

# Topic 1: The Constitution

## What is a Constitution?

A **constitution** is a set of rules and agreements that defines the way in which a state or a society is run. As such, every single country has a constitution, including dictatorships like North Korea.

A constitution sets out where **sovereignty** lies in a country and how it might be divided between the different parts of a country, its government, and its people. It places limits on the power of rulers and often has sections to guarantee the rights of individuals. Today, these rights are often known as **civil liberties**.

A constitution, however, does not define exactly what should happen in any given society. It is designed to act as a framework upon which laws and more complex structures can be built.

## What are the functions of a Constitution?

Constitutions vary greatly from country to country, however, there are several functions that are common to all constitutions:

- They provide legitimacy to those in power. It gives a legal status to the actions of **government**.
- They protect freedom. They restrain the behaviour of those in office and they set out the rights and responsibilities of government.

The first ten **amendments** of the **U.S Constitution (1787)** are known as **U.S Bill of Rights**. These ten amendments set out basic rights for the citizens of the United States and include provisions such as:

**1<sup>st</sup> Amendment** - Guarantees Freedom of Speech in the United States

**2<sup>nd</sup> Amendment** – Allows for a ‘well-regulated militia’ and says ‘the right of the people to keep and bear Arms, shall not be infringed’

Gun owners in the United States still use the **Second Amendment** against any attempts to limit gun ownership.

- They encourage stability in government. They introduce order and predictability into the way government runs.
- They set out the basic goals and values of a state.
- They distinguish the spheres of influence of different parts of government. This is particularly the case in a **Federal System** where there can be multiple Constitutions within a single country.

The United States and Germany have Federal Constitutions. The USA, for example, is made up of fifty states. These states have their own governments and their own rights. The Federal (national) government does not have control over state governments. For example, the Federal Government is responsible for Foreign Policy but States have different laws regarding crime. For example, as of 2017 thirty-one states allow the Death Penalty and eighteen have outlawed it. In addition, marijuana has been legalised in some states, but not in others.

The UK and France, however, have **unitary systems**. This means that one central government holds power. In Britain, power is held by the **Westminster Parliament** and the **Executive** that comes from within it. Any power that is held elsewhere is done via a process of **devolution**.

- They can create a fresh start for governments, particularly after periods of revolution or upheaval.

**Constitution of the Russian Federation** (1992) – A new Constitution for Russia after the collapse of Communism and the Soviet Union.

**The Basic Law of West Germany** (1949) – A new democratic Constitution for Germany after World War Two and the fall of the Third Reich (Hitler's Germany).

**The Constitution of Ireland** (1937) – The first Constitution of an independent Ireland that was not linked to a Treaty with the British Government. This Constitution aimed to symbolise a new start for the governance of Ireland.

### What are the main types of Constitution?

There are two main types of Constitution:

- A **codified Constitution**
- An **uncodified constitution**

In a codified Constitution, all its major parts are enclosed in a single document. These Constitutions are normally a **revolutionary constitution**; they are created as a new start for the governance of a country. The best example of a codified constitution is the Constitution of the United States of America (1787) which was created after the declaration of America's independence from Great Britain.

#### Examples of Codified Constitutions

United States of America – 1787

Australia – 1900

Germany – 1949

France – 1958

South Sudan – 2011 (The World's newest independent country)

As of 2018, 158 countries in the world have codified Constitutions.

France has had five different codified Constitutions since its first, in 1793. However, if the constitutions from the period of the French Revolution were included, the number would actually be fifteen!

In an uncodified constitution, the elements that make it up are not enclosed in a single document. An uncodified constitution draws on a wide range of sources. These constitutions are normally **evolutionary constitutions**, they have evolved organically over a long period. The best example of an uncodified constitution is that of the UK.

### Examples of Uncodified Constitutions

Israel  
New Zealand  
United Kingdom  
Saudi Arabia

As of 2018, only four countries in the world have uncodified constitutions.

It is sometimes suggested that Canada also has an uncodified constitution. However, despite relying on a number of conventions, for example in who is appointed Prime Minister, the Constitution of Canada very clearly outlines the different powers of branches of the National and Provincial Governments.

Despite having an uncodified constitution, the Basic Law of Saudi Arabia declares that the Qu'ran (Muslim Holy Book) is the Constitution of Saudi Arabia!

