

# EDEXCEL A LEVEL POLITICS

## COURSE COMPANION

## COMPONENT 2: THE CONSTITUTION

Detailed Study Notes for the Constitution topic in Edexcel  
A Level Politics



## CONTENTS

<b>KEY TERMS</b>	<b>2</b>
<b>1.1 HISTORICAL DEVELOPMENT OF THE UK CONSTITUTION</b>	<b>5</b>
MAGNA CARTA (1215)	5
BILL OF RIGHTS (1689)	6
ACT OF SETTLEMENT (1701)	6
THE ACTS OF UNION (1706-07)	6
PARLIAMENT ACTS (1911 & 1949)	7
THE EUROPEAN COMMUNITIES ACT (1972)	7
<b>1.2 THE NATURE OF THE UK CONSTITUTION</b>	<b>8</b>
WHAT IS A CONSTITUTION?	8
WHAT ARE THE MAIN PRINCIPLES AND CHARACTERISTICS OF THE UK CONSTITUTION?	9
<b>1.3 THE SOURCES OF THE UK CONSTITUTION</b>	<b>14</b>
STATUTE LAW	14
CONVENTIONS	17
COMMON LAW AND TRADITION	18
WHAT KIND OF CONSTITUTION DO WE HAVE IN ANY CASE?	23
<b>1.4 CONSTITUTIONAL REFORM</b>	<b>25</b>
INTRODUCTION: THE MOVEMENT FOR REFORM	25
IN CONTEXT: CONSTITUTIONAL REFORM AND THE COALITION	27
ELECTORAL REFORM	29
PARLIAMENTARY REFORM	32
THE HUMAN RIGHTS ACT (1998)	37
THE FREEDOM OF INFORMATION ACT (2000)	39
JUDICIAL REFORM	41
LOCAL GOVERNMENT AND LONDON GOVERNMENT REFORM	44
CONSTITUTIONAL REFORM: EVALUATION	52
<b>1.5 DEVOLUTION</b>	<b>56</b>
INTRODUCTION	56
WHAT IS DEVOLUTION?	57
SCOTTISH PARLIAMENT AND GOVERNMENT	61
THE PROBLEM OF EVEL	64
WELSH ASSEMBLY AND GOVERNMENT	67
NORTHERN IRELAND ASSEMBLY AND EXECUTIVE	71
DEVOLUTION AND BREXIT	73
WHAT CHANCE FURTHER REFORM?	75
ASSESSING THE EFFECTS OF DEVOLUTION	78
DEVOLUTION: OVERALL EVALUATION	87
DEVOLUTION: A SUMMARY OF THE ARGUMENTS	89
<b>1.6 CODIFICATION</b>	<b>90</b>
REASONS TO CODIFY	91
REASONS NOT TO CODIFY	96
DO WE NEED A BRITISH BILL OF RIGHTS?	100
MAKING COMPARISONS WITH THE USA	102
CODIFICATION: ASSESSING THE DEBATE	105

## Key Terms

<b>Constitution</b>	A set of rules and principles determining the relationship between political institutions and the distribution of power within a political system, including where sovereignty lies. A constitution establishes limits on power, defines and protects the rights of citizens and establishes the relationship between government and the people. A constitution is often contained in a single document and usually includes rules for its own amendment, although neither of these norms apply in the UK. The related concept of constitutionalism, or constitutional government, refers to the way political institutions are governed and bound by rules, conventions and principles as found in the constitution.
<b>Entrenched</b>	Entrenchment is the means through which constitutional changes are protected from change, for example by populist governments or for overtly political purposes; specifically, rigorous criteria must be met for the constitution to be amended, in the US involving 'supermajorities' in Congress (two-thirds majorities in both houses) and then a three-quarters majority of the States (38 or more). Entrenchment is also delivered by legislative supermajorities in France and Germany, and in the latter case there are some sections of the constitution which cannot be amended.
<b>Unentrenched</b>	A constitution with no special procedure for amendment. An unentrenched constitution contains articles and rules which can be changed by simple majorities and normal legislative processes, so that one government need not be restricted or bound by the actions of a previous administration, providing it has a majority in the legislature.
<b>Codified</b>	A constitution written down and contained in a single source, such as the US Constitution (1787). Most constitutions are codified and are therefore highly visible and easily accessible to citizens; they are also often associated very closely with national identity and a nation's values.
<b>Uncodified</b>	A constitution not contained in a single written document. This is much less usual. Canada, New Zealand and Israel join Britain in lacking a codified constitution, although Britain is different in that it has a single-tier legal system; there is no specially-protected 'higher law', nor is there a politicised judiciary empowered to determine the meaning of the constitution in specific cases. <sup>1</sup>
<b>Unitary</b>	There is a single, or primary source of political authority; all legal sovereignty – this being the locus of power - is contained in a single place within a political system. There may be a devolution or dispersal of power, but ultimate power remains at the centre and changes such as devolution can be reversed and central power restored. The UK has a unitary system due to parliamentary sovereignty, although some see continuing devolution as a threat to this.
<b>Federal</b>	There is a division of power as sovereignty is shared across central and regional governing institutions. A balance must be struck to avoid both over-centralisation and excessive decentralisation. The USA is a federal system and is typical in that smaller

