

PART I

Constitutional Regulation in the
Absence of a Codified Constitution

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1

The Purposes and Characteristics of Constitutions

[Constitutions are] codes of norms which aspire to regulate the allocation of powers, functions, and duties among the various agencies and officers of government, and to define the relationship between these and the public.

S. E. Finer, V. Bogdanor and B. Rudden, *Comparing Constitutions*
(Clarendon Press, 1995) p. 1.

CHAPTER OUTLINE

We begin by examining the key purpose of a constitution; the definition and allocation of governmental power. Following this – using examples – we illustrate the various functions that such devices are meant to perform and the differing forms that constitutions can take. The chapter then goes on to introduce the UK Constitution, noting its key characteristics and comparing them with those of constitutions elsewhere.

THE NATURE AND PURPOSE OF CONSTITUTIONS

The central purpose of a constitution is to allocate and regulate governmental power within a state. A constitution establishes the key institutions of government; it grants power to them, distributes power between them, and governs the ways in which the institutions of government interact with each other. A constitution also controls the way in which those institutions might exercise their powers, and determines how those powers might be exercised in relation to the individuals who reside within that state. Constitutions are therefore, as the quote which opens this chapter suggests, a distinctive species of legal norms (rules) concerned with the government and governance of the state within which they apply.

Key Issues

- Constitutions are traditionally concerned with the allocation and regulation of governmental powers within a state. A constitution will – typically in liberal democracies – divide governmental power between three core branches of the state: the executive, the legislature and the judiciary.

4 1 The Purposes and Characteristics of Constitutions

- Constitutional law is therefore the body of law that determines the exercise and control of governmental power between both the institutions of government and between those institutions and the individual.

Described in the abstract, constitutions shoulder enormous responsibility: they control, in effect, the mechanisms by which we are to be governed, the composition of the various components of government and the nature of the relationship(s) between individuals and the machinery of the state. Constitutional law, therefore, should not be thought of as an esoteric subject only of interest to political or legal philosophers (although it is obviously of interest to both of those groups), for the reason of its considerable *practical* significance. Even from the brief definition of a constitution given above, we can discern a number of general characteristics of constitutions that can clearly be seen to influence government in practice. Constitutions allocate governmental power. In liberal democracies, this allocation will typically be between three distinct arms, or branches, of government – the legislature, the executive and the judiciary – each of which exercises specific functions under the authority vested in it by the constitution.¹ First, the constitution may typically empower a parliament – the legislature – to enact rules for the governance of the country in the form of legislation (otherwise known as statutes). In the UK, parliamentary legislation deals with a number of issues of obvious significance to the government of the country: for instance, legislation governs who may be eligible to stand for election as a Member of Parliament,² the powers of the police,³ what legal rights the individual may be able to assert against the state,⁴ what structures of local – or sub-national – government should exist,⁵ and so on. But legislation also governs a huge range of topics which affect us on a daily basis (in many cases, perhaps, without our really appreciating it): for example, statute law regulates such diverse activities as with whom we can marry or enter into a civil partnership,⁶ road safety,⁷ our rights as consumers,⁸ and the regulation of broadcast media,⁹ to give but a few examples.

The second branch of the state is the executive branch, typically referred to as the government. The constitution governs not only which individuals should comprise the executive branch, but also how the various roles associated with executive functions should be exercised. For example, constitutional rules concern the appointment of a Prime Minister, and influence who the Queen should appoint as her Ministers of the Crown. Hence, in the constitution of the UK, it is generally the case that the leader of the largest

¹ See Chapter 8.

² House of Commons Disqualification Act 1975.

³ See e.g. Police and Criminal Evidence Act 1984; Criminal Justice and Public Order Act 1994.

⁴ See e.g. Human Rights Act 1998; Freedom of Information Act 2000.

⁵ See e.g. Scotland Act 1998; Government of Wales Act 1998; Northern Ireland Act 1998; Greater London Authority Act 1999; Local Government Act 2000.

⁶ Matrimonial Causes Act 1973; Civil Partnerships Act 2004; Marriage (Same Sex Couples) Act 2013.

⁷ Road Traffic Act 1988.

⁸ Consumer Protection Act 1987.

⁹ Broadcasting Act 1990; Broadcasting Act 1996; Communications Act 2003.

5 Does the United Kingdom Have a Constitution?

political party in the House of Commons will hold the office of Prime Minister, while those people who are recommended to the Queen by the Prime Minister will act as government ministers.¹⁰ Rarely a day goes by without some mention of the activities of the executive in the press. Frequently, for example, we will read about, or see television coverage of, ministers answering questions in Parliament. They do so not out of courtesy, but because the constitution requires Ministers of the Crown to present themselves to Parliament to explain their policies, successes and failings. The government is both *created* by, and *regulated* by, constitutional norms.

