

Public Law

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Constitutions and Constitutional Law

1. Introduction

People often say that the United Kingdom does not have a constitution. They are wrong. It may not have a *written* constitution, in the sense of a single document entitled ‘The Constitution’. Nonetheless, the UK undoubtedly has a constitution. What, though, is a constitution? And what are constitutions for?

No organisation can work effectively without ground rules setting out who is responsible for doing particular things, how they should do them, and what should happen if things go wrong. This is true of companies, schools and universities, and even of sporting clubs and debating societies. Does the head teacher have the authority to compel science teachers to teach creationism? (And, if she has no such authority, but tries to do so anyway, what can be done?) Who gets a say in appointing the head of a university? Can the chair of the debating society be removed if she tries to stifle open discussion and, if so, how? In the absence of rules providing for eventualities such as these, a number of risks arise. A dictatorial leader may be able to carry on unchecked, in the absence of an effective mechanism for bringing him into line or getting rid of him. Chaos might reign if there is no accepted way of deciding who should be in charge and what should be done if she misbehaves. And people might end up being treated in ways that are widely considered to be unacceptable if the authority of those in power is not subject to appropriate and effective limits.

Such circumstances are undesirable in most walks of life, but they are particularly undesirable when it comes to the running of a country. If someone dislikes how his company or club or university is governed, there are at least the options—albeit ones that might be practically difficult to take—of walking away or of joining another organisation. But, short of emigration, people do not have that option if the country is governed badly or corruptly. For that reason (and, as we will see, many others), it is especially important that transparent, widely accepted rules exist concerning the arrangements for governing the country and for changing how it is run—and by whom—if a particular government, or an aspect of the system of government, is felt to be deficient. How is the Prime Minister chosen? How often must elections be held? What happens if no political party wins a clear majority in an election—who decides, and according to what principles, which party should form the next government? Can the government sack the judges if the courts give Ministers a hard time? To what extent is the government allowed to intervene in people’s lives in order to promote (what it regards as) the common good?

For example, can the government put people in prison because it thinks that they are at risk of committing serious criminal offences, or torture people to extract confessions, or are people entitled not to be treated in such ways? Questions like these raise issues relating to how the country is run, the powers of those in government, and the rights of those of us who are governed. These issues are fundamental. They are the concern of public law—and they are the sort of questions with which we will engage in this book.

2. Constitutions

‘Public law’ is a broad term. Some people prefer instead to talk of ‘constitutional law’ and ‘administrative law’, the former being concerned with the basic ground rules determining the powers of the government and the fundamental rights of individuals, the latter being to do with the more detailed rules with which the government is required to comply. This distinction makes some sense in countries with written constitutions, in which ‘constitutional law’ is (at least in part) about the meaning and application of a single constitutional text. In the UK, however, the absence of a written constitution makes the dividing line between constitutional and administrative law hard to locate and somewhat artificial. There is little practical, or even academic, merit in trying to draw that line in relation to the UK, and we do not propose to do so. However, that does not change the fact that the UK has certain ground rules that would, in most countries, be found in a constitutional text. An important part of the purpose of this book is to explain what those ground rules are and to assess them critically. To embark upon this task, we must begin by explaining what constitutions are *for*.

At a very basic level, a constitution serves the same purpose as any other set of rules: it anticipates issues that may arise—the resignation of a Prime Minister, an attempt by the government to suppress freedom of speech, a row between central and local government about who is responsible for doing what—and prescribes what should happen when they do, or at least provides mechanisms by which such matters might be resolved. Constitutions also serve a number of specific functions and possess a number of particular characteristics that distinguish them from ordinary rules and laws.¹ In sections 2.1–2.4, we examine these functions and characteristics in general terms—thinking of what the constitutions of Western democratic countries are typically like—rather than with particular reference to the UK. Later in the chapter, we consider how the UK’s constitutional arrangements measure up.

2.1 Power allocation

Many legal rules are concerned with regulating the conduct of *private parties*: individuals, companies, and so on. For example, the criminal law stipulates that certain things—such as intentionally killing someone—may generally not be lawfully done, and specifies what punishment may be applied to offenders. And the law of tort says

¹ See, eg Feldman, ‘None, One or Several? Perspectives on the UK’s Constitution(s)’ [2005] CLJ 329.

that people must take reasonable care to avoid causing foreseeable harm to those liable to be affected by their actions, otherwise they may have to pay compensation. In contrast, the pre-eminent function of a constitution is to allocate *state* power—that is, the power to do things such as make laws (such as legislation), exercise governmental power (such as administer government programmes), and determine disputes between people (through the judicial process). These are things that ordinary people cannot do, either for practical reasons (if you were to say that you had made a ‘law’, everyone would ignore it) or because it would be unlawful if they did (if you were to lock someone in your cellar because they had stolen from you, you would be acting unlawfully). In contrast, the state has both the legal power (because it is given such power by the constitution) and the practical wherewithal to do such things. If the state body responsible for making law says that something is illegal and, if committed, is punishable by several years’ imprisonment, most people will sit up and take notice.

So one of the functions of constitutions is to allocate state power—that is, they determine what the government can and cannot do. Three points should be noted in this regard.

First, constitutions generally *divide powers among different institutions of government*. These divisions are usually along functional lines; thus, in most systems, there is a legislative branch that is authorised to make law, an executive branch that is empowered to implement the law, and a judicial branch that is responsible for rendering authoritative resolutions to disputes concerning the interpretation and application of the law. It is, as we will see, the function of the constitution to determine precisely where these dividing lines should be situated, how rigidly they should be enforced, and what should happen if they are crossed.

Second, along with these ‘vertical’ dividing lines (so-called for reasons that Figure 1.1 makes apparent),² constitutions generally also *divide power horizontally*—that is, they allocate power to different tiers of government. For example, in the UK, government power is shared between the European Union (EU), the UK government, the governments of the devolved nations, and local councils.

Third, a key function of most constitutions is to lay down not only the internal divisions of power within government, but also to determine *where government power stops and individual freedom begins*. There are a number of ways of thinking about this matter.

We might say that what government can do is limited by *fundamental constitutional principles* (or what are sometimes referred to as the principles of ‘the rule of law’). An example will help to illustrate this point. Assume that, on 1 February 2014, a woman has sex with a married man. On 1 March 2014, a new government is elected and immediately enacts a law that makes adultery a criminal offence *with retrospective effect*: in other words, even people, like those in our example, who engaged in adultery *before* the new law was enacted will be guilty of a criminal offence. This type of law, known as ‘retroactive criminal legislation’, is unconstitutional in many countries—that is, the legislature is not constitutionally authorised to enact such legislation. Why? Because

² Vertical dividing lines are shown in Figure 1.1 only in respect of central government. Although some such dividing lines exist in relation to other levels of government, they tend to be drawn in rather different ways, as we explain in Chapters 7 and 8, in which we deal with the European Union, devolution, and local government.

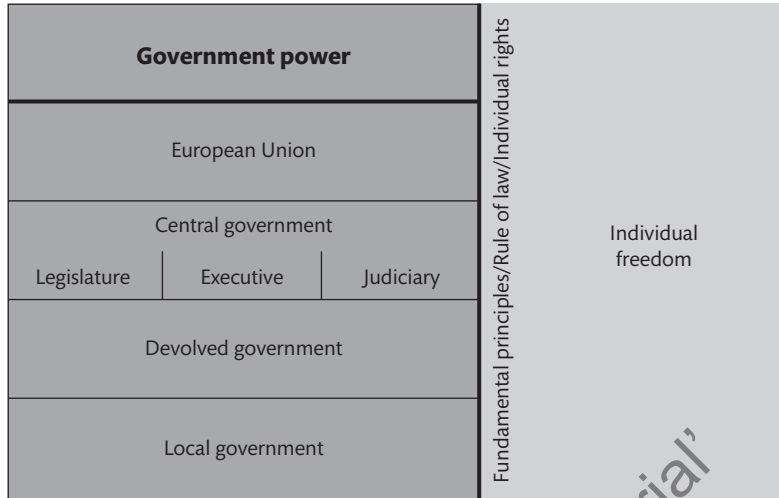


Figure 1.1 Government power and individual freedom

it offends against the fundamental principle of legal certainty, which says that people should have the opportunity to know what the law is so that they can make informed choices about whether to conform to it and thus avoid legal liability. In many countries, denying people that sort of choice is regarded as so unfair that the constitution prohibits the enactment of legislation that would have such an effect. There are many other principles that might, and in many countries do, similarly limit government power. What those principles are is presently unimportant;³ the point, for now, is simply that constitutions often restrict what the state can do by denying government the power to infringe such principles.

Alternatively, or additionally, the constitutional limits of government authority may be characterised in terms of *individuals' rights*. In many legal systems, the constitution confers fundamental human rights on people and provides that the government must not interfere with those rights. For example, the constitution might give people a right to free speech—the corollary of which will be that the government is denied constitutional authority to make laws (or do other things) criminalising (or otherwise limiting) free speech.⁴ In this sense, the fundamental rights of the individual limit the scope of government power: they determine the position of the line dividing areas in which the government has the constitutional power to act and those in which individuals are free to do as they please.

2.2 Accountability

It has been said that ‘Power tends to corrupt, and absolute power corrupts absolutely.’⁵ There is more than a grain of truth in this. If someone is given extensive power to do as

³ We discuss such principles in Chapter 2.

⁴ Of course, this depends on what is contained within the right to free speech and whether it is subject to any limits—see Chapter 19.

⁵ Acton, Letter to Bishop Mandell Creighton, 3 April 1887.

he wishes, he might exercise it wisely and selflessly; alternatively, he might—because he is incompetent, badly advised, or downright corrupt—make imprudent or self-serving decisions. An employer fearful of such conduct on the part of employees will seek to guard against it by carefully vetting people before appointing them; she will, however, almost certainly monitor their performance once they have been appointed, requiring them to account for how they are spending their time and checking to see whether their work is of an acceptable standard.

