

SHOULD THE UNITED KINGDOM ADOPT A CODIFIED CONSTITUTION?

Birleşik Krallık Yazılı Bir Anayasa Benimsemeli mi?

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ABSTRACT

Notwithstanding “*Magna Carta Libertatum*”, which is accepted the first constitutional document in the history, was issued by King John of England, the United Kingdom has not adopted a codified constitution until now. In 2015, the United Kingdom celebrated 800th anniversary of Magna Carta. However, the debate continues on whether or not the UK Constitution should be codified. In this study, legal opinions of distinguished jurists regarding the issue will be briefly analysed.

Keywords: Written Constitution-Unwritten Constitution- The Constitution of the United Kingdom - Magna Carta Libertatum - The Principle of Parliamentary Sovereignty

ÖZET

Tarihte kabul edilen ilk anayasal belge “*Magna Carta Libertatum*” İngiliz Kralı John tarafından düzenlenmesine rağmen şimdiye kadar Birleşik Krallık yazılı bir anayasa benimsememiştir. Birleşik Krallık, 2015 yılında Magna Carta’nın 800. yılını kutladı. Bununla birlikte, Birleşik Krallık Anayasasının tek bir anayasal metinde toplanmalı mı toplanmamalı mı konusundaki tartışma devam etmektedir. Bu çalışmada, önemli hukukçuların bu konu ile ilgili hukuki görüşleri öz bir biçimde analiz edilecektir.

Anahtar Kelimeler: Yazılı Anayasa - Yazısız Anayasa - Birleşik Krallık Anayasası - Magna Carta Libertatum - Parlamentonun Egemenliği İlkesi.

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I. INTRODUCTION

The lack of a codified constitution in the United Kingdom has gained considerable attention over the few decades in response to whether the present constitutional arrangements meet the expectations of British citizens. The issue is highly divisive in the doctrine of British constitutional law.¹

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¹ **Bogdanor, Vernon**, (2008), Enacting a British Constitution: Some Problems, Public Law, p.38-40.

Lord Hailsham regards the Parliament as an “*elective dictatorship*” since there is no legally enforceable guarantee against tyrannical government.² In addition, some point out that British constitutional settlement does not protect people from the legislative power of the Parliament.³ What is more, the absence of a higher authority except with the legislature of the United Kingdom is likely to have some doubts about the enforceability of supreme rules.⁴

On the other side of the coin, several writers highlight that the current constitutional order of the United Kingdom has produced robust government, which provides British citizens with human rights, the provision of social welfare and accountability in administration.⁵ They advocate that an uncoded constitution allows a great virtue of flexibility in the sense that government of the day may change comfortably any provision.⁶ Hence, the demand of the citizens could precisely be echoed in the Parliament. Similarly, according to Bentham view, “*a codified constitution reflected solely the dead hand of the past.*”⁷ Dicey, furthermore, indicates that as the system can check automatically itself, a written constitution for Britain would seem unnecessary.⁸ In the same vein, Ringen states that “*...British theory that hold a constitution to be a complex and evolving living organism that cannot be set in stone once and for all...*”.⁹

As above mentioned that there has been significant disagreement among writers in the doctrine concerning whether British historic constitution should be altered or remained. This paper, first of all, will provide a brief synthesis

² **Barendth, Eric**, (1997), Is There a United Kingdom Constitution?, Oxford Journal of Legal Studies, Vol.17(1), p.138.

³ **Elliott, Catherine/Quinn, Franches**, (2011), English Legal System, Essex, Pearson Press, p. 41.

⁴ **Madgwick, Peter/Woodhouse, Diana**, (1990),The Law and Politics of The Constitution, First published, The United Kingdom, Harvester Wheatsheat, p. 12.

⁵ **Barber, N.W.**, (2008), Against a Written Constitution, Public Law, Sweet & Maxwell Limited, p. 18; **Denham, Paul**, (1999), Law a Modern Introduction,4th edition, London, Hodder and Staughten Educational Press, p. 5-6.

⁶ **Bogdanor, Vernon/Khaitan, Tarunabh/Vogenauer, Stefan**, (2007), Should Britain Have a Written Constitution?, Political Quarterly Vol.74(4), p. 501.

