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# THE DISTINCTION BETWEEN WRITTEN AND UNWRITTEN LAW AND THE DEBATE ABOUT A WRITTEN CONSTITUTION FOR THE UNITED KINGDOM

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*This essay aims at reflecting on the persistent relevance of the traditional distinction between 'written' and 'unwritten' law as an essential feature of the English legal tradition, in order to better understand the current discussion concerning the enactment of a written Constitution for the United Kingdom, after the wide public consultation launched in 2014 by House of Commons. Three main aspects are considered: the difference between the idea of Rule of law and the continental idea of Staatsrecht, the concept of parliamentary sovereignty, the relationship between statute law and case law. It will be argued that even if a written constitution should ever see the light in the United Kingdom, it will presumably have a very particular status. A peculiarly 'British' one.*

## 1. Introduction

One of the main features of the English legal system regarding the sources of law is the classical distinction between "written law" and "unwritten law", that is between statutes enacted by Parliament and cases decided by judges, which have the value of precedents for the solution of subsequent similar cases (1). This traditional classification has clear medieval origins and was defined by William Blackstone in the eighteenth century in his famous and influential *Commentaries*:

"The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the *lex non scripta*, or common law; and the *lex scripta* the written, or statute law. The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions".

Blackstone questions by whom the validity of these customs or maxims is to be determined and his answer is: "by the judges", being

"the depository of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. [...] The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration".

From these assumptions, Blackstone concludes that the cornerstone of English law is "general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained on our reports, and digested for general use in the authoritative writings of the venerable sages of the law" [20, pp. 67-73].

One should not be misguided as to the meaning of written-unwritten law. Written law

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does not mean rules of law expressed in writing, but a law which is dictated in an imperative way, “an express precept which not only declares or contains, but in its very words constitutes the law” [6, p.233]. Conversely, unwritten law does not mean a law which is not formulated in writing, but one which consists in the reason and spirit of cases and not in the letter in particular cases (2). The difference lies in the fact that the former is compulsory because it is enacted, whereas the latter is compulsory as general custom.

The aim of these pages is to reflect on the persistent relevance of this traditional distinction as a key to understanding the current discussion concerning the enactment of a written Constitution for the United Kingdom. It is an issue that has been much debated in the past, but which came to the fore again in 2014, when the House of Commons (one of the two Chambers of the Parliament) launched a wide public consultation precisely on this topic.

It is impossible to foresee if this initiative will achieve any results, in a situation which appears even more complicated after the recent referendum on the exit of the United Kingdom from the European Union (the so-called Brexit) (3). Yet, it is useful to try to give an account of some aspects of the context in which this debate takes place. To this end, three aspects are to be considered: *i*) the difference between the idea of Rule of law and the continental idea of *Staatsrecht*; *ii*) the concept of parliamentary sovereignty; *iii*) the relationship between statute law and case law. A brief consideration of these three features will make it possible to give an account of the most contentious issues and to make some final remarks about the relevance and the persistency of a conception of law which continues to be grounded on the dichotomy between written and unwritten law.

## 2. The Rule of Law and its differences with the continental “Staatsrecht”.

The distinction between written and unwritten law is essential to the understanding of the conception of Rule of Law in the English Legal System and the way it differs from the continental idea of *Staatsrecht*. Both doctrines share the same aim, that is the need to subject the exercise of public powers to legal regulation, in order to protect the rights of citizens. But the ways through which this aim is pursued differ significantly (4).

In the common law tradition, the limitation of state powers is achieved through a law which does not derive from the state itself, but

from the common law, i.e. from an “unwritten” law (case law), which develops autonomously from the state (5). It is worth remembering the ancient *dictum* contained in the year books and expressed in the language of the time (the so-called “law French”), according to which the law is the King’s greatest legacy; for by the law he himself and all his subjects are governed, and if there were no law, there would be neither King nor inheritance (6). It is easy to understand that the idea underlying this formulation is that law both preexists the sovereign’s authority and binds him.

