UK Constitutional Law (LAW1091)

For a majority of states in the world, a codified constitution lays down the rules that allocate and control governmental power (these shall hereinafter be referred to as the “Rules”) in a single document. The same cannot be said for the United Kingdom (UK), where such Rules are diverse in nature, sometimes uncertain in content and all of them easy to change. These are the features that will be carefully examined hereunder, after which it will not be difficult to come to the conclusion that the UK does indeed have a constitution, albeit an atypical one.

Without a codified constitution, the Rules of the UK originate not from a single document but rather a variety of sources. Statutes, or Acts of Parliament, form a substantial bulk of these Rules. For example, the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006 (which supersedes the original version passed in 1998) are statutes that declares the powers the relevant institutions (e.g. the Scottish Parliament) hold. “Constitutional” conventions also play a role in the Rules. While not legally binding, political actors are often compelled to follow these conventions (proposed by Sir Ivor Jennings, this is one of the criteria that political practices have to meet in order to be considered as conventions)[footnoteRef:1]. An example of convention is the Salisbury doctrine: “House of Lords should not reject at second or third reading Government Bills brought from the House of Commons for which the Government has a mandate from the nation.”[footnoteRef:2] Other sources include the common law[footnoteRef:3], the royal prerogative[footnoteRef:4] and European Union law. [1: I Jennings, The Law and the Constitution (5th edn, University of London Press 1959) 136] [2: Glenn Dymond and Hugo Deadman, “The Salisbury Doctrine”, House of Lords Library Note LLN 2006/006, 30 June 2006] [3: See M v Home Office [1994] 1 AC 377.] [4: See R v Earl of Northumberland (1568) 1 Plowden 310 [75 ER 472].]

However, it is untrue to assume that in a state with a codified constitution, the origin of the Rules is singular. Within the EU, member states are bound by EU law in a similar manner to the UK (before its withdrawal from the EU), even though most of them have a codified constitution[footnoteRef:5]. Across the Atlantic, in the House of Representatives of the United States, it is only by convention that the speaker is an incumbent member of the House.[footnoteRef:6] When the Rules of such states are derived not only from the codified constitutions themselves, it can hardly be contended that the Rules of the UK having a diversity of sources negates the existence of a constitution. [5: Note that the Kingdom of Sweden does not have a codified constitution.] [6: U.S. Const. art. I, § 2, cl. 5]

Which exactly do the Rules of the UK include? Due to their diverse nature, it is unclear as to which statutes are “constitutionally” significant. Laws LJ attempts to differentiate “constitutional” statutes from “ordinary” statutes by introducing the follow principle— “a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.”[footnoteRef:7] In practice, relatively mundane statutes can potentially be considered “constitutionally” significant, as many statutes involve “rights”, hence this principle is not quite effective in practice. [7: Thoburn v Sunderland City Council [2002] EWHC 195 (Admin); [2003] Q.B. 151 [25]]

Legal scholar F. F. Ridley argued that “in the absence of legal criteria that distinguish constitutional law from other laws, the definition become so broad that it defines nothing at all.” However, this is not necessarily true.

Consider the common debate over the definition of a sandwich. Is a burger a sandwich? Is a hotdog an open sandwich? It makes no difference where one stands on this matter, it cannot be denied that a sandwich does exist, because there exists a standard sandwich with two slices of white bread with ham and cheese in between. This is the precise situation of UK’s Rules. Knowing that the Scotland Act 1998 is definitively “constitutional”, it follows that a UK constitution must exist.

