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Preface

'Another book on constitutional law?' The purpose of this book is not to rival the major textbooks, whose authors are perforce obliged to try to cover the subject in all its many aspects. Instead, the aim here is to offer students a deeper perspective on some of the central themes. In the case of constitutional law, there is particular force in Sir Walter Scott's observation (in *Guy Mannering*) that: 'A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.' That a proper understanding of the constitution cannot be gained from legal rules alone may increase the difficulties of the subject for the student, but also adds immeasurably to the interest and enjoyment to be derived from it. If this book eases the difficulties, and helps to convey to readers some of that interest and enjoyment, it will have achieved its objects.

Parts of chapters 3 and 9 originally appeared in *Public Law*, and I am grateful for permission to reproduce the relevant material. Some of the book was prepared while I was a Visiting Scholar at Wolfson College, Cambridge in the congenial atmosphere fostered by its President, Professor D. G. T. Williams. Mr John Alder, Professor Francis Lyall and Professor Graham Zellick found time to comment on several chapters, and I benefited from their suggestions, not least when they were unable to agree with my views. My colleague at the University of Manchester, Professor Gillian White, was also kind enough to advise on one chapter.

Mary Platt, Helen Christie, Christine Johnson and Angela Wallace coped efficiently and cheerfully with my manuscript, and Butterworths were as considerate a publisher as any author could wish for. Without the help and encouragement of my wife Ruth, this book could not have been written. Without the diversions offered by Philip and Sally, it might have been written twice as quickly, and it is dedicated to them by the father they were sometimes able to persuade to come out to play.

C. R. M.
Manchester
February 1987

Contents

Preface v
Table of statutes xi
List of cases xv

Chapter 1. The British constitution 1

Chapter 2. The United Kingdom 8
The nations united 10
England 10
Wales 11
Scotland 12
Great Britain 14
Ireland 16
United Kingdom of Great Britain and Ireland 17
Dissolution and devolution 18
Dissolution 19
Devolution 21
Legislative devolution 22
Administrative devolution 25
The Royal Commission and its aftermath 29
Prospects 32

Chapter 3. Constitutional conventions 35
Laws and conventions distinguished 39
Laws and enforcement 41
Conventions in the courts 44
Conventions becoming law 48
What are conventions? 52

Chapter 4. Was Parliament born free? 61
What makes the Acts of Union different 62
Parliament and the union legislation 66
The attitude of the courts 71
Coda 78

Chapter 5. The sovereignty of Parliament 79
The development of legal supremacy 79
Dicey on parliamentary sovereignty 81
A merely legal conception 84
The case law 87
Has sovereignty shrunk? 94
The 'manner and form' argument 97
A matter in the keeping of the courts 103
Sovereignty and change 105

Chapter 6. The European Community and the British constitution 109
The European Community 110
Community institutions 113
The Council 113
The Commission 115
The Parliament 116
The Court of Justice 119
Community law 121
Community law and national law 123
Community law in the United Kingdom 125
Community primacy and parliamentary sovereignty 127
Supervision 132

Chapter 7. Parliamentary privilege 134
The nature of privilege 134
The scope of the privileges 136
Freedom of speech 137
Freedom from arrest 141
Regulating composition 142
Exclusive cognisance of internal affairs 143
Penal jurisdiction 145
Privilege and the courts 148
Reform proposals 150
Some current issues 151
Committees and leaks 152
The misuse of freedom of speech 153
Pressures and interests 155

Chapter 8. The royal prerogative 159
A brief history 161
Conventional limitations 166
Statutes and the prerogative 169
Political accountability 172

The prerogative and the courts 175
Abolition or reform? 182

Chapter 9. Legislature, executive and judiciary 185
The doctrine of the separation of powers 186
Origins 186
Montesquieu 189
The doctrine and the British constitution 192
Legislature and judiciary 196
Executive and judiciary 200
Legislature and executive 204
Conclusion 208

Index 213

Table of statutes

References in this Table to Statutes are to Halsbury's *Statutes* of England (Fourth Edition) showing the volume and page at which the annotated text of the Act will be found.

Page references printed in **bold** type indicate where the section of an Act is set out in part or in full.

