. Moodie *Some problems of the constitution*. (London: Hutchinson, 1971) fifth edition [ISBN 978-0091099411], pp.23-24.

Reflect and review

Look through the points listed below:

Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can state the statutory sources of constitutional law.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can state the common law sources of constitutional law.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can explain the meaning and scope of the non-legal sources of the constitution – constitutional conventions.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

	Must revise	Revision done
3.1 Acts of Parliament	<input type="checkbox"/>	<input type="checkbox"/>
3.2 Common law	<input type="checkbox"/>	<input type="checkbox"/>
3.3 European sources	<input type="checkbox"/>	<input type="checkbox"/>
3.4 Non-legal sources	<input type="checkbox"/>	<input type="checkbox"/>
3.5 Ministerial responsibility	<input type="checkbox"/>	<input type="checkbox"/>

