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Constitutions; the Nature and Sources of the United Kingdom Constitution

Introduction

For many, this is the most difficult area of the whole subject. It is rather theoretical and seems to have no beginning and no end. Different lecturers have very different approaches in this area. Some like to include a lot of political theory and others do not. We hope that the Questions and Suggested Answers in this chapter help your understanding of the key ideas and issues.

This area concerns a fairly traditional set of issues.

A good starting point is, why does any country have a constitution at all? The obvious answers are: first, to limit the power of the government so that it cannot do whatever it likes; secondly, to protect the rights or liberties of the individual not just from the government but also from other powerful groups; and a third less obvious reason is legitimacy. Why do 'the people' accept that a particular small group of individuals is entitled to govern and set the laws of the land? This is often a function of a written constitution: such documents often say that the people of the country have decided upon these particular constitutional arrangements. For example, 'We the People of the United States do ordain and establish this constitution for the United States of America.' Many countries with a written constitution have specialist courts to deal with public law issues, separate from the private law courts.

The UK is different: it is one of the few countries in the world without a 'written constitution', and there is no clear-cut distinction between public law and private law.

Some critics, dating back to Thomas Paine in the eighteenth century (*The Rights of Man* (1792)) and continuing into modern times (for instance F. F. Ridley 'There is no British Constitution: A Dangerous Case of the Emperor's Clothes' (1988) 41 Parliamentary Affairs) claim that the UK's arrangements are so defective that there is

no constitution at all as none of the key aims (granting legitimacy, limiting government and safeguarding liberties) is achieved. The conventional view, however, as put in for example A. V. Dicey's *Introduction to the Study of the Law of the Constitution* (1885) and Sir Ivor Jennings' *The Law and the Constitution* (1959), is that the UK does have a constitution but not a 'written constitution', that is instead of being set out in one or a limited series of documents, it comes from many different sources such as statutes, cases and crown prerogative.

Much of the UK constitution is now written down, in a whole swathe of statute law. However, a significant element is unwritten and indeed not law, being the Conventions of the constitution, which oil the wheels and plug the gaps. Vitally important matters like the existence of the Prime Minister and the real powers of the Queen are governed by convention.

Some consider 'restraining principles' such as the Rule of Law and the Separation of Powers as sources; we consider these topics later, in the context of restraining the power of the State.

Question 1

A written constitution would make a great improvement to the United Kingdom system of government.

Discuss.

Commentary

A constitutional law course will often start by considering what a constitution is, including a comparison between so-called 'written' and 'unwritten' constitutions. Many students will be hoping for a question like this to turn up in an examination, but it is not quite as straightforward as it seems to write a *good* answer to a question like this.

The phrase 'written constitution' is really a misnomer. A written constitution need not be contained in one document and the constitution could be a few pages long or hundreds of pages long. Some unwritten constitutional conventions will also operate. By the same token, an 'unwritten constitution' will include some elements that are written down somewhere. A written constitution is one that is largely codified in one document or a limited series of documents and, invariably, has legal status. A particular country's written constitution may be short and vague or long and detailed, and it may or may not have special, higher legal status than the ordinary laws of the land. An unwritten constitution is a constitution that is not codified as described above, instead having many different sources.

The question poses a proposition. The student should not take it for granted as being right and indeed does not have to agree with it. Typical of many public law questions, there is no single, right answer to this kind of question. What is required in answer is cogently to argue all sides, in

essence discussing the arguments for and against a change to a written constitution for the UK and coming to a substantiated conclusion. An effective answer will proffer sufficient examples of points made, including up-to-date illustration.

Answer plan

- What a constitution is for
- Written constitutions are adopted following major upheaval such as independence or revolution
- Written constitutions have legal status, sometimes as higher law with a special amendment procedure
- Written constitutions often contain a Bill of Rights
- The UK constitution comprises many sources including statutes, cases and conventions
- An unwritten constitution is flexible, whereas written constitutions may be rigid
- A written constitution cannot contain or provide for everything.

