Lecture Two: Constitutions

The ‘constitution’ refers to a single authoritative document which sets out the rules governing the composition, powers and methods of operation of the main institutions of government and the general principles applicable to their relations to citizens. The oldest one is the American Constitution, the writing of which introduced ‘the age of constitutions’. The view that came to be adopted was that expressed by the radical **Thomas Paine**, in *The Rights of Man*: ‘Government without a Constitution is power without Right’.

Britain does not have such a written statement describing the framework and functions of the organs of government and declaring the principles governing the operation of such institutions. Yet it obviously has institutions and rules determining their creation and operation, and the British Constitution consists of these. In addition, there have evolved a number of conventional rules and practices which have helped to attune the operation of the Constitution to changing conditions.

Characteristics of the two constitutions

- **Age**

Britain and the United States both have old constitutions, the one being the oldest in the world, the other being the oldest *written* constitution in the world. In both countries, constitutional development has been continuous and largely unbroken. The British Constitution comprises an accumulation over many centuries of traditions, customs, conventions, precedents and Acts of Parliament. It is old by any standards, for its origins can be traced back at least to the period following the Norman Conquest. Constitutional developments have come about gradually .

In the case of America, its framers (the Founding Fathers) met at the Philadelphia Convention in 1787 in order to negotiate agreement on a replacement for the Articles of Confederation. The debate was primarily between the federalists who favoured a strong national government, and the anti-

federalists who favoured strong state government for they believed that this would be closer to the people. The outcome was a compromise between these two positions, often labelled dual federalism.

- **Written v unwritten constitution**

It is probably more useful to distinguish between:

• **codified** constitutions such as that of the United States, in which all the main provisions are brought together in a single authoritative document; and

• **uncodified** constitutions such as that of the United Kingdom, which exist where there are constitutional rules many of which are written down but have not been collated.

Most of the British Constitution is written down somewhere, so that it is technically not 'unwritten'. It is largely because of its ancient origins that the British Constitution is so unsystematic. No attempt has been made to collate it together, and codify the various rules and conventions that are part of it.

- **Sources**

In the American case, the major source of the Constitution is the document itself and those developments which have been included in the Constitution as a result of the passage of amendments. However, there are other sources which show that the web of constitutional arrangements goes beyond the formal ones above. Certain statutes have had a constitutional impact (such as the laws creating the executive departments and fixing the jurisdiction of federal courts). In addition, judicial decisions have been significant, rather more so than in Britain, for judges have been called upon to decide what the Constitution means at any given moment. Their decision can change over time, so that segregation was seen as acceptable in 1896 but unacceptable in 1954.

In the United Kingdom, there are many sources which can be consulted in order to locate the elusive British Constitution. These include:

• major constitutional documents – e.g. Magna Carta 1215;

• major texts by eminent experts on the Constitution – e.g. Bagehot's *The*

English Constitution 1867;

• major statutes – e.g. the Human Rights Act 1998;

• case (judge-made) law – e.g. Spycatcher Case 1987;

• common law, based on custom and precedent – e.g. ancient law such as the powers of the Crown (the Royal Prerogative);

• constitutional conventions – e.g. that the choice of Prime Minister should be made from the House of Commons

- **Flexible v rigid constitution**

Being unwritten in a formal sense, the British Constitution can be easily amended. Even drastic changes can be made by passing an Act of Parliament, though there is a developing custom that fundamental changes would probably require a referendum if they have not already been submitted to the electorate in a general election. The US Constitution is usually described as 'rigid', in that it can only be amended after prolonged deliberation.

Because it is not codified in a single document, it is easy to suggest that the British Constitution is more flexible than the American one. It is not difficult to pass a law or adapt a convention. Yet by virtue of its brevity and the generality of its language, the American one has required interpretation and supplementation, and has been relatively flexible.