PAGE

Acquisition of Land (Assessment of Compensation) Act 1919 . 64, 91
An Act for the Better Propagation of the Gospel in Wales 1649 12
Act of Settlement (1700) (10 *Statutes* 51) 14, 64, 77, 80, 83, 107, 193, 204
Aliens (1705) 14
Appellate Jurisdiction Act 1876 (11 *Statutes* 563) 107, 143, 197, 199, 201
Appellate Jurisdiction Act 1887 (11 *Statutes* 571) 201
Appellate Jurisdiction Act 1908 (11 *Statutes* 576) 201
Attainder of Thomas Forster (1715) 198

Bill of Rights (1688) (10 *Statutes* 44) 1, 3, 4
preamble 165 ..... 80, 107, 193
art 9 ..... 80, 88, 136, **138**, 139, 140, 143
British Nationality Act 1948 128
British Nationality Act 1981 1
British Railways Act 1968 88

Chequers Estate Act 1917 (10 *Statutes* 291) 36
Church of Scotland Act 1921 69

PAGE

Church Patronage (Scotland) Act 1711 69
Churches (Scotland) Act 1905 69
Civil Aviation Act 1971 179
Colonial Laws Validity Act 1865 (7 *Statutes* 211)
s 5 ..... **100**, 101
Contracts of Employment Act 1972 184
Courts Act 1971 204
s 15 199
Criminal Justice (Scotland) Act 1980 (12 *Statutes* 806) 90
Crown and Parliament Recognition (1689) 104
Crown Proceedings Act 1947 (13 *Statutes* 16)
s 40 170

Defamation Act 1952 (24 *Statutes* 117)
s 9 141
Defence Act 1842 (3 *Statutes* 1083): 170

Emergency Powers (Defence) Act 1939
s 9 172
Equal Pay Act 1970 (16 *Statutes* 187) 130
European Communities Act 1972 (10 *Statutes* 617) ... 75, 79, 128

PAGE

European Communities Act 1972 —*continued*
s 1 126
2 210
(1) 126, 128, 130
(2) 126, 128
(4) 126, 129, 130
3 127
Sch 2 126
Government of Ireland Act 1914 .. 20
Government of Ireland Act 1920 . 20, 21, 22, 24

Health and Safety at Work etc Act 1974 (19 *Statutes* 613) 184
s 15 128
His Majesty's Declaration of Abdication Act 1936 (10 *Statutes* 90) 107
House of Commons Disqualification Act 1975 ..... 196, 205
s 2 (1) 205
House of Commons (Redistribution of Seats) Act 1979 (15 *Statutes* 474) 23
Housing Act 1925 91
Humble Petition and Advice (1657) 3

Interpretation Act 1978
s 6 87
Immigration Act 1971
s 33 172
Instrument of Government (1653) . 3
preamble 4
Ireland Act 1949 107
Irish Appeals Act 1783 ..... 17, 65
Irish Church Act 1869 ..... 19, 66, 94, 77, 91
Irish Free State (Agreement) Act 1922 ..... 21, 78
Irish Free State (Consequential Provisions) Act 1922 (Session 2) 21, 78
Irish Free State (Constitution) Act 1922 ..... 21, 78

PAGE

Judicial Committee Act 1833 (11 *Statutes* 542)
s 4 201
Judicial Committee Amendment Act 1895 (11 *Statutes* 573) .. 201
Juries Act 1974 (22 *Statutes* 409) . 142

Land Law (Ireland) Act 1881 19
Landlord and Tenant (Ireland) Act 1870 19
Laws in Wales Act 1535 ..... 11, 12
Laws in Wales Act 1542 ..... 11, 12
Life Peerages Act 1958 .... 107, 143
Local Government Act 1972 11

Magna Carta (1215) ... 1, 3, 4, 161
Meeting of Parliament Act 1694. See Triennial Act 1694

Nigeria Independence Act 1960 (7 *Statutes* 112) 96
Northern Ireland Act 1974 32
Northern Ireland Act 1982 33
Northern Ireland Assembly Act 1973 33
Northern Ireland Constitution Act 1973 ..... 33, 107
Northern Ireland (Temporary Provisions) Act 1972 ..... 24, 32

Occupier's Liability Act 1957 ... 184
Official Secrets Act 1911 (12 *Statutes* 194)
s 1 175