Finally, the judiciary is tasked with determining the outcome of legal disputes, including those between private individuals or bodies, and those between the individual and the executive. Constitutional rules govern the legal mechanisms by which disputes between individuals, or with the state itself, might be resolved fairly and finally. Again, hardly a day goes by without the press reporting on the progress or outcome of a criminal trial or decision involving the government in judicial review proceedings. Therefore, the constitution provides an institutional structure for the impartial resolution of legal disputes and constitutional rules tell us when – and on what grounds – we might challenge decisions taken by public officials.

In sum, the constitution therefore tells us which institutions should exercise governmental power, and how those bodies should be composed. The constitution grants power to those bodies, and provides mechanisms that govern how their powers might lawfully be exercised. Further, the constitution provides structures and procedures to resolve disputes of law between the individual and the state, or between private bodies or individuals.

CHARACTERISTICS OF CONSTITUTIONS: DOES THE UNITED KINGDOM HAVE A CONSTITUTION?

Key Issues

Though at the outset of this chapter a working definition of a constitution was offered, there is a disagreement over the precise meaning of the term. At the heavily prescriptive end of the spectrum, some authors argue that a 'constitution' must satisfy a series of specific characteristics – for instance, that it must be immune from amendment or repeal through the ordinary legislative process – in order to be worthy of the name. Others (as with our working definition) consider that the term 'constitution' may be applied to the general system of rules and conventions applicable to government and governmental powers. While at the least prescriptive end of the spectrum some consider that the constitution is simply the result of 'what happens' in the course of a country's governance.

While constitutions may take different forms – an issue addressed below – there are certain key characteristics that constitutions are argued to possess. The academic writer

¹⁰ See Chapter 10.

6 1 The Purposes and Characteristics of Constitutions

F. F. Ridley has categorised what he argues to be the central characteristics of a constitution as follows:

- (1) [A constitution] establishes, or constitutes, the system of government. Thus it is prior to the system of government, not part of it, and its rules cannot be derived from that system.
- (2) [A constitution] therefore involves an authority outside and above the order it establishes. This is the notion of constituent power . . . In democracies that power is attributed to the people, on whose ratification the legitimacy of a constitution depends and, with it, the legitimacy of the governmental system.
- (3) [A constitution] is a form of law superior to other laws – because (i) it originates in an authority higher than the legislature which makes ordinary law and (ii) the authority of the legislature derives from it and is thus bound by it. The principle of hierarchy of law generally (but not always) leads to the possibility of judicial review of ordinary legislation.
- (4) [A constitution] is entrenched – (i) because its purpose is generally to limit the powers of government, but also (ii) again because of its origins in a higher authority outside the system. It can thus only be changed by special procedures, generally (and certainly for major change) requiring reference back to the constituent power.¹¹

Let us address each of these characteristics in turn.

1. A Constitution Must Be Prior to a Government

First, Ridley suggests that a constitution must be in existence prior to the formulation of a government. If we accept that a constitution provides the grounds on which a government can be created, then this suggestion would appear to make logical sense. The rules of the constitution, in other words, the rules that provide for the very creation of a government, must be agreed to and in place *before* the actual formulation of a government. A legitimate government is one which is created subject to the specifications of the constitution, in turn, as Ridley argues, ‘a constitutional order derives its legitimacy from the constituent act which establishes it.’¹²

2. The Force of a Constitution Can Be Traced to the Notion of Constituent Power

Secondly, the normative force of a constitution is to be attributed to something other than the system of government established; in other words, a higher source of authority than that wielded by the government itself. In a democracy, Ridley argues, a constitution owes its authority, ultimately, to the people who – collectively – endorse its terms and therefore its legitimacy. The Constitution of the United States of America 1787 perhaps reflects this sentiment best in its famous opening passage:

¹¹ F. F. Ridley, ‘There is no British constitution: A dangerous case of the emperor’s clothes’ (1988) 41 *Parliamentary Affairs* 340, 342–3.

¹² *Ibid.*, 343.

7 Does the United Kingdom Have a Constitution?

We the People of the United States, in order to form a more perfect Union, establish Justice, ensure Domestic Tranquility, provide for common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.¹³

3. A Constitution is Superior to the Ordinary Law

Thirdly, as the authority of the legislature (and of the executive and judiciary) must ultimately derive from the constitution, then the powers of those branches of government may not exceed the powers granted by the constitution itself. As a result, the constitution is of a higher status of authority than the laws, rules and regulations, and judgments passed, by those arms of government who owe their authority to the constitution. As a result, the constitution both empowers and, as importantly, *limits* the power exercisable by the branches of government.