⁷ **Bradley, A.W./Ewing,K.D.**, (2011), Constitutional and Administrative Law, 15th edition, Hampshire, Pearson, p. 2; **Bogdanor, Vernon/Khaitan, Tarunabh/Vogenauer, Stefan**, (2007), Should Britain Have a Written Constitution?, Political Quarterly Vol.74(4), p.501.

⁸ **Dicey, A.V.**, (1982), Introduction to the Study of the Law of the Constitution, USA, Liberty Fund Inc., p. 85.

⁹ **Blick,Andrew**, (2011), Codifying - or not Codifying-the UK Constitution: A Literature Review for the House of Commons Political and Constitutional Reform Committee, London, p. 9.

of recent literature from the field, and then analysis of disadvantages of the codification of the British constitution. Finally, it will attempt to justify the current constitutional order is more appropriate to the needs of the United Kingdom than a codified one.

II. WHY THE UNITED KINGDOM DOES NOT HAVE A CODIFIED CONSTITUTION?

Constitution, codified¹⁰ or uncoded¹¹, establishes the character of a government by defining the basic principles to which a society must conform; by describing the organization of the government and regulation, distribution, and limitations on the functions of different government departments; and by prescribing the extent and manner of the exercise of its sovereign powers. It is known that constitution takes precedence over the other sources of law.

Almost all democratic countries in the world have a written constitution regulating the role of public institutions within the state and relationship between the citizens and the state.¹² The United Kingdom, however, does not have a single constitutional document due to the fact that it has been improved from the seventeenth century to the current time without any constitutional moment.¹³ On the other hand, the majority of written constitutions were enacted for making fresh start in the sense that they experienced a historical break such as a revolution.¹⁴

Furthermore, it is stated that the United Kingdom constitution is flat since the status of the constitution is not hierarchically-superior to other statutes.¹⁵ This is because Dicey theory predominates over British constitution, which advocates the sovereignty of parliament. It means that the Parliament

¹⁰ Codified (written) constitution means that a constitution in which key constitutional provisions are provided for within a single written document.

¹¹ Uncoded (unwritten) constitution means that a constitution is made up of rules that are found in a variety of sources in the absence of a single written document. British constitution has seven fundamental sources, which are statute law, European Union law, common law, judicial decisions, works of authority, conventions, Royal Prerogative.

¹² **Turpin, Colin/Tomkins, Adam**, (2011), *British Government and the Constitution*, Cambridge, Cambridge University Press, p. 1.

¹³ **Tomkins, Adams**, (2005), *Our Republican Constitution*, Oregon, Hart Publishing, p. 7.

¹⁴ **Barnett, Hilaire**, (2011), *Constitutional and Administrative Law*, New York, Routledge Press, p.18.

¹⁵ **Elliott, Mark**, (2014), *Cambridge Sixth Form Law Conference Talk: The UK's (unusual) Constitution*.
<http://publiclawforeveryone.com/2014/03/19/cambridge-sixth-form-law-conference-talk-the-uks-unusual-constitution/>

can enact any law whatsoever and that there can be no superior authority to overturn or set aside it.¹⁶ At this regard, Bogdanor states that if the Parliament is sovereign power in the United Kingdom, it is pointless to enact a codified constitution as it serves to demarcate the power of the Parliament.¹⁷

Nevertheless, with new improvements in the constitution of the United Kingdom, the parliamentary supremacy has been under pressure in recent years. For instance, European Communities Act 1972 has had a profound effect on British constitutional order since European law takes precedence over all domestic sources of law in certain legal matters. Moreover, the Devolution Acts¹⁸ and the Human Rights Act 1998 are highly likely to limit the power of the United Kingdom Parliament. In this respect, it can be argued that it is time to consolidate the constitution of the United Kingdom into a single document. In the next title, the issue will be examined.

III. TO CODIFY OR NOT TO CODIFY?

First and foremost, a codified constitution may enable fundamental rules, which explain institutions of the state, individual rights and relationship between the citizens and the state. Particularly, it could impose limits on government and separates powers between legislature, executive and judiciary.¹⁹ Therefore, the separation of powers would be crystallized. What is more, a written constitution might be pervaded by the rule of law on the ground that the basic rules of supreme document.²⁰ Thus, violation of individual rights may be prevented by a codified constitution. All of those are likely to be ensured by a written constitutional settlement because it can precisely delineate supreme rules.