Suggested answer

Every organised state has a constitution, but it does not necessarily have to be a written one. Even clubs and societies have a constitution, as there have to be some rules and the members need to know who has the power to make decisions or take actions. So what is the purpose of a constitution? A constitution grants legitimacy to the State and its governance, provides for how the State is to be governed, limits the power of those who govern and (in a liberal democracy) protects the individual citizen from them. It is there to ensure that those who run the State do not behave in an *arbitrary* manner. They must act according to the rules and procedures and not persecute or oppress the citizen. For example, a government official could not just say to someone 'I do not like you, you cannot live in this country.' Instead there must be laws about nationality, immigration and fair trial. A constitution provides for these things, but just as importantly it would also state who has the power to do what. Who can make laws, is there a Head of State, is there a Prime Minister and who has the real power to decide?

Nearly every country in the world, apart from the UK, New Zealand and Israel, has a written constitution. Generally, countries adopt a written constitution when there is a dramatic break with the past and there is a need to make a fresh start with a new system of governance. For example, the end of the eighteenth century saw the United States of America obtaining its independence (from the UK) and the French Revolution overthrowing the rule of King Louis XVI, each country consciously embracing a new beginning with a new, written constitution. England was, in fact, one of the first countries to have a written constitution, with Oliver

Cromwell's 'Instrument of Government' in 1653, after he had overthrown and executed Charles I. It only lasted, however, until 1660, when the old system of royal government was restored. Since then the UK system of government has changed out of all recognition, but it has changed gradually and there has never been such a drastic break with the past that required or engendered a general desire from politicians or the people for a 'clean sweep' embodied in a new, written constitution.

The Constitution of the United States 1787 is generally considered a 'classic model' written constitution starting as it does (the **Preamble**) with a declaration of values and principles:

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, 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.
>
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The UK has no such statement. Instead, writers such as Bagehot and Dicey propound our constitutional values.

A written constitution often lays down a special procedure under which the constitution can be changed. For example, Article V of the US Constitution 1787 stipulates that two-thirds of both Houses of the Congress or two-thirds of the legislatures of the states can propose amendments to the Constitution. The proposed amendment then has to be ratified by the legislatures of three-quarters of the states. In the Republic of Ireland, a Bill passed by both Houses of Parliament, together with a majority of the votes in a referendum and the assent of the President amends the Constitution. In contrast, there is no special procedure to change any part of the UK constitution.

The written constitution of a federal country will tend to detail the federal structure, providing, in detail or not, for the powers of the regions (the States of the US or Provinces of Canada for instance) and the powers of the federal (national) government. The unification of once independent countries to form a new, single, federal state is often the reason for adopting a written constitution and occurred in the United States of America, Canada, Australia, Nigeria, Malaysia and Germany, to give just a few examples. The UK, as the name suggests, is a union of once separate countries, but it is not federal. Instead, the Parliament of the UK, which sits at Westminster, retains full legislative supremacy. It has recently granted varying degrees of self-government to Scotland, in the Scotland Act 1998, to Northern Ireland in the Northern Ireland Act 1998 and to Wales in the Government of Wales Acts of 1998 and 2006. The UK Parliament can, however, repeal those Acts and regain full powers to govern Scotland, Northern Ireland and Wales. There is no

written constitution to stop the sovereign Parliament of the UK doing this. The question is whether Westminster would do this, which comes down to political acceptability and consequences.

Many written constitutions contain a list of rights, to which the citizen is entitled. Often, as in the United States and Germany, they are constitutionally protected and cannot easily be taken away by the Executive or Legislature. The UK has a Bill of Rights from 1689, but that was designed more to reduce the power of the King rather than to grant rights to his subjects. The Human Rights Act 1998 now gives domestic force to most of the European Convention on Human Rights 1950. Section 3 of the Act, however, carefully preserves the supremacy of Parliament. UK courts cannot 'strike down' (judicially review) primary legislation even if it is incompatible with human rights, and Acts of Parliament can still restrict human rights.

Most written constitutions contain some sort of 'organisation chart' of government and explain whether there is a President or Prime Minister, or both, and what their powers are, who has the power to legislate, who appoints the judges, and so on. There is no equivalent in the UK, as the system of governance has just evolved over the centuries. The Head of State is the Monarch, which is a matter of ancient common law, and there is no law that says that there has to be a Prime Minister. The existence of a Prime Minister is down to 'convention' or non-legal custom (below).

