Optimize Public Law, Podcast 2: Sources of Law of the UK Constitution

This is a podcast which accompanies *[Optimize] Public Law* by Ursula Smartt.

In our first podcast you were introduced to the general principles of what makes up a Constitution. You learnt that the UK Constitution is unwritten, compared with, for example, the American or French Constitutions, and you learnt the difference between what is meant by the Government (the Executive) and the Legislative or Legislature, that is Parliament.

Now we're going to look at what makes up the UK Constitution. We're going to look at sources of law that make up this Constitution. This will strengthen any argument which you may have with a continental European student, who says that Britain does not have a written Constitution.

You should argue that there are written sources, which make up the UK Constitution. Alright, this doesn't mean that there is *one* codified document, like the US Bill of Rights. But there are a number of sources which make up the UK Constitution, dating back to the **Bill of Rights of 1689**.

One of the main sources of the UK Constitution are **statutes or Acts of Parliament**. Some are worth citing, particularly when you discuss this type of question in the exam, such as the **Bill of Rights of 1689** or the **Constitutional Reform Act of 2005**, which changed and curtailed the way the House of Lords functions. **The Act of Settlement 1701** remains one of the main constitutional laws governing the succession to the throne of the United Kingdom. Chapter 2 of Ursula Smartt's *Optimize Public Law* will give you plenty of examples of other statutes which you can cite in your essays.

Another source of law is **common law**. You may already have learnt during other English legal system lectures, that English law initially evolved through a mass of oral customary rules, also known as **custom law**. This varied from one region to another, and was not initially written down. Custom law was enforced in rather arbitrary fashion and local courts dispensed justice such as the tin mining courts of Devon and Cornwall.

In 1154, Henry II institutionalised common law by creating a unified court system 'common' to the country. Judges travelled from court to court and began to *write down* judgements. This is why common law is also known as 'judge-made-law'. The circuit judges' decisions were then written down and set the precedent which would be used in legal argument in subsequent similar cases. This then became known as the **law of precedent.** The distinctive feature of English common law is then that it represents the law of the courts

as expressed in **judicial decisions**. The grounds for deciding cases are found in the principles provided by past court decisions or precedents – which is then different to a system which is purely based on statute (or the Acts of Parliament).

Other sources of the UK Constitution are so-called **Advisory Sources or Writers of authority**. In Podcast Number 1 we already mentioned some of these famous constitutional writers, such as A.V. Dicey and his *The Law of the Constitution* of 1885. To gain higher marks, you should also have a look at the writings of Sir William Ivor Jennings and quote his *The Law and Constitution* of 1933, and Walter Bagehot and his *The English Constitution* of 1867. Often parliamentarians quote legal writers' authorities when they want to make a point or discredit others, for example, when an opposition MP wants to discredit the Executive (that is the Government or a Cabinet Minister) for using 'arbitrary' power. He may then use a quote from Dicey to remind the Minister that he must justify his actions by reference to a specific legal rule.

Conventions are other sources of the UK Constitution established over time. These are rules which have developed through custom and practice and are generally not written down. Which makes Conventions rather tricky, particularly when they are tested in a court of law.

Sir Ivor Jennings' theory is that a Convention only arises if there is an important 'reason' for its existence. In his view, Conventions are pure political tools. Jennings argued that Conventions ensure that state institutions are run properly.

Here is an example: Royal Assent. This is the Convention that the Queen or King will accept the legislation in a form of a bill before Parliament. When the Monarch grants **Royal Assent** a bill before Parliament becomes a statute or Act of Parliament.

Another Convention exists that the Prime Minister is a member of the House of Commons [HC]. Some Conventions have been tried and tested in British courts of law, and the courts held that Conventions are not enforceable in a court of law, like an Act of Parliament is. Chapter 2 of your *Optimize Public Law* book will give you plenty more examples.

So, to summarise, the British Constitution consists of legal rules, found in statute, case law (that's judicial precedent), subordinate legislation or statutory instruments, and Conventions.

If you wish to write a concluding sentence in your exam essay or piece of coursework, you might consider this:

> Though the UK's Constitution is not one piece of written codified document, such as a 'Bill of Rights', it is more like an assemblage of laws, statutes, conventions, customs and common law, which make up the general constitutional set-up and system. According to the Constitution of the United Kingdom the British community has agreed to be governed in this way. The British Constitution is founded on statutory and common law rules, made up of Conventions, common law (judicial precedent), legislation, Acts of Parliament and EU Law. The process of Government in the UK is regulated by binding political rules which are known as constitutional Conventions.