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**A SHORT PRIMER ON BRITISH CONSTITUTIONALISM:
A CONSTITUTIONAL SYSTEM *WITHOUT* A CONSTITUTION**

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Abstract

This article is a primer on the British constitutional system. It discusses the various constitutional characteristics and classifications; elements of the “unwritten” British constitution; and advantages and disadvantages of written and unwritten constitutions. The paper concludes with a description of the main features of the British constitutional system—most especially the revered “Magna Carta” of 1215, which many regards as “...the first great public act of the nation, after it has realized its own identity.” The paper is designed to explain key differences between the American and British constitutional systems as a resource for students seeking a better understanding of governmental structures as a part of an introductory course in international business that adopts a comparative approach to business decision-making in the international environment. While this study focuses on Great Britain, the aim is to encourage the understanding the context of business decision-making while operating in various democratic structures.

Key Words: *written and unwritten constitutions; republican; monarchal; separation of powers; Magna Carta*

1.0 INTRODUCTION

A re-run of an episode of “the Crown” highlighted a phrase the Queen had uttered in her stern reprimand of Lord Mountbatten in connection with his involvement in a possible “coup d’état” against Prime Minister Harold Wilson in 1968. The Queen stated her absolute opposition even to the idea of such an action and cited the British Constitution as her source. This was rather startling as we had come to know (or rather “believe”) that Great Britain (or the United Kingdom) did *not* have a Constitution. What is the “truth”? Does Great Britain have a Constitution? As it turns out, the United Kingdom, along with New Zealand and Israel, are the only three countries in the world to have an uncoded or ‘unwritten’ constitution. For Americans the first and most complete model is the Constitution of the United States of America of March 4, 1789, followed by the Polish Constitution of 1791, which historian Norman Davies (1966, p. 699) describes as “the first constitution of its type in Europe.”

Peped.org (2015) provides an excellent overview of issues relating to the existence of a Constitution: “A constitution is a set of rules, generally in written form, which identify and regulate the major institutions of the state and govern the relationship between the state and the individual citizen.”

Quoting Barnett, in “*Introduction to the Scope of Constitutional Law*,” Peped.org (2015) notes that:

“Constitutions, whether written or unwritten, will share common features. They will identify the principal institutions of the state – the executive, the legislature and the judiciary. In relation to each of these, the constitution will specify their functions and powers. In addition, the constitution will identify the rights and freedoms of citizens, through a Bill of Rights which operates both to protect citizens and to restrict the power of the state.”

Wade (2019) adds: “A constitution is a framework of legislation and principles that govern a country or state. Arguably, the most well-known is the US constitution. Ratified in 1788, the document contains 27 amendments is readily available to read online.”

2.0 Standard Constitutional Classifications or Characteristics

Constitutions may be ‘*written*’ or ‘*unwritten*,’ ‘*codified*’ or ‘*uncodified*.’ Constitutions may also be classified as ‘*rigid*’ or ‘*flexible*.’ A rigid constitution is one in which the amendment process is very difficult, requiring special procedures or multiple layers of approval before any changes can be made. The American Constitution, by this standard, is considered “rigid.” Amending the Constitution in the United States requires passage by two-thirds vote of both houses of Congress and ratification by three-fourths of the states (Kay, 2018). In contrast, the British constitution is essentially flexible. Parliament— the supreme law-making body within the United Kingdom— may “theoretically alter the constitution at will, although in practical terms this can only be done with the support of the people.”

Constitutions may be classified according to whether they are ‘*republican*’ or ‘*monarchical*.’ In a republican form, such as the Constitution of the United States, there will normally be a Head of State (usually designated a President) who is directly elected by the vote of the people—although modified by the unique “electoral college” system in the United States (Fortier, 2020), which itself has been subject to criticisms from time to time (e.g., West, 2020). Britain, by contrast, is monarchical, with the King or Queen as Head of State, an individual who holds widespread formal powers, sometimes referred to as “the royal prerogative” (Poole, 2018; Beinlich, 2019; see also Deseure, 2019). In practice, however, these powers are exercised by the elected government which is headed by the Prime Minister or a Premier, or by the Chancellor in Germany.