The UK constitution is to be found in many sources. Acts of Parliament are important and many are of constitutional significance, for example the Act of Settlement 1700 and the European Communities Act 1972. More and more of the UK constitution is now developed by passage of Acts of Parliament. These can be very important changes, for example the Human Rights Act 1998, making positive human rights directly enforceable in UK courts for the first time or the Constitutional Reform Act 2005 in strengthening the separation of powers. This indicates that nothing is permanent in the UK constitution, everything may change.

Case-law also constitutes an important source of the UK constitution; those cases involving a constitutional matter that is. For example, the House of Lords reaffirmed the principle of the supremacy of Parliament in *Pickin v BRB* [1974] AC 765, but a few years later had to moderate it, to take account of membership of the European Union, in *Factortame (No. 2)* [1991] 1 AC 603. We are talking here of the daily case law of the ordinary courts of the land. Unlike many of the countries with a written constitution, the UK does not have a Constitutional Court that rules on constitutional issues and the Supreme Court, newly established under the Constitutional Reform Act 2005, in no way mirrors that of the United States for example. All legal cases, constitutional or not, go through the same court system.

Historic documents, such as the Magna Carta 1215 and the Bill of Rights 1689 are important for establishing constitutional principles, such as the idea

that the King or Executive does not have unlimited power, but these documents do not have the special, formal legal status of a written constitution; indeed all law in the UK is ordinary law, be it concerning the constitution or any other matter.

A lot of the UK constitution is not law at all and consists of constitutional conventions, which were defined by Dicey in his *The Law of the Constitution* as:

> understandings, habits or practices which, although 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. (p. 24 10th edn 1959).

Much of the most important parts of the constitution can be found in convention, such as the office of Prime Minister, the Cabinet, ministerial responsibility and how the considerable legal powers of the Queen are exercised by ministers in her name. As constitutional conventions are not law, they are not legally enforceable (***Attorney-General v Jonathan Cape Ltd* [1976] QB 752**) and whilst in one sense are constant, they may also be said to be constantly changing. For example, whereas in the 1950s a minister would have had to resign if exposed as having an extra-marital affair or for being homosexual, neither of itself commands resignation today.

This is supposed to be the major advantage of an unwritten constitution, its flexibility and its ability to evolve. By contrast, it can be difficult to change a written constitution. On the other hand, if everything can change, as it can with the UK constitution, then the protection of individual liberties is arguably less strong. Also, without the relative certainty of a rigid, written constitution, the citizen and even the politician may find it more difficult to know just where he stands in terms of the true constitutional position.

Some think that Prime Ministers and the governments that they lead have too much power and can take away any right by just using Parliament to pass an Act or by merely changing a convention. However, even in countries with written constitutions, that document is unlikely to reveal the full constitutional position. For instance in the United States, the power of the Supreme Court to strike down legislation for 'unconstitutionality' is not found in the written constitution but in a case, ***Marbury v Madison* [1803] 1 Cranch 137**. Under **Article II of the US Constitution**, the President needs the consent of the Senate to agree treaties, but a practice or convention has grown up of making 'Executive Agreements' with other countries without Senate approval.

The difference between a written and unwritten constitution is not as great as some suppose. It is not possible to write down everything in a document that will be valid for all time. Much of the UK constitution is in Acts of Parliament anyway and that is increasingly the position today. Every country has different constitutional arrangements and those of the UK just reflect its individual history of being one of the oldest unified states in the world.

Question 2

The main purpose of constitutional conventions is to ensure that the legal framework of the Constitution will be operated in accordance with the prevailing constitutional values or principles of the period.

(*Re Amendment of the Constitution of Canada* [1982] 125 DLR (3d) 1)

Discuss.

Commentary

Nineteenth century writers like Dicey and twentieth century ones like Jennings stressed the importance of conventions in the UK constitution. Arguably they over-stressed their importance and constitutional writers looked for conventions that did not really exist, for instance some in the area of ministerial responsibility. There was a reaction in the 1960s and some writers asserted that there were no such things as conventions. Opinion has now swung back again, as in ***Re Canada*** (above). Conventions definitely exist and are of significance in the UK constitution. Questions on conventions usually demand familiar territory to be considered: what are conventions, how do they operate, how do they change and how are they enforced? The student is usually expected to be critical, often done most effectively by using specific examples of operation, breach and sanction.