This concept is characterized by a slow and gradual process of adaptation of the medieval inheritance to the needs of modern society, culminating in the XIX century contribution by Albert Venn Dicey. But it still remains the core idea underpinning the Rule of Law in the common law tradition.

In contrast, the theory of *Staatsrecht* is an effect of the great change which took place on the Continent, culminating in the codification movement soon after the French Revolution of 1789. Obviously, it is neither possible nor useful to go into this in depth, but it is still worth noting, from a general comparative perspective, that the codifications led to a real disruption of continuity on the Continent. Previously, “law” had never been conceived only as the product of the will of the political authority, whereas from that moment on the situation changed radically and the law was identified with the legislation enacted by the state.

In this new context, the idea of *Staatsrecht* was shaped in Germany by Robert von Mohl in the eighteen thirties [16, R. von Mohl, 1832-34] as a compromise between the liberal doctrine (supported by the enlightened bourgeoisie) and the authoritarian ideology of the conservatives (the monarchy primarily). In fact, the *Staatsrecht* is opposed to the absolutist state, through the elaboration of the two classical liberal principles of public enforcement of individual rights and separation of powers. On the one hand, individual rights are conceived as a creation of the state and limit its power; so, in contrast with the French revolutionary view, the source of individual rights is not the people’s sovereignty, but the legislative power of the State itself, which expresses the spiritual identity of the people. On the other hand, the principle of primacy of law is transformed into the principle of legality: the system of rules given by Parliament is to be respected rigorously by both the executive and the judiciary, as a condition of the legality of their acts. In this perspective, an arbitrary use of legislative po-

wer is not contemplated, because the assumption is that there is a perfect correspondence between the will of the state, legality and moral legitimacy [4, p.21]. The *Staatsrecht*, therefore, as it was originally conceived, is the State which limits itself through statute law [5, p. 310]. With substantial variation, this concept was later also followed both in France [3, p. 284] and Italy and we can say that it characterizes all the civil law countries.

As a consequence of this conception of *Staatsrecht*, in the civil law systems administrative law is seen as a distinct "special" branch of law, with a completely separate judicial structure (administrative courts). On the contrary, in English law "the citizen's remedies against the state have been enhanced by the development of a system of administrative law based on the power of the court to review the legality of administrative action" [8, p.296]. So, in contrast with the continental *Staatsrecht*, where public authorities are subjected to scrutiny regarding the legality of their acts by a separate jurisdiction, the Rule of Law implies and postulates a unity of jurisdiction, i.e. the submission both of private individuals and of public authorities to the same judge [11, p. 247], (7).

The dichotomy between written law and unwritten law, which underlies the conception of Rule of Law, explains the reason why the British constitution remains a diverse combination of statutes, common law, customs, manuals and parliamentary rules [1, p.74], so that it is impossible to clearly determine a formal dividing line "between what constitutes a core component of the constitution and what does not" [13, p.2]. In this context, the role of case law is essential, to the point that English jurists can make an assertion which sounds alien to any continental jurist: "constitutional law remains a common law ocean dotted with islands of statutory provisions [...] Whether we like it or not, the common law is the responsibility of the courts" [18, p. 273].

Significantly, as we will see later, one of the chief reservations about adopting a written constitution is the fear that the relationship between the courts and Parliament would be affected in a way that could compromise the very delicate equilibrium which makes English law a unique and dynamic legal system. In order to better understand this point, the following paragraphs will try to describe, on the one hand, the formal preeminence of statute law over case law (expressed through the doctrine of Parliamentary sovereignty) and, on the other, the attitude with which statute law is considered by English judges.

### 3. The doctrine of Parliamentary Sovereignty: the (formal) preeminence of statute law.

In English law, there is no source of law more authoritative than an Act of Parliament and the doctrine of parliamentary sovereignty means that the courts are obliged to uphold and enforce the statutes, even if they consider them contrary to a constitutional principle.