Parliament Act 1911 ..... 20, 43, 51, 56, 207
Parliamentary Commissioner Act 1967 (10 *Statutes* 350) . 141, 174
Parliamentary Election Act 1868 . 142
Parliamentary Oaths Act 1866 ... 144
Parliamentary Papers Act 1840 (24 *Statutes* 92) 149
s 3 141
Parliamentary Privilege Act 1700: 141
Parliamentary Privilege Act 1703: 141
Parliamentary Privilege Act 1737 (13 *Statutes* 3) 141

PAGE

Parliamentary Privilege Act 1770: 135, 141
Parochial and Burgh Schoolmasters (Scotland) Act 1861 69
Peerage Act 1963 ..... 67, 143
Petition of Right (1628) (10 *Statutes* 37) 80, 166
Police and Criminal Evidence Act 1984 (12 *Statutes* 941, 17 *Statutes* 207) 185, 208
Post Office Act 1953 180
Poynings Act (1494) 16
Privilege of Parliament (1512) . 137, 138
Probate Act 1857 89

Race Relations Act 1965 90
Referendum Act 1975 (17 *Statutes* 54) 131
Representation of the People Act 1832 107
Representation of the People Act 1983 (15 *Statutes* 476) .. 1, 142
Roman Catholic Relief Act 1829 (14 *Statutes* 1143) 19
Royal Titles Act 1953 (10 *Statutes* 85) 72, 73

Scotland Act 1978 ..... 7, 77, 90
s 85 32
Scottish Episcopalians (1711) 69
Septennial Act 1716 83
Sex Discrimination Act 1975
s 80 128
Single European Act 1986 . 114, 121
Social Security Act 1975 ... 89, 130
South Africa Act 1909 101
Southern Rhodesia Act 1965 95
Statute of Proclamations (1539) .. 163
Statute of Wales (1284) 11
Statute of Westminster 1931 (7 *Statutes* 12) 94
preamble 50
s 4 ..... 50, 51, 95
Supreme Court Act 1981 (11 *Statutes* 756)
s 11 199

PAGE

Suspensory Act 1914 20

Taxation of Colonies Act 1778 97
Title of the King (1485) 162
Town and Country Planning Act 1971 184
Translation of the Bible into Welsh (1563) 12
Tribunals and Inquiries Act 1971 (10 *Statutes* 364)
s 8, 13 209
Triennial Act 1694 ..... 80, 165

Union with Ireland Act 1800 ... 3, 4, 18, 66, 91
art 1 69
5 66
Union with Scotland Act 1706 (10 *Statutes* 56) 3, 4, 15, 25, 27, 63
art I 67, 72, 75
II 67
VI 67, 69
VII 67
IX 67, 68
XII 67
XVI 67, 68
XVIII 68, 75, 76
XIX 68, 69, 75
XX 68
XXI 67, 68
XXIV 68
s 6 67
Universities (Scotland) Act 1853 . 169

Wales Act 1978 7
s 80 32
Wales and Berwick Act 1746 12
War Damage Act 1965 200
Welsh Bible and Prayer Book Act 1563 *see* Translation of the Bible into Welsh (1563)
Welsh Language Act 1967
s 4 12
Wireless Telegraphy Act 1949 ... 186

PAGE

EIRE

Constitution 1922
art 47 102

INDIA

Constitution
art 37 43

IRISH PARLIAMENT

Declaratory Act 1720 17

SCOTTISH PARLIAMENT

Act anent Peace and War 1703 14
Act of Security 1703 14
Claim of Right (1689) 80, 165
Protestant Religion and Presbyterian Church Act 1707 . 63, 68
Union with England Act 1707 *see* Union with Scotland Act 1706

UNITED STATES

Constitution 1787 ..... 2, 15, 192
Eighteenth Amendment 1920 ... 5
Twenty-Second Amendment 51