Constitutions may also be ‘*unitary*’ or ‘*federal*.’ Under a written constitution, the constitution will define which powers are exercisable by the central or federal government, and which powers are exercisable by the constituent parts of the federation – usually known as states, or under certain circumstances, by local governments. In a federal system, power is said to be diffused rather than concentrated in any one body. The constitution has overriding force, and is often described as “the supreme law of the land.” Conflicts between the federal and state governments will be resolved according to the provisions of the constitution. For centuries, Britain has been a unitary state, with one Parliament, sitting in London, having ultimate law-making power over all of Great Britain’s constituent nations – England, Northern Ireland, Scotland, and Wales. Even

though certain powers are now exercised by local governments (Beel, Jones, & Jones, 2017; Raikes, 2020) or to the elected assemblies of Northern Ireland (Todd, 2010; Matthews & Pow, 2020), Scotland (Wright, 2017), and Wales (Moon & Evans, 2017; Evans, 2018) in a process where powers have been *devolved* (Ayres, Flinders, & Sandford, 2016; Wallace, 2019), these powers remain subject to the ultimate control and authority of the Parliament of the United Kingdom (Fenwick & Elcock, 2018).

A further classification determines whether a particular constitution is classified as ‘*supreme*’ or ‘*subordinate*.’ A supreme constitution is one that is not subject to any external superior authority. A subordinate constitution is one where the constitution is drafted and introduced into a country by an external sovereign power, and theoretically may be amended or repealed by that external power. Prior to Brexit (Hunter, Lozada, & Shannon, 2021), this distinction was the subject of much debate concerning the status of the British constitution in relation to Great Britain’s membership in the European Union (see Ewing, 2017).

From the standpoint of the European Court of Justice, the treaties that established and defined membership in the European Union (EU) were considered supreme, thus the sovereignty of EU member states is limited by membership in the EU. From the standpoint of British judges, however, Great Britain maintained that the powers of the Parliament remained “intact,” because Great Britain had *voluntarily* accepted the authority of European Union law through an Act of Parliament – the *European Communities Act 1972* – which provided for its ‘reception and enforcement’ of European Law within the domestic courts of law in Great Britain. [The same debate is now currently being waged in Poland where the governing authority has maintained that it has the sovereign authority to selectively reject individual European Union laws or directives (Hunter & Lozada, 2021).]

Finally, a constitution may be classified according to whether the powers and functions of the principal institutions of the state – the executive, legislature, and judiciary – are *separated* or not (Duignan & DeCarlo, 2018).

Under the United States’ written constitution (Bowie, 2019), for example:

- “Article 1 of the Constitution vests executive power in the President;

- Article 2 vests legislative power in the Congress and Article 3 vests supreme judicial power in the Supreme Court;
- the President is elected separately from Congress and may not be a member of Congress;
- the President may veto legislation passed by Congress, but his or her veto may be overridden by a two-thirds vote in the Senate;
- the President appoints Supreme Court judges; and
- the Supreme Court has the power to declare acts of the President, Acts of Congress or of state legislatures unconstitutional and therefore unlawful” (Peped.org, 2015).

Based on these general characteristics, Dennett (2019) writes: “The main features of the UK constitution is that it is uncoded; flexible; traditionally unitary but now debatably a union state; monarchical; parliamentary; and based on a bedrock of important constitutional doctrines and principles: parliamentary sovereignty, the rule of law, separation of powers; the courts are also basing some decisions on bedrock principles of the common law. Meanwhile, the laws, rules, and practices of the UK constitution can be found in constitutional statutes; judicial decisions; constitutional conventions; European Union law and international treaties; the royal prerogative; the law and custom of Parliament; and works of authoritative writers.”

Blackburn (2015) notes, however, that “Unlike most modern states, Britain does not have a codified constitution but an unwritten one formed of Acts of Parliament, court judgments and conventions.”

According to Wade (2019), the Constitution of the United Kingdom is comprised of:

- “i) Conventions such as the office of Prime Minister (Caufield, 2012); ii) Treaties; iii) Precedents, i.e. case law;
- (iv) Institutions such as the House of Commons; iv) Acts of Parliament, for instance, the European Communities Act 1972 (previously mentioned); and
- v) Fundamental principles.”

Wade (2019) adds: “The rule of law, separation of powers, the royal prerogative (power of the Crown which is exercised by the prime minister) and parliamentary sovereignty are the basic tenets of the UK Constitution.”