This seems contradictory with respect to the Rule of Law described above. But this contradiction is only apparent (8). It is not the aim of this article to consider in depth either the meaning, or the historical and philosophical origins of the doctrine of parliamentary sovereignty (9). More simply, it is important to stress the peculiar relationship between statute law and case law. To this end, a useful guideline is the *dictum* of an eminent English judge, sitting in the (then) House of Lords: "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights [...]. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual" [17] (10).

Once again, it is evident that this way of reasoning shows to what point the dichotomy between written and unwritten law is essential to the understanding of the English legal system: "In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law" [19]. In other words, "the rule of law recognizes two sovereignties, not one and not three" [18, p. 291].

This aspect cannot be underestimated, because it is essential to grasp that the hallmark of the English Legal System is the importance accorded to the decisions of judges as sources of law. In this sense, the common law is "unenacted", and so "unwritten", law [8, p.295] and it binds not only private individuals, but also public authorities. In Magna Carta we find the first formulation of a principle whose basis has been well summarized as follows: "the law of the realm should be written down to guide the king in ruling the kingdom" and "due process

facilitated by the judgment of peers and guided by the law of the land should be applied not only in the king's courts but *also to the king himself*" [9, p.51]. This idea, according to which the "king" is bound by a law which is not created by himself, continues to characterize the English tradition, in a never-ending variation of scenarios.

According to the doctrine of Parliamentary sovereignty, case law cannot contradict statute law and the courts are bound by statute law, but at the same time the idea of the "two sovereignties" is at the root of a cultural attitude that tends to consider the relationship between common law and statute law in terms of separateness, like oil and water [8, p. 300]. In this perspective, the reciprocal implication between the idea of Rule of Law and case law ensures the protection of individuals against the state by subjecting the action of public authorities to scrutiny under the jurisdiction of the common law courts.

#### **4. The attitude of common law judges towards the interpretation of law.**

The dichotomy written-unwritten law is also essential for understanding the strict approach of English judges and jurists to the interpretation of statute law, to the point that "Psychologically, if not statistically, statutes can still appear to many lawyers as exceptions rather than the rule" [19].

A recent example of this attitude can be drawn from a case decided by the UK Supreme Court in 2015 [15, UKSC, 2015] (11). Very briefly, a journalist employed by a newspaper sought disclosure (under the Freedom of Information Act 2000 and the Environmental Information Regulations) of correspondence sent by Prince Charles to various Government Departments between 1 September 2004 and 1 April 2005. The Departments refused disclosure and the Information Commissioner upheld that decision. The Upper Tribunal ordered that Mr Evans was entitled to disclosure of 'advocacy correspondence' falling within his requests, including advocacy on environmental causes, on the grounds that it would generally be in the overall public interest for there to be transparency as to how and when Prince Charles sought to influence government. But subsequently the Attorney General used the statutory 'veto', according to section 53(2) of the Freedom of Information Act 2000, enabling him to block disclosure. Under section 53(2), the Attorney General can decide that an order against a government department shall cease to have effect. The Supreme Court, dismissing

the appeal against the decision of the Court of Appeal, upheld a very strict interpretation of the relevant statutory provisions.

It is obviously impossible to examine these decisions in depth, but it is useful to quote the *dictum* of Lord Neuberger (for the majority), focusing on "two constitutional principles which are also fundamental components of the Rule of law. First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the Rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinized statutory exceptions, reviewable by the court at the suit of an interested citizen" (12). For this reason, the right of citizens to seek judicial review of actions and decisions of the executive has "its consequences in terms of statutory interpretation", in the sense that "[t]he courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear" (13).

An aspect which emphasizes the strict approach to the interpretation of statute law is the so-called presumption against the alteration of the common law. This means that even if Parliament is sovereign and can alter the common law, in order to do so it must expressly enact legislation to that end. If there is no express intention, the courts assume that a statute is to be interpreted in a manner which does not introduce any change to the common law (14). This is further proof of the persistent importance and implications of the distinction between written and unwritten law, which continues to characterize the common law experience and mindset.

