How did the British Constitution evolve before 1900?

Codified Constitutions are often written to mark a new period in a nation's history. They usually occur after a political revolution. It is evident that Britain has not had a major permanent revolution. When the monarchy was removed and Britain became a Republic in 1649 this was reversed with the Restoration of the Monarchy in 1660.

Despite having no major permanent revolution, there have been a number of major changes that have been made to the UK constitution. However, these changes have been evolutionary, rather than revolutionary. The British constitution has grown organically – with blocks building upon each other rather than a deliberate and wide-sweeping change that would be bought by a codified constitution.

> A.H Hanson and Malcolm Walles wrote of the British habit of placing 'new wine in old bottles' to describe the development of the British constitution.

Some of the most important building blocks in the constitution are:

- **Magna Carta (1215)** – The Magna Carta is sometimes called the foundation of the UK constitution. It was the first time that the power of the monarch had been fundamentally limited. For example, the notion of Habeas Corpus was established and limits were placed on the King's powers over taxation.
- **The Bill of Rights (1689)** – The Bill of Rights, which took place after the Glorious Revolution, limited the King's power and ensured the powers of Parliament. For example, the notion of parliamentary privilege was established by the Bill of Rights.
- **The Act of Settlement (1701)** – The Act of Settlement placed clear rules on who could take the throne. It barred Roman Catholics, and those married to Roman Catholics, from becoming monarch. Arguably, it also paved the way for the Acts of Union.
- **Acts of Union (1707)** – The Acts of Union merged the Kingdoms of England and Scotland to form the United Kingdom.

What about Ireland and Wales?

The Act of Union (1800) – Saw Ireland join the UK to become the United Kingdom of Great Britain and Ireland. In 1922 Ireland was partitioned. Northern Ireland remained part of the United Kingdom whilst Ireland became independent.

Wales – In 1542 the Laws in Wales Act essentially incorporated Wales into the English legal system. As such, it did not have its own Act of Union in the 18th or 19th century.

Be Careful!

Do not over-revise this section.

Edexcel have said that there will not be a stand-alone question on the British Constitution before 1900. Instead, this information might be incorporated into a wider question.

What are the key principles of the UK constitution?

There are four key principles that underpin the UK constitution. These are the things that have traditionally been seen as essential to the way the UK constitution works:

1. **Parliamentary Sovereignty** - In the UK, Parliament is the supreme legal authority. Parliament can create or reverse any law and this cannot be challenged by any other body. Parliament cannot bind its successors and each individual Parliament is Sovereign. However, as Parliament is chosen by the people, it may be argued that Britain really has Popular Sovereignty.

> "The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament thus defined [i.e., as the 'King in Parliament'] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament"
> A.V Dicey, *Introduction to the Study of the Law of the Constitution*, 1915

A.V Dicey famously summed this up as Parliament can "make, or unmake any law" whilst Sir William Blackstone said Parliament "can, in short, do everything that is not naturally impossible"

The doctrine of Parliamentary Sovereignty in the UK has three key facets:

Law on Any Matter – There can be no limit on Parliament's right to make any law it pleases. This includes retrospective laws. For example, the War Crimes Act (1991) gave the British Courts the right to try individuals who became British Citizens after 1990 for crimes they had committed in World War Two. Only one person has ever been convicted under this act.

Legislative Supremacy – The idea that Parliament enjoys supremacy over other branches of government over issues concerning law. This is not the case in the United States, where laws can be found to be unconstitutional.

Equality of legislation – All laws in the UK have the same status. They are all passed in the same way. There is no difference between constitutional law and normal laws passed in Parliament.

2. **The Rule of Law** – The rule of law is an essential part of the British constitution.

> A.V Dicey famously called Parliamentary Sovereignty and the Rule of Law the 'twin pillars of the constitution'.

In particular the Rule of Law means that:

- Everyone is equal under the law

Under the Rule of Law everyone, no matter their power or status, is subject to the same laws.

> In 2006/2007, British Prime Minister, Tony Blair, was twice interviewed by Police investigating the 'cash for honours' controversy. This epitomises the idea that no-one is 'above the law'.

> In December 2018 Peterborough MP, Fiona Onasanya, was convicted of perverting the course of justice having lied to police about whether or not she was driving a car that was caught speeding. She was sentenced to three months in Prison and in May 2019 was removed as an MP under the Recall of MPs Act (2015).

