

## **W201 The Individual and the State**

### **Study Notes on Constitutions**

#### **Why have a Constitution at all?**

Most constitutions deal with one or more of the following.

##### 1 Basic values - the preamble

It will contain a summary of the underlying values the society considers important. These values may include democracy, liberty or equality. The preamble of the American Declaration of Independence (see below) is a good example.

##### 2 The machinery of government

It will allocate powers between the three branches of government - the executive the legislature and the judiciary and impose any necessary checks and balances.

##### 3 Human rights

It will list the human rights which are to be protected eg the right to life, to free speech, to privacy, to a fair trial, freedom from discrimination and many others.

Finally it will contain provision for amendment of the constitution in the future.

#### **Need a constitution be written?**

Only Israel, New Zealand and the UK have unwritten constitutions.

Common sense dictates that if anything is worth writing down a constitution is important enough to qualify. In the UK the absence of a written constitution is largely historical accident.

There has been no invasion, revolution or cataclysmic political event in the last three hundred years resulting in a change in the system of government and the need for a new written constitution.

Most countries have adopted a written constitution on gaining independence or following a revolution or war and the overthrow of a system of government. The important test however is how any constitution works in practice.

## **How does the UK fit into this?**

In the UK the early development of the principle of the sovereignty of parliament embodied in the Bill of Rights of 1689 has made it logically difficult to move to a written constitution.

If there were now to be a written constitution entrenching or guaranteeing fundamental rights then by definition:

- a) there would be a higher authority than parliament
- b) the power of parliament (to change those rights) would be limited.

As a result parliament would no longer be sovereign!

In the UK we have placed our trust not in a written document and entrenched rights but in the good sense of a majority in parliament who must face re-election.

This picture is slowly changing with the adoption of the European Convention of Human Rights in the Human Rights Act 1998. Although the method of adopting the convention is by a format deliberately compatible with parliamentary sovereignty the concept of written fundamental values (with which future legislation should be compared) breaks new ground as it is a limiting influence on complete parliamentary sovereignty.

Instead of a single document the sources of the UK constitution are to be found in places which include:

- 1 Statute (for example The Bill of Rights 1689, The Act of Settlement 1700 or The Human Rights Act 1998)
- 2 Common law (for example Entick v Carrington 1765)
- 3 Conventions
- 4 Legal principles (for example parliamentary sovereignty, rule of law and separation of powers)
- 5 Legal writers (for example Dicey).

Before studying the UK's unwritten constitution it makes sense to look at an example of the more common written constitution to see first how a written constitution works.

## **The American Example**

The preamble to the American Declaration of Independence reads in part as follows:

“We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed, that whenever

any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundations on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness.” 4 July 1776.

After the War of Independence the constitution was drawn up by a convention in 1787. Based on the principle of the separation of powers it gives all legislative power to Congress (Article I), all executive power to the President (Article II) and all judicial power to one supreme court (Article III). Article V provides for amendment by two thirds majority of both houses of Congress and three quarters of the state legislatures. Thomas Jefferson (later the 3rd President) who was abroad in France when the Constitution was adopted pointed out the need for a Bill of Rights setting out the rights of citizens. This resulted in the first ten amendments in 1791 providing for inter alia

freedom of speech	freedom of the press
freedom of religious worship	the right to jury trial.

After the Civil War came three “Civil War” amendments the 13th 14th and 15th granting slaves freedom, civil rights and male suffrage. Votes for women only resulted from the 19<sup>th</sup> amendment in 1920.

A written constitution with entrenched provisions can sometimes have disadvantages - if mistakes are made they are difficult to change - for example in the USA at the end of World War 1 came the 18th amendment which prohibited alcohol nationwide (“prohibition”). It was later repealed by the 21st amendment.

Sometimes provisions become out of date. Many consider the right to bear arms an anachronism but it has proved difficult to amend.