Those who are in charge of government go through a very public form of vetting procedure in the form of elections, and their jobs are not secure—they must submit themselves to re-election periodically. However, the sheer amount of power wielded by government, and the importance of the tasks with which it is entrusted, are such that it would be extremely unwise to leave politicians to their own devices for the periods of several years that normally elapse between elections. If, for example, a government were to use its armed forces to invade another country in breach of international law,⁶ or introduce a new benefits system the flawed design and implementation of which resulted in erroneous payments running to several billions of pounds,⁷ most people would consider it desirable, if not imperative, to have systems in place enabling those responsible to be identified, making them explain themselves, requiring them to put things right (where possible), enabling them to learn lessons for the future, and providing redress in the event of unlawful, as opposed to merely unwise, government action. All of these enterprises fall under the broad heading of *accountability*, and a key purpose of a constitution is to ensure that those entrusted with power are required to exercise it responsibly and called to account when they do not.

2.3 Legitimacy and consensus

The fact that a country has a system of *constitutional* government does not necessarily mean that it has a *good* system of government. A constitution might, for example, ascribe very broad powers to the government, and accord very few rights to individuals, making the state capable of lawfully doing things that most people in the country concerned would consider unacceptable. There are, of course, many such constitutions to be found around the world. Within the democratic tradition, however, the purpose of a constitution is not only to allocate power; it is also to allocate power *in a manner that is regarded as morally acceptable*.

This view of the purpose of constitutions conceals a number of important value judgements. Key amongst them, however, is that people are not objects to be governed by those lucky or brutish enough to seize the reins of power; rather, each individual is to be recognised as an autonomous, morally valuable being, whose views are worthy of respect (or at least of being heard). In practice, the principle of individual autonomy cannot, and should not, mean that everyone can do as they wish: people's desires inevitably conflict (one person may like to play very loud music at 2.00 am; her neighbour

⁶ As has been said to be the case in respect of the invasion of Iraq in 2003.

⁷ As in the case of the tax credits system: see House of Commons Public Accounts Committee, *HM Revenue and Customs: Tax Credits and Income Tax* (HC 311 2008–09).

may like a good night's sleep), and so law is used as a means of ensuring that the exercise of a given person's autonomy does not unreasonably impact on others. Such laws are legitimate not because everyone necessarily agrees with them, but because those responsible for making, implementing, and adjudicating on such laws have been authorised to do so via a democratic process.⁸

Viewed thus, one of the main purposes of a constitution is to put in place a set of arrangements that enjoys popular legitimacy, which enables the people of a given country to be governed in a way that they regard as acceptable, and which thereby renders legitimate the exercise of power by the institutions of government. There are a number of practical ways in which a constitution may be imbued with this sort of legitimacy. The most obvious and transparent way is to have a genuinely inclusive national debate about what the constitution should say and then to hold a referendum on the terms of the new constitution. A process of this nature⁹ was followed in South Africa in the 1990s as it emerged from the shadow of apartheid.

Constitutions thus derive legitimacy from the fact that they reflect some sort of consensus about how the country should be governed, and about where the line should be drawn between the powers of the government and the autonomy of the individual. Is it possible to achieve such a consensus in practice? Within most societies, there will be sharp divisions of opinion about what the government should do and how it should do it. Should the state provide health care that is funded from general taxation and free at the point of access, or should people pay for their own health insurance? Should the main purpose of the criminal justice system be deterring criminality through harsh punishment or rehabilitating offenders by helping them to rebuild their lives? Democratic politics is premised on the assumption that disagreements like these exist, and on the resulting need to make provision for choosing between competing visions of how the country should be governed. If consensus is generally so hard to achieve, how is it attained in relation to constitutions (in which context, we have noted, consensus is all-important)? Here, two crucial features of constitutions need to be considered: their *generality* and their *fundamentality*. We address each in turn.

First, constitutions tend to be drafted in general, lofty, unspecific terms, *raising* difficult questions without *answering* them. For example, a constitution may say that 'everyone has the right to life'—but does this mean that people have a right to choose when and how their life should be ended, meaning that the government is not allowed to enact laws criminalising euthanasia? If, as is often the case, constitutions themselves dodge such hard questions, they ought at least to make provision for them to be answered in some way. This, in turn, raises a very thorny issue: if the constitution is unclear and its meaning disputed, who should be responsible for deciding what it means? In particular, should courts have the last word (constitutions are legal texts, so judges are surely best placed to interpret them) or does democracy require that this should be left to politicians (it being arguable that elected representatives have

⁸ Democracy itself is a complex and contested notion. We explore its different possible meanings in Chapter 5.

⁹ Albeit involving endorsement by the South African Parliament rather than by the people generally in a referendum.

a more legitimate claim to decide upon controversial social issues)? Many constitutions fail even to address this question. Although the former position applies in the USA (courts are able to strike down unconstitutional laws), its Constitution does not explicitly address this point. It fell to the US Supreme Court, shortly after the adoption of the US Constitution at the turn of the nineteenth century, to assert a strike-down power—an assertion that proved controversial, given the absence of any express constitutional basis for it.¹⁰

Second, constitutions often secure consensus not only by avoiding difficult questions, but also by focusing on fundamental matters on which a *natural* consensus exists. Many of the matters with which constitutions deal are genuinely uncontroversial because they reflect views that are both deeply and widely held. For example, few people would dissent from the propositions that criminal liability and punishment should not be imposed upon someone unless he has received a fair trial before an independent court, or that legislators and members of the executive government should hold office only for limited periods, after which they are required to submit themselves to re-election if they wish to continue. This is not to deny that difficult questions arise even in relation to the most fundamental matters. (Is the constitutional requirement of a fair trial met if the government, citing national security concerns, refuses to let the defendant adduce potentially helpful evidence? Must the government be dissolved and an election held on the constitutionally appointed date even if large swathes of the country are ravaged by a natural disaster the week before, such that many people would be unable to exercise their right to vote?) Nevertheless, some principles—even though they may have to be applied in unforeseen circumstances that raise hard questions—are regarded as sufficiently fundamental to be the subject of genuine consensus and, as such, they find a natural home in the constitution.

2.4 Permanency—amendment and interpretation

This leads on to a final, closely related point. If constitutional principles are in this sense fundamental, then they are also, in a sense, timeless. Many of the laws that the legislature enacts remain on the statute book for only a few years, to be replaced by a new set of laws enacted by different—or even the same—legislators, convinced that they have found a better, cheaper, or more palatable solution to a given problem. However, if constitutions are repositories of fundamental principles, should they be capable of being amended with the same ease as regular law? Few, if any, people would argue that constitutions should be set in stone, that they should be incapable of amendment, such that societies should be made to live in thrall to the past, enslaved by the values of earlier, perhaps less enlightened, generations. However, most constitution-drafters across the world have taken the view that constitutions should not be easy to amend. If their purpose is to reflect genuinely fundamental principles that represent a deep-seated consensus that limits the power of the government and protects the rights of the individual, they should not be capable of being amended casually and thoughtlessly as a

¹⁰ *Marbury v Madison* 5 US 137 (1803).

knee-jerk reaction to some passing fashion or crisis. Constitutions therefore often prescribe an amendment process that demands a broad consensus, such that they cannot easily be altered. For example, to change the US Constitution, an amendment must be proposed by a two-thirds' majority of both chambers of the national legislature and then approved by three-quarters of the individual states' legislatures.¹¹

There are risks if constitutions are too easy to change, but problems are also likely to arise if amendment is too difficult. However hard constitution-drafters try to include only fundamental principles, it is inevitable that a constitution will, to some extent, reflect the views, attitudes, and circumstances prevailing in the country at the particular time when the constitution is adopted. If the constitution is very difficult to amend, then courts may have to be relied upon to reinterpret provisions that are regarded as out of date.¹² This, in turn, places immense powers in judicial hands. Take, for example, the Second Amendment to the US Constitution, which says that 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.' Does this mean that everyone is entitled to own a handgun such that gun-control legislation would be unconstitutional? The anti-gun lobby argues that it does not, pointing out that the Second Amendment was adopted at a time when the USA, lacking professional armed military and police forces, sometimes had to rely on groups of armed citizens—'militia'—to undertake law-enforcement duties. Viewed in this way, it is said that the right to bear arms conferred by the Second Amendment is contingent on a need for citizen militia—and that, since that need does not arise today, regular citizens are no longer constitutionally entitled to own handguns. However, the US Supreme Court has refused to accede to this argument. Striking down gun-control legislation in 2008, it ruled that the right to bear arms is 'unconnected with service in a militia'.¹³ Unless a future Court adopts a different view, the only solution (from the standpoint of those who regard the present position as problematic) lies in amending the Constitution—which is no easy task.

We can take two points from this discussion. First, the easier it is to amend a constitution, the less point there is in having it in the first place: if a constitution can be amended or overridden with ease, it ceases to be a constitution in any meaningful sense and becomes akin to any other law. Second, if a constitution is very hard to amend, the risk arises that, unless judges can be persuaded to reinterpret the constitution, lawmakers may find that their hands are tied by principles that were adopted centuries earlier in radically different social circumstances and which are arguably inappropriate today. Getting that balance right is one of the hardest tasks faced by those who have to draft constitutions.

¹¹ US Constitution, art 5. (There is an alternative process that is even harder to comply with, but which has never been successfully used.)

¹² Not everyone agrees that such reinterpretation is legitimate. While some courts and commentators take the view that constitutional texts are 'living instruments' to be interpreted according to contemporary circumstances, the school of thought known as 'originalism' holds that courts are simply required to ascertain and implement the original intention of those who drafted the constitution, however long ago that was. See generally Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford 2006).