One of the countries with an uncodified constitution, New Zealand, was formerly part of the British Empire. They are still members of the **Commonwealth**. They share many constitutional characteristics with the UK. For example, New Zealand retain Queen Elizabeth II as **Head of State**.

### Be Careful!

Sometimes uncodified constitutions are called **unwritten constitutions** whilst codified constitutions are called **written constitutions**. This can sometimes be confusing because a large amount of uncodified constitutions are, in fact, written down.

## How are Codified Constitutions made up?

The way a Codified Constitution is made up varies greatly from country to country. However, many constitutions follow a similar structure:

1. **Preamble** – An opening statement of principle and aims.

The **Preamble** of the U.S Constitution states:

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

2. **Organisational Section** – Articles explaining the way government institutions will be organised and what their duties will be.
3. **Bill of Rights** – A statement of the fundamental rights of individuals.
4. **Constitutional Amendments** – The changes that have been made to the original constitution

## What are the different characteristics of Constitutions?

Alongside being codified and uncodified, there are other characteristics that differ between constitutions.

### Flexible v Entrenched

A **flexible constitution** is one that can be changed easily. These types of constitutions are rare. They can be altered simply by passing laws. This means that there is no **fundamental law** and constitutional laws are no different from normal laws and there is no formal process for changing the constitution.

### UK Real Examples of Statutes that provide constitutional change

In 2011 the Coalition Government passed the Fixed Term Parliaments Act (2011). This means that a General Election in the UK must be held every five years unless:

- A motion for an early **General Election** is agreed by at least two-thirds of the **House of Commons**.
- If a **motion of no confidence** is passed in the government and no alternative government is confirmed within 14 days.

This constitutional change was passed in the same way as any other law, showing how flexible the UK constitution is.

In 1999 the **House of Lords Act** was passed. This removed all but 92 **Hereditary Peers** from the House of Lords.

Some critics have argued that the Fixed Term Parliament Act was only part of the **Coalition Agreement** because the Liberal Democrats were worried about the Conservatives holding a second election to win a majority when they became more popular! Commentators have also pointed out that previously when the Prime Minister called a General Election there would be an immediate month long General Election campaign. However, since the Fixed a Term Parliament Act, everyone knows a when the election will be so campaigning for the 2015 General Election appeared to start months beforehand, making it more like the American electoral cycle.

On the 12<sup>th</sup> June 2014 Lord Grocott introduced the Fixed-Term Parliament Act 2011 (Repeal Bill) which would reverse the original act. However, this bill was not passed.

### UK Hypothetical Example of Statutes that provide constitutional change

In the UK the constitution can be changed simply by passing a law in Parliament. For example, since the Parliament Act of 1949 the **House of Lords** can only delay legislation for one year. Therefore, if the House of Commons passed a law stating that the House of Lords should be abolished, it would do so if it was agreed upon for two years in a row. A major constitutional change, removing a House of Parliament, could be made by a simple law!

An **entrenched constitution** is one that is difficult to change. A good example can be found in comparing the UK and US constitutions.

### Amending the UK and US Constitution

The US constitution is entrenched. It contains many **entrenched provisions**. This means it is extremely difficult to change and amend. Since it was ratified in 1787 it has only been amended 27 times and two of these changes have been made about the same thing – prohibition! In the United States, **constitutional sovereignty** exists. This means that all power in the US flows from the US Constitution. The Framers (those who wrote the constitution) made it deliberately difficult to change. This was largely because they had just broken free of the tyrannical rule of Britain under George III and did not want the Government to be able to amend the constitution and take too much power for themselves. The US Constitution can be amended in two ways:

1. A **supermajority** (2/3s) of both houses of the US Congress must vote to change the Constitution. It then must be ratified (agreed to) by 3/4s of all the state legislatures (parliaments)
2. A constitutional convention is called by 2/3s of state legislatures who can make as many amendments as they like. These amendments must then be approved by 3/4s of the states.

In all of US History 27 amendments have been agreed, six have failed to be ratified and thousands have proposed but not agreed. In fact, as of 2017 only 0.23% of proposed constitutional amendments had ever been agreed.

By contrast, the UK constitution is remarkably easy to amend. In the UK, there is **parliamentary sovereignty**. This means that Parliament holds the ultimate power in the political system. Therefore, if a **simple majority** Parliament agree a new law to change the constitution then it will be changed. The Human Rights Act, Devolution and the Fixed Term Parliaments Act are all recent examples of this.