Answer plan

- Habits or practices, or mandatory conduct of those involved in the day-to-day workings of the constitution
- Conventions are not laws and thus not legally enforceable
- Conventions are enforced by peer pressure, public opinion or personal morality
- Conventions evolve over time.

Suggested answer

In all constitutions, even those that are written, like that of Canada, various practices or ways of doing things that are not strictly provided for in the constitution grow up over the years. These practices can harden and become the accepted way of doing things. Then they may be called conventions. In *Re Canada* (above), although the written Canadian constitution did not require it, it was the convention that the consent of the Canadian provinces be obtained before changes were made to the constitution.

In the UK, a country without a written constitution, conventions are particularly important. In the late nineteenth century, Dicey drew attention to the role of conventions in the UK. He believed that most of the UK constitution and many of its most important parts consisted of conventions. This did not mean that there were no rules, merely that a lot of the rules were not legal ones. As he put it in *Introduction to the Study of the Law of the Constitution* (1885):

> The other set of rules consists of conventions, understandings, habits or practices which, though they may regulate the conduct of several members of the sovereign power, of the Ministers, or of other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed 'the conventions of the constitution', or constitutional morality.

If one looks only at the legal rules of the constitution, this gives a seriously misleading impression. Legally, the Queen may refuse the Royal Assent to a parliamentary Bill. However, by convention she always agrees, taking the advice of Her Majesty's government. Legally, the Queen chooses the Prime Minister, but by convention it is always the person who can command a majority in the House of Commons. By law the Queen chooses her own ministers, but by convention they are chosen by the Prime Minister.

Conventions are clearly not the law because, as in the above examples, they sometimes contradict the strict legal position. The courts take judicial notice of the existence of conventions and in considering them where relevant to the case decision, they may influence that decision, but the courts cannot enforce conventions because they are not law. In *Attorney-General v Jonathan Cape* [1976] QB 752 there is an interesting discussion of the various conventions relating to Cabinet secrecy, but the court could not enforce them, only the material law, breach of confidence. In *Madzimbamuto v Lardner-Burke* [1969] AC 645 the court observed that there was a convention that the UK would not legislate for (the then) Rhodesia without that colony's consent. This however did not stop the UK Parliament from legislating in breach of the convention if it chose.

There are many examples of convention. It is probably impossible to make a complete list. The office of Prime Minister and the existence of the Cabinet are conventional only. Ministers are accountable to Parliament and responsible for the actions of their civil servants. Significant parts of the Ministerial Code reflect conventional behaviour; although the Code is written down, it is not of legal status and merely reproduces and fleshes out convention. Parliament meets every year, but the Bill of Rights 1689 says only that it should meet 'frequently'.

Conventions do not just affect politicians and the Monarch, they apply also to the judges, to councillors, to all involved in the workings of the constitution. So, for example, it is by convention that judges, pursuant to the separation of powers and fair trial being seen to be done, do not involve themselves in party politics.

One of the difficulties with conventions is identifying a convention. It can be hard to differentiate between what is convention and what merely the everyday behaviour of, for example, politicians. Whereas some such as Dicey saw conventions as describing what happens, 'habit', 'practice', above, others consider conventions to *prescribe* acceptable conduct. In *The Law and the Constitution* (1959) Jennings recommended a three-stage test. First, what are the precedents; how often and how consistently has this practice been observed before? Secondly, did the actors in the precedent believe themselves to be bound by the rule, obliged to follow the precedent? Thirdly, there must be a reason for the rule. In other words, the convention must fit in with the perceived notion of what should be done and how, according to the accepted principles or values of the constitution like democracy, accountability. This test works well with some of the major conventions, for example the convention that the Royal Assent always be given. The precedents are very strong, no Monarch having refused since 1708. It seems clear that the present Queen considers herself bound by the convention, having strictly followed the precedent throughout her reign of nearly 60 years. The principal reason for the rule is that an hereditary Monarch should abide by the wishes of the democratic government; it would be unacceptable for an unelected Monarch to interfere. Whilst the convention regulating Royal Assent is a strong, well-established example on the Jennings test, it is not so clear-cut with some others, such as when a minister should resign, and this to some gives rise to doubts about conventions generally.