¹³ *District of Columbia v Heller* 554 US 570 (2008). See also *McDonald v City of Chicago* 561 US 3025 (2010).

2.5 What about the UK?

Of course, those difficulties have never had to be faced in the UK—because it does not have a codified constitution.¹⁴ So far, we have said little about the UK, referring instead to the functions and characteristics of constitutions *generally*. It is the purpose of this book as a whole to address the specific constitutional arrangements that apply in the UK, and it would be counterproductive to attempt a detailed critique of those arrangements in an introductory chapter. It is, however, appropriate to say something at this point about how the UK's arrangements measure up against what has been said thus far.

There are a number of respects in which the UK constitution is consistent with what has been said of constitutions generally. Power is divided vertically (albeit, as we will see, in a rather incomplete fashion) between three branches of central government (legislature, executive, and judiciary), as well as horizontally between several tiers of government (European, UK, devolved nations, and local). Provision is made for holding the government to account both politically and legally. People are said to possess constitutional and human rights, and fundamental constitutional (or 'rule of law') principles are recognised. All of these arrangements enjoy a form of consensus-based legitimacy: although they have never been endorsed in a referendum or subjected to the sort of national conversation that preceded the adoption of the South African Constitution, some of the UK's arrangements have been put in place by a democratic institution in the form of the UK Parliament. Meanwhile, those that have not (such as those aspects of the constitution that pre-date the existence of genuine democracy in the UK) can be replaced by Parliament if it wishes, meaning that such arrangements enjoy a sort of indirect democratic legitimacy: the fact that they remain in place implies that they are deemed to be acceptable.

Whatever the similarities, there is though an important difference between the constitution of the UK and the constitutions of most other countries. That the UK's constitution is not 'written' is the most obvious difference—but it is not the *crucial* difference. The key point of distinction is that the UK's constitutional arrangements have *no special legal status*.¹⁵ These two things—the existence of a written constitution, on the one hand, and the attribution of special status to the constitution, on the other—often, but do not have to, go hand in hand.¹⁶ It is the latter factor—assigning special status to constitutional law—to which many of the typical characteristics of constitutions considered earlier in this chapter are attributable. When such status is given to

¹⁴ During the English Civil War, the monarchy was overthrown in 1649 and an English republic was briefly established. Under the terms of the Instrument of Government (1653)—England's first and only written constitution—executive power passed to an elected Lord Protector (Oliver Cromwell). However, with restoration of the monarchy in 1660, the Instrument of Government was discarded.

¹⁵ We note in Chapter 5 a suggestion that courts should only be willing to accept that Parliament has interfered with certain pieces of constitutionally important legislation if it specifically says that this is its intention. However, even if this suggestion were to come to be widely accepted, it would result in constitutional law enjoying a superior status to regular law only in a very limited sense.

¹⁶ For example, in 2009, the then Justice Secretary, Jack Straw, said that he was in favour of a written constitution drawing together existing constitution laws, but that he would not want it to have special legal status. See House of Commons Justice Committee, *Constitutional Reform and Renewal* (HC 923 2008–09), [61].

constitutional law, several things are likely to follow. First, the constitution will enjoy a degree of *permanence*—that is, it will be capable of amendment only if the appropriate constitutional process is fulfilled. Second, other law will exist *in the shadow of the constitution*—that is, it will be valid only if it is consistent with the constitution. Third, as a result, *fundamental constitutional values*¹⁷ will constitute an absolute brake on government—that is, it will be unauthorised to act contrary to them, even through the medium of democratically enacted legislation, and, if it tries to do so, the courts will be able to intervene.

In the UK, none of these things is true. First, because there is no legally distinct (and superior) category of constitutional law, *the law dealing with constitutional matters has the same status as all other law*. This means that any aspect of the constitution can be changed as easily as any regular law can be changed. Second, it follows that ‘regular’ law *does not exist in the shadow of ‘constitutional’ law*—because no such distinction exists. The validity of any given law therefore cannot be called into question on the ground that it is inconsistent with the constitution. Third, as a result, *fundamental constitutional values and human rights cannot exist in the UK in the sense that they exist in many legal systems*. They cannot operate as an absolute brake on government power, precisely because there is no body of constitutional law or principle that is hierarchically superior to ordinary law. The government can therefore, by causing legislation to be passed, do anything—even if that involves contradicting long-established constitutional principles or rights that people regard as fundamental.

The foregoing is—necessarily at this stage of the book—a sketch of the UK’s constitutional arrangements. All of the issues just mentioned are addressed in detail in subsequent chapters. It is, however, necessary to enter three qualifications, not because they contradict what has been said, but because it is necessary to give a rather fuller picture—not least in order to explain why, its unusual constitutional arrangements notwithstanding, the UK is a country in which fundamental principles and rights are (generally) respected.

First, the fact that important principles in the UK are not written into laws that have special, higher constitutional status *does not mean that there are no such principles*. In many countries, lawmakers respect fundamental rights and principles because they are legally impotent to do otherwise: retroactive criminal laws (which would offend legal certainty) and laws criminalising criticism of the government (which would contradict free speech) remain unenacted because the constitution denies the legislature any power to make such laws. In the UK, such rights and principles are also regarded as important: criticising the government has not been made into a criminal offence; and criminal law does not normally have retroactive effect. The difference is that in the UK lawmakers are legally *capable* of enacting legislation that conflicts with fundamental principles and rights—yet they generally *choose* not to. There are several reasons for this, including (hopefully) legislators’ own sense of morality and, in any event, fear of adverse consequences at the next election.

¹⁷ Or ‘rule of law principles’, or ‘fundamental human rights’—the terminology is, for the time being, unimportant.

Q Is it acceptable that, in the UK, basic rights and fundamental constitutional principles rely, for their ongoing existence, upon lawmakers choosing not to interfere with them, rather than being legally incapable of doing so?

Second, the fact that lawmakers can, if they are determined to do so, pass laws that conflict with fundamental constitutional principles *does not mean that such principles are without any legal significance*. When, in this chapter, we refer to ‘lawmakers’ and ‘legislation’, we mean the UK Parliament and the laws that it enacts. Acts of the UK Parliament are the highest form of law within the UK constitution and, as such, cannot be struck down by courts if they conflict with fundamental constitutional principles. However, *other lawmakers*, such as the legislatures of the devolved nations, and *other parts of the government*, such as Ministers and local authorities, do not wield the sort of power that the UK Parliament possesses. We will see that, in relation to such lawmakers and parts of the government, it often *is* possible for the courts to police their conduct—overturning things that they have done, where appropriate—in order to ensure compliance with fundamental constitutional principles. In this sense, then, such principles *do* have legal significance: they are enforceable against a broad range of legislators and parts of the government, albeit that the UK Parliament itself can, if it is determined to do so, lawfully act contrary to such principles.

Third, *the orthodox view of the British constitution presented here is not a universally accepted one*. While the view that constitutional principles do not have a special, higher legal status in the UK remains the dominant one, that view is increasingly being questioned by constitutional lawyers and judges. Indeed, three very senior judges indicated in 2005 that if laws were enacted that offended against the most fundamental constitutional principles, the courts might consider themselves capable of striking down, or refusing to apply, such laws¹⁸—a view that was echoed by the then President of the UK Supreme Court in a media interview in 2010.¹⁹ Whether such statements are anything more than empty threats is a question that is beyond the scope of this introductory chapter. However, we note that, if the UK courts were to adopt such a position, it would imply that the UK *does* have a body of constitutional principles that is superior to all other law—and would therefore entail removing the principal factor that distinguishes the UK’s constitutional arrangements from those that apply in many comparable countries.

3. Case studies

One of the difficulties involved in studying public law is that its many different aspects are interconnected: it is hard to grasp any given topic without knowing something about other parts of the subject. We therefore conclude this introductory chapter with three case studies that—without attempting the impossible task of explaining the entire

¹⁸ See the speeches of Lord Hope, Lord Steyn, and Baroness Hale in *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

¹⁹ Lord Phillips, BBC *Today* programme, 2 August 2010.

subject in a few pages—aim to provide a sense of how the different topics to be considered in this book relate to one another. The case studies are also intended to convey a flavour of the type—and importance—of the issues with which public law is concerned.

3.1 Terrorism and public law

When Al-Qaeda terrorists killed around 3,000 people by flying aircraft into prominent landmarks in the USA—most notably the World Trade Center in New York—on 11 September 2001 ('9/11'), the geopolitical consequences were immeasurable. The most obvious such consequence was the decision of the US and UK governments, only weeks after the 9/11 attacks, to invade Afghanistan, Al-Qaeda's main stronghold, and to overthrow its Taliban-led government, which was supportive of Al-Qaeda. Domestically, the US and UK governments took other drastic steps. Most notoriously, the US government established an enormously controversial detention camp at a US military base at Guantánamo Bay, Cuba, where 'enemy combatants' were held. Most were never charged with or convicted of any criminal offence, and received no recognisable form of due process. A form of torture known as 'waterboarding', involving simulated drowning, was practised there.

The UK's domestic response was different from that of the USA, but was, at least in some respects, no less draconian. The centrepiece of that response was the Anti-terrorism, Crime and Security Act 2001. The Act dealt with a wide range of matters,²⁰ but we are concerned with one particular aspect. In the wake of 9/11, the government perceived that a major threat to the security of the UK was posed by foreign Islamic extremists.²¹ Ordinarily, that perceived threat could have been dealt with in one of two ways: by instituting criminal proceedings or by deporting the suspects to their countries of origin. However, the government was unable or unwilling to adopt either of those courses of action. On the one hand, criminal proceedings (eg for conspiracy) could not be brought because, it was asserted, securing convictions would involve revealing to the court evidence that would compromise national security. On the other hand, physically removing such people from the UK by deporting them to their home countries was not legally possible. This is because the European Convention on Human Rights (ECHR)—which, as a matter of international law, is binding upon the UK²²—prohibits deportation if there is a real risk that the person concerned will be tortured or otherwise ill-treated on return to his home country. Many of the people about whom the UK government was concerned came from countries in which precisely that risk would arise. Taking the view that neither deportation nor criminal proceedings were viable, the government instead invited Parliament to pass the 2001 Act.