<sup>1</sup> Technically, the British Constitution is part-codified as parts of it *are* written down, such as the European Convention on Human Rights, via statute law. However, such features have no special protection and remain vulnerable to the actions of governments.



	states came together at the founding of the nation to surrender some sovereign authority to a central government: <i>e pluribus unum</i> .
<b>Sovereignty</b>	<p>Denotes where ultimate political power lies within a political system.</p> <p>The sovereign authority is a final decision-maker and cannot be overruled by any other institution. In international politics and law, sovereignty grants national authorities full jurisdiction over their own affairs, although the UN's Responsibility to Protect (2005) indicates sovereignty can be challenged by international society if a government places its own citizens in danger. 'Pooled sovereignty' occurs when sovereign states agree to exercise sovereignty collectively. In the UK, 'legal' sovereignty lies with parliament but 'political' sovereignty, referring to where power lies in practice, is often held by the executive, and 'popular' sovereignty is exercised by the people at election time and during referendums, whereby the will of the people directly determines where power will lie or what constitutional decision will be taken.</p>
<b>Parliamentary sovereignty</b>	The constitutional principle at the heart of UK politics, that Parliament can make, amend or unmake any law, and cannot bind its successors or be bound by its predecessors. In theory, parliament can pass any law and a government with a loyal majority cannot be overruled, even if seeking to change a constitutional law. However, Britain's membership of the EU has restricted parliamentary sovereignty in some areas and European legislation is superior to UK law in these cases; the extent of this influence is hotly contested.
<b>The rule of law</b>	All institutions and bodies and all citizens, including those in the highest offices of state, must follow the law and will be held to account on an equal basis if they do not. This principle underpins responsible, rule-bound government in liberal democratic systems, protects the legal order and ensures just, fair and equal social and economic relations. Some believe the rule of law is not easily compatible with the doctrine of parliamentary sovereignty as outlined above.
<b>Statute law</b>	Laws passed by Parliament, via a simple majority vote of MPs in the House of Commons; the House of Lords also hears and votes on Bills and may suggest amendments and delay proposals for up to a year. Most UK laws are introduced by the government although MPs can propose Private Members' Bills. There is no distinction between 'higher' and 'basic' law and any Bill securing a majority will receive Royal Assent and thus become an Act of Parliament.
<b>Common law</b>	Unwritten laws made by judges where the law does not cover the issue or is unclear, thus allowing for a popularly accepted interpretation to emerge from the judicial review process. Common law is a centuries-old source of the UK constitution although it has more recently been curtailed by European regulations and directives, and by the writing of the European Convention on Human Rights into UK statute law.
<b>Conventions</b>	Traditions, principles and procedures not contained or formally written in law but developed and accepted over time. Conventions are generally thought to be binding on all actors in the political process. Examples include the Salisbury Convention, the principle that the House of Lords should not block any legislation resulting from the governing party's election manifesto.

<b>Authoritative works</b>	Works written by experts describing how a political system is run, which are not legally binding but are taken as significant guides, effectively codifying key historical principles as articulated by constitutional experts and authorities. Most recently, rules on the forming of a coalition government were drawn up by Gus O'Donnell (Cabinet Secretary) following the 2010 General Election, which had produced a Hung Parliament.
<b>Treaties</b>	Formal agreements with other countries, usually ratified by Parliament. Such treaties have helped establish the relationship between UK government and supranational European institutions and have therefore established the nature and distribution of sovereignty, largely moving power towards the EU. The Maastricht Treaty (1992), which replaced the European Community with the European Union and hastened the process of further integration, is one example, and it is under Article 50 of the Reform (Lisbon) Treaty (2009) that Britain will trigger proceedings to leave the EU.
<b>European Union Law</b>	Law passed by the European Union, which take precedence over UK Law in certain defined areas. Prior to Britain's withdrawal from the Union, jurisdiction is largely held by the EU in legislative areas encompassing agriculture, trade, fisheries, employment, competition law and regional economic development; jurisdiction is also contested in several other areas, including aspects of foreign and defence policy, overseas development and economic and environmental policy. Since the Factortame case (1990), which ruled the UK Merchant Shipping Act must cede to EU fisheries regulations (thus allowing Spanish vessels to operate in British waters without the consent of parliament), the primacy of EU law has been recognised and any disputes over interpretation are referred to the European Court of Justice. Parliament has been mindful of any potential clash with EU law while framing legislation.
<b>Devolution</b>	The dispersal of power within a political system from superior/central to subordinate/regional institutions, seen in the UK since 1997 with the creation of executive and legislative branches of devolved government in Scotland, Wales and Northern Ireland, each with a range of steadily expanding powers. Devolution does not, however, involve a transfer of sovereignty which, short of full national independence being granted to any of the three entities mentioned, continues to reside with Parliament.