3.0 Advantages and Disadvantages of an Unwritten Constitution vs a Written Constitution

Wade (2019) discusses the advantages and disadvantages of an “unwritten” constitution. Some argue that Great Britain should have a written constitution (see King, 2019). Bogdanor, Khaitan, and Vogenauer (2010, p. 499) write that “There are two reasons why Britain has lacked a constitution. The first is that, historically, Britain never had a constitutional moment; the second is the doctrine of parliamentary sovereignty.” Are there any advantages of an ‘unwritten’ constitution? Wade (2019) maintains that the main advantage is “that these types of constitutions are dynamic, flexible and more amenable to constitutional reform.” Wade (2019) cites the *Fixedterm Parliaments Act* (2011) which ensures a general election for Parliament every five years, subject to two exceptions (see Forsyth, 2011; Yglesias, 2019; UK Parliament, 2021). The UK constitution has been described as a “living constitution” because it more easily “evolves and adapts” to reflect changing social attitudes, as was in the case of the enactment of the *Marriage Act 2013* (Falcetta, Johnson, & Vanderbeck, 2021), which recognized the right of same-sex couples to marry, reflecting the change in view of British society on the issue (see Weeks, 2017).

Are there any disadvantages of an ‘unwritten’ constitution?

The absence of a written constitution has hierarchal implications, meaning that the UK does not have a single, written document that has a higher legal status over other laws and rules, as may generally be seen in the case of a written constitution. It might be argued that because of this fact, the UK constitution, comprised of a number of sources, makes it “less accessible, transparent and intelligible.”

Unlike a fixed, written constitution, the powers of the executive, legislative, and judicial branches are often not clearly defined, “which can lead to ambiguity, uncertainty and possible conflict between the three pillars of government.” The inherent flexibility found in an uncoded constitution means that various provisions could be subject to multiple and perhaps contradictory interpretations. Wade (2019) cites the contrary interpretations taken by the office of the Prime

Minister and the judiciary regarding the Prime Minister's *prorogative power* to suspend Parliament during the Brexit crisis.

As to the issue of prorogation, Elkins (2019) wrote: "Judicial control of the prerogative to prorogue is not justified or required by the fundamental rule (or principle) of parliamentary sovereignty. Proroguing Parliament in no way flouts parliamentary sovereignty. Parliamentary sovereignty is not set aside during a prorogation any more than it is after a dissolution. It is wrong to think that this prorogation bypasses Parliament or turns the constitution on its head."

4.0 Main Features of the British Constitutional System

Most Britons would certainly argue that there is a British constitution—but perhaps only in an abstract sense—existing in a variety of laws or statutes or *Acts of Parliament*, practices and conventions that have evolved over long periods of time. Under these circumstances, Lay (2020) argues that "Brexit was supposed to prove that Britain's unwritten constitution was not fit for purpose, but instability in countries with a written one—and the lessons of our own history—suggest the opposite." Most Britons or students of history would recognize the *Declaration of 1689* or the *Bill of Rights* (Lester, 1990), which followed the forcible replacement of King James II (1685–88) by William III (1689–1702) and Mary (1689–94) in what has been termed the "Glorious Revolution" (1688) (Pincus & Robinson, 2011; Cox, 2012). It established the supremacy of Parliament over the Crown, stated that it was illegal for the Crown to suspend or dispense with the law, and insisted on due process in criminal trials.

The most direct formulation of this principle may be found in Dicey (1982, pp. 3-4):

"The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."

4.1 The Role of Conventions in the British System

An important characteristic of the British unwritten constitution is the special significance of political customs known as 'conventions' which are the unwritten rules of constitutional practice

dealing with the workings of government (Caufield, 2012). These include the office of Prime Minister and the rules under which the Prime Minister is appointed—including the “convention” that the Prime Minister must “command the confidence of the House of Commons” (Marleau & Montpetit, 2000) and either be the party leader of the majority party in the House of Commons or one who heads a coalition of parties which commands that majority.