As Figure 1.2 shows, the effect of Pt 4 of the Act was to allow the government to imprison (notwithstanding the absence of any criminal charge or trial) suspected foreign terrorists who could not be deported. This involved depriving (an admittedly small

²⁰ For a concise, critical overview, see Tomkins, 'Legislating against Terror: The Anti-terrorism, Crime and Security Act 2001' [2002] PL 205.

²¹ We note in passing that the terrorist attacks on the London transport network on 7 July 2005 were carried out by British citizens.

²² Because the UK chose to become bound by it.

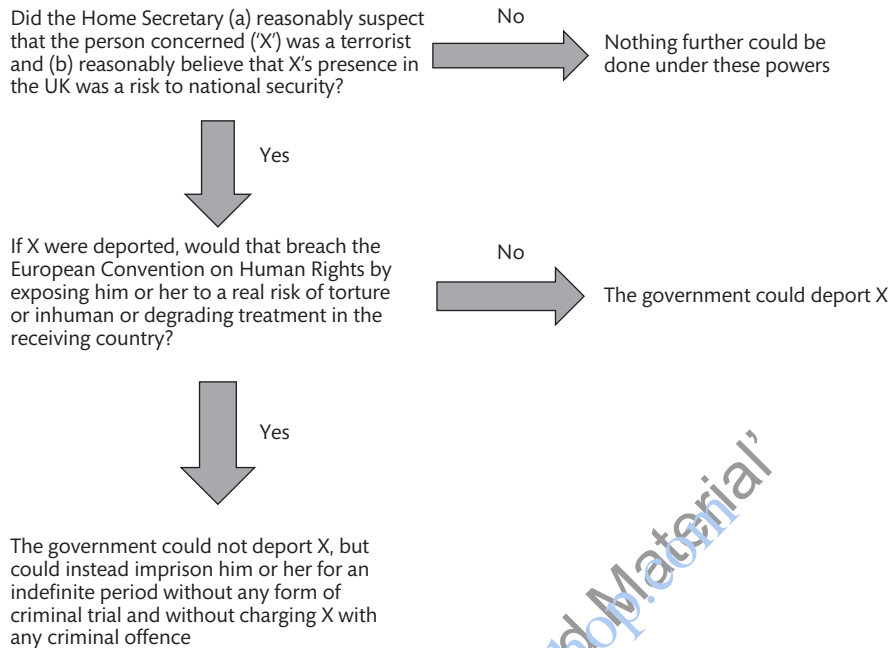


Figure 1.2 Part 4 of the Anti-terrorism, Crime and Security Act 2001

number of) people of their liberty on the say-so not of an independent court, but of the executive government, and not on the basis of criminal charges proven beyond reasonable doubt, but on the basis of suspicion—reasonable belief—that the person concerned was a threat to national security, and involved in terrorism. Although detainees could appeal to a specialist judicial tribunal (the Special Immigration Appeals Commission), they could not, for national security reasons, know the case against them or the evidence on which the decision to detain them was made; they could, however, be represented by a security-cleared lawyer (a Special Advocate).

This regime proved to be highly controversial, opinion being divided between those who supported the government's attempts to contain the perceived threat posed by the individuals concerned and those who deplored such a flagrant breach of basic rights and due process. This episode tells us a great deal about the UK constitution. In the remainder of this section, we focus on three key aspects of the story: the relative ease with which the legislation could be enacted, the involvement of the courts and the use of human rights law to challenge the legislation, and the aftermath of the legal process.

3.1.1 The enactment of the legislation

How and why was the executive branch of government able to get Parliament to confer these extraordinary powers upon it? The answer lies in three interlocking features of the UK constitution.

First, in the UK, the political party (or coalition of political parties) with a majority of seats in the *House of Commons* is asked by the Queen to form the executive government. The House of Commons is one of the two chambers of the UK Parliament, the

other being the House of Lords. The government therefore has a majority in the House of Commons and it can almost always rely on the Commons approving its proposals for new legislation: members of each political party usually vote as instructed by the party's leadership. However, the House of Commons was even more supine than usual when it came to passing the 2001 Act. In a climate of genuine fear created by the 9/11 attacks in the USA, politicians were falling over themselves to be seen as tough on terrorism. Many opposition, as well as government, Members of Parliament (MPs) were therefore willing to support the legislation, and it received almost no genuine scrutiny: a parliamentary committee later observed that 'many important elements of the [legislation] were not considered at all in the House of Commons, which had only 16 hours to deal with 126 clauses and eight Schedules'.²³

Second, it is not normally sufficient for the House of Commons to support proposed legislation: in most circumstances, the approval of the *House of Lords* is also required. The House of Lords—most of the members of which are appointed on the recommendation of the leaders of the main political parties, and none of whom is elected—looked much more critically and carefully at the legislation. Grave concerns were expressed by some of its members, but the House of Lords eventually approved the legislation. In part, this reflects the House of Lords' consciousness that if it asserts itself too vigorously, it lays itself open to the charge that it is an undemocratic institution with no right to frustrate the will of the elected House of Commons. It is also significant that, partly in recognition of its lack of democratic legitimacy, the House of Lords has limited powers: the most that it can normally do is to delay the enactment of legislation for one year. That power can be, and sometimes is, used to significant effect if a government is desperate to get legislation through quickly, and indeed the government did agree to some significant amendments in order to appease the House of Lords. Ultimately, however, the Lords did not exercise its power to delay the enactment of the legislation, no doubt accepting that it would have been inappropriate to block measures regarded by the elected branches of the constitution as imperative to national security.

So far, we have seen that the executive branch of government faces little serious opposition when it is determined to push legislation through Parliament, because of its effective control of the House of Commons and the subservient position of the House of Lords. However, a third, crucially important, point must be noted: as we have already seen, *the UK constitution imposes no absolute limits upon the authority of lawmakers*. There is no body of constitutional law or principle that has a special, higher legal status and therefore even fundamental principles—such as the liberty of the individual—can be abolished or limited provided that the government can persuade Parliament to enact legislation having such an effect. This means that the executive branch of government is in effective control of a legislature that has unlimited constitutional authority to make law. It would be a gross oversimplification to say that this means the government can do whatever it wants—but the 9/11 experience shows that, at least in some circumstances, it is in an extraordinarily powerful position.

²³ Joint Committee on Human Rights, *Anti-terrorism, Crime and Security Bill: Further Report* (HL 51 HC 420 2001–02), [2].

3.1.2 The *Belmarsh* case

What, then, of the courts? They cannot, of course, strike down an Act of Parliament, even if it impinges upon fundamental constitutional values. There are, however, two things that they *can* do when faced with law that appears to conflict with such values.

First, the courts adopt as their starting point the assumption that lawmakers do not wish to enact legislation that offends basic constitutional principles or cuts across human rights. The courts therefore generally attempt to interpret the law in a way that is consistent with such rights and principles. Of course, this approach can work—in the sense of yielding an outcome that is consistent with constitutional principles—only if it is possible to interpret the legislation in question in such a way. If lawmakers have made their intention to override basic rights sufficiently clear—as they doubtless did when, in passing the Anti-terrorism Act, they authorised the government to deprive people of their liberty without charge or trial—then this approach cannot bear fruit: the law is clear and the courts have to apply it.²⁴

However, the courts have a second string to their bow. In 1998, Parliament enacted the Human Rights Act 1998 (HRA). This Act authorises the courts, in appropriate cases, to consider whether legislation is compatible with certain human rights—and, if it is not, to issue a ‘declaration of incompatibility’: a formal statement from the court that the legislation concerned breaches human rights standards, even though it remains valid until amended. This is precisely what happened in relation to the Anti-terrorism Act. In 2004, in the *Belmarsh* case²⁵—so-called because the people detained under the Act were held in Belmarsh high-security prison—a number of detainees asked the court to rule on whether the Anti-terrorism Act breached their right to liberty, which is one of the rights protected by the HRA. Superficially, the answer to this question seems obvious: the detainees were being deprived of their liberty, and none of the circumstances in which the right to liberty can validly be restricted—such as detention following conviction and sentencing by a criminal court—applied. However, there was a complication. Under the HRA, it is possible to suspend certain rights—including the right to liberty—if, and to the extent that, a war or a public emergency threatening the life of the nation makes it necessary to do so. The court therefore had to decide whether those conditions were satisfied. If they were, it would not be possible (as the detainees wished the court to do) to declare that the Anti-terrorism Act was incompatible with the detainees’ right to liberty—because their right to liberty would have been lawfully suspended. If, however, those conditions were not met, the court would be able to issue such a declaration, because the right to liberty would remain in force. The court held that the conditions were *not* satisfied. Although most of the judges refused to overrule the government’s view that, following 9/11, the risk posed by terrorism constituted a public emergency threatening the life of the nation, the majority held that the government had not shown that it was necessary to detain foreign suspects without charge or trial. They noted that the government had not taken any steps to detain *British* suspects, and said that ‘if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners’.²⁶

²⁴ This is the orthodox view. It is not universally shared, as we explain in Chapter 5.

²⁵ *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

²⁶ *A* at [231], *per* Baroness Hale.

The right to liberty had therefore not been validly suspended, and the court declared that the relevant provisions of the Anti-terrorism Act were incompatible with it.