## 1.1 Historical Development of the UK Constitution

### Magna Carta (1215)

The Magna Carta, or 'Great Charter' is perhaps the most celebrated document in British political history. Signed between King John (r.1199-1216) and his feudal barons at Runnymede in June 1215 in resolution of a political crisis, the document established for the first time the equality of all, including Kings, before the law, and began to re-define the role of a monarch in relation to their subjects, acting as an early check on autocratic executive power.<sup>2</sup>

Parts of the document were replaced or rewritten soon afterwards and what remained of the original 63 clauses has been repealed and reframed on many occasions, yet it still stands as a kind of ancient foundation stone of the British Constitution and historically underpins the right to liberty in Britain. This is due to the judicial values and principles it is associated with, such as the right of all 'free men' to a fair trial contained in the 39<sup>th</sup> Clause, still part of British law to this day:

'No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice.'

Although not regarded as a key feature of the original document, this has subsequently been widely interpreted, as in the 14<sup>th</sup> century when it was taken by Parliament to entrench the right of **trial by jury**. For Lord Devlin, 'Trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.'<sup>3</sup>

The Magna Carta has its legacy in many of the modern world's key constitutional documents, such as the American Declaration of Independence (1776) and Bill of Rights (1791), and both the Universal Declaration of Human Rights (UDHR<sup>4</sup> (1948)) and the European Convention on Human Rights (ECHR<sup>5</sup> (1950)), the latter now incorporated into UK law via the 1998 Human Right Act. The document is now mostly significant for its symbolic importance; curators at the British Library refer to the Magna Carta as 'a **potent, international rallying cry against the arbitrary use of power**' and for the late Lord Bingham Clauses 39 and 40, with their emphasis on freedom, lawful judgment and justice, retain 'the power to make the blood race'.

Shami Chakrabarti, former director of Liberty and now Shadow Attorney General, regards the Human Rights Act as 'a modern day Magna Carta', adding: 'If the Great Charter's principal lesson is that no power is absolute, the Human Rights Act honours that legacy by exercising constraint over an increasingly authoritarian executive.' However, she is also clear that the document's importance might be more symbolic than real, noting its limitations and emphasising instead the importance of protecting the 1998 legislation:

'Magna Carta ... has nothing to say about free speech or personal privacy, religious freedom or peaceful protest, and it offers no redress when rights are infringed. ... It's easy to romanticise Magna Carta, but for all its rich tradition (unlike the Human Rights Act) it cannot help ordinary people in checking abuses of power.'<sup>6</sup>

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<sup>2</sup> Winnie the Pooh creator A.A. Milne helped fix his reputation when he wrote "King John was not a good man" (1927) and contemporary histories also portrayed him as a malevolent monarch, as in this line attributed to thirteenth century monk Matthew Paris: "Foul as it is, Hell itself is defiled by the fouler presence of John". However, King John's reputation has been contested in recent decades, with some arguing he was an energetic reformer.

<sup>3</sup> Lord Devlin, quoted in Dominic Raab, *The Assault on Liberty: What Went Wrong with Rights* (HarperCollins, 2009)

<sup>4</sup> Universal Declaration of Human Rights

<sup>5</sup> European Convention on Human Rights

<sup>6</sup> Shami Chakrabarti, 'Magna Carta and human rights', *British Library Online*, <http://www.bl.uk/magna-carta/articles/magna-carta-and-human-rights#sthash.ppv5uMgK.dpuf>

## Bill of Rights (1689)

This was the legislative outcome of the ‘**Glorious Revolution**’ of 1688, whereby William of Orange, having invaded England in support of opponents of authoritarian King James II (r. 1685–88), was invited by Parliament to take the Crown along with his wife Mary on the basis that they abide by certain restrictions and limitations. James, who had fled to France upon the defeat of his armies, was declared to have broken his ‘contract’ with the people and both Houses then agreed upon a statement of laws and liberties against which to damn the actions of James and his predecessors and to frame the terms of their support to the Dutch royals. This became an Act of Parliament subsequently known as the Bill of Rights (unusually, as it is an indeed an ‘Act’ and not a ‘Bill’), binding the monarch to the rule of law and due process and asserting the role of parliament in giving assent to money bills and to the raising of armies in peacetime.

