What are the hallmarks of a political, as opposed to a legal, constitution?

The concept of a political constitution is perhaps most famously enclosed within J.A.G Griffith’s statement describing it as ‘no more and no less than what happens’. However, in his famous 1978 Chortley lecture, Griffith did not attempt to provide a normative prescription for a previously unknown type of a constitution – a ‘political’ one – as his primary focus was on creating a descriptive account of functioning of the British constitutional arrangements, ie a set of practices by which the state power is allocated and divided between different branches of the state apparatus. In identifying the hallmarks of a political constitution, this essay will thus focus on identifying the features of the UK arrangements which arguably serve as examples of the constitutional status quo being shaped through political, rather than legal means, which is the defining principle of political constitutionalism. The hallmark features will be considered in three groups: a) state power allocation, b) conferral and protection of individual rights and c) provision of governmental accountability. However, the use of the UK constitution as an example of a political constitution should not be equated with the assumption that the UK constitution is strictly political in its nature; similarly to the majority of constitutions, it possesses some characteristics of both systems, playing supplementary, rather than antagonistic, role to each other.

Within the area of state power allocation, a political constitution places primary focus on the supremacy of politics over law and the primacy of the elected legislature in creation of statutory provisions. The ultimate power is vested in a political, rather than legal, process and endows the country’s primary legislature with the power to make and unmake any law, as ‘law is politics carried on by other means’. The doctrine of Parliamentary sovereignty is an example of this approach, with the Parliament being the chief legislator in the country. Some of its Acts have recently been recognised by the courts as possessing ‘constitutional’ status, i.e. being of normative importance in the overall constitutional scheme of state institutions and rights, but the scope of protection granted by this ‘constitutional’ nature is limited to conditional suspension of the doctrine of implied repeal of Parliamentary acts, as stated by Laws LJ in Thoburn and upheld by the UK Supreme Court in HS2; indeed, any constitutional change can be brought about by an explicit repeal in ordinary legislation, as statutory constitutional arrangements do not possess special legal status - changes of ‘constitutional weight’, such as re-distribution of power between the political bodies (eg. Parliament Acts of 1911 and 1949, Constitutional Reform Act 2005) were made law by ordinary Acts of Parliament. The power resting in the Queen-in-Parliament is regulated through a set of political practices contained both in legislature and in constitutional conventions, placing further emphasis on continuing political tradition. Conventions in particular can be considered to be a characteristic of a political constitution. Their existence is guided by political practices and the precedent, relying on the political actors party to the conventions feeling obliged to observe them;

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1 Griffith, ‘The Political Constitution’ (1979) 42 MLR 1, p.18
2 Gee and Webber, ‘What is a Political Constitution?’ (2010) 30 OJLS, p. 275
4 Elliott and Thomas, p.81
5 Gee and Webber, p. 277
7 Thoburn v Sunderland City Council [2002] EWHC 195 (Admin) paras 60-67; * R(HS2 Action Alliance Ltd) v Secretary of State for Transport) [2014] UKSC 3
8 Elliott & Thomas, p.11
10 Elliott and Thomas, p.81
11 Re Resolution to Amend the Constitution [1981] 1 SCR 753
while being legally unenforceable, as no legal sanction for breaking them exists\textsuperscript{12}, although the courts are able to recognise them in their deliberations. The widespread observance of the conventions is motivated by the fear of political consequences of disobedience, as the supreme elected body (eg. The House of Commons) is the forum through which those wronged by a breach of convention may seek remedy\textsuperscript{13}. Constitutional conventions may or may not be codified in the sense of being recorded (eg. The Cabinet Manual, compiled in 2011), but the areas governed by them, such as the principle of ministerial responsibility or Cabinet collective responsibility are not statutorily regulated\textsuperscript{14}. It is the politics that shape the law, which results in a considerable degree of constitutional flexibility, as nothing except for the key tenets enshrining the vesting of power in the legislature is permanent; an ‘unconstitutional’ action may as well be understood as immoral or highly politically improper, rather than simply unlawful\textsuperscript{15}. Should the patterns of political behaviour change, so would the constitutional make-up of the country, a result of which is the characteristic tendency for piecemeal constitutional development over the years, rather than all-encompassing singular reforms - the constitution changes by virtue of changes in precedent, and it is quite rare for sudden and widespread changes in the political behaviour to occur in absence of a ‘break’ in the previous system, such as a revolution or regime change\textsuperscript{17}.