3.1.3 The aftermath

What use was a mere declaration which, as a matter of law, Parliament was free to ignore? This question throws into sharp relief a fundamental aspect of the UK constitution that we have so far only addressed in passing—that is, that while there are no *legal* limits that confine lawmakers' powers, there are considerable *political* limits upon the exercise of such powers. We mentioned in section 2.5 that, the absence of legal limits notwithstanding, there are several reasons explaining why—in general—UK legislators do not enact oppressive laws. One of the most important such reasons is that, even if they are tempted to do so, elected legislators will be sensitive to public opinion: there may be public protests or hostile media comment in response to oppressive laws, and MPs may fear losing their seats in the House of Commons at the next election if they vote in favour of legislation that is despised by a sufficient number of people. Thus, in practice, the political process provides a brake on the exercise of lawmaking power. Against this background, a declaration by the highest court in the land—and one accompanied by excoriating criticism by several senior judges—that UK law is inconsistent with basic human rights has a good deal of significance. It does not, for reasons that we have already mentioned, amount to the court striking down the legislation: as one of the *Belmarsh* judges put it, the impact of a declaration of incompatibility 'is political not legal'.²⁷ However, its political significance should not be underestimated: a declaration of incompatibility will be grist to the mill of those inside and outside Parliament who wish to see the legislation repealed.

The declaration issued in the *Belmarsh* case had precisely that effect: the government found itself under irresistible pressure to repeal Pt 4 of the Anti-terrorism Act. The then Home Secretary told the House of Commons that he 'accept[ed] the [court's] declaration of incompatibility' and its 'judgment that new legislative measures must apply equally to nationals as well as to non-nationals',²⁸ and later stated, when seeking Parliament's approval of fresh legislation,²⁹ that it had been 'designed to meet the [court's] criticism that the previous legislation was both disproportionate and discriminatory'.³⁰

What we see here, then, is an example of the *legal* process, which resulted in a declaration that the Anti-terrorism Act was incompatible with fundamental constitutional principles, triggering a *political* process that resulted in those principles being upheld. In turn, this phenomenon raises the ideas of *legal constitutionalism* and *political constitutionalism*. We address these matters in Chapter 2—indeed, we argue that the relationship between them is key to understanding how the modern British constitution works—but for now we need simply say that they reflect two different views of how

²⁷ A at [142]. ²⁸ HC Deb, vol 430, col 306 (26 January 2005).

²⁹ The Anti-terrorism Act was replaced by the Prevention of Terrorism Act 2005. It provides for the imposition of 'control orders' on suspected terrorists (both British and foreign), but stops short of giving the executive branch of government the authority to imprison suspected terrorists without reference to the courts.

³⁰ HC Deb, vol 431, col 151 (22 February 2005).

fundamental constitutional values should be upheld. The former puts its faith in the courts; the latter relies on the political process. Quite sensibly, few countries put all of their eggs in one basket—but, as we explain in more detail in Chapter 2, the absence in the UK of a body of constitutional law that ties the hands of lawmakers means that unusually heavy reliance has to be placed upon the safeguards afforded by the political process. Whether those safeguards are adequate is another matter—and one that we explore throughout this book.

3.1.4 Conclusions

What, then, does this episode tell us about the UK constitution? Without rehearsing all that has been said so far, three points should be emphasised. First, the episode underlines *the pivotal position occupied by the executive government*. It wields enormous power because of its capacity to get legislation enacted—a capacity that is attributable to its control of the House of Commons and the constitutionally inferior position of the House of Lords. Second, the power of the executive is augmented by the fact that the Parliament it dominates is *not subject to any absolute constitutional limits*: there being no hierarchically superior body of constitutional law in the UK, Parliament is legally free to do as it wishes. Third, however, we have seen that this does not mean that *fundamental constitutional principles* are irrelevant. The principle at stake in the *Belmarsh* case, concerning the liberty of the individual, was ultimately upheld through the combined effect of the legal and political processes. While lacking the power to strike down the offending provisions of the Anti-terrorist Act, the court's declaration that it conflicted with the right to liberty proved to be of enormous political significance, prompting the executive government to ask Parliament to repeal Pt 4 of the Act. As we embark on our study of public law, this episode therefore serves as an important reminder that it will be crucial to aim to understand the nature of, and the relationship between, the legal and political systems that exist for holding government to account.

3.2 Prisons

We can now turn to consider our second case-study: the operation and accountability of the prisons system. At first glance, it might be assumed that the prisons system has more to do with criminal law and justice than with public law, but this would be incorrect for several reasons. The prisons system comprises a large administrative apparatus that is run, managed, and financed by the government. It is the means by which key policy goals are pursued: the punishment and rehabilitation of offenders, the protection of the public, and the reduction of future reoffending. The prisons system is also a large-scale area of government. There are over 140 prisons with some 80,000 prisoners. Some 26,000 prison officers work within HM Prison Service, the government agency that manages and runs the prisons system. In 2011–12, the Ministry of Justice spent £3.6 billion on the prisons system. There is also a government Minister who is answerable to Parliament on matters concerning prisons.

To operate the prisons system, it is necessary that the government has the appropriate legal powers. These are provided by the Prison Act 1952, which gives the power to the government to confine and treat prisoners. However, while this Act provides the legal

basis for the prisons system, it is by itself an incomplete statement of the law concerning prisons. This is partly because that legislation is now over half a century old and successive governments have come into power with different ideas as to how prisons should be run and organised. It is also partly because the challenges facing prisons have changed over time. For example, the 1952 Act said nothing about testing prisoners for drugs: provision for this was introduced by subsequent Acts of Parliament. There is another reason why the 1952 Act is an incomplete statement of the law governing prisons: many of the detailed rules governing the regulation and management of prisons are set down not in 'primary legislation'—that is, an Act of Parliament—but in statutory instruments—that is, 'delegated' or 'secondary legislation'. Such legislation, which is commonplace, is enacted by the government under powers conferred by an Act of Parliament. So, in the context of prisons, the 1952 Act authorises the government to make rules concerning the regulation and management of prisons. These rules—the Prison Rules—govern matters such as prisoners' physical welfare and work, their communications with people outside prison, and the ability of prison officers to search prisoners' property. These are the detailed rules that are administered by prison officers on a daily basis.

3.2.1 Public administration and administrative law

Against this background, three general points might be made. The first is that the constitution is not inhabited only by Parliament, government Ministers, and the courts, but also by many other public bodies, called *administrative agencies*, of which HM Prison Service is but one. Such agencies should bear much of the responsibility for providing front-line services. For example, the Highways Agency is responsible for operating, maintaining, and improving the strategic road network in England; HM Revenue and Customs collects the taxes that fund public services; and the Environment Agency is charged with addressing climate change, and improving air and water quality. These are only a few examples of the many government agencies that form part of the larger governmental machine. As we shall see, such administrative agencies are accompanied by a whole host of other bodies, such as regulators, tribunals, and ombudsmen.

Why do we have such bodies? In the modern state, government exercises many different policy functions; it is responsible for a large number of areas of social life, and often the only way of managing and implementing policy is through public administration. When government acts, it is usually through the medium of some administrative agency or other. In the case of prisons, it is HM Prison Service that manages and governs prisons, and this agency is staffed by permanent officials who are appointed and not elected. Elected politicians perform very few, if any, of the basic operational tasks of government; this is the responsibility of public officials and civil servants who work in administrative agencies. While the Prime Minister is the head of the UK government, he does not personally deliver public services; the task of the Prime Minister and other government Ministers is to oversee and direct the work of government agencies rather than to perform governmental functions themselves. In the context of prisons, it is prison governors and officers who actually run and manage prisons.

Second, the development and growth of administrative agencies has gone hand in hand with the development of a particular type of law. Consider the Prison Act 1952,

for example. This is what might be labelled *administrative legislation*—that is, legislation that does not impose duties upon or confer rights on private individuals, but which lays down the legal rules as to how a particular part of government is to operate and be organised. Such legislation will typically confer legal powers and obligations on administrative agencies, which are needed so that they can perform their public functions.

Virtually all contemporary legislation is of this character and this has been the case for some time. As long ago as 1901, it was noted that ‘the substantial business of Parliament as a legislature is to keep the machinery of the state in working order’ and that the net result of Parliament’s legislative activity ‘has been the building up piecemeal of an administrative machine of great complexity, which stands in constant need of repair, renewal, reconstruction, and adaptation to new requirements.’³¹ Parliament keeps the governmental machine—the administrative state—in working order by enacting administrative legislation. In order to manage the myriad policy programmes for which government is now responsible—managing the economy, policing, taxation, social security, planning, immigration, transport, environment, climate change, and so on—it is necessary to have legislation setting out the legal powers, duties, and organisation of government agencies and bodies.

Third, while much of this legislation is detailed and complex, it is often only a *partial statement of the law*. As we have noted, the Prison Act 1952 is supplemented by delegated legislation in the form of the Prison Rules. Today, the volume of such delegated legislation far outstrips that of primary legislation. In 2012, Parliament enacted 23 Acts of Parliament, while there were over 3,300 statutory instruments made by the UK government. As a parliamentary select committee has noted, ‘secondary legislation makes up the majority of the law of this country. When implemented it affects every sphere of activity.’³² The reason for this is simple: the scale and complexity of modern government far outstrips the legislative capacity of Parliament, and so the executive itself must shoulder a large part of the lawmaking burden.

These points are not unique to the prisons context. Modern government is a very large and complex organisation. It is regulated by a particular type of law—administrative law. One purpose of administrative law, as we have seen, is to lay down the detailed rules and regulations concerning how government is to operate in the particular area concerned. However, setting out the responsibility and powers of government is only one side of the coin: the other concerns holding government to account for the exercise of its powers.