The British Monarchy, as an institution, may be seen as one of the three components of the Parliamentary system, along with Commons and Lords. In theory, the Sovereign (or “The Crown”) possesses absolute power, unchecked by the judiciary, to refuse assent to a bill passed by the two Houses of Parliament. However, convention dictates that the Sovereign will automatically give his or her assent to any government bill that has been duly enacted by Parliament. Another important convention is that all government ministers must have a seat in Parliament in order to hold office—interestingly, in the case of the Prime Minister and Chancellor of the Exchequer, the senior cabinet officer responsible for British finances—specifically in the House of Commons. Unlike the American “separation of powers” model, the ‘Westminster system of parliamentary government’ (Carney, 1993) provides for a direct form of executive responsibility and accountability to the legislature by requiring cabinet ministers to hold seats in the Parliament.

4.2 Charters and Documents

Although Great Britain does not have a written constitution, it has a rich historical heritage of constitutional charters and documents that form the foundation of the British constitutional system. Almost every American and certainly every British school boy or girl has heard of the *Magna Carta* of 1215, often referred to as the ‘Great Charter of the Liberties of England’ (McKechnie, 1914; Gooch, 1965).

The *Magna Carta* established the principle that the British sovereign (at that time King John) was subject to the same laws as were the barons (see Pyrcz, 2017). This simple concept laid the foundations for the establishment of constitutional government and guaranteed certain fundamental freedoms and rights under the law. Helmholz (2016) reported that Bishop William Stubbs, in his commentary on the *Magna Carta* wrote: “The Great Charter is the first great public act of the nation, after it has realized its own identity’ and added that “The[e] whole

constitutional history of England is little more than a commentary on the *Magna Carta*.”

Blackburn (2015) has stated that the *Magna Carta* “established the direction of travel for our political system towards representative institutions and, much later, democracy itself.” And, in his third inaugural address in 1941, President Franklin Roosevelt commented that “The democratic aspiration is no mere recent phase in human history. It is human history. It permeated the ancient life of early peoples. It blazed anew in the Middle Ages. It was written in *Magna Charta*” (National Archives, 2021). Interestingly, there is still some considerable debate as to just how “great” the Great Charter actually was (e.g., Helmholz, 2015).

In 1258, the *Provisions of Oxford* provided for a Council (The Privy Council) of twenty-four members through whom the King should govern, to be supervised by a Parliament (Jacob, 1924; Guy, 2009; Ross, 2021; Maggioni, 2021). This Council was convened for the first time in 1264 by Simon de Montfort (Wickson, 1970) and asserted the rights of the English barons to representation in the King’s government. During the constitutional conflicts of the 17th century, the *Petition of Right* (1628) relied on *Magna Carta* for its legal basis, and set out the rights and liberties of British subjects—most most importantly freedom from arbitrary arrest and punishment. The *Bill of Rights* (1689) settled the primacy of Parliament over the monarch’s prerogatives (Poole, 2018), providing for the regular meeting of Parliament, free elections to the Commons, free speech in parliamentary debates, and some basic human rights, most famously freedom from ‘cruel or unusual punishment.’

The *Bill of Rights* was followed by the *Act of Settlement* (1701) which controlled succession to the Crown, and established the principle of judicial independence. Interestingly, the House of Commons asserted their interpretation of the law by presenting the king with a ‘*Petition of Right*,’ rather than a formal bill or Act of Parliament. By this Petition, Parliament was certainly implying that they were claiming a subject’s *existing rights*, rather than creating new ones. Blackburn (2015) noted that “Over the past century there have been a number of Acts of Parliament on major constitutional subjects that, taken together, could be viewed as creating a tier of constitutional legislation, albeit patchy in their range and with no special status or priority in law.” These Acts of Parliament include:

- The *Parliament Acts* (1911–49) that regulate the respective powers of the two Houses of Parliament;
- The *Representation of the People Acts* (1918) (as amended) providing for universal voting and other matters of political representation;
- The *European Communities Act* (1972) making the UK a legal partner in the European Union (see Ramiro-Troitino, Kerikmae, & Chochia, 2018; Dorey, 2021); □
The *Scottish, Welsh and Northern Ireland Devolution Acts* of 1998 (as amended) (see Moon & Evans, 2017; Evans, 2018 (Welsh); Wright, 2017 (Scotland) creating an executive and legislature for each of those three nations in the UK; and
- The *Human Rights Act* (1998) (Justice.org, 2002; Equality and Human Rights Commission, 2021) was enacted as a part of Labour’s political platform (Labour Campaign for Human Rights, 1988). The Act established a bill of rights and freedoms actionable by individuals through the courts, incorporating into UK law the rights and freedoms guaranteed under the European Convention on Human Rights of 1953 (Burlington, 2017 (Northern Ireland)).