List of cases

PAGE

Absence in Ireland, an, Re (1977) 130
Adegbenro v Akintola (1963) . 44
Amministrazione delle Finanze dello Stato v Simmenthal SpA: 106/77 (1978) 125
Antrim's (Earl) Petition (1967): 130
Ashby v White (1703), (1704): 148
A-G v De Keyser's Royal Hotel Ltd (1920) 170, 171, 172
A-G v Jonathan Cape Ltd (1976) 44
A-G for Canada v A-G for Ontario (1937) 126
A-G for New South Wales v Trethowan (1931); on appeal (1932) 92, 100
A-G of Quebec and A-G of Canada (1982) 45
Bate's Case (1906) 164
Beach v Freeson (1972) 141
Blackburn v A-G (1971) 93, 104, 128, 176
Bowles v Bank of England (1913) 99
Bradlaugh v Gossett (1884) .. 42, 144
Bribery Comr v Ranasinghe (1965) 102
BBC v Johns (1965) 160
British Coal Corpn v R (1935) . 95
British Railways Board v Pickin. See Pickin v British Railways Board
Bulmer v Bollinger (1974) ... 127
Burdett v Abbot (1811) 149
Burmah Oil Co v Lord Advocate (1965) 170, 172, 178, 200

PAGE

Carl Zeiss Stiftung v Rayner and Keeler (No 2) (1967) .. 179
Case of Proclamations (1611) . 81, 82 164, 175, 177
Chandler v DPP (1964) ... 175, 176, 177, 179, 182
Cheney v Conn (1968) 91, 125
Church of Scientology of California v Johnson-Smith (1972) 139
Collco Dealings Ltd v IRC (1962) 129
Conway v Rimmer (1967); revsd (1968) 178
Costa v ENEL: 6/64 (1964) .. 124
Council of Civil Service Unions v Minister for the Civil Service (1985) 161, 181, 182, 204
Croft v Dunphy (1933) 90
Darnel's Case (1627) 164, 175
Day v Savadge (1615) 80
Defrenne v Sabena: 149/77 (1978) 123
Dhlamini v Carter (1968) 96
Dillon v Balfour (1887) 138
Dr Bonham's Case (1610) 80
Duncan v Cammell, Laird & Co (1942) 178
Duport Steels Ltd v Sirs (1980): 195
Edinburgh and Dalkeith Rly Co v Wauchope (1842) ... 76, 88
Ellen Street Estates Ltd v Minister of Health (1934): 64, 91, 92, 102, 129
Engelke v Musmann (1928) .. 175
Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd (1974) ... 130

PAGE

EC Commission v France: 24, 97/80R (1980) 120
EC Commission v France: 232/78 (1979) 120
European Parliament v EC Council: 13/83 (1986) 118
Felixstowe Dock and Rly Co v British Transport Docks Board (1976) 131
Ferrers' Case (1543) 163
Five Knights' Case. See Darnell's Case
Frontini v Ministero delle Finanze (1974) 125
Garland v British Rail Engineering Ltd (1983) 131
Gibson v Lord Advocate (1975): 72, 75
Glasbrook Bros Ltd v Glamorgan County Council (1925) . 159
Glasgow Corpn v Central Land Board (1956) 178
Gloucester (Bishop) v Cunnington (1943) 130
Godden v Hales (1686) 80, 81, 165
Goffin v Donnelly (1881) 139
Goodwin v Fortescue (1604) . 142
Gouriet v Union of Post Office Workers (1977); revsd (1978) 180, 183
Grand Duchy of Luxembourg v Parliament: 230/81 (1983) . 120
Hall v Hall (1944) 89
Hanratty v Lord Butler of Saffron Walden (1971) 176, 182
Harris v Minister of the Interior (1952) 101
Heath v Pryn (1670) 89
Henn and Darby v DPP (1981): 129
Hinds v R (1977) 194
Hughes and Vale Pty Ltd v Gair (1954) 92
Ibralebbe v R (1964) 46
Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getriede und Futtermittel: 11/70 (1970): 124

PAGE

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1974) ... 125
Jenkins v A-G (1971) 176
Laker Airways Ltd v Department of Trade (1977) 179, 180
Lee v Bude and Torrington Junction Rly Co (1871) ... 89
Liversidge v Anderson (1942) . 46, 177, 183
Lord Advocate v University of Aberdeen (1963) 159
Macarthys Ltd v Smith (1979): 130, 131
Macarthys Ltd v Smith (1981) . 130
MacCormick v Lord Advocate (1953) 72, 74, 75, 77, 92
McWhirter v A-G (1972) 128
Madzimbamuto v Lardner-Burke (1969) 44, 95
Magor and St Melons RDC v Newport Corpn (1952) 210
Manuel v A-G (1983) 50, 87, 97
Martin v O'Sullivan (1984) .. 89
Medical Expenses incurred in France, Re (1977) 130
Middlesex Sheriff's Case (1840): 149
Minister of the Interior v Cohn-Bendit (1980) 125
Moore v A-G for the Irish Free State (1935) 77
Mortensen v Peters (1906) ... 76, 91
Nairn v University of St Andrews (1909) 130
Ndlwana v Hofmeyr (1937) .. 97
Nold v EC Commission: 4/73 (1974) 123
Oxford and Cambridge Universities v Eyre and Spottiswoode Ltd (1964) 159
Parliamentary Privilege Act 1770, Re (1958) 201
Pasmore v Oswaldtwistle UDC (1898) 43