3.2.2 Government accountability

In 2006, it was publicly disclosed that over 1,000 foreign national prisoners had been released from prison by HM Prison Service without first being considered for deportation to their country of origin by the Immigration and Nationality Directorate, as should have happened. Both HM Prison Service and the Immigration and Nationality Directorate were administrative agencies within the same parent government department, the Home

³¹ Ilbert, *Legislative Methods and Forms* (Oxford 1901), pp 210, 212, and 213.

³² House of Lords Merits of Statutory Instruments Committee, *What Happened Next? A Study of Post-Implementation Reviews of Secondary Legislation* (HL 180 2008–09), [1].

Office. The release of the prisoners was a major failure within government to coordinate the activities of these two agencies and to protect the public. As a consequence, the then Home Secretary, Charles Clarke, was dismissed from the government by the Prime Minister.

The following year, there was an important reorganisation within government—a ‘machinery of government’ change, which is a structural reorganisation of the responsibilities of different government agencies. To enable the Home Office to focus on its core mission of protecting the public, it was stripped of responsibility for prisons by transferring HM Prison Service to a new government department, the Ministry of Justice. This was a major change in the organisation of executive government, and the decision had various ramifications as regards the funding of government and the relationship between the executive and the judiciary. This decision was, however, simply announced by the then Prime Minister, Tony Blair, to Parliament not by way of an oral statement to the House of Commons, but through a written ministerial statement. MPs in the House of Commons regretted that there had been no opportunity for detailed parliamentary scrutiny of this significant change to the machinery of government.

These two episodes each raise a number of questions. Why was the Home Secretary dismissed when the failure had been that of the two agencies within his government department to coordinate their activities? Who is responsible for the overall organisation of the executive government? What role is there for Parliament to scrutinise the government, whether in relation to specific issues such as the failure to consider deporting foreign prisoners or big-picture questions such as changes in the organisation of central government? All of these questions are, at root, about accountability. In any area of government activity, it is imperative that there should be systems for ensuring that power is being exercised responsibly, that decisions are being taken conscientiously and fairly, and that corrective action can be taken if these standards are fallen short of. Taking the prisons system as an example, how should, and how can, those responsible for its operation be held to account?

First, given the importance of the functions performed by the prisons system, it is important that Parliament is able to *scrutinise* policy and administration in this area of government. This can be done by asking questions of relevant Ministers in Parliament or by holding parliamentary debates on policy issues pertaining to the prisons system. Moreover, in the UK, each government department is overseen by a parliamentary select committee made up of MPs from the House of Commons. Since the prisons system falls within the remit of the Ministry of Justice, it is overseen by the House of Commons Justice Committee, which conducts inquiries and publishes reports into the prisons system.

Second, the prisons system is funded by government—meaning that it is paid for by taxpayers. An essential attribute of a good government is that it does not waste public money, but spends it wisely. Given the cost of the prisons system, it is important that there are effective mechanisms for overseeing how money is spent within it and whether such money could be spent more efficiently. The public needs to know that government is delivering value for money—and so it is necessary to have *financial accountability*. This raises issues that are peculiar to government. If a given company is inefficient, customers will flock to better, cheaper providers, but if people do not

think that government is providing value for money, they cannot go elsewhere. In the absence of the sort of discipline normally supplied by market economics, distinctive audit bodies are needed to oversee how government spends public money. In the UK, the principal audit body is the National Audit Office; it reviews government agencies to assess whether or not they are delivering value for money and then reports its findings to Parliament.

Third, the prisons system makes decisions that adversely affect the lives and rights of individuals. It is therefore important that such individuals whose rights and interests have been affected are able to *challenge* such decisions. Public law provides a variety of different mechanisms by which individuals can seek to challenge administrative decisions. One such mechanism is for the individual concerned to take the government agency concerned to a court in order to test the lawfulness of its decision. This court process is known as ‘judicial review’ and it is the principal mechanism by which individuals can challenge the legality of public decisions.

Indeed, legal challenges against prison decisions are a major area of judicial review. The courts have recognised that ‘under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication.’³³ Consequently, if a decision by the prison authorities infringes the rights of a prisoner, then the prisoner is able to take the prison authorities to court in order to protect her rights. For example, in the case of *Daly*, a prisoner challenged a Prison Service policy whereby prisoners could be excluded when their cells were being searched, even if this meant that their legally privileged correspondence—for example letters to or from their lawyer—would be examined in their absence. Allowing the challenge, the court recognised that, under the common law, there is a fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice.³⁴ The Prison Service policy, it was held, unlawfully interfered with this right: while it would be justifiable to exclude some prisoners (eg those prone to violence) during cell searches, it was not necessary to have a blanket rule excluding *all* prisoners. In this way, judicial review corrected an administrative policy that disproportionately interfered with prisoners’ rights.

While important, judicial review is not the only mechanism that individuals are able to access to challenge decisions by government bodies. There are a range of non-court processes that, together, comprise the administrative justice system. We can illustrate here two such mechanisms that operate in the general context of prisons and criminal justice.

First, there are mechanisms through which to investigate complaints that individuals make against government bodies. Such complaints may be investigated by an ‘ombudsman’ or another specialist complaint-handling body. For example, the Prisons and Probation Ombudsman investigates complaints from prisoners about their treatment by prisons. An effective complaint mechanism for prisoners is an important safeguard against the abuse of power by prison officers. Furthermore, if prisoners were to have

³³ *Raymond v Honey* [1983] 1 AC 1, 10.

³⁴ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

no such mechanism of addressing their legitimate grievances, then the already difficult challenges in managing prisons effectively would be rendered more problematic.³⁵

Second, there are other mechanisms—tribunals—that enable individuals who have received a negative decision from a government body to appeal against that decision. For example, the UK government has a long-established policy of providing money (compensation) to people who have been physically or mentally injured because they were the blameless victim of a violent crime. This policy is administered by a government body, the Criminal Injuries Compensation Authority. What if someone thinks that her application has been wrongly refused by the authority? In such cases, the person concerned can appeal against the authority's decision to an independent judicial tribunal.³⁶ It adjudicates upon such disputes and is able to substitute its own decision for that of the Criminal Injuries Compensation Authority.³⁷

3.2.3 Conclusions

What does all of this tell us about government accountability? It tells us that just as government is complex and diverse, so the arrangements for holding government to account are varied. Any given department or agency needs to be scrutinised by reference to a range of standards—including political, administrative, legal, and financial—and a network of accountability institutions capable of undertaking those forms of scrutiny is therefore required. This serves as a useful reminder, as we embark upon our study of public law, that government is a large and complex enterprise, and that the different accountability processes that oversee government operations do not operate in isolation from each other, but together comprise a wide-ranging system for holding government to account. Whether or not those institutions, individually or collectively, provide wholly adequate scrutiny is an important question—but one that we can tackle only in subsequent chapters, as we look at each area in detail.

3.3 Post-1997 constitutional reforms

The Labour governments of 1997–2010 implemented a far-reaching set of constitutional reforms.³⁸ They include 'devolution' (ie the creation of new governments and legislatures in Northern Ireland, Scotland, and Wales); the introduction of new voting arrangements for elections to the devolved legislatures; the creation of a city-wide system of government in, and an elected mayor for, London; significant changes to local government; the enactment of freedom of information and human rights legislation; the removal from the House of Lords of most members who inherited their seats; the near-abolition of the ancient office of Lord Chancellor; the abolition of the judicial functions of the House of Lords; the creation of the UK Supreme Court; and the creation of a statutory body responsible for dealing with MPs' pay and allowances. By any measure, this is a significant set of changes to the country's constitutional arrangements.

³⁵ We examine ombudsmen in detail in Chapter 15.

³⁶ Known as the 'First-tier Tribunal (Criminal Injuries Compensation)'.
³⁷ We examine tribunals in detail in Chapter 16.

³⁸ See generally Bogdanor, 'Our New Constitution' (2004) 120 LQR 242; Bogdanor, *The New British Constitution* (Oxford 2009).

Moreover, the government that took office in 2010 did not by any means consider its predecessor's constitutional reforms to be the last word: it promised a range of significant changes, including to the House of Lords, the voting system, the electoral cycle, and the powers of devolved institutions, albeit that some of those policies have since foundered on the rocks of coalition realpolitik. It is not our purpose here to address the individual or collective significance of these changes, actual or proposed (although many are examined in detail in subsequent chapters); rather, our present concern is with the way in which constitutional reform is undertaken in the UK.³⁹

In most countries, constitutional reform is a big deal. Changing constitutions is usually hard: a wide consensus is normally needed in order to secure compliance with the constitutionally prescribed amendment process. Politicians (who are usually the initiative-takers in such matters) therefore do not casually seek the amendment of constitutions. The possibility is only mooted if the matter is of grave importance, and, even then, only if it is felt that the proposed change would withstand the intense scrutiny that it would be likely to attract and stand a good chance of commanding the necessary support. We noted in section 2.4 that there are good reasons for making constitutions difficult to amend: they are supposed to represent a brake on government power, a guarantee of individuals' rights, and a repository of fundamental principles that should not be allowed to yield just because a government can muster a bare majority in the legislature. Unusually, of course, the UK constitution is capable of being amended in precisely such circumstances: constitutional law having no higher legal status, everything is up for grabs provided that the government can persuade Parliament to enact the necessary legislation. This simple fact of constitutional life in the UK has profound implications for the process of constitutional reform. It means the difficulties, formality, and momentousness that usually attend attempts to change and reform constitutions elsewhere are normally absent in the UK. It is often relatively easy for the government to reform the UK constitution; perhaps too easy. One risk is that a government might adopt a casual approach to constitutional reform, which produces piecemeal or ill-thought-through reforms. These are not mere possibilities. The post-1997 constitutional reforms were practically influenced in a number of ways—several of which we highlight in sections 3.3.1–3.3.3—by the relative ease with which they could be accomplished.