- The law is administered independently of government

In Britain the judiciary is supposed to be independent and neutral of government. In recent years, this has been increasingly seen to be the case following the Constitutional Reform Act (2005), which, amongst other things, ensures that senior judges are chosen by an independent Judicial Appointments Commission.

- Citizens have rights and government power is not unlimited

In 2004 a major Human Rights case was heard by the Law Lords (then the highest court in the UK). The case was called A v. Home Secretary and concerned terror suspects who had been imprisoned indefinitely at Belmarsh Prison under anti-terrorism legislation. The Law Lords found that the UK government had acted contrary to the European Convention of Human Rights (and the Human Rights Act, 1998) by holding terror suspected indefinitely without trial. This is an example of where the power of the government over citizens is limited.

The importance of the Rule of law was popularised by A.V Dicey who said that there were three key elements to the rule of law. These were that everyone is equal under the law and that the law is administered independently of government. Along with these was that citizens' rights were guaranteed by natural law and that no 'Bill of Rights' was required to protect them.

3. **The Fusion of Powers** – In the British constitution there is what Walter Baghehot called, a 'Fusion of Powers'. In the UK the government is appointed from the Legislature, meaning it is therefore directly accountable to it. Walter Baghehot argued that the fusion of powers was a key reason for the success of the British political system.

Walter Bagehot said "the efficient secret of the English constitution may be described as the close union, the almost complete fusion, of the executive and legislative powers"

In the UK the Executive and Legislative branches are intertwined. The Executive is normally formed from the largest party in the House of Commons, with the Prime Minister coming from the largest party. This means that the Prime Minister is de facto head of the legislature and is able to use this fact to push through their political agenda. Some people have been critical of this arrangement, with Lord Hailsham, for example, commenting that Britain has an elective dictatorship. However, the Fusion of Powers does help to ensure strong and decisive government in the UK, especially when compared to the gridlock often seen in the US system, with its separation of powers and checks and balances.

4. **Constitutional Monarchy** – The UK also possesses a Constitutional Monarchy. The Monarch remains a part of Parliament although their position is now symbolic and ceremonial. A law still cannot be passed unless it receives Royal Assent. The executive powers of the Queen are now delegated to the Prime Minister and government whom act upon this so-called Royal Prerogative.

In the U.K the Monarch has two key roles:

Head of State – The chief public representative of the country who performs a variety of constitutional roles

Head of Nation – The less formal role of providing a focus for national identity and giving a sense of stability and continuity.

In the Monarch's constitutional role, there are four key duties that they have:

To use Royal Prerogative Powers – The Monarch retains many theoretical powers. However, the vast majority are no longer exercised and are instead exercised by the government. However, some prerogative powers still exercised by the monarch are:

Honorary Appointments – The Queen may grant a life or hereditary peerage to anyone. All honours are given under the authority of the Crown, so the awarding of knighthoods, peerages, OBEs and MBEs are all within the Queen's prerogative powers.

Proroguing and summoning Parliament – The Queen is responsible for the prorogation and summoning of Parliament. However, it is expected that the Queen 'acts of the advice of the government' regarding the prorogation and summoning of a new Parliament.

> In August 2019 the Queen, acting on the advice of the Prime Minister, prorogued Parliament until the 14th October 2019. This was extremely controversial because such as long prorogation was unprecedented and it would limit Parliament's ability to scrutinise the Government's Brexit Bill. The decision was challenged in court by campaigner Gina Miller and the case (Miller v. Prime Minister) eventually reached the Supreme Court. The Supreme Court ruled that the prorogation was unlawful as it failed to respect the principles parliamentary sovereignty and representative democracy. The prorogation was therefore ruled by the Supreme Court to be null and void.

Appointing and Dismissing a Prime Minister – The Monarch is responsible for appointing a new Prime Minister and dismissing one who lost an election. By convention the Monarch chooses the leader of any majority Party in Parliament.

> **A* Zone**
>
> The person the Prime Minister officially appoints to become Prime Minister is the person who can 'best command the confidence of the House of Commons'.