In contrast, it can be stated that a single written document may lead to break down the flexibility of British constitution. Mackintosh highlights that the United Kingdom Constitution is "*sui generis*", which stems from ancient history as it is a product of historical development rather than deliberate design.²¹ In the same vein, according to Low; "*Other constitutions have been*

¹⁶ **Sueur, Andrew Le/Sunkin, Maurice/Murkens, Jo Eric Khushal**, (2010), Public Law Text, cases, and materials, First edition, New York, Oxford University Press, p. 28.

¹⁷ **Bogdanor, Vernon**, (2008), A Codified Constitution, Politics Review, Vol. 18 (1), p. 3.

¹⁸ The Scotland Act 1998, the Northern Ireland Act 1998, the Government of Wales Act 2006.

¹⁹ **Barendth, Eric**, (1997), Is There a United Kingdom Constitution? Oxford Journal of Legal Studies, Vol.17(1), p.138.

²⁰ **Waldron, Jeremy**, (1990), The Law, USA, Routledge Press, p. 82.

²¹ **Denham, Paul**, (1999), Law a Modern Introduction, 4th edition, London, Hodder and Staughten Educational Press, p. 7.

built; that of England has been allowed to grow".²² In addition, Bentham argues *"We have a matchless constitution. We ought not to be dominated by the lessons which our ancestors learned about constitutional government; nor should we reject those lessons out of hand or from sheer ignorance"*.²³ Moreover, Gamble argues that *"the danger of any kind of codified constitution [...] is that it locks in a particular set of arrangements which may be the best available at the time, but may later be judged inappropriate and then may be very difficult to change."*²⁴ Those authors emphasize that the flexibility of the constitution enables Britain to adopt contemporary principles due to the fact that British constitutional arrangements possess a dynamic framework. It can be concluded that even though a codified constitution may provide fundamental principles that is not overturned by an act of parliament, it is likely to be inadequate to comprehend the needs of British citizens in the future.

Furthermore, it is asserted that an unwritten constitution creates omnipotent parliament since there is no fundamental rule to limit the power of the legislature. The parliamentary supremacy refers to the idea that there is no source of law higher than statutes. The theory has been debated by authors owing to the fact that it causes the legislature is controlled by the majority political party.²⁵ In this regard, Lord Hailsham defines government as an *"elective dictatorship"*.²⁶ He expresses that a codified constitution for the United Kingdom must be produced due to limit of political action, thereby protecting the rights of the minority groups. Marshall remarks that the limits on the exercise of legislative power must be examined by constitutional court to impede the infringement of individual rights.²⁷

On the other hand, Grey argues that there is nothing to be gained and everything to be lost by restrictive definition of legal terms such as constitution.²⁸ He considers that enacting codified constitution completely

²² **Bogdanor, Vernon**, (2008), A Codified Constitution, Politics Review, Vol.18(1), p. 1.

²³ **Bradley, A.W./Ewing, K.D.**, (2011), Constitutional and Administrative Law, 15th edition, Hampshire, Pearson, p. 1.

²⁴ **Turpin, Colin/Tomkins, Adam**, (2011), British Government and the Constitution, Cambridge, Cambridge University Press, p.31.

²⁵ **Allen, Micheal/Thompson, Brian**, (2011), Constitutional and Administrative Law, Oxford University Press, p. 28.

²⁶ **Bradley, A.W./Ewing, K.D.**, (2011), Constitutional and Administrative Law, 15th edition, Hampshire, Pearson, p. 4.

²⁷ **Sueur, Andrew Le/Sunkin, Maurice/Murkens, Jo Eric Khushal**, (2010), Public Law Text, Cases, and Materials, First edition, New York, Oxford University Press, p. 24.

²⁸ **Barendth, Eric**, (1997), Is There a United Kingdom Constitution?, Oxford Journal of Legal

meaningless if the constitutional document without legally enforceable guarantees of citizens' rights and precise balance between institutions of the state. The interest in written constitution started in the eighteen century to save citizens from absolute government. Those relatively include liberalism, democracy, individual rights and separation of powers, as termed "*the principles of constitutionalism*". However, despite the fact that there are a significant number of countries, which have a codified constitution, "*the features of constitutionalism*" cannot be found.²⁹ Sartori describes such constitutions as "*nominal*" and "*facade*".³⁰ He stresses that a constitution must contain "*the principles of constitutionalism*". Otherwise, it is submitted that a tyrannical government behaves constitutionally when people are subject to violation.