#### **5. The debate concerning a written constitution.**

In the light of what has been discussed above, it is now possible to give an account of the current debate concerning the adoption of a written constitution for the United Kingdom, which is one of the only three countries in the world not to have one (together with Israel and New Zealand) (15).

This issue is obviously not new and has been the subject of wide-ranging discussion (16), but in 2014 it was relaunched by the official initiative of the House of Commons, through its Political and Constitutional Reform

Committee. Significantly, the results of this consultation were published in 2015, during the celebrations of the 800<sup>th</sup> anniversary of Magna Carta (1215-2015), with the evocative title: "A new Magna Carta?" (17).

Very briefly, the House of Commons Constitutional Committee investigated three options. The first is to adopt a Constitutional Code, that is a document sanctioned by Parliament but without statutory authority, setting out the essential existing elements and principles of the Constitution and workings of Parliament. The advantage of this solution would be to substitute rules which are sometimes inaccessible and often unwritten with one text, a single document, easily accessible and intelligible, containing a set of rules about how the country is governed. In this sense, the process of constitutional codification would not imply a change in the rules applied, but only their rational and comprehensive formulation.

The second option is a Constitutional Consolidation Act, that is consolidation into a statute of the existing laws of a constitutional nature, common law principles and parliamentary practice, together with a codification of essential constitutional conventions.

The third option is a real written Constitution, that is a document of basic law intended to govern the United Kingdom, including the relationship between the state and its citizens, an amendment procedure and elements of reform (18).

The debate about these possible options is extensive and of course is also influenced by politics. In contrast with the cautious approach of the first two options, the third is preferred by those who emphasize the need for radical change, especially through a modification of the doctrine of Parliamentary sovereignty. The main argument is that a constitution should express the sovereignty of the people, so that at least in some cases Parliament should be subject to constitutional limitations. Moreover, some argue that a written constitution would improve the English legal system, because it would face and solve outstanding constitutional problems, especially concerning the relationships between England, Scotland, Wales and Northern Ireland, the parliamentary control over the executive prerogative powers, as well as integrating or replacing the Human Rights Act 1998 with a British Bill or Rights (19).

This last aspect is extremely controversial and has recently been discussed at length not only among scholars, but also at a legislative level: the House of Lords European Union Committee has just issued a very detailed report

which appeared just before the referendum on Brexit, with the significant title: "The UK, the EU and a British Bill of Rights" (20).

The issue concerning the drafting of a UK Bill of Rights, to be inserted in a written constitution, is closely linked with the recent tendency to resist the monopoly of the protection of human rights at a European level. In this regard, it has to be remembered that, after a long period of reflection, at the end of the last century the United Kingdom implemented the European Convention for Human Rights through the Human Rights Act 1998. This legislation captivated English jurists and judges, to the point that they considered it the main source for the protection of human rights. More recently, however, the Supreme Court has questioned this approach. In a very important case decided in 2013, it clearly asserted that "the development of the common law did not come to an end on the passing of the Human Rights Act 1998" [12, UKSC, 2013]. In a subsequent case, it stated even more clearly: "it was not the purpose of the Human Rights Act that the common law should become an ossuary" [10, UKSC, 2014]. This new trend has been defined as a 'resurgence' of the common law protection of human rights against European sources, in order to make clear that human rights were already, and continue to be, a part of the British national inheritance. In this context, it is claimed that a written constitution could provide the opportunity to set a balance between the European and the domestic dimensions of the protection of human rights and also to better define the respective competence in their assessment (21).

## 6. Conclusive remarks.

Leaving aside the opposing arguments, whose analysis would of course need a far more exhaustive discussion than is possible here, it is very significant to point out that everyone recognizes that the main reservation concerning the enactment of a written constitution revolves around the relationship between the courts and Parliament [14, p.9]. As can be seen, the distinction written-unwritten law always lurks in the background and regularly re-emerges.