The notion of a **constitutional monarchy** bound by a **sovereign parliament** was thus established, as seen in the coronation oath taken by William and Mary, whereby they swore to govern with respect to "the statutes in Parliament agreed on" rather than by "the laws and customs ... granted by the Kings of England". Subsequently, ‘**royal prerogative**’ powers have transferred in many cases to the office of the Prime Minister, although parliament remains sovereign and any executive overreach is met with criticism on these grounds, as seen in the recent Article 50 case.<sup>7</sup>

## Act of Settlement (1701)

By the turn of the century, William III (he of the Glorious Revolution) was ill and without an heir; another crisis loomed as supporters of the exiled James II rallied abroad and William’s successor-to-be, sister-in-law Anne, remained childless. The Act laid down the terms of the succession in favour of the heirs of the Protestant Sophia of Hanover; the disqualification that would arise from marrying a Roman Catholic was not removed in Britain until the Succession to the Crown Act of 2013, two years after it was repealed across the Commonwealth. More significantly, for our purposes, the Act also consisted of a further series of important constitutional principles and provisions, namely that parliament and not the monarch would determine the appointment and tenure of judges, and that the monarch could not reverse or pardon the subject of an ‘impeachment’ triggered by the House of Commons, nor could any Crown officeholder or official sit in the Commons.

## The Acts of Union (1706-07)

Following the Treaty of Union in July 1706, two pieces of legislation, the Union with Scotland Act (passed by the English Parliament in 1706) and the Union with England Act (passed by the Scottish Parliament in 1707), united the two kingdoms of England and Scotland, until this time separate states under the same monarch. The kingdom of Great Britain was formed and both parliaments united to form the Westminster Parliament in London. At various points over the preceding century competing interests on both sides had debated and rejected models for a union between the two nations but their interests coincided in 1707; many Scots had lost money in the Panama scheme and the British, keen to avoid war, needed to prevent a Scottish alliance with France. Together, English and Scottish subjects would develop and expand the British Empire and a British identity would develop; that this was achieved by peaceful legislative means, between states previously so often at war with each other, and that it should have had such a successful outcome, is what Simon Schama calls ‘**one of the most astonishing transformations in European history**’.<sup>8</sup>

Of course, **Devolution** has returned a parliament to Scotland and has seen power dispersed from Westminster in many key areas. Scottish Nationalists continue to speak of a second referendum. For the moment, though, England and Scotland remain united and Scottish, as well as Welsh and Northern Irish

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<sup>7</sup> ‘The Bill of Rights’, British Library Online Collections. <http://www.bl.uk/collection-items/the-bill-of-rights>

<sup>8</sup> Simon Schama quoted in ‘The History of Parliament: British Political, Social and Local History’, website maintained by the [Institute of Historical Research](http://www.historyofparliamentonline.org/node/41087). <http://www.historyofparliamentonline.org/node/41087>

## Edexcel A Level Politics Course Companion

### Component 2 Topic 1: The Constitution

representatives sit alongside English MPs in the House of Commons, still housed in the Palace of Westminster.

#### Parliament Acts (1911 & 1949)

The Liberal Party, elected in 1906 with a **landslide majority**, introduced a programme of social reform encompassing such measures as national insurance, old age pensions and free meals for school children. To finance the change David Lloyd George, Chancellor of the Exchequer and future Prime Minister, attempted to pass a redistributive finance bill in 1909 subsequently termed the '**People's Budget**'. A **constitutional crisis** ensued as the House of Lords, dominated by Conservative peers, refused to pass the budget and the controversy rumbled on through two elections in 1910. To resolve the crisis and prevent the Lords holding up parliamentary business to such an extent again, the Parliament Bill of 1911 removed the Lords' power to **veto** money bills. It also replaced the Lords' power of veto over other bills with the power of delay and reduced from seven to five years the maximum length of a parliamentary term. The Lords, threatened with an influx of new Liberal peers, passed the bill into law in August 1911 (131-114). It was implied that further Lords reform would follow but the First World War intervened and the issue fell from the agenda.