Due to a lack of entrenchment, “constitutionally” significant statutes are not in practice superior to “constitutionally” insignificant ones— both can be changed easily in the Parliament. This stems from the doctrine of parliamentary sovereignty, meaning “Parliament may make or un-make any law whatsoever, and nobody has the power to override or to set aside Parliament's legislation.”[footnoteRef:8] F. F. Ridley, in arguing that the UK has no constitution, laid down four characteristics that a set of Rules must contain in order for it to qualify as a constitution, one of which is that it “involves an authority outside and above the order it establishes”; another is its superiority to other laws “because (i) it originates in an authority higher than the legislature which makes ordinary law and (ii) the authority of the legislature derives from it and is thus bound by it.” By “authority”, Ridley refers to the people, who ultimately grants the constitution legitimacy under a democratic system.[footnoteRef:9] [8: A Tomkins, Public Law (Oxford University Press 2003) 17] [9: FF Ridley, 'There is No Constitution: A Dangerous Case of the Emperor's Clothes' [1988] 41(3) Parliamentary Affairs 342-343]

It may hence be inferred that without entrenchment, the constitution is not guarded against abuse of power from the government. However, the people who can grant legitimacy to the set of Rules are the same people who can grant the Parliament legitimacy. While the UK political order does not operate under the principle of popular sovereignty, the Parliament is not an unchanging institution that exists in a vacuum, it is formed by political actors that the people believe can represent their interests. The fact that parliamentary sovereignty allows for “constitutionally” significant statutes to be easily changed does not necessarily mean that these Rules do not reflect the interests of the people. In fact, the lack of entrenchment means that these Rules can be more adaptable to changing sentiments within society. Therefore, it does not logically follow that the UK does not have a constitution simply because UK’s Rules are more susceptible to change.

Prefacing the four characteristics, Ridley contends that “without these characteristics, it is impossible to distinguish a constitution form a description of the system of government in a way that is analytically precise.”[footnoteRef:10] However, as shown above, determining the existence of an uncodified constitution by counting the number of characteristics it shares with codified constitutions can be problematic. Certainly, if a set of Rules fulfils the criteria of being homogenous in nature, certain in content and difficult to change, or contains all four characteristics proposed by Ridley, a constitution must exist. The reverse is not necessarily true. [10: ibid]

Perhaps it may be more conducive to test whether a set of Rules is a constitution by observing whether they perform the functions of a constitution. Academic A. Tomkins suggests that “constitutions perform three main tasks: they provide for the creation of the institutions of the

State; they regulate the relations between those institutions and one another; and they regulate the relations between those institutions and the people (citizens) they govern." By definition, the Rules perform the first two tasks. A piece of "constitutionally" significant statute performs the last task: Human Rights Act 1998 protects UK citizens from potential abuse of power of the government by giving effect to the European Convention on Human Rights. Directly applicable in UK courts, it has been relied on by appellants in A v Secretary of State for the Home Department [2004] UKHL 56 to challenge the Home Secretary's power to detain them in the absence of any criminal charge. Functionally, the UK does indeed have a constitution.

In conclusion, though the rules that allocate and control governmental power in the United Kingdom do not fully resemble codified constitutions of other states, they ultimately perform the function that other codified constitutions do. Therefore, the United Kingdom does have a constitution— an exceptionally unique one.

Bibliography

Cases

1. M v Home Office [1994] 1 AC 377.
2. R v Earl of Northumberland (1568) 1 Plowden 310 [75 ER 472]
3. Thoburn v Sunderland City Council [2002] EWHC 195 (Admin); [2003] Q.B. 151 [25]
4. Statutes
5. European Convention of Human Rights
6. Human Rights Act 1998
7. Government of Wales Act 2006
8. Northern Ireland Act 1998
9. Scotland Act 1998
10. U.S. Const. art. I, § 2, cl. 5

Journals

1. A Tomkins, Public Law (Oxford University Press 2003) 17
2. FF Ridley, 'There is No Constitution: A Dangerous Case of the Emperor's Clothes' [1988] 41(3) Parliamentary Affairs 342-343
3. I Jennings, The Law and the Constitution (5th edn, University of London Press 1959) 136

Others

1. Glenn Dymond and Hugo Deadman, "The Salisbury Doctrine", House of Lords Library Note LLN 2006/006, 30 June 2006