4. A Constitution Must Be Entrenched

And finally, Ridley argues that a constitution must be entrenched, that is, must be protected from amendment or repeal by those who temporarily hold governmental power at the request of the electorate. Constitutions, it is suggested, should have longevity, and should not be susceptible to legislative revision in the same way that ordinary laws may be. It should be remembered that the idea of limited government – the notion that those who govern us should not possess entirely unfettered power – lies at the heart of constitutions, and therefore, of constitutionalism.

An Overly Prescriptive Definition?

On this reading perhaps, Ridley's assertions may seem entirely uncontroversial. Applying his own definition, Ridley concludes that the UK has no constitution, at least not in any meaningful sense of the word. This is primarily because, in the UK, Parliament, and not the constitution, is sovereign.¹⁴ As a result of the doctrine of parliamentary sovereignty – which holds that parliamentary legislation is the highest law of the land and that Parliament can make, or unmake, any law – Ridley argues that any of the UK's 'so-called constitutional arrangements may be changed by Parliament by simple majority vote'.¹⁵ As a result, the UK lacks what Ridley argues to be the defining characteristics of a constitution, namely, a superior body of 'constitutional' rules, largely immune from legislative interference, which determine how a government should be composed and how it should operate.

However, Ridley's definition of a constitution may appear – especially to a student with even a passing familiarity with the British, or UK, system of government – to be highly, perhaps overly, prescriptive. First, Ridley's conclusion would appear to suggest that there is no stable body of rules which govern how an administration (or government) should be

¹³ Emphasis added. See also: the preamble to the Constitution of The Republic of South Africa 1996.

¹⁴ For a more detailed analysis of the doctrine of parliamentary sovereignty, see Chapter 6.

¹⁵ F. F. Ridley, 'There is no British constitution: A dangerous case of the emperor's clothes' (1988) 41 *Parliamentary Affairs* 340, 350–1.

8 1 The Purposes and Characteristics of Constitutions

formed, and how its powers should be exercised. To say that this body of rules is entirely absent in the UK's system of government would be misleading; elections to the House of Commons – which effectively determine which political grouping(s) will form the UK's government – are governed by primary legislation¹⁶ and we have already, for instance, encountered the conventional rule that the leader of the party able to command a majority in the House of Commons will ordinarily be appointed by the Queen to the office of Prime Minister. Once in office, a government's power is not unfettered; the law relating to judicial review places restrictions on the exercise of governmental power.¹⁷

Ridley would further suggest that we have not given our consent to the system of government established. While the UK Constitution does not contain a grand declaration such as that found in the opening lines of the Constitution of the United States of America, that is not to say that government in the UK is not carried out on behalf of the electorate. As a result of regular general elections to Parliament, which determine both who will represent us in the legislature, and which party (or parties) will form a government, our consent to the system of government is given, albeit indirectly. Therefore, as one leading constitutional commentator has declared, 'even in the British system, constituent power – the power to make and alter constitutional contracts – rests with "the people"'.¹⁸

Ridley's thesis regarding the lack of a distinction between 'constitutional' and 'ordinary' law would also appear to be open to question. '[C]onstitutional statutes', in other words legislation recognised as having an especial significance for the powers of government or the rights of individuals, have been identified in judicial decisions by UK courts.¹⁹ In addition, the importance of 'constitutional' reform and innovation has been recognised by the creation of a number of parliamentary committees with specific mandates to scrutinise the operation of governmental structures and processes, and the implications of proposed amendments to them.²⁰

Finally, Ridley's analysis would also suggest that there is no guarantee of longevity and stability in the UK Constitution, as can arguably be found in those systems with entrenched constitutional orders. While the legal entrenchment of specific statutory provisions is not a feature of the UK system of government, many of its fundamental features can be traced back many centuries. The constitutional rule that the monarch grant 'royal assent' to legislative proposals approved by the Westminster Parliament has – to give but one example – been applied without exception since 1708.²¹

As we will examine in greater detail in the chapters that follow, each of Ridley's suggestions may be open to question. For present purposes, however, Ridley's highly

¹⁶ See, for instance, Representation of the People Act 1983 (governing who is eligible to vote); Fixed-term Parliaments Act 2011 (governing when general elections should be held).

¹⁷ See Chapters 19 and 20.

¹⁸ M. Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) p. 224.

¹⁹ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151. See also the recognition of 'fundamental principles' of the constitution in *R (Buckingham CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324, [207] (on which see: P. Craig, 'Constitutionalising Constitutional Law: HS2' [2014] PL 373).

²⁰ See for instance, the House of Lords Select Committee on the Constitution and the House of Commons Public Administration and Constitutional Affairs Select Committee.

²¹ The topic of constitutional conventions – the group of norms to which this rule belongs – is covered fully in Chapter 2.

9 Does the United Kingdom Have a Constitution?

specific definition of a constitution illustrates but one of a number of varying analyses of what a constitution is, or should be. Other definitions, which – as we will see – may lend themselves more readily to the UK’s unique constitutional arrangements, are less dogmatic.