More specifically, opponents to a written constitution argue that it would politicize the judiciary, because non-elected judges will have to give judgments on questions of a political nature which should be left to the exclusive competence of Parliament (22). In fact, it is well-known that most written constitutions have a higher status and priority as law, enabling judicial review of ordinary legislation on the grounds of incompatibility with the con-

stitution itself. Should the British constitution be a document like this, it is evident that the doctrine of Parliamentary sovereignty would be radically affected, for the simple reason that Parliament could be prevented from adopting a statute if it is in contrast with the constitution.

In order to sidestep this outcome, which is considered serious even by those who plead in favour of a written constitution, a typically "British" solution has been put forward [14. P.9]. It takes inspiration from the mechanism adopted by the Human Rights Act 1998. One of the issues which was seen as an obstacle to the integration of conventional rights within the English legal system through a statute was precisely its intrinsic value: formally it was a simple statute, but substantially it had a 'constitutional' relevance, because it could limit the omnipotence of Parliament.

The way-out of this problem was fixed in Art. 3 of the HRA, according to which "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". At the same time, sec. 3.2 makes clear that sec. 3.1 "does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility".

Thus, while judges are given the power to interpret every statute (prior or subsequent to the HRA) in a way which is compatible with the convention rights, at the same time they are inhibited from affecting the validity of a statute if they consider it incompatible with the convention rights. This point is explicitly clarified by Art. 4, which provides that in case of incompatibility the judge does not have the power to invalidate the statute and is only allowed to make a declaration of incompatibility, not affecting "the validity, continuing operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made".

All this shows that the HRA "has a dialectical tension at its core. On the one hand, the measure presents itself as establishing a new, justiciable language of human rights; on the other, it declares itself to be still in thrall to the fundamental constitutional principle of Parliamentary sovereignty" [2, p.248] (23).

It is exactly this kind of compromise which is suggested in the drafting of a written consti-

tion in order to attempt to retain parliamentary sovereignty (24).

To illustrate this solution, it is pertinent to quote directly from the official document prepared by the Political Committee of the House of Commons: "One possible way for the UK to attempt to retain parliamentary sovereignty, should it adopt a codified constitution, would be to use a 'declaration of unconstitutionality'. This would be a variation on the method that is currently used under section 4 of the Human Rights Act 1998, whereby the courts can declare that a piece of UK legislation is incompatible with a provision of the European Convention on Human Rights" [7, House of Commons 2013-14].

As a result, it is clear that the only effect of a declaration of unconstitutionality would be of a political nature. It would be a mere warning to Parliament, leaving it the sole responsibility regarding the decision to modify or not the "unconstitutional" statute. With this solution the compatibility with the doctrine of parliamentary sovereignty is certainly guaranteed, but at the same time the impact of a written Constitution is substantially neutralized.

This highlights the uneasiness felt by English jurists when facing the concrete implications of a written constitution. In the background it is easy to perceive the heavy weight of the heritage of the English legal tradition and in particular the distinction between written and unwritten law. To the point that one should not be misguided by the use of the word 'Constitution': even if a written constitution should ever see the light in the United Kingdom, it will presumably have a very particular status. A peculiarly 'British' one.

#### Notes

1. For a general discussion concerning the sources of law in English law, see L. Moccia, *Comparazione giuridica e Diritto europeo* [], Milan, 2005, p. 409 and ff.
2. This is the well-known statement by Lord Mansfield in a case of 1762 (*Fisher v. Prince*, 3 Burr. 1363).
3. See P. Craig, *Brexit: a drama in six acts*, in *Eur. Law. Rev.*, 2016, p. 447.
4. For a first approach, see D. Fairgrieve, *Etat de Droit and Rule of Law: Comparing Concepts*
5. For a full discussion, cf. L. Moccia, *Comparazione giuridica e diritto europeo* []. Milano, 2005, p. 219.
6. "La ley est la plus haute inheritance que le Roi ad; car par la ley il meme et tous ses

sujets sont rulés, et si le ley ne fuit, nul Roi, et nul inheritance sera" (19 Hen. VI. 63).