Taking up the mantle from the then much-diminished Liberals, the Labour Party took on the Lords in the late 1940s over their nationalisation plans. Seeking to protect its plans to nationalise the iron and steel industries, Labour sought to reduce the Lords' power of delay from two years to one. The controversy ran for several years and Labour's Parliament Bill of 1947 was finally passed into law in December 1949, forced through under the provisions of the 1911 Act. The **Salisbury Convention** dates to this moment, that is, the idea that the Lords should not block legislation for which the government has a mandate by virtue of having won the most recent election. The 1949 legislation has been used on only four occasions: The War Crimes Act 1991; the European Parliamentary Elections Act 1999; the Sexual Offences (Amendment) Act 2000; the Hunting Act 2004.

#### The European Communities Act (1972)

Following two unsuccessful attempts to join in the 1960s, this Act marked the UK's accession to the European Economic Community established by the Treaty of Rome (1958); membership was officially conferred to Britain on New Year's Day of 1973.

The basis of the recent case against the government over Article 50 was that such a process would involve the repeal of this 1972 legislation therefore, under the doctrine of parliamentary sovereignty, only parliament could give its assent to such a measure. The Supreme Court found that the referendum alone did not cancel out the original legislation.



## 1.2 The Nature of the UK Constitution

### What is a Constitution?

A constitution is primarily a set of rules and principles specifying how a country should be governed, how power is distributed and controlled, and what rights citizens possess. It is usually written down and contained within a single document; the UK is unusual in having an uncodified constitution with many sources. Constitutions vary in length, the famous US Constitution of 1787 being rather short, but will typically all contain guidance on matters such as those listed below:

- **Rules and guidelines for conducting elections**, including when and how often elections are held, who can stand for elected office, which processes and procedures are to be applied (including details of the electoral system), and provisions for the oversight of elections.
- **The relationship between the key institutions, or branches, of government**: the executive, the legislature and the judiciary. It is usual to set out precisely what powers are held by the different branches, and how individuals within them, including the chief executive, can be checked or removed.
- **The location of sovereignty** (ultimate political authority) within a political system. In the case of the USA, sovereignty lies with the people ('We the People...') and in the UK sovereignty, by convention, rests with Parliament.
- **Ways in which a constitution can be amended**: a constitution must contain a clear statement of the processes by which it can be changed. Some 'originalists', such as the late Supreme Court Justice Antonin Scalia, believe constitutions should be beyond reproach but most political actors and commentators view them as 'living' documents. That is, it should be possible to adapt and change a constitution so that it better matches the values and principles of the time, and so that problems and challenges not envisaged at the time of the constitution's founding can be addressed within the bounds of the system. An uncodified constitution makes no distinction between 'higher' constitutional and other law, therefore amendment is easily attained via a parliamentary majority and no special arrangements are necessary.
- **A statement of the rights of citizens against the state and how redress might be gained**. The opening 10 Amendments to the US Constitution are known as the 'Bill of Rights' and guarantee freedoms such as the right to a fair trial and 'due process of law', free speech, freedom of religion and, notoriously in the case of the 2<sup>nd</sup> Amendment, 'the right of the people to keep and bear Arms', a staple of presidential election campaigns. The situation is more complicated in the UK but recent statute law such as the Human Rights Act (1998) and the Freedom of Information Act (2000) serve a similar purpose, as does common law and convention, albeit these protections are not entrenched and the lack of codification also explains some confusion as to where the rights of citizens lie.
- **The overall type of government**. The American constitution specifies that it will be both a democratic and a federal system, with federalism and the separation of powers enshrined in the 10<sup>th</sup> Amendment: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' This provides the moral and legal force behind States' Rights.
- **What the nation stands for**. A constitution begins with a Preamble, a short statement the purpose of which is to neatly summarise and crystallise the values and principles a nation hopes

Component 2 Topic 1: The Constitution

to embody and wishes to project to the rest of the world. They are aspirational and often quite vague statements intended to inspire citizens and shape a positive national identity and political culture. The French constitution promises the Republic will embody 'the common ideal of liberty, equality and fraternity'; in Brazil, the constitution promotes 'the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society'; Russia swears its allegiance to 'the universally recognized principles of equality and self-determination of peoples'; India highlights Justice, Liberty, Equality and Fraternity, and Ireland promises 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'. A closer look at preambles would reveal no shortage of 'spin' and a certain tendency towards the airbrushing of history but in theory a constitution encapsulates a set of values, beliefs and goals the people of a country can collectively support and often, as in the case of the racially very diverse nation of Brazil, such statements are careful constructions aimed at overcoming potential barriers to unity. In this way, a constitution goes to the heart not only of a country's system of government but also to its image of itself.