Conventions are continually changing. Up until 1902 a Prime Minister could come from the House of Lords or Commons. Since then they have always had to be members of the Commons. From the 1960s a convention was established that no new hereditary peerages would be created, yet in the 1980s Mrs Thatcher revived the practice. So, whilst the practice has probably lapsed again, is there a convention here and, if so, what is it; it certainly is not strongly established on the Jennings test, being questionable if not falling down on precedent. How conventional behaviour evolves may either add to or lessen stability and certainty in assessing what will or should happen next time, in essence will the convention be followed. Also, of course, new conventions may be established. For example, Tony Blair was the first Prime Minister to attend the Liaison Committee comprising the 'Chairs' of the various select committees and set up to question the incumbent Prime Minister. Gordon Brown followed Mr Blair's precedent and so, whilst there is no legal requirement for attendance, there is now the expectation of this and perhaps an ever-strengthening sense of obligation. One stance is that put in an editorial in *Public Law* in 1963, pp. 401–2:

> so let us delete those pages in constitutional text-books headed conventions, and talk about what happens and why what happened yesterday may not happen tomorrow.

Conventions are called rules but they do not look much like rules. They are often vague and imprecise. In contrast with laws, there is no body or designated

procedure for making a convention. In many cases, despite the efforts of writers like Jennings, it is hard to say whether a convention exists or not.

Even if existence and breach of convention is established in a given situation, there may still be difficulty in enforcement. In court, if a law is broken, a binding penalty can follow. But what if, for example, a minister is revealed to have lied to Parliament in clear breach of convention? Whereas the minister may choose to resign or be forced by the Prime Minister to resign, this is not necessarily the case. Whilst Foreign Secretary Lord Carrington and his ministerial team resigned as a matter of honour in 1982 following the Argentinean invasion of the Falklands, such proactive conduct is rare. If one traces through the many ministerial 'lapses in conduct' of the 1980s and 1990s, most were seen to cling to office and try to ride out the media scrutiny and political pressure, usually supported by the Prime Minster of the time. Even leaving aside the lack of independence of the Prime Minister and his motivation (from principle to pragmatism to expediency), is it satisfactory that some resign and others do not? Whilst the inherent flexibility may better suit what is more naturally a political rather than legal realm of constitutional activity, this leaves those unhappy with the outcome with no recourse, with principles, values or morals at stake. The major apologists for conventions had their solutions. Dicey states that if a convention was broken then legal problems would eventuate. His example was that if Parliament did not meet every year, the Budget could not be authorised nor could a standing army, both legal necessities. It is hard to see how this could apply to some conventions like, for instance, ministerial responsibility. Jennings believed that conventions had to be obeyed because 'the system' would break down if they were not and 'political difficulties' would arise. If the Queen refused her Assent there would be a crisis as indeed there could be if the Prime Minister tried to govern without a Commons majority. Again this can only apply to some conventions. When Mrs Thatcher refused Opposition nominations for life peerages hardly anyone noticed.

Re Canada considered the sanctions available. In extreme cases of unconventional behaviour a constitutional superior can dismiss the guilty person. In 1975 the Prime Minister of Australia was dismissed by the Governor-General for trying to govern without an approved Budget. Prime Ministers sometimes dismiss erring ministers. The real enforcement though is reflected in the quotation in the question. Conventions merely reflect 'the prevailing constitutional values or principles of the period'. This recognises that conventions change over time; indeed it may be argued that, far from being the rock of constancy, conventions are constantly changing. It would now be utterly unacceptable for the Queen actively to rule the UK or an unelected Lord to lead the government. It also means that constitutional 'rules' are not like legal rules. As Dicey suggested years ago they are more like moral rules. Politicians, judges and others refrain from breaking constitutional rules because they accept the rule in terms of right and wrong behaviour or perhaps because they fear the disapproval of their peers

or the public. As with any moral rule, there are genuine disagreements as to what the rules are and some rules are considered more important than others. There are strong (or normative) conventions such as those that surround the role of the Queen. These will seldom, if ever, be broken. In contrast there are weak (or simple) conventions, for example that judges must abstain from party politics, perhaps more honoured in the breach than the observance.