In terms of rights, a political constitution’s distinguishing feature is the lack of specific provisions protecting the individual rights from being infringed upon by those in power, as well as derivation of rights from the current views of the society rather than enforcing them on the people from above. The body of public law in England did not develop with protection of human rights in mind; its roots lie in the public duty enforcement and correcting public wrongs\textsuperscript{18}, ie. regulation of the political aspects of governance. Griffith argues that there are no over-arching and infallible rights in a society; instead, rights should be viewed in terms of being political claims, exerted by individuals against those currently in power\textsuperscript{19}. The body of rights is created through constant, inherent conflict present in the society\textsuperscript{20}, with the winning side being able to grant their claims legal status. If the majority of citizens agree with a certain claim for long enough, the claim might thus gain a special status, and be recognised by the courts as a fundamental constitutional principle (eg. The rule of law, from which the principle of legality follows), imposing limits on the executive’s powers\textsuperscript{21}. However, those limits are subject to the Parliament’s will to submit to them. The introduction of the Human Rights Act 1998 enabled the courts to abandon pursuit of abstract constitutional rights in favour of references to the constitutional statute\textsuperscript{22}, but as seen in the Belmarsh case, the Parliament can still legislate contrary to its provisions, and it is only due to threat of political fallout that the statutory provision\textsuperscript{23} was amended to remove the inconsistency\textsuperscript{24}. The limits on political power of rights infringement possessed by the courts are few, and mostly relate to impact prevention, rather than securing of a particular right – reflecting the courts’ reluctance to recognise a subset of rights which could be considered to be of constitutional importance based

\textsuperscript{12} R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 [136]-[151]
\textsuperscript{13} Attorney General v Jonathan Cape (1976), QB 752
\textsuperscript{14} Elliott and Thomas, p.51
\textsuperscript{15} Lord Reid in Madzimbamuto v Laird-Barke [1969] 1 AC 645
\textsuperscript{16} Elliott and Thomas, p.27
\textsuperscript{17} N.W. Barber, Against a written constitution, P.L. 2008, Spr, 11-18, p.1
\textsuperscript{18} B. Dickinson, The common law and the Human Rights Act, p.14
\textsuperscript{19} Griffith, p.17
\textsuperscript{21} R (Simms) v Secretary of State for the Home Department [2002] 2 AC 115
\textsuperscript{22} Dickinson, B. Human Rights and the UKSC
\textsuperscript{23} Section 23 of the Anti-terrorism, Crime and Security Act 2001, to be exact
\textsuperscript{24} Elliott and Thomas, p. 17
on common law precedents. The extent of Parliament’s control over individual rights is visible in Lord Hoffmann’s reasoning in Simms – his assertion of protection of fundamental rights from being overridden by general words mirrors Laws LJ’s reasoning in Thoburn, while expressly confirming that the Parliament has the legal capability of legislating contrary to fundamental principles of the human rights. Taking a step further, Griffith also argues that the very existence of summary bills of rights and codified rights is contrary to the idea of political claim enforcement, as rights-based legislation necessarily seeks to maintain the political and legal status quo, forcing questions of policy and economy into the rigid realm of questions of law, shifting the onus of answering them from the politicians onto judges – contrary to the principle of supremacy of politics over law. A nation governed by a political constitution is thus aware of rights-based conflict occurring, but instead of attempting to entrench those rights which are accepted at any given time, it provides space for execution of the political claims.