Constitutional principles

- **Support for democracy and the rule of law**

Both constitutions include implicit or explicit constitutional principles. **Implicitly, both countries are committed to democracy**. Their institutional arrangements enable free political activity to take place, and regulation of the clashes of interest which arise within any society. The rule of law is a core liberal-democratic principle with deep roots in Western civilization. It does not by itself explain what it means to live in a free society, but it acts as an important restraint upon the power of government and as an assurance to individuals that there can be certainty about the law and its application. It

implies that there is a standard of impartiality, fairness and equality against which all governmental actions can be evaluated, and that no individual stands above the law.

In Britain, there is widespread support for the rule of law and for the individual rights which it seeks to protect. It is seen as a cardinal feature of the British Constitution, **deeply rooted in common law**. In the USA, the principle is not specifically mentioned in the Constitution, yet it is one of the most important legacies of the Founding Fathers. The **rule of law is implicit in a number of constitutional provisions in the American Constitution**. Under Article IV, the 'Citizens of each State shall be entitled to the Privileges and immunities of Citizens in the several states. In the Bill of Rights, the Fifth Amendment requires 'due process of law' and 'just compensation' whenever government initiates adverse actions against a citizen.

- **Monarchy v republic**

The British **monarchy is a constitutional** one, in which the Queen 'reigns but does not rule'. She is Head of State and as such exercises a number of ceremonial functions. So too do elected Presidents in **republics**, but in the American case the President combines the role of figurehead with the more important, politically active position of being Chief of the Executive. The British Constitution is a unitary rather than a federal one. Parliament at Westminster makes laws for all parts of the United Kingdom, whereas under federal arrangements the power to make laws is divided between central and state authority.

Unlike the British, Americans have always been used to the idea of living separately (in the days of the colonies), in powerful independent states (in the days of the Articles of Confederation) or in states which shared power with Washington (ever since the federal union was created by the Founding Fathers).

- **Parliamentary v presidential government, a fusion or a separation of powers?**

The British have a system of parliamentary government, in which the **Executive** is chosen from the **Legislature** and is dependent upon it for support. Thus the Cabinet is chosen from the House of Commons and responsible to it. The Americans have presidential government, in which the Executive is separately elected and in theory equal to the Legislature.

In America there is a **separation of powers**; in Britain there is **a fusion of power.** In America, heads of departments and other executive bodies do not sit in Congress, and neither can congressmen possess executive office; in Britain, government ministers always sit in Parliament, the majority of them in the elected House of Commons – via the principle of ministerial responsibility, both individually as heads of their departments and collectively as members of the Cabinet, they are answerable to the House. Of course, the key member of the Executive in America – the President – is answerable as well, but in his case his responsibility is directly to the people rather than to the Legislature.

In Britain, **Parliament is sovereign**, so that the government can only continue in office as long as it has the support of the House of Commons. The Prime Minister and his or her colleagues have to attend the House and defend and answer for their actions. Parliament is the supreme law-making body; it has no rivals.

In both countries, there is a recognition of the desirability of an independent judiciary. Judges are appointed for life, and politicians do not involved in the proceedings or judgements of actual cases before the courts. However, ministers may bring about changes in court procedure and amend the law to affect sentences passed on categories of defendant.

In America, although Congress may pass new laws affecting the courts, ultimately judges decide on the constitutional acceptability of any legal changes. Indeed, they are the final arbiters of what is meant by the principle of a separation of powers. American constitutional arrangements have resulted in a

diffusion of authority. It was always intended that no part of the constitution should develop excessive powers at the expense of the others. In Britain, constitutional sovereignty lay in theory with parliament, but there has been a significant drift of power from the legislature to the executive, resulting in a **concentration rather than a diffusion of power**.

- **The sovereignty of parliament v the sovereignty of the people**

If the British Constitution provides for the sovereignty of parliament, the American one stresses the sovereignty of the people – popular sovereignty

Constitutional change

The flexibility of the unwritten British Constitution makes constitutional change relatively easy to accomplish. British judges cannot declare laws unconstitutional as Parliament, which passed them, is sovereign, the supreme law-making authority, though since the 1980s they have been much more willing to find ministers guilty of exceeding their powers or otherwise infringing the law. Their contribution to constitutional doctrine has been important in another way. Decisions were taken by judges hundreds of years ago in cases where there was no statute to guide them. On areas such as personal liberty, they made up the rules as common law, and ever since many of these rules have continued to be applicable.