The UK system, which is based on conventions, can accommodate enormous constitutional change without the need for a revolution or new constitution. That the Queen no longer governs is just one example. The weakness is that the evolution of the constitution cannot be halted and government may be tempted by the lack of legal restraint to take more power for itself. For example, local government was considered a counterbalance to central government but since the Second World War central government has removed much of its powers. This may or may not be 'unconventional' but it is not illegal.

Question 3

The UK is becoming a more federal country.

Discuss.

Commentary

The structure of the UK is dealt with in the early chapters of most public law textbooks. Many students read this quickly, treating it as merely introductory and raising no constitutional issues. Indeed, most English-based students probably think that the undoubted fact that Scotland and Northern Ireland have different legal systems from that of England is of no great interest, because they have already been told that in their degree they are only studying English law. The structure of the UK should not, however, be taken for granted. It is a product of historical, political change over the centuries including significant recent change by devolution of powers to Northern Ireland, Scotland and Wales. The key to answering this question is an understanding of the structure of the UK, which is nothing like as uniform as is sometimes imagined, and an attempt to define the word 'federal'. Anyone can look it up in the dictionary, but, like many words of constitutional significance, its exact meaning remains elusive, with different writers defining it differently.

Answer plan

- The difference between a unitary and a federal state
- The structure of the UK

- Devolution of administration
- The primary legislative powers of the Scottish Parliament
- The delegated legislative powers of the Welsh Assembly
- The restoration of self-government to the Northern Ireland Assembly
- A written constitution for the UK? The conundrum of parliamentary sovereignty
- The definition of a federal state.

Suggested answer

It is usually assumed, without too much discussion, that the UK is a unitary state. Like many other basic ideas in the UK constitution it can be traced back to the nineteenth century writings of A. V. Dicey, where he stated in his *The Law of Constitution* that:

> Unitarianism, in short, means the concentration of the strength of the State in the hands of one visible sovereign power be that Parliament or Czar.

By contrast:

> Federalism means the distribution of the force of the State among a number of co-ordinate bodies each originating in and controlled by the constitution.

Crudely then, unitarianism means a concentration of power at the centre, whilst federalism means a distribution of power between the central authority and, say, regional governments. Some would be satisfied with this rough and ready distinction, but Dicey is saying that there is more to it than that. The sovereignty of Parliament meant that the UK had to be a unitary state because Parliament did not share its supreme legislative authority with any other person or body. Conversely, in a federal state, supreme authority would lie in a written constitutional document, which would divide power between the central authority and the regions, provinces, states or whatever they might be called. So it depends upon what one means by federalism. It is therefore necessary to consider the structure of the UK to establish whether any divisions of authority between different governmental spheres may be identified.

The structure of the UK is not as uniform as is sometimes supposed, because it is a union of several countries that were once separate. Wales was conquered by England in the middle ages, but the two countries were not formally united until an Act of Parliament in 1536. The same legal system operates in both England and Wales, but some of the administration of government was devolved to Wales as long ago as 1964 with the establishment of the Welsh Office, headed by the Secretary of State for Wales, a minister in the UK 'Whitehall' government.

Scotland was never conquered by England, but instead the two countries voluntarily united (though some would say effectively forced by a dominant England).

From 1603 they were ruled by the same king and by the Treaty of Union 1707, the two countries merged to form Great Britain. Their two separate Parliaments became (or were replaced by) one, but in the Treaty care was taken to preserve some distinctly different Scottish institutions. Scottish private law, the courts, the church and universities were all protected from change by the new Parliament of Great Britain. To this day Scottish law, the church, education and local government remain different from their English equivalents. Some of the administration of government was restored to Scotland with the establishment of a Scottish Office and a Secretary of State for Scotland in 1928.