### Gun Crime and the Constitution in the UK and US

A good example of the problems of entrenchment exists through looking at gun crime in the USA and the UK.

In the USA the Second Amendment to the US Constitution was passed in 1791. The second amendments 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.”*

This amendment has been regularly interpreted to mean that all US citizens have a right to own and carry firearms. However, the US have suffered several major gun massacres in recent years. For example:

2018 – 17 people were killed at a High School in Parkland, Florida.

2016 – 50 people killed at a Gay Nightclub in Orlando, Florida

2012 – 27 people, mostly children, killed at Sand Hook Elementary School in Newtown, Connecticut.

However, despite these gun massacres the right to own and bear arms remains because the US Constitution is so difficult to change and some politicians believe the Second Amendment should be protected.

In contrast, the UK suffered one of its worst gun massacres in March 1996 when a gunman called Thomas Hamilton killed 16 children and one teacher at Dunblane Primary School. However, the British Parliament was quickly able to debate Gun Control and in 1997 a new law called the Firearms Amendment Act was passed. This banned all handguns except for those specifically used for hunting. Because of Parliamentary Sovereignty, Britain could quickly amend its constitution to deal with changing circumstances.

There are several changes to the U.S Constitution that have failed to become law, because some the states have not agreed to them. For example:

**The Equal Rights Amendment** – This Act was designed to guarantee equal rights for women. It passed Congress in 1972 but failed to become part of the Constitution because only 35 out of 38 required states ever ratified it.

Equally, some states have still not ratified, or have taken a long time to ratify, some of the most famous constitutional amendments. For example, Mississippi did not ratify the 13<sup>th</sup> Amendment (1865), abolishing slavery, until 1995!

One of the Founding Fathers of the US Constitution was critical of how difficult it would be to amend. Thomas Jefferson believed that the Constitution should be rewritten during every generation to avoid ‘the dead ruling the living’. He could predict the danger that the US Constitution would become outdated and yet the American People may well be stuck with its clauses.

One key difference between codified and uncodified constitutions is that in uncodified constitutions **Judicial Review** is more limited. In the UK, there is no mechanism to find a law **unconstitutional**. In contrast, as of 2017, the U.S Supreme Court in its history has ruled that over 180 Acts of Congress have been unconstitutional. It has also ruled that 968 state laws have been unconstitutional. This does mean that in the US the Supreme Court can have a say on who the Constitution is interpreted.

Changes to a Constitution are known as constitutional amendments. Codified Constitutions have varying numbers of amendments. This shows that different Constitutions have varying degrees of entrenchment.

### Number of Amendments to Codified Constitutions

France – 18 since 1958  
 Germany – 50 since 1949  
 Ireland – 33 since 1937  
 Japan – 0 since 1947  
 United States – 27 since 1787

The last Amendment to the US Constitution was in 1992.

Two of the Amendments to the US Constitution have been about the same thing:

18<sup>th</sup> Amendment (1919) – Prohibited the manufacture and sale of Alcohol  
 21<sup>st</sup> Amendment (1933) – Repealed the 18<sup>th</sup> Amendment!

Any revision to the Irish Constitution has to be confirmed by a national referendum. This takes place after any constitutional law passes both Houses of Parliament.

This occurred after the **Good Friday Agreement** between Ireland and the UK which saw Ireland repeal sections 2 and 3 of its Constitution, which claimed Northern Ireland should be part of a united Ireland. It was passed after 94% of Irish citizens voted for it.

It has been increasingly accepted that some constitutional amendments are so important that they should be decided by the population in a **referendum**. This has notably happened three times in Britain since 2010:

**The AV Referendum (2011)** – A referendum on whether Britain should change the voting system from the First Past the Post system to the Alternative Vote system. The result was 67.9% in favour of retaining First Past The Post.

**The Scottish Independence Referendum (2014)** – A referendum for the people of Scotland on whether Scotland should leave the United Kingdom and become an independent country. The result was 55% in favour of remaining in the United Kingdom.

**The European Union Referendum (2016)** – A referendum on whether Britain should leave the European Union. The result was that 51.8% of people voted in favour of **Brexit**.

## Unitary v Federal

A unitary system is one in which power is normally concentrated in the **central government**.

Unitary Constitutions tend to exist in smaller countries, or countries that have a very **homogenous population**. The UK officially has a unitary constitution.