### What are the main principles and characteristics of the UK Constitution?

The much-quoted American constitution is clear as to its own purpose; the Founding Fathers, working against a backdrop of revolutionary war, intended for the document to help shape a political system that would live up to the ambition of the 1776 Declaration of Independence that all citizens would enjoy the right to 'life, liberty and the pursuit of happiness'. The Preamble reads as follows:

'We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, 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.'

With no codified constitution in the UK, there is greater ambiguity as to what the underlying principles and characteristics of the British constitution are in practice. We can, though, identify a number of core constitutional ideas and values present in the UK constitutional tradition which, taken together, help articulate the *nature* of the UK Constitution.

#### An uncodified (and unentrenched) constitution

An **uncodified constitution** is a constitution not contained in a single written document. Canada, New Zealand, Saudi Arabia and Israel join Britain in lacking a codified constitution, although Britain is different again in that it has a single-tier legal system; there is no specially-protected 'higher law', nor is there a politicised judiciary able to determine the meaning of the constitution in specific cases.

The UK constitution is drawn from a variety of sources, many going back several centuries (see below). This is not to say the constitution is *unwritten*, as there are many written elements, but a lack of *codification* does ensure a corresponding lack of entrenchment, that is, there are no special safeguards against future reform and repeal of existing constitutional laws, or of an adjustment in the conventions that help shape the constitution's core content.

## Edexcel A Level Politics Course Companion

### Component 2 Topic 1: The Constitution

Unlike in France, where a three-fifths majority in the legislature (or, as in Ireland, a referendum) is required for amendment, or in America and Germany where the legislature's threshold is set at two-thirds of all representatives, with an additional three-quarters of the states required in America to validate an amendment, there is no restriction on Parliament's ability to amend the UK Constitution should a majority support such a move. Parliament can neither be bound by nor bind in turn other parliaments and, given the tendency of the electoral system to reward even modestly supported governments with substantial parliamentary majorities, the government effectively gains control of the constitution so long as the executive can maintain party discipline. It is true to say that referendums have become much more common in the UK and are now expected whenever major constitutional matters are at stake, but no higher, constitutional law stipulate this must happen. The relative advantages and disadvantages of this unusual situation are discussed in the final section of this course companion.

#### The unitary state

A **unitary state** is a state in which there is one central source of political power and authority. In the case of the UK, sovereignty resides with the Westminster Parliament and most of the time this means that power is concentrated in the hands of the Government in London. Whatever powers might be granted to other individuals and institutions, such as an elected mayor or a devolved assembly, the UK Parliament has the power to withdraw, even to the extent of shutting down whole institutions. This, at least, is the theory. The unitary state has been under threat for some time now, as these thoughts from academic Andrew Gamble back in 1994 reveal:

'One of the problems for contemporary Conservatives is discovering a rationale for preserving the Union following the disengagement from empire and the development of the EU. Multinational states are no longer common elsewhere in Europe, and the principle of national self-determination as well as the devolution of power to regions within the European Union has made the British state appear an anachronism, one of the last ancient regimes in Europe. Nationalists have not been slow to urge the break-up of the UK state.'<sup>9</sup>

In reality, as later analysis will show, the UK has entered into a finely balanced quasi-federal structure and, with new powers having been devolved to Scotland, Wales and Northern Ireland and 'metro mayors' set to lead new structures of regional governance in England, the drift away from the traditional unitary state seems set to continue even in spite of Britain's decision to free itself of supranational European institutions.

#### Parliamentary Sovereignty

This vital constitutional principle, embodying the idea that Parliament, a body of the people's elected representatives, can make, amend or repeal any law, and can neither bind its successors nor be bound by its predecessors, goes to the very heart of the UK political system. Parliament, according to this idea, is supreme and exercises power over all other institutions and agencies of representation and governance. It does this through its primary, unchallenged role at the centre of the law-making process and via an accompanying network of **accountability**, scrutiny and other representative mechanisms. Virtually any law

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<sup>9</sup> Andrew Gamble, 'The National Question', in Dennis Kavanagh & Anthony Seldon (Eds), *The Major Effect* (Macmillan, 1994), p.384

## Edexcel A Level Politics Course Companion

### Component 2 Topic 1: The Constitution

one can imagine can be passed by Parliament and no one, not even a current or former Prime Minister or a media mogul like Rupert Murdoch, can escape its forensic oversight. However, for many years now the doctrine has seemed under threat.

It was long a concern that European legislation was legally superior to UK law, as established by the Factortame Case of 1991 in which a Spanish fishing company successfully challenged the legality of the 1988 Merchant Shipping Act, which had required that all vessels registered in the UK should be at least three-quarters British owned. EU law might no longer be such a grave concern following the Brexit vote but parliamentary sovereignty was complicated anew by the swathes of constitutional reform accompanying the Labour Party's election to office in 1997.