Ireland presents a far more complicated picture. The kings of England had been trying to conquer and subdue that country since the twelfth century. For a short period from 1782 an Irish Parliament with legislative independence existed, until 1800 when there was an attempt to emulate the 1707 union of England and Scotland. The Union with Ireland Act 1800 formed the United Kingdom of Great Britain and Ireland and established one Parliament for the new country. This arrangement did not endure, because of the growth of a 'Home Rule' movement in nineteenth century Ireland which turned into demands for outright independence in the early twentieth century. The southern part of Ireland broke away in 1920 to form an independent country, The Republic of Ireland, which was formally recognised by the UK Parliament by the Ireland Act 1949.

Northern Ireland remained part of the United Kingdom and under the Government of Ireland Act 1920 had its own Parliament, Prime Minister, Cabinet and Civil Service. This Parliament, however, only had limited powers to legislate, no power to raise taxes and it was clear that the Westminster Parliament retained supremacy. The division between 'the two sects or sides' in 'the North' remained. On the one hand, the wish of the catholic/nationalist minority for reunification with the rest of Ireland and to see 'the Brits' out, and on the other the desire of the protestant/unionist majority to stay within the UK. In the late 1960s this flared up into violence in the so called 'troubles' and in 1972 'direct rule' from London replaced the Unionist-dominated 'Stormont Parliament'.

The 'British Islands' present an interesting constitutional anomaly. The Channel Islands are not part of the UK, but instead are possessions of the Monarch. These islands retain their ancient legislatures, governments, courts and legal systems. They have considerable autonomy to make their own laws, even those relating to taxation. It is generally thought that the Westminster Parliament retains legislative supremacy and could override the wishes of the islands, but, by convention, it does not do this and instead seeks the agreement of the island governments. The Isle of Man is another ancient kingdom and it, too, retains its own legislature, Tynwald, its own government and legal system. It is clear that the UK Parliament still has ultimate legislative authority, but again in practice it is not exercised.

So, it can be seen that a number of separate legislatures and governments already exist or have existed within the UK. Because of an increase in support

for nationalist political parties in Scotland and Wales, a Royal Commission on the Constitution was established in 1969, reporting in 1973. This 'Kilbrandon Report' came up with the idea of 'devolution':

> the delegation of central government powers without the relinquishment of sovereignty.

Implementation in 1978, however, met with insufficient support expressed in the referendums held in Scotland and Wales. By contrast, in 1998 significant devolution of powers across the Union (save England) was sanctioned by referendums of the electorates of Northern Ireland, Scotland and Wales.

The Scotland Act 1998 meant that, nearly 300 years on, Scotland has a Parliament once more. Elected by the voters of Scotland, this new Parliament is vested with full legislative power except for those matters specifically reserved to the Westminster Parliament. The Scots Parliament also has the power to vary the basic rate of income tax by up to 3% and to determine spending priorities. A Scottish government has been established with ministers and its own 'First Minister'. Indeed, the Scotland Act could almost be regarded as a kind of 'written constitution' for Scotland for it defines many things that are left to convention in the Westminster arrangements. It specifies how the First Minister is to be chosen and requires 'special majorities' of two-thirds, to do things like call an early election or dismiss a Scottish judge.

The new Scottish Parliament is now well established. Reviewing devolution to Scotland 10 years on, the 2009 Calman Commission declared:

> The Scottish Parliament has embedded itself in both the constitution of the United Kingdom and in the consciousness of the Scottish people. It is here to stay.

The Parliament has grown in stature and influence. Classically illustrating how convention and law work together, the 'Sewel convention' has developed: by cooperative agreement, the UK government has agreed that it will not legislate on matters devolved to Scotland, unless the Scottish Parliament consents. The UK coalition government of 2010 has promised to implement in full the Calman Commission recommendations, including replacing the variable Scottish tax regime with a new, specific Scottish income tax rate, together with new borrowing powers for the Scottish Executive.

The Scottish National Party is in government for the first time in Scotland, albeit a minority administration. It has dropped its plan to put independence for Scotland to a referendum of the Scottish electorate in 2010.

Under the Government of Wales Act 1998, Wales now has an elected Assembly and an Executive (government) which is accountable to the Assembly.