The Human Rights Act, commonly called ‘the Convention Rights,’ sets forth the “human rights” that are guaranteed to all British citizens. These include:

- Article 2: Right to life
- Article 3: Freedom from torture and inhuman or degrading treatment
- Article 4: Freedom from slavery and forced labour
- Article 5: Right to liberty and security
- Article 6: Right to a fair trial
- Article 7: No punishment without law
- Article 8: Respect for your private and family life, home and correspondence
- Article 9: Freedom of thought, belief and religion
- Article 10: Freedom of expression
- Article 11: Freedom of assembly and association
- Article 12: Right to marry and start a family
- Article 14: Protection from discrimination in respect of these rights and freedoms

- Protocol 1, Article 1: Right to peaceful enjoyment of your property
- Protocol 1, Article 2: Right to education
- Protocol 1, Article 3: Right to participate in free elections
- Protocol 13, Article 1: Abolition of the death penalty

5.0 Why is this Study Important? How Can it be Helpful?

In any course on international business, it is important to understand the governmental structure of a nation in which an investment is contemplated. While this study has focused on Great Britain, it may be applied more broadly to other nations in order to understand the context of business decision-making and who the “players” are—especially where operating in a democratic structure such as exists in Great Britain is important.

When studying globalization, we frequently encounter situations in which firms must abide by the local rules, regulations, and governmental structures of the countries in which they operate. Insight on how this process works is essential.

For example, in 2005 and 2006, US-based Google had to negotiate and ultimately deal with the Chinese government’s restrictions on freedom of speech to do business in China (Gao, 2011; Grogan & Brett, 2017). It is well known that in China, all internet services are required to censor information which the government deems sensitive, and Google has acknowledged doing so (Kharpal, 2019). In 2010, Google chose to discontinue its mainland Chinese version of its site and to direct mainland Chinese users to a Hong Kong version because of China’s restrictive political and legal guidelines. As a result, within months, the Chinese government made Google’s services inaccessible to most Chinese users. Wadell (2016) reported that Google reversed course by January 2016 and was hiring dozens of Chinese in preparation for its reentry into the Chinese market (see also Kharpal, 2016). What had changed? Google decided to engage the Chinese government more directly and more frequently. As Wadell (2016) reported, at that time, Google also was negotiating an agreement to offer an app store for Android devices that would only include Chinese government-approved apps. As a result, Google was able to gain access to millions of users to which it otherwise would not have had access (Kharpal, 2016). More importantly, by working with the Chinese government, Google is now aiming to help Chinese businesses use its products outside of China.

The dual issues of “who decides” questions relating to investment policies and determining the legal basis for these decisions are threshold considerations that play an important part in determining the ultimate success or failure of any investment strategy. While businesses generally would prefer to operate in democratic countries, characterized by openness and transparency, there is no “one-size-fits-all” model of democracy. As an example, The Economist Intelligence Unit, an affiliate of the periodical The Economist, has published the Democracy Index since 2007 (The Economist Intelligence Unit, 2007). In its original iteration, The Economist Intelligence Unit (2007) points out that a challenging fact for individuals and businesses alike is that *freedom* is usually used as synonymous with *democracy*. To move beyond this simplistic assertion, Kekic (2007) states that the Democracy Index compiles data on whether elections are free and fair, civil liberties, functioning of government, political participation, and political culture. Based on these five categories, the Index differentiates between *full democracies*, *flawed democracies*, *hybrid regimes*, and *authoritarian regimes*. Their most recent report as of this writing is that only about half (49.4%) of the world’s population live in a democracy of some sort, and even fewer (8.4%) reside in a “full democracy” (The Economist Intelligence Unit, 2021). The Economist’s Democracy Index raises some peculiar issues relevant for businesses operating in a global economy: only 44.9% of the countries and territories included are considered to be democracies—the majority (55.1%) are considered authoritarian or hybrid regimes. Understanding the system and process of government in the countries in which a business intends to operate is, therefore, critical.

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