The third area in which the specific mechanisms of the political constitutional order can be observed within UK governing arrangements is the provision of governmental accountability, chiefly ensured through political proceedings, consequences and remedies. Entrusting of ultimate order to the process of politics, rather than independent judiciary, endows the executive branch with nearly unlimited constitutional power to make law, as the executive usually is chosen on basis of control held over the legislatures. However, this power is subject to what is perhaps the strongest check of all – the public opinion. As stated by Griffith, politicians are much more vulnerable than judges. In the political system, emphasis is placed on development of trust in healthy political processes and ensuring that basic norms of political behaviour, such as upholding of civic virtues, governmental openness, public access to information and healthy responsiveness of political agents to citizens’ claims through the party system are observed. Those principles are upheld in a twofold manner – provision of internal checks on the work of the political bodies, such as the National Audit Office ensuring the financial accountability of governmental spending, or by measures addressing upholding of the public trust in the authority, which is necessary for the political constitution to function properly. Should the trust be breached by an elected politician or a civil servant, the dual system of convention and legal statutory an ensures that consequences will follow – in the form of dismissal (convention of ministerial responsibility), de-selection, or challenge to the decision through the process of appeal to political (Ombudsmen, tribunals) or legal bodies. The possibility of challenging decisions through legal means in the political system is necessarily limited to the weakest form of judicial review, as the judges lack the democratic legitimacy necessary to participate in settling the conflict inherent to each society on which the system rests. Thus, even at the highest instance, the judges do not have the power to override legislation provided in the Acts of Parliament, and their capabilities are limited to issuance of a declaration of incompatibility with the Human Rights Act. However, this protection does not extend to secondary legislation; As seen on the example of the Miller cases, the government can be held to account for non-compliance with principles of use of executive prerogative, if the

25 Human Rights and UKSC, p.29
26 R (Simms) v Secretary of State for the Home Department [2002] 2 AC 115
27 Griffith, p.17
28 Elliott and Thomas, p. 17
29 Griffith, p. 18
30 Tomkins in Gee and Webber, p. 282
31 Bellamy in Gee and Webber, p. 285
32 Elliott and Thomas, p.23
33 Ibid., p.23
35 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; R (Miller) v The Prime Minister [2019] UKSC 41
Parliament does not authorise its actions through legislation; incidentally, the struggle surrounding the planned UK withdrawal from the European Union serves as a prime practical example of the application of principles of separation of powers and governmental accountability within the political system – the executive, having lost its majority in the legislative body, is significantly hindered in carrying out its policies, as due to the principle of parliamentary sovereignty, it is nevertheless bound by its Acts, with the Supreme Court acting as an additional, strictly legal check, which ensures the government’s compliance with Parliamentary Acts under the threat of being held in contempt of court.  

The three key hallmarks of the political constitution can be thus summed up as a) supremacy of politics over law in terms of determination of constitutional arrangements of the country, with the elected legislative body being in key position of unlimited power; b) lack of specific protection allocated to individual rights through a constitutional bill of uninfriengeable rights, as all rights are subject to political processes; c) provision of governmental accountability through political remedies and consequences enforced by the court of public opinion, from which the legislature draws its legitimacy, accompanied by a weak form of judicial review. The British constitution, although currently in the process of changing its character to an increasingly legal one through imposition of ever-growing list of judicial checks on the legislative power of the Parliament and the executive, shares many of the characteristics of a ‘model’ political constitution – at least in the realm of established precedent. However, the political constitution has been established to be subject to constant change, so this apparent ‘legalisation’ can be possibly attributed to a political shift occurring, with Parliament willingly subjecting itself to legal control through enacting a growing body of constitutional statutes, which reflect the will of the people – and as we know, everything that happens in a system governed by a political constitution is constitutional by default.

\[\%\text{As argued by Griffith, p. 18}\]