Technically, the devolved institutions are permitted to exercise power in specified areas only so long as Parliament supports the initiative, but the trend is very much now towards further devolution and it is impossible to imagine any attempt by Westminster to return power to the centre. Two further challenges to parliamentary sovereignty exist and threaten to erode the concept simultaneously.

- Firstly, there is evidence to suggest a creeping accumulation of power at the level of the executive, as recent theories regarding Downing Street 'presidentialism' and the expansion of the Office of the Prime Minister attest. Tony Blair suffered no defeats at all in the House of Commons during his first two terms, a period when analysts began categorising MPs as over-spun 'delegates' of No.10 rather than political actors in their own right and, although parliament has been more rigorous thereafter, many were also disturbed by the sight of Theresa May in the Lords' gallery as the Bill for Exiting the European Union was discussed earlier this year.
- Secondly, enthusiasm has grown for 'popular sovereignty', most easily expressed in referendums but also seen in single-issue and pressure group activity, the signing of e-petitions and public participation via other digital and consultative mediums. On the surface, this seems all to the good but one argument against direct or 'popular' democracy of this kind is that we lose respect for and faith in our representative institutions as a result, and Parliament is certainly not yet recovered to a high point in the public's esteem.

Former Prime Minister Gordon Brown wrote of parliamentary sovereignty having 'taken a bashing because referendums, reflecting popular sovereignty, are now in effect required before important constitutional decisions are made.'<sup>10</sup> For Anthony Barnett, the Brexit debate, 'constitutional dynamite for Britain', challenged parliamentary sovereignty in yet more profound ways, such that he now believes the concept itself to have been fatally altered. Barnett writes of the 2016 EU referendum:

'The assumption was that it would confirm the status quo and that deference, self-interest and fear of the consequences, would renew consent to elite rule. Instead, consent was withdrawn. A new sovereign, 'The people', has now displaced the old. Unless 'the people' changes its mind, the Commons and Lords – both with Remain majorities – must obey and vote to leave the EU. It is no longer a matter of acting on the basis of their own judgment. By terminating the 1972 European

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<sup>10</sup> Gordon Brown, 'Union does not mean uniform: Are we moving to a federal United Kingdom and a written constitution?', in *The New Statesman*, 19 June 2014. <http://www.newstatesman.com/politics/2014/06/union-does-not-mean-uniform>



### Component 2 Topic 1: The Constitution

Communities Act, 'parliamentary sovereignty' will only be restored as a technicality. For in fact and in spirit the referendum drove a stake through its heart. The 'Will of the People' must now prevail. Those who resist are 'Enemies of the People'. This is the raw meat of dictatorship.'<sup>11</sup>

This is strong stuff and for some will seem rather hysterical, but such are the passions referendums engender. For Barnett, only a 'democratic constitution', that is, a new, codified constitution born of a reawakening of 'England's passionate constitutional culture', can restore the UK political system. Still, there is no formal imperative for Parliament to call any further referendums. The recent trend *can* be reversed, and too many referendums could be unpopular and would likely result in voter fatigue. What seems certain, though, is that no discussion on the nature of the UK Constitution can take place without a serious and substantive focus on the doctrine of parliamentary sovereignty.

### Parliamentary Government

In *The English Constitution* (1867), a key foundational text of the constitution as a whole, Walter Bagehot identifies the 'efficient secret' of the British system as the 'fusion' of power achieved by the executive and legislative branches of government. In most modern systems, there is a strict separation, enabling a check on the potential accumulation of power at the centre by the executive, but this arrangement can also appear too fixed and might, when accompanied by a **partisan party political environment**, hinder the effectiveness of strong government by delivering a kind of legislative gridlock.

In the UK, the fusion of powers described by Bagehot arises due to the government being drawn from parliament; that is, all ministers must be members of the House of Commons (or House of Lords, although this is rare), and even the Prime Minister has a representative role like all other MPs, albeit with the support of a large constituency team. This arrangement allows the government to control the legislature by manipulating its **Commons majority**, using the **Whip** when patronage powers and appeals to party loyalty fail. In turn, ministers are accountable to parliament and appear regularly before MPs and **parliamentary committees**, and the Prime Minister takes questions from the House each week in a high-profile, heavily reported session called **Prime Minister's Questions**, or 'PMQs'. At times, Parliament seems to gain the upper hand, as when the 2010 General Election deprived the Prime Minister of a single-party majority, and in previous years weak governments have seen their proposals defeated in the House, but much of the time one party does indeed enjoy a comfortable majority and through this the system of parliamentary accountability combined with executive supremacy delivers what supporters of the UK's uncoded constitution would refer to as 'strong and stable government'.