3.3.1 Piecemeal reform

First, human nature is such that, generally speaking, the harder something is to do, the less keen people will be to do it. If you live a long walk from the nearest water source, you will take the biggest container you can carry and fill it up before returning home, rather than making several daily trips to fill 500ml bottles. Likewise, if constitutions are hard to amend, governments (or anyone else putting forward proposals) will be inclined to think long and hard before suggesting changes: repeatedly going through a protracted constitutional amendment process is likely to be unattractive. Attaching a degree of difficulty to constitutional amendment is therefore a disincentive to the

³⁹ See generally Baker, 'Our Unwritten Constitution' (2010) 167 *Proceedings of the British Academy* 91; Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *LQR* 48.

presentation of ill-thought-through, disjointed, piecemeal proposals. Since the converse is also true, it is unsurprising that the post-1997 constitutional changes cannot be said to amount to a *programme* of reform in the sense of being a coherent package. The myriad Acts of Parliament that effected the reforms were introduced over a period of several years; the first reforms were thus drafted and implemented many years before not only the shape of later reforms was known, but before such reforms had even been contemplated. As a result, difficult questions were simply brushed aside or postponed (perhaps indefinitely). Reviewing the general approach to constitutional reform in the UK, a parliamentary committee noted in 2009 that “unfinished business” has been the enduring motif of many of the strands of constitutional renewal.⁴⁰

As we will see in Chapter 7, shortly after it was elected in 1997, the Blair government introduced devolution in Scotland, Wales, and Northern Ireland.⁴¹ It did so, however, without any clearly worked-out plan in relation to England, which, in the absence of devolution, continues to be governed and legislated for by the UK executive and Parliament. One of the strangest results of this is the so-called West Lothian question,⁴² which, briefly, asks why it is legitimate for MPs representing the devolved nations to be allowed to vote on laws affecting only England, now that English MPs cannot vote on laws affecting only the devolved nations (because the latter are enacted by devolved legislatures in which English MPs do not sit). Lord Irvine, the Cabinet Minister responsible for driving through many of the post-1997 reforms, famously said: ‘Now that we have devolution up and running, I think the best thing to do about the West Lothian question is to stop asking it.’⁴³ The coalition government that took office in 2010 disagreed, and charged a commission with the task of identifying possible solutions. What the solution might be is a question for a later chapter; for now, the point is simply that the government that introduced devolution clearly felt no obligation to present a cohesive package of proposals that addressed the West Lothian question.

The sometimes piecemeal nature of constitutional reform in the UK is a phenomenon that is not confined to the post-1997 changes. We will see in Chapter 5 that the democratic credentials of the House of Commons are a fairly recent innovation: it is less than 100 years since all adult men and women were given the right to vote in elections to the Commons. As the democratisation of the Commons proceeded, the view developed, unsurprisingly, that it was anomalous to have a wholly unelected House of Lords. In 1909–11, in circumstances that we relate later in the book, legislation was enacted to curtail the powers of the Lords, eliminating its involvement in financial legislation and giving it a power only to delay, rather than block, other legislation. The preamble to the Parliament Act 1911—the Act that imposed those limits on the House of Lords—explicitly stated that it was a temporary measure, pending the replacement of the House of Lords with a Second Chamber constituted on a popular instead of

⁴⁰ House of Commons Justice Committee, *Constitutional Reform and Renewal* (HC 923 2008–09), [1].

⁴¹ The position in Northern Ireland was complicated by its unusual political circumstances and the need to broker a deal that would facilitate an end to terrorist violence; as such, it was something of a special case. See further Chapter 7.

⁴² Named after Tam Dalyell, who, when MP for West Lothian, drew public attention to this issue.

⁴³ HL Deb, 25 June 1999, col 1201.

hereditary basis'. A century later, that has not yet happened. However, one of the first elements of the post-1997 reforms to be implemented was the removal from the House of Lords of 'hereditary peers'—that is, those who had inherited the right to sit in the upper chamber.⁴⁴ This change was introduced before a Royal Commission established by the government had made its recommendations about full reform of the House of Lords, and was intended to be a stopgap measure pending such reform—reform which has not (yet) been completed.

3.3.2 Constitutional reform on the hoof

A second feature of constitutional reform in the UK is that it can be undertaken in a relatively informal way that is not attended by the sort of consultation and forethought that is likely to be exhibited in systems in which reform is a more difficult business. As the House of Lords Constitution Committee has noted: 'The constitution is the foundation upon which law and government are built. Yet the United Kingdom has no agreed process for constitutional change.'⁴⁵ There is no clearer example of the extemporaneous and impromptu nature of constitutional reform in the UK than the aptly titled Constitutional Reform Act 2005.

On 12 June 2003, a government press release was issued stating that the office of Lord Chancellor (who was head of the judiciary, a senior government Minister, and speaker⁴⁶ of the House of Lords) was to be abolished; a new post (and a new government department to go along with it) of Secretary of State for Constitutional Affairs was to be created; a new way of appointing judges in England and Wales was to be established, and the Appellate Committee of the House of Lords, which had served as the court of final appeal for most matters in the UK, was to be abolished and replaced with a Supreme Court.⁴⁷ These announcements concerned constitutional changes of momentous significance, going to the heart of the legal system, the principle of judicial independence, and the relationship between the courts and the government. Yet they were announced without any consultation: even the senior judiciary, including those directly affected by the proposals, knew nothing of them until the day on which they were announced.

And all of this happened in the middle of a Cabinet reshuffle in which the then Lord Chancellor, Lord Irvine, left the government, giving rise to strong suspicions that these major changes were as much about personality as about constitutional reform. One commentator has said that 'it is difficult to resist the conclusion that the reforms were the product of policy making on the hoof', not least because they directly contradicted things that the government had said shortly before the announcements were made.⁴⁸ Thus the new Supreme Court has been characterised as one 'born of secret ministerial cabal and a press release.'⁴⁹

⁴⁴ House of Lords Act 1999.

⁴⁵ House of Lords Constitution Committee, *The Process of Constitutional Change* (HL 177 2010–11), [5].

⁴⁶ ie the presiding officer.

⁴⁷ Le Sueur, 'The Conception of the UK's New Supreme Court', in Le Sueur (ed), *Building the UK's New Supreme Court* (Oxford 2004), p 4.

⁴⁸ Le Sueur, p 4. ⁴⁹ Le Sueur, p 5.

Succour is given to this view by a paper submitted by Lord Irvine—who had maintained a dignified silence since leaving the government in 2003—to the House of Lords Constitution Committee in November 2009.⁵⁰ In it, he says that he only learned of the proposals a week before they were announced, and that, upon doing so, he asked the then Prime Minister, Tony Blair

how a decision of this magnitude could be made without prior consultation with me, with . . . my Permanent Secretary [ie the most senior civil servant in his department], within government, with the judiciary, with the authorities of the House of Lords which would lose its Speaker and with [Buckingham] Palace.

Blair, according to Irvine, ‘appeared mystified and said that these machinery of government changes always had to be carried into effect in a way that precluded discussion because of the risk of leaks’.

Taken at face value, this is an extraordinary view that treats fundamental changes to the architecture of the constitution as akin to such commonplace phenomena as the rebranding of government departments and the transfer of responsibilities between them. So poorly thought-through were the government’s initial proposals that those involved appeared ignorant of the fact that the 700-year-old office of Lord Chancellor—to which there were over 5,000 statutory references—could be abolished only through the enactment of complex primary legislation. In fact, as we relate in Chapter 6, the office of Lord Chancellor still remains today, albeit that the Constitutional Reform Act 2005 drastically reshaped it. The purpose of this discussion is not to consider the substantive merits of the reforms introduced by that Act. There were, as we will see later in the book, strong—perhaps even compelling—arguments for many or all of the changes that it ushered in. But even those who support the *effects* of the Act have expressed concern about the *process* (or rather lack of process) that preceded it. Indeed, Blair himself concedes that the process was ‘bumpy’ and ‘messy’, and that questions of detail were only addressed at the ‘last minute’—but, he maintains, ‘the outcome was right’, the implication being that this is what really matters.⁵¹

Nonetheless, it is highly likely that the process of constitutional reform will remain ad hoc and haphazard. In 2011, the House of Lords Constitution Committee criticised the absence of any clearly-defined (and especially rigorous) process for effecting constitutional changes, arguing that such a process should be established.⁵² In response, the government made clear its unwillingness to become locked into a particular procedure for constitutional reform: ‘It is intrinsic in the United Kingdom’s constitutional arrangements that we do not have special procedures for dealing with constitutional reform.’⁵³

3.3.3 Constitutional reform as an ongoing process

The third and (for the purposes of this discussion) final implication of the ease with which the UK constitution can be changed is that it allows constitutional reform to

⁵⁰ House of Lords Constitution Committee, *The Cabinet Office and the Centre of Government* (HL 30 2009–10), Ev 81–4.

⁵¹ House of Lords Constitution Committee, HL 30, Ev 86–7.

⁵² House of Lords Constitution Committee, *The Process of Constitutional Change* (HL 177 2010–11).

⁵³ Deputy Prime Minister, *The Government Response to the House of Lords Constitution Committee Report ‘The Process of Constitutional Change’* (Cm 8181 2011), [27].

be, in effect, a rolling process that lacks finality. This has important implications. Some might be regarded as advantages. Treating the constitution as a perpetual ‘work in progress’ makes it possible to keep it under review, and to react quickly when it is felt that things are not working well or that established arrangements need to be updated. For example, the systems of devolution introduced in Scotland and Wales have been reviewed and significantly altered since their introduction in 1999. Meanwhile, notwithstanding the extensive nature of the post-1997 reforms, the Brown government, in 2009—responding, it seems, to public disaffection with politics and government following a scandal concerning MPs’ expenses—mooted the possibility of a new swathe of changes, perhaps even including a written constitution.⁵⁴ As noted, the change of government wrought by the 2010 election did not put an end to constitutional reform.