Nevertheless, when the Constitution of the United Kingdom is analysed in terms of the principles of constitutionalism, it can be seen that it is superior to the majority of countries, which have a codified constitution. Furthermore, Dicey emphasizes that Britain does not need a constitutional document to protect rights or impose limitations upon the exercise of powers because the courts provide the necessary protection with the rule of law.³¹ He, also, expresses that governments should behave legitimately since they are democratically elected.

Moreover, British constitution has changed dramatically over the few decades. For example, Parliamentary sovereignty has come under challenge because the European Law prevails over all of law sources, including act of parliament in accordance with European Communities Act 1972. In addition, the Devolution Acts and the Human Rights Act 1998 have tended to weaken the power of legislature. As Bogdanor stated, "*...the authority of British parliament has now been dispersed, both upwards to Europe, downwards to the devolved bodied and sideways to the judge...*"³² It would appear that existing British constitutional settlement outweighs enacting codified constitution because of the fact that it has been success to generate not only stable government but also provide people with democracy, individual rights and social welfare in

Studies, Vol. 17(1), p. 140.

²⁹ Ibid, p. 140.

³⁰ **Madgwick, Peter/Woodhouse, Diana**, (1990), *The Law and Politics of The Constitution*, First published, The United Kingdom, Harvester Wheatsheat, p. 31.

³¹ Ibid, p. 32.

³² **Bogdanor, Vernon**, (2008), *Enacting a British Constitution: Some Problems*, Public Law, p.38.

comparison with many counterparts as well as can limit on the Parliamentary sovereignty by virtue of some constitutional acts such as European Communities Act 1972, Human Rights Act 1998 and Devolution Acts.

Last but not least, the United Kingdom Constitution originates from conventions, statutes and case law lie in the history of the United Kingdom. According to an idea provided by Dicey: Constitutional law is divided into two sets of principles, the law of the constitution and the conventions of the constitution.³³ However, Barber argues that laws and conventions tend to place upon a spectrum of types of social rules instead of separate categories of rules.³⁴ It would seem that the latter is more persuasive owing to the fact that a sharp distinction between laws and constitutional conventions is delicate matter in the light of British constitutional law. On the other hand, those conventions, statutes and case law has been scattered over the history, from Magna Carta 1215 to the recent changes the European Communities Act 1972, the Human Rights Act 1998 and the Devolution Acts, requires deep detailed information.³⁵ Dicey argues that the understanding of British constitution is necessary to engross the attention of historians and statesmen.³⁶ The further aspect is that how the values are based is unclear notwithstanding the fact that ongoing debate has arisen in the issue. It can be discerned that there is a broad consensus regarding establishing a codified Britain constitution is likely to be a formidable task because it possesses longstanding history and sophisticated structure.

VI. CONCLUSION

The United Kingdom has always been unusual amidst democracies since it lacks a codified constitutional document.³⁷ Hence, numerous strong arguments indicated by scholars, who are in favour of the codification of the British constitution. For example, a codified constitution can prevent violation of individual rights by the state and protect minority groups from pressure of majority.

³³ **Sueur, Andrew Le/Sunkin, Maurice/Murkens, Jo Eric Khushal**, (2010), *Public Law Text, cases, and materials*, First edition, New York, Oxford University Press, p. 40.

³⁴ **Barber, N. W.**, (2011), *Law and Constitutional Conventions*, *Law Quarterly*, Vol. 125, p. 294.

³⁵ **Denham, Paul**, (1999), *Law a Modern Introduction*, 4th edition, London, Hodder and Staughten Educational Press, p. 6-7.

³⁶ **Madgwick, Peter/Woodhouse, Diana**, (1990), *The Law and Politics of The Constitution*, First published, The United Kingdom, Harvester Wheatsheat, p. 33.

³⁷ **Hockman, Stephen/Bogdanor, Vernon et al**, (2010), *Towards a Codified Constitution*, *Justice Journal*, p. 74.

On the other hand, taking everything into account, it is reasonable to conclude that the constitutional architecture of the United Kingdom should continue existing since, first of all, the codification of the constitution is likely to create serious deadlock in the future in spite of the fact that it might be appropriate at the day of present. The United Kingdom Constitution, also, enables British citizens to have more favourable welfare environment than many countries, which have a codified one. Lastly, a codified the UK constitution is difficult and demanding task since it originates from conventions, statutes and case law lie in the history of the United Kingdom.

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