In America, the constitution has been amended on 27 occasions by the passage of a constitutional amendment, but there is another way by which change can come about: judicial interpretation. American courts have the power of judicial review which enables them to declare any act or action of Congress, the executive branch or one of the 50 state governments, illegal. They can also interpret the Constitution as they did in the major cases of *Furman v Georgia* in 1972 (concerning the death penalty), *Roe v Wade* in 1973 (concerning abortion), and *Plessy v Ferguson* 1896 and *Brown v the Topeka Board of Education* 1954 (concerning the legality of segregation).

The Need for constitutional renewal

From the 1970s to the 1990s, several issues and events combined to cast doubt upon British constitutional arrangements. Among others:

Adherence to the European Convention on Human Rights raised the question of conflict between British law and the European code.

• **Membership of the European Community/Union** made community law been binding on the British Parliament and had major implications for the doctrine of the Sovereignty of Parliament.

• **The introduction of Direct Rule in Northern Ireland** in 1972 replaced 50 years of rule in that province via the Stormont Parliament.

• **The growth of nationalism in Scotland and Wales** in the mid-1970s and in subsequent periodic upsurges posed a challenge to the existing arrangements for Scottish and Welsh government.

• **The Referendum on Europe** in 1975, the first held across Great Britain, had implications for the doctrine of Parliamentary Sovereignty. Also, the holding of it led to another breach with tradition. Ministers were allowed to differ in their attitudes to membership of the European Community, temporarily waiving the idea of collective responsibility.

• **The dismantling of the Greater London Council (GLC) and the Metropolitan County Councils** was a significant inroad into the form of local democracy in Britain. Other local authorities found that their powers were circumscribed in the years of Conservative rule.

• **The increasing use of quangos** led many people to feel that too many decisions were being taken by unelected bodies whose members were closely connected – sometimes related – to the government of the day.

During the period of the Major administration of 1992–97, the opposition parties began to agree, clarify and popularise their proposals for constitutional change. Other than the Labour and Liberal Democrat parties, various groups and individuals campaigned for constitutional change. Among the campaigning

groups were **Charter 88**, **Demos**, the **Institute for Public Policy Research** and the **Institute of Economic Affairs**.

The Blair government and the constitution

Among the changes made are the following:

• The incorporation of the European Convention into British law;

• The introduction of a new electoral system for European elections;

• The establishment of the Jenkins Commission on the electoral system for Westminster (and a cautious welcome for its recommendations, but no subsequent action);

• The abolition of the hereditary system in the second chamber and the establishment of a commission to work out the basis for a new body to replace the existing House of Lords (with discussion under way on the best means of proceeding to a second phase of reform);

• The introduction of devolution for Scotland and Wales, following the outcome of the referendums of September 1997;

• The creation of a new authority for London, including an elected Mayor – along with provision for the adoption of elected mayors in other parts of the country; and

• Talks leading to the Good Friday Agreement in Northern Ireland, with the intention of creating an assembly and power-sharing executive.

Attitudes to the constitution in the United States

Americans tend to regard their Constitution with considerable awe and Reverence. Indeed, according to US historian Theodore White, the nation is more united by its commonly accepted ideas about government, as embodied in the Constitution, than it is by geography. Nevertheless, on occasion, there has been some interest in reform. Both chambers of Congress have voted on proposed innovations since 1995. The Senate has rejected them all and in the House only two changes – flag desecration (approved three times) and the balanced budget (approved once) have passed with the necessary majority. Even

these issues tended to be ones of broader national policy, albeit with constitutional implications, rather than straightforward issues directly affecting some aspect of institutional arrangements.