PAGE

Pickin v British Railways Board (1973); affd sub nom British Railways Board v Pickin (1974) 74, 77, 81, 88, 89, 90, 93, 144
Pigs Marketing Board v Redmond: 83/78 (1978) ... 125
Prince's Case (1906) 99
Prohibitions del Roy (1607): 164, 193, 200
Province of Bombay v Municipal Corpn of Bombay (1947): 172
R v Allen (1862) 175
R v Brixton Prison Governor, ex p Soblen (1963) 177
R v Criminal Injuries Compensation Board, ex p Lain (1967) 160
R v Elliot, Hollis and Valentine (1629); revsd (1668) 138
R v Graham-Campbell, ex p Herbert (1935) 145
R v Hampden, Ship Money Case (1637) 80, 165, 166, 175
R v HM Treasury, ex p Smedley (1985) 195
R v Jordan (1967) 90
R v Lewes Justices, ex p Home Secretary (1973) 179
R (Hume) v Londonderry Justices (1972) 23
R (O'Brien) v Military Governor, NDU Internment Camp (1924) 101
R v Ndhlovu (1968) 96
R v Paty (1704) 148, 149
R v Pitt and Mead (1762) 147
R v Secretary of State for the Home Department, ex p Hosenball (1977) 177, 183
R v Secretary of State for the Home Department, ex p Thakrar (1974) 91
Resolution to Amend the Constitution, Re (1981) 45, 50

PAGE

Rivlin v Bilainkin (1953) 139
Roquette Frères SA v EC Council: 138/79 (1980) ... 118
Sabally and N'Jie v A-G (1965): 172
Schmidt v Secretary of State for Home Affairs (1969) 177
Secretary of State for the Home Department v Lakdawalla (1972) 176
Selwyn (Canon), ex p (1872) .. 77, 91
Seward v Vera Cruz, The Vera Cruz (1884) 130
Shields v E Coomes (Holdings) Ltd (1979) 131
Ship Money Case. See R v Hampden, Ship Money Case
Sillars v Smith (1982) 77, 89
Simmenthal Case. See Amministrazione delle Finanze dello Stato v Simmenthal SpA: 106/77
Snoxell and Davies v Vauxhall Motors Ltd (1978) 129
Stockdale v Hansard (1837) .. 42, 82, 99, 100, 140, 144, 149
Stourton v Stourton (1963) ..141, 150
Transocean Marine Paint Association v EC Commission: 17/74 (1974) 123
Van Duyn v Home Office: 41/74 (1974) 123
Van Gend en Loos v Nederlandse Administratie der belastingen: 26/62 (1963): 121, 123
Vauxhall Estates Ltd v Liverpool Corpn (1932) ... 64, 91, 102, 129
Vera Cruz, The. See Seward v Vera Cruz, The Vera Cruz
Wason v Walter (1868) 141
Webb v Outrim (1907) 90
Wensleydale Peerage Case (1856) 143

Decisions of the European Court of Justice are listed below numerically. These decisions are also included in preceding alphabetical table

	PAGE
26/62: Van Gend en Loos v Nederlandse Administratie der belastingen (1963)	121, 123
11/70: International Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getriede und Futtermittel (1970)	124
17/74: Transocean Marine Paint Association v EC Commission (1974)	124
41/74: Van Duyn v Home Office (1974)	123
149/77: Defrenne v Sabena (1978)	123
83/78: Pigs Marketing Board v Redmond (1978)	125
232/78: EC Commission v France (1979)	120
138/79: Roquette Frères SA v EC Council (1980)	118
24, 97/80R: EC Commission v France (1980)	120
230/81: Grand Duchy of Luxembourg v Parliament (1983)	120
13/83: European Parliament v EC Council (1986)	118