### The Rule of Law

According to this important principle, 'law rules'. **All institutions and bodies, public and private, all citizens including those in the very highest offices, and all those charged with maintaining law and order, must follow the law and will be held to account on an equal basis if they transgress.** In theory, the rule of law frames responsible, rule-bound government, protects the legal order and ensures just, fair judicial procedures and equitable social and economic relations in modern liberal democracies. Under this

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<sup>11</sup> Anthony Barnett, 'Brexit has killed the sovereignty of Parliament', published by [openDemocracy](https://www.opendemocracy.net/anthony-barnet/brexit-has-killed-sovereignty-of-parliament), 05 December 2016. <https://www.opendemocracy.net/anthony-barnet/brexit-has-killed-sovereignty-of-parliament>

## Edexcel A Level Politics Course Companion

### Component 2 Topic 1: The Constitution

principle, citizens can not only expect due process and a fair trial if they are arrested on suspicion of having broken the law, they can also seek a prosecution of senior political and other figures if they feel they have exceeded their powers or otherwise acted against the law. In receipt of these and other cases, judges must operate with full independence and according to the strictest neutrality, applying the law to the exclusion of all political pressures and concerns. For Lord Bingham, it is the practical application of the rule of law that ‘makes the difference between Good and Bad Government’, for ‘aspiration without action is sterile. It is deeds that matter.’<sup>12</sup>

Supporters of codification in the UK argue the rule of law would be better protected by a US-style Bill of Rights. Some also fear the judiciary is becoming too activist. However, the UK judiciary has consistently ruled in favour of citizens whose constitutional rights have been compromised – for example, the Belmarsh detainees, released in 2004 – so while the system is not perfect (Parliament has since passed several anti-terrorism laws that campaigners feel threaten civil liberties), there is room for redress within existing structures and the ECHR has expanded the scope of the appeals process further since its incorporation into UK law in 1998.

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<sup>12</sup> Tom Bingham, *The Rule of Law* (Penguin, 2011), pp.173-74

## 1.3 The Sources of the UK Constitution

The UK Constitution is drawn from a range of sources, often but not always written and, crucially, not codified or written down in one place. Much of the constitution consists of statute law and conventions but there is more to it than that, and Britain's constitutional text is constantly being updated and reinterpreted.

### Statute Law

**Acts of Parliament**, passed by both Houses and given [Royal Assent](#), contribute to the shaping of constitutional principles and, more dramatically, the resolution of constitutional stand-offs. This status does not pertain to all laws but only those made in relation to important constitutional matters, although there is no separate arrangement for the entrenchment or 'writing in' of important statute law, despite its important status.

Statute law will be enforced due to [parliamentary sovereignty](#) and the rule of law and in recent years it has accounted for hugely significant constitutional change in the UK, framing and legitimising the process of devolution, establishing a separate Supreme Court, fixing the date of future general elections and codifying important human rights and civil liberties milestones. Statute law has also played an important historic role in the evolution of the UK's constitutional settlement; for example, the [1928 Equal Franchise Act](#) gave women the vote on the same terms as men, the [1949 Parliament Act](#) reduced the Lords' power of delay to one year and the Scotland, Northern Ireland and [Government of Wales Acts of 1998](#) established the devolved administrations.

### Key constitutional statutes

General parliamentary statutes	
House of Commons Disqualification Act 1975	<ul style="list-style-type: none"><li>Sets out which people cannot be MPs e.g. judges, civil servant, police constables etc.</li><li>Limits the number of Ministers in the Commons to 95</li></ul>
Ministerial and Other Salaries Act 1975	<ul style="list-style-type: none"><li>Sets out the maximum numbers of paid ministerial posts i.e. 109</li><li>Sets out the pay for other posts such as Lord Chancellor and Speaker</li></ul>
Fixed Term Parliaments Act 2011	<ul style="list-style-type: none"><li>Elections must be held every 5 years, at a pre-determined date</li><li>Exceptions in the case of votes of no-confidence or a two-thirds majority vote by the Commons (e.g. 2017 General Election)</li></ul>
Representation of the People Acts	
1969	<ul style="list-style-type: none"><li>Lowered the voting age from 21 to 18</li><li>Allowed university students to vote in their uni town</li></ul>
1983	<ul style="list-style-type: none"><li>Limited election expenses &amp; limited candidates to one free mail-shot</li><li>Prisoners unable to vote</li></ul>