The UK has traditionally been considered to be a unitary state. However, the **devolution** of Scotland, Wales and Northern Ireland in 1998 has challenged this notion. Yet, the powers given to the **Scottish Government**, **Northern Ireland Executive** and **Welsh Government** are all devolved powers. The **Westminster Government** therefore retains sovereignty, as an Act of Parliament could reverse the Acts of devolution. The UK Parliament therefore retains **legal sovereignty** over the **devolved assemblies**.

Federal Constitutions have **shared sovereignty**. The federal (national or central) government will control some issues while the states or provinces will be in charge of others. Of these two different types of government, neither has legal supremacy over the other.

## Presidential v Parliamentary

An example of federalism in action exists in the USA. It is up to different states to decide, for example, if they use Capital Punishment. Currently only 31 states allow the death penalty. Another example is that 8 states have fully legalised Cannabis.

### Examples of Federal Systems

USA (fifty states)  
Australia (six states and three territories)  
Russia (eighty-nine constituent parts)

A **presidential system** is one in which the branches of government are clearly separated. This means there are more **Checks and Balances**. This is known as the **separation of powers**. The key branches of government are the **Legislative Branch** (legislature), **Executive Branch** (Executive) and **Judicial Branch** (Judiciary).

### U.S Separation of Powers

An example of a presidential system with a clear separation of powers is the USA.

President Trump (Head of the Executive Branch) in the USA is not a member of the **U.S Congress** (legislature). He cannot even enter the Chamber of Congress without the permission of the Speaker of the House.

Equally, President Trump cannot fire a Judge, even though he nominates them for the **U.S Senate** to ratify.

The branches of government in the USA are very clearly defined.

In a **Parliamentary System** there is a **fusion of powers**. A person can be an active member of different branches of government. The UK has a parliamentary system of government.

Theresa May is the **Prime Minister** and therefore the Head of the Executive. However, she is also MP for Maidenhead. She is therefore a member of the legislature. As leader of the largest party in the House of Commons, she was also invited to become Prime Minister. As Prime Minister she also appoints judges on behalf of the Queen, even though now, by convention, this is done largely on the advice of a commission. The UK Prime Minister can therefore has a role in all three branches of government.

**What are the other key characteristics of Constitutions?**

Other characteristics of Constitutions include the fact that some are a **monarchical system** whilst others are **republics**.

**Example Monarchical Governments**

- UK (**Constitutional Monarchy**)
- Canada (Constitutional Monarchy)
- New Zealand (Constitutional Monarchy)
- Australia (Constitutional Monarchy)
- Saudi Arabia (**Absolute Monarchy**)
- Qatar (Absolute Monarchy)

**Example Republics**

- USA (Federal Republic)
- Ireland (Unitary Republic)
- Germany (Federal Republic)

Australia held a referendum in 1999 on whether or not it should become a Republic. The motion was rejected by 55% to 45% and Queen Elizabeth II remained Head of State.

The most prominent group campaigning for **Republicanism** in England is simply called ‘Republic’.

The movement have campaigned against things such as:

1. The Royal Family being given an allowance.
2. The fact that any MP or Lord must make an Oath of Allegiance to the Queen before taking their seat.
3. Public Money and cost to the economy being spent on Royal Weddings, such as that between Prince William and Catherine Middleton. It is estimated that the wedding of Prince William and the Duchess of Cambridge cost £5 Billion!

Among the most famous Republican MPs is Dennis Skinner. He famously mumbles his **Oath of Allegiance** to the Queen and refuses to attend the Queen’s Speech in the House of Lords during the **State Opening of Parliament**.

Some constitutions emphasis **parliamentary sovereignty** whilst others place emphasis in the sovereignty of the people. This latter idea is sometimes known as **popular sovereignty**. In recent years proponents of this idea have supported the increasing use of referendums.

A summary of the characteristics of the UK constitution

**Uncodified** - o single document exists which brings together the rules concerning how the country is run

**Unitary** - Parliament in Westminster is sovereign. Any powers possessed by the Northern Irish, Welsh and Scottish governments are devolved from Westminster.

**Flexible** - The UK constitution can be easily amended and change via a single act of Parliament

**Parliamentary System** – The UK has a Fusion of Powers, whereby branches of government are intermingled. The Executive is formed from the legislature.