1 The British constitution

Every state in the world has a constitution in the original sense of the word, by which is meant the body of rules and arrangements concerning the government of the country. In the United Kingdom, where the principal institutions of government have developed over hundreds of years, many of these rules are customary in origin.[1] Some of the rules are to be found in legislation, including such famous enactments as Magna Carta and the Bill of Rights, as well as modern statutes like the Representation of the People Act 1983 and the British Nationality Act 1981. Others reside in the judgments of the courts, although Dicey, the greatest of our constitutional lawyers, exaggerated the importance of this element when he characterised our constitution as 'judge-made'.[2] Some other matters which call for consideration are not legal at all: the government of a country could not be fully described without reference to political facts, practices and obligations.[3]

In the eighteenth century, another meaning of the word 'constitution' came into fashion. Following their success in the War of Independence, the Americans had chosen to establish a framework for national government in a single document which was called a 'Constitution for the United States of America'. Similarly, the revolutionaries in France had drawn up a Constitution in 1791 which limited the authority of the King. These were the models which the radical politician Thomas Paine had in mind when he complained that 'no such thing as a Constitution exists in England'.[4] Later the contrast with the United States and France inspired the French writer de Tocqueville to remark that our constitution was one which did not exist.[5] De Tocqueville, who was an admirer of the British constitution, was merely drawing attention to the absence of a single document referred to as 'the constitution'.

The term 'constitution' continues to be used in two senses. Of course, if we are speaking of the British constitution, only one meaning is possible. On

1 These include important parts of constitutional law such as parliamentary privilege (see ch 7) and the royal prerogative (see ch 8).
2 A V Dicey *Introduction to the Study of the Law of the Constitution* (10th edn) p 196.
3 Some of these are referred to as constitutional conventions: see ch 3.
4 Thomas Paine *The Rights of Man* Part the Second ch 4.
5 Alexis de Tocqueville *Democracy in America* vol 1 pt 1 ch 6.

other occasions, it is generally clear from the context which meaning is intended. Not content with that, however, some writers coined the term 'written constitution' to describe a document such as the United States Constitution of 1787. What is worse, countries were then divided by some commentators into those having a written constitution or, lacking that, an unwritten constitution. This was a singularly unhappy distinction. It suggested, wrongly, that in countries such as the United Kingdom, constitutional rules were only customary and could not be found in written form in statutes, reported cases and books, perhaps even that they were 'transmitted orally from generation to generation, like the earliest poetry of ancient Greece'.[6] It also suggested, wrongly, that in countries such as the United States, all the rules and arrangements concerning government had been reduced to writing in a single document. In practice, this is never the case. The documents called constitutions are often fairly short, and so many constitutional matters are regulated by ordinary legislation. Over the years, too, the framework in the document becomes overlaid with judicial interpretations and political practices. In other words, the constitution of a country, in the older sense of the word, includes, but is invariably larger than, the constitution in the newer sense.

The true distinction, it may be seen, is simply between states where some of the more important constitutional rules have been put in a document, or a set of associated documents, given special sanctity, and states where the constitution has many sources, none of which enjoys such recognition.

It is easy to understand why in many countries the fundamental framework of government has been set out in a document. What was more natural in post-revolutionary Russia in 1917 or newly independent Nigeria in 1960, or Zimbabwe after an independence settlement giving civil equality to the black majority was agreed in 1979? When there is a break with the past, and the institutions of government are altered, a formal embodiment of the new arrangements seems appropriate. The births of new nations and the unions of partners are aptly marked by rites of passage in the form of constitutional documents to which a special significance is attached. If later, in a state which has had such a constitution, it is desired to change some fundamentals, as in Canada in 1982, when a new constitution was adopted which could be amended without recourse to the United Kingdom Parliament, then a formal document is likely to be employed, so that the new arrangements may present as much appearance of legitimacy as did the old.

The circumstances which have led to the making of constitutions in other countries have largely been absent in this one. The British have not suffered conquest, or the loss of a major war, or revolution, for several hundred years. The United Kingdom has resulted from unions of the nations in the British

6 H W Horwill *The Usages of the American Constitution* (1925) p 1.