The powers of the Welsh Assembly have been extended by the Government of Wales Act 2006, extending the matters upon which the Assembly may legislate. There is also the possibility of the Welsh Assembly gaining full (primary) legislative powers,

if the people of Wales agree in a referendum, although the 2006 Act clearly states the UK Parliament retains the ultimate power to legislate for Wales.

After talks spanning the 1990s aimed at ending the violent conflict in Northern Ireland, a 'home rule' structure embracing forced cooperation through mandatory power-sharing between the two communities was finally agreed. The Northern Ireland Act 1998 restored devolved government in Northern Ireland and established an elected Assembly with legislative powers. It, however, has considerably less power than the Scottish Parliament, as it is unable to legislate on a number of matters reserved to the Westminster Parliament. Unlike the Scotland Act, the Northern Ireland Act makes clear that it does not affect the power of the UK Parliament to make laws for Northern Ireland on any subject. There is a Northern Ireland Executive, however, with ministers accountable to the Assembly. As in the Scotland and Wales Acts, there are provisions distinctly resembling a 'written constitution'. For instance, 'special majorities' are required to elect the First Minister and Deputy First Minister. This caused problems with the first elected Assembly of 1999, when the republican Sinn Fein party and the unionist parties could not agree who should be First Minister. Accordingly the Westminster Parliament resumed control under the Northern Ireland Act 2000. Devolved government was restored by another Act of the UK Parliament, the Northern Ireland (St. Andrews Agreement) Act 2006. Also, in 2006, control over policing was ceded to the Northern Ireland Assembly and now this has been implemented, supposedly the last piece in the 'jigsaw' of 'home rule'.

So has the UK become a federal state? According to Bradley and Ewings' *Constitutional and Administrative Law* a federal UK would need a written constitution to guarantee that the autonomy granted to Northern Ireland, Scotland and Wales could not legally be removed again by the Westminster Parliament. If (above) Northern Ireland, Scotland and Wales now have de facto written constitutions in the form of the Acts of Parliament establishing their localised governance, neither England or the UK do and crucially of course, even if the 'set' of written constitutions were to be completed, the legal sovereignty of the Westminster Parliament UK would still mean, arguably, that that which is given away may always, ultimately be taken back. As Munro puts it in *Studies in Constitutional Law*:

> the United Kingdom is classed as a unitary, not a federal state. The Parliament at Westminster is omnicompetent.

Not all definitions of federalism are quite so legalistic. For instance, de Smith and Brazier (*Constitutional and Administrative Law*) define it in more practical, political terms:

> The difference between a federal and non-federal constitution will often be clear-cut; sometimes it will only be one of degree; sometimes it will be positively misleading.

So in reality is the UK a federal state? Even though Northern Ireland, Wales and, particularly, Scotland have been granted increasing rights to legislate and govern their own affairs, how much independence do Wales, Northern Ireland, Scotland, the Channel Islands and the Isle of Man really have? Perhaps it comes down to political sovereignty, political reality. More than once, when judged necessary, the Whitehall government and Westminster Parliament have taken powers back from the localised authorities of Northern Ireland. From this, however, one may argue that in the absence of such political extremis as has prevailed in Northern Ireland, it would be a brave UK government and Parliament indeed that dared to take back what it had relinquished, especially when the present evidence is of a hunger for *more*, not less devolved governance.

The more powerful Westminster Parliament and government usually have the means to ensure that their wishes are respected, even without legislation. For instance, Westminster decides how great a share of UK tax revenue each part of the UK receives. However, the Scottish Parliament is the most powerful of the devolved structures and, if the people of Scotland actually voted for full independence, that might call into question how powerful the UK Parliament ultimately is; as a matter of law, it could still abolish the Scottish Parliament, but, as a political reality, this seems highly unlikely.

Further reading

Barnett, H. *Constitutional and Administrative Law*, 7th edn (Cavendish, 2008), chs. 1, 2, 4 and 5.

Bradley, A. and Ewing, K. *Constitutional and Administrative Law*, 14th edn (Longman, 2006), chs. 1, 2, 5 and 6.

Loveland, I. *Constitutional Law, Administrative Law and Human Rights*, 4th edn (OUP, 2006), chs. 1, 3 and 9.