All of this, it might be said, illustrates the greatest strength of the UK’s constitutional arrangements: their immense flexibility—that is, their capacity to adapt to changing needs and circumstances. It is, of course, hard to argue against the proposition that it should be possible, without undue difficulty, to improve constitutional arrangements that prove to be defective or outmoded. Though it is important, in thinking about this matter, to make sure that two conceptually distinct matters are not confused with one another. The fact that *some issues, such as detailed, technical arrangements*, should be capable of being amended with relative ease does not mean that *all constitutional arrangements, including those pertaining to fundamental principles*, should be amenable to equally casual amendment. After all, one of the main points of enshrining such principles in constitutional law is to ensure that they cannot be discarded whenever they prove inconvenient to the government of the day. This distinction is one that is, or at least can be, well served by legal systems with hard-to-amend written constitutions: matters of the latter type can be reflected in the constitutional text itself; while matters of detail can be dealt with in regular law, which (subject to the limits imposed by the constitution) can be amended with relative ease as circumstances change and experience develops. The difficulty is that, in the UK, this distinction does not exist in formal terms: while it might be possible to say that arrangement ‘X’ is fundamental and should not be interfered with readily, but that matter ‘Y’ is a mere point of detail that should be more readily capable of amendment, no such distinction is reflected in *law*. The result is that even constitutional arrangements concerning indisputably fundamental principles remain exposed to the chill winds of party politics. A good illustration of this is the way in which the HRA has been kicked around by the main parties as if it were a political football.

The effect of the HRA is considered in outline in Chapter 2 and in detail in Chapter 18. For now, it suffices to say that it gives effect in UK law to certain fundamental human rights, such as the right not to be tortured, the right to a fair trial, and the right to free speech. In many countries, such rights enjoy constitutional status—that is, they are recognised by the written constitutional text and thus limit the powers of the executive government and the legislature. Within such a system, constitutional rights can be removed or otherwise interfered with only by amending the constitution itself—which,

⁵⁴ Prime Minister’s Office, *Building Britain’s Future* (Cm 7654 2009), ch 1.

as we know, is likely to be difficult. The UK, lacking such a higher body of constitutional law, could not adopt that sort of approach to the legal protection of human rights and so the HRA was enacted. Being a regular law (there being no other type), the Act is capable of being amended or even repealed, just like any other such law. This fact has not evaded the notice of politicians from both of the main parties. One of the great ironies of the Act is that the government that caused it to be enacted subsequently complained bitterly when judges applied it (quite properly) in ways that stopped Ministers from doing things that they wanted to do. We saw in section 3.1.3 that, to its credit, the Blair government accepted the historic ruling in the *Belmarsh* case, but the courts' judgments in human rights cases have not always been so meekly received by government.

For instance, in the wake of the terrorist attacks on the London transport network in July 2005, Tony Blair said that he would consider seeking the amendment of the HRA if it were to turn out that it would stop the government from effectively fighting the so-called 'war on terror'.⁵⁵ And in 2009, responding, it would seem, to the view expressed strongly in certain sections of the media that the HRA gives undue weight to the interests of criminals and asylum seekers at the expense of the so-called law-abiding majority, the Brown government proposed replacing or supplementing the Act with a 'Bill of Rights and Responsibilities'.⁵⁶ Meanwhile, the Conservative Party undertook, in its 2010 election manifesto, to repeal the HRA, replacing it with a 'British Bill of Rights'.⁵⁷ The coalition government subsequently appointed a commission to consider the possibility of such legislation, but the commission was so riven by disagreement that it largely failed to make meaningful proposals.⁵⁸ Constrained by coalition to retain the HRA for now, Conservative politicians have instead been reduced to venting their fury at decisions taken under it and the ECHR to which it gives effect. A decision concerning prisoners' right to vote made the Prime Minister, David Cameron, feel 'physically sick',⁵⁹ while another, which appeared to obstruct the deportation of a terror suspect, made his 'blood boil'.⁶⁰ Other senior Ministers, including the Home Secretary, have openly advocated the possibility of repealing the HRA and perhaps even withdrawing from the ECHR.⁶¹

This is not the place in which to consider the merits or otherwise either of the HRA itself or of possible reforms in this area (matters that are addressed in Chapter 18); rather, our point is simply that the fact that the HRA—the closest thing that the UK has to a constitutional Bill of Rights—is perceived as fair game by politicians tells us something important about the UK constitution. It tells us that, ultimately, very little is sacrosanct and that, in the UK, at least to some extent, the normal principles of constitutionalism are turned on their head. In most countries, the constitution is hierarchically at the top of the system of law and government: everything else has to fit around it. In the UK, the constitution, such as it is, is malleable. If existing constitutional arrangements prove to be an obstacle to what the government regards as the

⁵⁵ Downing Street press conference, 5 August 2005.

⁵⁶ Ministry of Justice, *Rights and Responsibilities: Developing Our Constitutional Framework* (Cm 7577 2009). The proposal was tentative and the relationship of the proposed Bill of Rights and Responsibilities with the HRA was unclear.

⁵⁷ Conservative Party, *An Invitation to Join the Government of Britain* (London 2010), p 79.

⁵⁸ See further Chapter 18, section 4.2. ⁵⁹ HC Deb, vol 517, col 921 (3 November 2010).

⁶⁰ 'Deported Qatada faces terror charge', *London Evening Standard*, 7 July 2013.

⁶¹ HC Deb, vol 566, col 24 (8 July 2013) (Theresa May MP).

efficient processing of asylum seekers, the effective prosecution of the ‘war on terror’, or the avoidance of critical comment in the tabloid press, then they can, if the political will can be mustered, be changed or done away with.

Q Is this a good or a bad thing? Might it be argued that the British approach is democratic, in the sense that politicians are able to do whatever the people want? What might be the disadvantages of such a system? In particular, why might the British approach serve the interests of minorities—especially of unpopular minorities, such as asylum seekers and suspected terrorists—poorly?

4. Conclusions

This chapter has looked at the sort of things that constitutions generally do and (in a necessarily introductory fashion) at whether, and if so how, the UK’s constitution does those things. We have seen that the main factor that distinguishes the UK’s arrangements is that none of them is laid down in a body of law that has a status higher than regular law. The net results of this idiosyncrasy of the UK system are twofold. First, those laws that deal with constitutional matters can, in principle, be amended as easily as any other law. This means that the UK constitution does not legally restrict the powers of government to the same extent as constitutions that do have a higher legal status and which can be changed only by going through a hard-to-comply-with amendment process. Second, it follows that, if arbitrary government is to be avoided in the UK, greater faith must be placed in the capacity of the political process to guard against the misuse of public power and the enactment of oppressive legislation. Public opinion is a powerful deterrent against such conduct, although we will see later in the book that the constitution supplies a wealth of more sophisticated mechanisms that seek to guard against, and correct, abuses of power by those in authority.

However, this brief portrait of the UK constitution is incomplete. Although it is sometimes said that, for the reasons set out in the last paragraph, the UK has a ‘political constitution’ rather than a ‘legal constitution’, it is clear that today there is far more constitutional law in the UK than ever before—thanks in large part to the post-1997 reforms. As a result, people have a wider array of legal rights that they can enforce against the government: rights of access to information under freedom-of-information legislation; and fundamental civil and political rights—to free speech, to respect for private life, to freedom of religion, and so on—under human rights law. In this sense, the UK now has a ‘legal constitution’ to a greater extent than it ever has done.

This does not detract from the fact that the UK’s constitution is still a political one in the sense that it is politics and not law that is the ultimate safeguard against abuse of power. On any traditional analysis, if the political process were to fail to deter such a step from being taken, Parliament could take away any of the legal rights that people currently enjoy and the courts ultimately would be powerless to do anything about it.⁶²

⁶² We noted that this traditional analysis is increasingly contested. We assess criticisms of it in Chapter 5.

However, what must not be overlooked is the way in which the legal and the political dimensions of the constitution relate to one another. Once legal arrangements concerning fundamental constitutional matters are put in place—for example, entitling the people of Scotland, Wales, and Northern Ireland to run their own affairs, or giving people enforceable human rights—it may not be easy for politicians, at a stroke of the legislative pen, to get rid of or override them, even though, in theory, they have the power to do so. (Think back to the *Belmarsh* case: the court lacked power to strike down the offending law, but the government felt obliged to ask Parliament to repeal it once the judges had said that it infringed human rights standards.) Once the genie is out of the bottle, it is hard to get it back in. In this way, the legal aspects of the constitution, while not technically immutable, may well shape the political landscape—and those aspects of the constitution that are highly valued by people generally may become so ingrained as to become, in practice, constitutional limits as real as any laid down in a written constitution.

The UK constitution is idiosyncratic and messy; it has strengths and weaknesses; certainly, no one sitting down with a blank sheet of paper would design such a constitution. However, constitutions that are designed from scratch are not perfect either: they have their own difficulties and complications. We should keep this in mind as we embark, in the following chapters, upon a detailed exploration of the UK's constitutional arrangements and as we try to work out whether they are merely eccentric or genuinely inadequate.

Further reading

BOGDANOR, *The New British Constitution* (Oxford 2009)

FELDMAN, 'None, One or Several? Perspectives on the UK's Constitution(s)' [2005] CLJ 329

KING, *The British Constitution* (Oxford 2007)

LOUGHLIN, *The British Constitution: A Very Short Introduction* (Oxford 2013)