> The Queen is expected to appoint as Prime Minister the person who can 'best command the confidence of the House of Commons'. In 1963 the Prime Minister, Harold Macmillan resigned due to ill-health. It was widely expected that Rab Butler would be appointed Prime Minister has he seemed to have the support of most MPs.
>
> However, after consultation with Macmillan the Queen instead appointed Alec Douglas-Home, who at the time was a member of the House of Lords. It was well known that Macmillan despised Rab Butler and also that Alec Douglas-Home was a family friend of the roles. This is one of the only times that it has been suggested that the Queen perhaps acted outside of the constitutional expectations placed upon her.

Giving Royal Assent to Acts of Parliament – The Monarch must give consent to bills before they become laws. Royal Assent has not been withheld since 1708. The role of the monarch in Parliament is known as the Crown-in-Parliament.

> The last time a bill from Parliament failed to receive Royal Assent was in 1708 during the rule of Queen Anne. This was when she refused to give Royal Assent for bill proposing to deal with the Scottish Militia.

"If the Prime Minister sent the Queen a bill properly passed by both Houses of Parliament calling for her own death warrant, the Queen would realistically have to sign it."

Walther Bagheot

What are the sources of the UK constitution?

As the UK constitution is uncodified it is not sourced in a single document, instead it has a wide and varied number of sources. These sources have changed and developed through time, with some becoming more or less important.

- **Statute Law** – Statute Law is traditionally seen as the main source of the constitution. As Parliament is sovereign in the UK, Statute Law is seen as the supreme source of constitutional law. There are many prominent examples of Statute Law that have built the constitution.

The Magna Carta (**1215**) – This agreement established the principle that the power of the monarch was limited and that citizens had fundamental rights.

The Bill of Rights (**1689**) – This agreement was signed after the Glorious Revolution and clearly set out the respective powers of Parliament and the Monarch. For example, there would be freedom of speech in Parliament.

The European Communities Act (**1973**) – This act saw Britain join the European Union.

The Scotland Act (**1998**) – This act established a devolved parliament and government in Scotland.

The House of Lords Act (**1999**) – This act removed the majority of hereditary peers from the House of Lords. It left only 92 hereditary peers sitting in the chamber.

The Fixed Term Parliaments Act (**2011**) – This act stipulated that Parliament would last for five years unless a General Election was held under special circumstances.

European Union (Notification of Withdrawal) Act 2017 – This bill triggered Article 50 and started the process of Britain leaving the European Union.

Statute Law is undoubtedly the most important source of the UK constitution. There are a number of reasons for this:

Parliamentary Sovereignty – The fact that Parliament is sovereign means that legally an act of Parliament cannot be overturned by any other body.

Popular Legitimacy – Statute Laws are passed by Parliament. Parliament is the representative body of the people. Therefore, laws passed by Parliament can be seen to have popular legitimacy.

Legislative Equality – Each Statute Law is passed in the same way. Unlike in other countries, like the United States, there are no fundamental laws that exist for constitutional changes.

Doctrine of Implied Repeal - If any element of a law contradicts an existing Statute Law the provision in the newer law automatically replaces the older one.

Clarifying Common Law – Statute Laws are often passed to clarify areas where Common Law has become hazy or controversial.

An of this is in the issue of Same-Sex Marriage. For a number of years judges had considered cases where same-sex couples wished to have the right to marry. The most famous case was Wilkinson vs. Kitzinger in 2006 where judges ruled that a same-sex couple had the right to a civil partnership, but not a marriage. This was clearly an issue which society wanted to see a change and so, in 2013, Parliament stepped in to create the Marriage (Same-Sex Couples) Act.

Crime and Courts Act (2013) - In 2000 a Farmer named Tony Martin shot two burglars and was imprisoned for three years. It started a national debate over the issue. Only in 2013, did the government pass Statute Law that offered clearer guidance on the issue, when the government more clearly defined 'reasonable force', which could include an appropriate weapon.

- **Common Law** – Common Law is often referred to as 'case law' or 'judge made law'. It refers to customs and practices that have developed through the precedent set by judges in their decisions. Many examples of key British values and principles are established through common law, the right to freedom of speech being an example.

Famous Examples of Common Law

Murder – Murder has not been defined by Parliament. Instead, it has developed and evolved as Common Law.

Common Law Marriage – It has been established by judges that in certain circumstances a co-habiting couple to have the same legal rights as a couple that have been registered as married.