A less prescriptive definition of a constitution than that offered by Ridley suggests that:

A country’s constitution is simply the set of rules and common understandings [relating to the composition and conduct of government] that currently exist.²²

On this definition, provided by Anthony King, less emphasis is placed on the necessity for a constitution to exist prior to the creation of a government, or for the constitution itself to be entrenched in some way. Ridley argued that a constitution ‘establishes, or constitutes, the system of government’. By contrast, King argues that the system of government is the constitution. The constitution – on King’s definition – should still be regarded as being binding, as it includes ‘rules’ relating to the composition and conduct of government. Similarly, King’s definition hints at the requirement of consent, mentioning the ‘*common understandings*’ that underpin the operation of the constitution. But perhaps the crucial difference between Ridley and King’s definitions is that while the former emphasises rigidity and stability, the latter appears to accommodate the potential for flexibility and change.

An even less prescriptive definition of a constitution, as suggested by the academic J. A. G. Griffith, suggests that:

The constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.²³

For Griffith then, the constitution is not seemingly defined by the structure of rules, practice and custom which govern how government *should* be composed and how government *should* operate. Rather, the constitution is defined, purely and simply, by what *does* happen.

Thinking Point ...

The *Oxford English Dictionary* defines ‘constitution’ as ‘[t]he body of principles according to which a state or organisation is governed’. Constitutions not only regulate governmental institutions but also companies, political parties, societies, trades unions, associations and so on.

Hence, there are different ways in which to go about defining what is a constitution, or what is constitutional. As we will see, elements of each of the three explanations of what a constitution is will be seen in the following analysis and explanation of the UK Constitution. At this stage it is sufficient to simply note that there are various ways in which the words ‘constitution’ and ‘constitutional’ can be interpreted. It follows from this

²² A. King, *The British Constitution* (Oxford University Press, 2007) p. 3. See also the definition given in the quotation at the opening of this chapter (S. E. Finer, V. Bogdanor and B. Rudden, *Comparing Constitutions* (Clarendon Press, 1995) p. 1).

²³ J. A. G. Griffith, ‘The Political Constitution’ (1979) 42 MLR 1, 19. See further Chapter 5.

10 1 The Purposes and Characteristics of Constitutions

that the characteristics of individual constitutions will also vary from state to state, and it is to the content and form of some of those constitutions that we now turn.

THE CONTENT OF CONSTITUTIONS

Key Issues

Though constitutions may typically deal with three core issues – the establishment of the branches of government, the delineation of their powers and the provision of individual rights – there is considerable variance between constitutions as to how, and in how much detail, these central functions are addressed. The content of a constitution may therefore tell us as much about a state's history or aspirations as it does about its system of government.

The content of constitutions across the world varies; each is inevitably shaped by the circumstances which give rise to the drafting and implementation of a particular instrument, or to the emergence and development of a particular rule or practice of governance. Drawn up in the aftermath of the Second World War, for example, the Constitution of Germany – the *Grundgesetz* or Basic Law – is according to its preamble ‘animated by the resolve to serve world peace as an equal partner in a united Europe’.²⁴ The modern Constitution of the Republic of South Africa is aspirational in its tone – reflecting the intentions of its framers to distance themselves from the discriminatory apartheid regime – and setting down the intention that the constitution would ‘lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law’.²⁵ The Constitution of the United States – with its famous system of checks and balances – reflects the commitment of the founders to a system of limited government, under which governmental power should not be exercised unsupervised.²⁶ Constitutions might further set down various characteristics of the state, from whether²⁷ or not²⁸ there should be a state religion, to the extent of the territory to which the constitution applies.²⁹

While the primary task of a constitution may be to establish and regulate a system of government, the topics covered by constitutions may go considerably beyond what is thought necessary to fulfil this task, from carefully describing the appearance of the national flag³⁰ or national coat of arms,³¹ to nominating the adoption of a national animal (which is ‘always attractive, but rarely edible’³²). All constitutions are therefore individual –

²⁴ See also the commitment to pacifism in Article 9 of the Constitution of Japan.

²⁵ Preamble to the Constitution of the Republic of South Africa.

²⁶ S. E. Finer, V. Bogdanor and B. Rudden, *Comparing Constitutions* (Clarendon Press, 1995), p. 15.

²⁷ For example, Section 79 of the Constitution of the Kingdom of Thailand 2007.

²⁸ For example, the First Amendment to the Constitution of the United States.

²⁹ Articles 1 and 2 of the Constitution of Lebanon.

³⁰ Article 22 of the German Basic Law.

³¹ Article 8a of the Austrian Constitution (on which, see A. King, *The British Constitution* (Oxford University Press, 2007) p. 7).

³² S. E. Finer, V. Bogdanor and B. Rudden, *Comparing Constitutions* (Clarendon Press, 1995) p. 6.