7. For an account of the recent debate in the United Kingdom concerning the utility of a bill of rights, foremost after the Human Rights Act 1998, see Lady Hale, *UK Constitutionalism on the March* // <https://www.supremecourt.uk/docs/speech-140712.pdf> and N. Walker, *Our Constitutional Unsettlement* // Public Law, 2014, p. 529

8. This point has already been extensively dealt with by A.V. Dicey, *An Introduction etc.*, p. 402.

9. For an in-depth account, see J. Goldsworthy, *Parliamentary Sovereignty. Contemporary debates*, Cambridge, 2010, especially chapters 2 and 3.

10. More recently, *Beghal v Director of Public Prosecutions* [2015] UKSC 49.

11. For a detailed analysis of this case, cf. T.R.S. Allan, *Law, democracy, and constitutionalism: reflections on Evans v Attorney General*, in C.L.J., 2016, 38.

12. *Ivi*, para 51 and 52.

13. *Ivi*, para 56, quoting the opinion of Lady Hale, in *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, para 159.

14. For a recent case in this field, see *R v Hughes* [2013] 1 WLR 2461.

15. In general, see the comprehensive study by A. Blick, *Codifying – or not codifying – the UK constitution. A*

16. The literature is immense; see O.H. Phillips, *Reform of the Constitution*, London, 1970; R. Holme-M. Elliott (eds), *1688-1988: Time for a New Constitution*, London, 1988; R. Brazier, *Constitutional Reform: Reshaping the British Political System*, Oxford, 2008; F. Vibert, *Constitutional Reform in the United Kingdom – An Incremental Agenda*, London, 1990; T. Benn-A. Hood, *Common Sense: A New Constitution for Britain*, London, 1993. More recently, see P. Bowen, *Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?*, in *Eur. Human Rights Law Rev.*, 2016, p. 361.

17. The text is published at the following link: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/599/599.pdf>. Magna Carta was enacted in 1215 at the end of a difficult period of controversy and civil war. It is still considered one of the fundamental statutes of the English legal system and it is at the origin of an idea of law as a limit to the sovereign's power, Among the most interesting

volumes published see R. Griffith-Jones-M. Hill (eds.), *Magna Carta, Religion and the Rule of Law*, Cambridge, 2015. See also Lady Hale, *Magna Carta: Our Shared Heritage*, in <https://www.supremecourt.uk/docs/speech-150601.pdf>. In the words of an eminent English judge, "The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality" (T. Bingham, *The Rule of Law*, Oxford, 2010, p. 12).

18. These three options are considered in the Report drafted by the House of Commons in 2014, available at <https://www.publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/463/463.pdf>.

19. For an in-depth analysis of the different issues involved, see R. Blackburn, *Enacting a Written Constitution for the United Kingdom*, in *Statute Law Review*, 2015, p. 1. See also B.C. Jones, *Preliminary Warnings on « Constitutional» Idolatry*, in *Public Law*, 2016, p. 74; D. Grieve, *Can a Bill of Rights do better than the Human Rights Act?*, in *Public Law*, 2016, p. 223; Q. Butavand, *Quelle actualité pour la Constitution du Royaume-Uni* [] // *Rev. franç. droit constit.* []. 2015, p. 539.

20. Available at <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf>.

21. On these issues cf. R. Masterman-S. Wheatle, *A Common Law Resurgence in Rights Protection*, in *European Human Rights Law Rev.*, 2015, p. 57. See also M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the United Kingdom*, London, 2011. About the utility of a Bill of Rights in a common law system, cf. J.D. Heydon, *Are Bills of Rights necessary in common law systems*, in *Law Quart. Rev.*, 2014, p. 392.

22. See for instance N. Barber, *Against a Written Constitution*, in *Public Law*, 2008, p. 11.

23. About the future prospects of the Human Rights Act, see R.J.A. McQuigg, *The Human Rights Act 1998: Future Prospects*, in *Statute Law Review*, 2014, p. 120. The implications of a possible repeal of the Human Rights Act are comprehensively dealt with by P. Sales, *Rights and fundamental rights in English law*, in *Cambr. Law Journal*, 2016, p. 86.