A key role of Common Law in 'filling in the gaps' left by Statute Law. It would be impossible for Parliament to legislate for every possible scenario that could arise under law, so it is essential that judges can fill in the gaps using precedent.

In 1995 Parliament passed the Disability and Discrimination Act. Within this legislation it stated that it was illegal for employers to place staff in a position which was likely to make their disability worst. However, the term 'likely' was not defined in the legislation.

As such, it took a Court Case called SCA Packaging vs Boyle to define what is meant by the term 'likely'. The House of Lords (then the UK's supreme court) defined 'likely' in this circumstance as something that might happen and not something would probably happen. This has since impacted thousands of other disability cases.

The Equality Act (2010) says that employers and public bodies must make 'reasonable adjustments' to accommodate people with a disability. This term is ambiguous and so it is for judges (particularly through employment tribunals) to decide whether or not an employer or public body has in fact provided a disabled person with a 'reasonable adjustment'. Each time a decision is made, this provides a judicial precedent which will then be followed by other judges when considering new cases.

- **Conventions** – A convention is a practice that is followed, even though it is not specified or codified. Conventions are not technically legally binding; they could be easily overruled by the passing of a Statute Law. However, they play an extremely important role the UK constitution.

Constitutional Conventions in the UK

There are a multitude of conventions that exist within the UK Constitution. Some of these are unnamed conventions. Examples are:

- The Monarch acts on the advice of Ministers, including the Prime Minister. The Monarch does not ignore advice from Ministers, including the Prime Minister.
- The leader of any party with an absolute majority is invited to form the government and become Prime Minister.
- Any Money Bills, including the Budget, must come from the House of Commons.

There are also a number of named conventions. These conventions are associated with a particular person, who oversaw their acceptance as a political custom:

Sewell Convention – This convention dictates that the Westminster Parliament will only legislate on reserved matters and will not legislate on devolved matters without first consulting the Scottish Parliament, Northern Ireland Assembly or Welsh Assembly. It is named after Lord Sewel, who helped devise it whilst sitting on the Scottish Constitutional Commission between 1994 and 1995.

Lascelles Principles – This was a constitutional convention that existed between 1950 and 2011 that dictated that the Queen could refuse to dissolve Parliament if a number of certain conditions existed. It was named after Alan Lascelles, the Private Secretary of King George VI.

Posonby Rule – This was a constitutional convention that dictated that any international treaty had to be laid before the House of Commons 21 days before ratification. It was named after Arthur Posonby, a Labour Party Minister.

Salisbury Convention – This is a convention that dictates that the House of Lords should not oppose legislation from the House of Commons that was part of the government's manifesto. This convention aims to ensure the democratic legitimacy of Parliament.

Dennison Rule – This is a convention that dictates which way the Speaker should vote if there is a tie in the House of Commons. This last happened in 1992. The convention states that the Speaker should always vote for the status quo and against any further debate on any issue. The convention is named after John Denison, a 19th Century Speaker of the House of Commons.

Constitutional Conventions in the UK can change and develop. For example, sometimes new conventions emerge.

New Conventions in the UK

Carswell Convention – It is now an accepted convention that if a Member of Parliament wishes to change parties they must resign and fight a by-election. This convention was established by Douglas Carswell in 2014 when he left the Conservative Benches and resigned as an MP, before being re-elected in a by-election as a UKIP MP. Since then, Mark Reckless also left the Conservative Party to join UKIP, forcing a by-election, which he won.

Hung Parliament Convention – Although not a named convention this convention emerged during the days after the 2010 General Election. The May 2010 General Election produced a Hung Parliament. This was the first since 1974. Whilst the Conservatives and Liberal Democrats negotiated a coalition agreement, Gordon Brown remained Prime Minister for four days. Commentators were not sure what would happen next. The successful resolution has set a constitutional precedent for what should happen, for instance, should a future election also result in a Hung Parliament.

A* Zone

The UK constitution has become increasingly codified since 1997. This has meant that often elements of the UK constitution that used to be determined by conventions, have now been codified into Statute Law. For example:

The Lascelles Principles – This convention ceased to exist when the Fixed-Term Parliaments Act (2011) was passed. The Fixed-Term Parliaments Act codified the circumstances under which an election could be held, therefore making the Lascelles Principles redundant.

The Posonby Rule – This convention ceased to exist when the Constitutional Reform and Governance Act (2010) was passed. This codified the Posonby Rule into law.

Early Elections – Prior to the Fixed-Term Parliament Acy (2011), the Prime Minister could call an early election whenever they saw fit (a royal prerogative power). However, it also codified the convention via which an early election must be called if Parliament declares that it has 'no confidence' in the Government. The law says that an early election must be called if:

a) The House of Commons declares that 'this house has no confidence in Her Majesty's Government'.
b) The Government has not won a subsequent confidence vote in the next 14 days.

One of the problems of conventions is that they are not legally binding and, if they are ignored, a constitutional crisis may erupt. This happens extremely rarely, however, there are occasions when well-established conventions have been ignored.

Examples of conventions that have been ignored

There are examples when constitutional conventions have been ignored, sometimes resulting in major constitutional crises.

The People's Budget – In November 1909 the House of Lords refused to vote for David Lloyd George's 'Peoples Budget'. By convention the House of Lords does not vote against budgets, however, the House of Lords did so. A major constitutional crisis emerged, with the King, Edward VII, trying to act as a mediator between the two houses. To prevent this happening again, King George V threatened to appoint hundreds of new Liberal Lords. Parliament, therefore, passed the Parliament Act (1911), meaning the House of Lords could only delay legislation for two years and not veto it indefinitely.

Nigel Farage challenges the Speaker – It is convention that during an election no major party will put up a challenger for the seat of the Speaker of the House of Commons. This is to help the speaker maintain his independence and not force him to stance on political issues. However, in 2010 Nigel Farage famously stood against John Bercow. In addition, in June 2017 Lib Dem Sarah Lowes said she would stand against Bercow, however, she backed down after political pressure.

House of Lords and Tax Credits Vote – In October 2015 the House of Lords voted by 289 to 272 against government plans to implement changes to the Tax Credits System. This was extremely controversial as, by convention, the House of Lords should not vote against money bills. However, Members of the House of Lords argued that this was a statutory instrument, not a bill, and therefore was not bound by this convention.

- **Royal Prerogative** – One key convention, which itself is a source of the British constitution, is the Royal Prerogative. The Royal Prerogatives are powers traditionally held by the monarch, but are now in effect exercised by the Government and its Ministers.

Royal Prerogative Powers in the UK

- The Queen can appoint and dismiss a Prime Minister. However, in reality the Queen always appoints the leader of the majority party in Parliament. No modern Prime Minister has ever refused to quit after losing a motion of 'no confidence' in the House of Commons. It would cause a constitutional crisis if they did!
- The Monarch has power over appointments (ministers, peers, honours, Church of England officials). However, in reality these are exercised by the Prime Minister.
- The Monarch can grant pardons for crimes and increase sentences. In reality, this is done by the Justice Secretary. Famously, Jack Straw said that Myra Hindley would stay in prison for life.
- The Queen can order military action and sign international treaties. In reality, the Prime Minister does this. The 2015 bombing of Syria being an example.

A* Zone

One of the key problems with Royal Prerogative powers is that they are not subject to clear scrutiny by Parliament.

For example, in 2015 Theresa May ordered air strikes against the Syrian Government. This issue was not put before Parliament and was not subject to a parliamentary vote. This led Jeremy Corbyn, amongst others, to call for a War Powers Act to remove the power of the Prime Minister to order military action without the consent of Parliament. He said:

"There is no more serious issue than the life and death matters of military action. It is right that parliament has the power to support or stop the government from taking military action"

Arguably, the Royal Prerogative is becoming less significant. There are some key examples of this:

Is the Royal Prerogative becoming less significant?

It can be argued that in recent years the Royal Prerogative has been a less significant power for Prime Ministers. There are some key examples of this:

The Fixed Term Parliament's Act – In 2011 Parliament passed legislation that fixed General Elections to take place every five years. Prior to this, it had been up to the Prime Minister when to call an election. Now, an early election (sometimes called a 'snap election') can only take place under particular circumstances:

1. If there is a vote of No Confidence in the Government.
2. If the House of Commons votes by a 2/3rds majority for a new election to take place.