24. In this sense, cf. R. Blackburn, *Enacting a Written Constitution etc.*, *op. cit.*, p. 9.

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1. B.C. Jones. *Preliminary Warnings on « Constitutional » Idolatry* // Public Law. 2016.
2. C.A. Gearty, *Reconciling Parliamentary Democracy and Human Rights*, // Law Quart. Rev., 2002.
3. Cf. A. Laquière. *Etat de droit e sovranità nazionale in Francia* [Rule of law and the National Sovereignty of France] // P. Costa-D. Zolo, *Lo Stato di diritto etc* [The Law-Based State].
4. Cf. D. Zolo. *Teoria e critica dello Stato di diritto* [Theory and Criticism of the Law-Based State ]// P. Costa-D. Zolo, *Lo Stato di diritto. Storia, teoria, critica* [Law-Based State. History, Theory, Criticism]. Milano, 2002.
5. Cf. G. Sartori. *Nota sul rapporto tra Stato di diritto e Stato di giustizia* [Notes on the relationship between the State of Rule of Law and the State of Justice]// AA.VV. *Dommatica, teoria generale e filosofica del diritto* [Dogmatics, General Theory and Philosophy of Law]. Vol. 2. Milano, 1964.
6. F. Pollock, *A First Book of Jurisprudence*. London, 1929.
7. House of Commons, Political and Constitutional Reform Committee, *Constitutional role of the judiciary if there were a codified constitution*, 2013-14, HC 802 // <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/802/802.pdf>.
8. J. Beatson, *Has the common law a future*, in *Cambridge Law Journal*, 1997.
9. J.W. Baldwin, *Due process in Magna Carta. Its sources in English law, canon law and Stephen Langton*, in R. Griffith-Jones-M. Hill (eds).
10. *Kennedy v Information Commissioner* [2014] UKSC 20, per Lord Toulson (at 46).
11. L. Moccia, *Comparazione giuridica e diritto europeo* [Comparative Law and European Law]. Milano, 2005.
12. *Osborn v Parole Board* [2013] UKSC 61, per Lord Mance (at 61).
13. P. Norton, *Introduction: A Century of Change* // P. Norton. *A Century of Constitutional Reform*, London, 2011.
14. R. Blackburn, *Enacting a Written Constitution for the United Kingdom*, in *Statute Law Review*, 2015.
15. *R (on the application of Evans) v Attorney General* [2015] UKSC 21.
16. R. von Mohl, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* [Police Law according to the Principles of the Law-Based State. Tübingen, 1832-4.
17. *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, per Lord Hoffmann.
18. S. Sedley, *The sound of silence: Constitutional Law without a Constitution* // Law Quarterly Review. 1994.
19. *X v. Morgan-Grampian Ltd.* [1991] AC 1, per Lord Bridge of Harwich.
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## РАЗЛИЧИЕ МЕЖДУ ПИСАНЫМ И НЕПИСАНЫМ ПРАВОМ И ДИСКУССИЯ О ПИСАНОЙ КОНСТИТУЦИИ ДЛЯ СОЕДИНЕННОГО КОРОЛЕВСТВА

Статья анализирует сохраняющуюся актуальность традиционного различия между «писанным» и «неписанным» правом в качестве существенной особенности английской правовой традиции для того, чтобы лучше понять нынешнюю дискуссию в отношении принятия писаной конституции для Соединенного Королевства после широкого публичного обсуждения, начатого в 2014 году Палатой общин. Рассматриваются три основных аспекта: разница между идеей верховенства закона и континентальной идеей Staatsrecht (конституционного права), кон-

цепция парламентского суверенитета, отношения между статутным правом и прецедентным правом. Можно предположить, что даже если писаная конституция когда-либо увидит свет в Соединенном Королевстве, она, вероятно, будет иметь особый статус – специфически британский.

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### Ключевые слова:

источники права, писаная конституция, верховенство закона, парламентский суверенитет, процесс конституционной реформы.

### Keywords:

Sources of law – Written Constitution – Rule of Law – Parliamentary Sovereignty – Constitutional Reform Process.