Given the 522-13 margin by which the House of Commons voted for the early June 2017, arguably this is a legal change and not a change to the political reality of the PM's power in calling an early election.

Constitutional Reform and Governance Act (2010) - The Constitutional Reform and Governance Act (2010) means Parliament, rather than the government, must now scrutinise international treaties.

Authorisation for Military Action – Since the Iraq War in 2003 it has now become an accepted convention that military action must be authorised by Parliament. This was very apparent in 2013 when David Cameron held a parliamentary vote to instigate air-strikes on Syria – he lost the vote 285-272.

Miller v Secretary of State for Exiting the European Union – In 2016 the Government was planning to use its Royal Prerogative powers to instigate Article 50. Article 50 is the formal mechanism under the Lisbon Treaty via which a member state of the European Union can indicate that it plans to withdraw. This action was challenged in the courts by an investment banker named Gina Miller who argued that because Britain had joined the European Union via Statute Law (The European Communities Act 1972), only Parliament could make the decision to leave the European Union. In January 2017 the UK Supreme Court adjudged that Miller was correct and that Article 50 must be authorised via Parliament. Although the Article 50 vote passed Parliament relatively easily, the case set a clear precedent about the use of Prerogative Powers.

Miller v Prime Minister – In 2019 Boris Johnson's decision to prorogue Parliament was challenged in court and eventually led to a unanimous decision by the Supreme Court that the decision had been unlawful. They ordered that the decision was reversed. This shows that the judiciary is willing and able to challenge the Royal Prerogative when it appears to have been abused.

- **External Relations** – External Relations play a role in the UK constitution. External Relations are the international arrangements that the UK has. This is particularly the case since Britain joined the EU, which has been an increasingly important art of the UK constitution. The Factortame case has also clearly established the principle whereby if an EU and UK law conflict, EU law takes precedence, giving EU law Legal Supremacy.

Be Careful!

When considering this issue, it is extremely important to note that Britain left the European Union on the 31st January 2020. Britain is currently in a transition period whereby EU Laws and Directives are still followed and Britain is subject to the rulings of the European Court of Justice (ECJ). This transition period will last until 31st December 2020. After this point, the EU will be completely removed as a source of the UK constitution.

Other External Relations that impact the UK Constitution

Although the EU is the clearest example of an External Relationship that impacts the UK Constitution, there are others. They may include:

The United Nations
NATO (North Atlantic Treaty Organisation)
IMF (International Monetary Fund)
The Commonwealth
World Bank

All of these organisations can make decisions that have a direct effect on the way the UK system of government runs, therefore making them a source of the UK Constitution.

- **Works of Authority** – There are a number of scholarly works of authority that have become important sources of the UK constitution. Although they are not legally binding, they have influenced the way important political figures have acted and how conventions have developed. There are a number of Works of Authority that impact the UK constitution, however, there are generally considered to be three that stand out:

The English Constitution by Walter Bagehot (1867) – This book was written by Victorian constitutional scholar Walter Bagehot. It set out the role of the Cabinet and the Prime Minister. This was an important work at a time when the position of the Prime Minister was rapidly changing. In the work Bagehot famously called the fusion of powers the 'efficient secret of the English Constitution'.

An Introduction to the Study of the Law of the Constitution by AV Dicey (1885) – This work by constitutional scholar AV Dicey set out the importance of Parliamentary Sovereignty and codified the essence of the principle of the rule of law.

A treatise on the law, privileges, proceedings and usage of Parliament (1844) by Erskine May – This work is commonly considered to be the bible for how parliament works and is often referred to by the Speaker in the House of Commons. The book was originally written by Erskine May, who was Clerk of the House of Commons in the mid-nineteenth century. The book has since been updated 23 times, with the 24th edition being published in 2011. The book is commonly simply referred to as 'Erskine May'.

A* Zone

In March 2019 the Speaker of the House of Commons, Jon Bercow, controversially prevented a third vote of Theresa May's Brexit Deal. In doing this he referenced Page 397 of Erskine May:

"A motion or an amendment which is the same, in substance, as a question which has been decided during a session may not be brought forward again during that same session."

SCCREW

A helpful mnemonic to remember the sources of the UK constitution is **SCCREW**.

Statute Law
Common Law
Conventions
Royal Prerogatives
External Relations
Works of Authority