# Part I
# Constitution, state and beyond

# 1

# The British constitutional order

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## 1 Nature of the British constitution

Almost every country in the world has a written constitution which is a declaration of the country's supreme law. All other laws and all the institutions of such a state are subordinate to the written constitution, which is intended to be an enduring statement of fundamental principles. The absence of this kind of supreme instrument in the governmental system of the United Kingdom is unusual, leaving many observers to wonder where our constitution is to be found, and indeed whether we have one at all.

What, then, do we mean when we speak of the British constitution? Plainly there exists a body of rules that govern the political system, the exercise of public authority, and the relations between the citizen and the state. The fact that the main rules of these kinds are not set out in a single, formal document does make for some difficulty in describing our constitution, although even in a country with a written constitution we soon discover that not all the arrangements for its government are to be found there: many elements of the constitution will have to be looked for elsewhere than in the primary document labelled 'the Constitution'. (The formal constitution may even be misleading, for we are warned by a Frenchman, Léon Duguit, that 'the facts are stronger than constitutions' and by an American, Roscoe Pound, that the 'law in books' is not necessarily the same as the 'law in action'.) But at all events a written constitution is a place where a start can be made. Lacking this, how do we set about describing the British constitution?

We might begin in a specific way by taking note of particular *rules and practices* that are observed in the working of the political system – for example, the rule that the civil service is politically objective and impartial (Constitutional Reform and Governance Act 2010, section 7(4)) – or the practice by which ministers answer Questions in the House of Commons. Rules and practices such as these, relating to the government of the country, are of great number and variety: if it were possible to make a complete statement of them, this could no doubt be presented as a formal description of the British constitution. (It would include much that elsewhere would be put into a written constitution and much more that would be left out.) We should then have the material for a definition of the British constitution, which might run something like this:

> a body of rules, conventions and practices which describe, regulate or qualify the organisation, powers and operation of government and the relations between persons and public authorities.

But such a definition, even if formally adequate, would fail to reveal some important features of the constitution.

Shifting our point of view slightly, we might think next of the *institutions and offices* which constitute the machinery of British government. An institutional description of the constitution would include Parliament, the government and the courts, the monarchy and the civil service, devolved assemblies and administrations in Scotland, Wales and Northern Ireland, and such offices as those of the Parliamentary Ombudsman, the Comptroller and Auditor General, and the Director of Public Prosecutions. Of course these institutions and offices are themselves to be explained by reference to rules and practices which constitute them or define their powers and activity. But we do not think of them simply as bundles of rules. Rather, they have what might be described as their own reality and momentum – often loaded with history and tradition – in what is sometimes called 'the living constitution'.

Reflecting further on the constitution, there would come to mind certain *ideas, doctrines or organising principles* which have influenced or inspired the rules and practices of the constitution, or which express essential features of our institutions of government or of relations between them. There can be no true understanding of the British constitution without an appreciation of the role within it of such commanding principles as those of democracy, parliamentary sovereignty, the rule of law, the separation of powers and ministerial responsibility (on each of which, see chapter 2).

We also have to think of the ways these various institutions and ideas are now required to operate in the context of globalisation and of the rise to prominence of international and supranational organisations such as the Council of Europe, with its influential European Convention on Human Rights (ECHR),

and the European Union (EU), with its vast and continually growing body of EU law (on both of which, see chapter 5).

Until now we have spoken rather loosely of 'rules and practices' of the constitution, and we need to be more definite. The *legal* rules that make up part of the constitution are either statutory rules or rules of common law. Many of the more important practices of the constitution also have the character of rules and, like legal rules, may give rise to obligations and entitlements. These non-legal rules are called *conventions*. (The nature of conventions and their relation to law is one of the fundamental problems of the constitution and is more fully explored in chapter 3.)

As already indicated, the attempt might be made to enumerate all the rules relating to the system of government in a comprehensive statement of the contents of the British constitution (although it would not remain up to date for long). A problem that would arise in doing this would be that of deciding whether rules were sufficiently connected with the machinery of government to count as part of the constitution. Should the statement include the rules and practices relating to the control of immigration, or the organisation of the armed forces, or the administration of social security? This sort of question would have to be answered rather arbitrarily, for there are no natural boundaries of the system of government or of the constitution. As S Finer, V Bogdanor and B Rudden have commented (*Comparing Constitutions* (1995), p 40), the British constitution is 'indeterminate, indistinct and unentrenched'. Moreover, much of it would remain so even if it were codified.

Unsurprisingly, no comprehensive list or statement of the kind under consideration has been attempted, but Albert Blaustein and Gisbert Flanz (eds), *Constitutions of the Countries of the World*, offered a list of constitutional *statutes* of the UK which (in 1992) named over 300 statutes, ranging from Magna Carta in 1215 and the 1689 Bill of Rights to more recent statutes such as the Parliament Acts 1911 and 1949, the Crown Proceedings Act 1947, the Parliamentary Commissioner Act 1967 and the European Communities Act 1972. The 2009 edition of *Blackstone's Statutes in Public Law and Human Rights* includes extracts from 110 statutes, of which only 28 were passed before 1975. The UK is said to have an ancient constitution, but if fully three-quarters of its statutes on constitutional law date from only the last 35 years, perhaps this is not the case. Whether any of this is a reliable indication of how much the British constitution has changed in recent times is a matter we shall consider later in this chapter.

A comprehensive list of constitutional rules would not tell us what is distinctive in the British constitution or what is of especial value. For the constitution is not mere machinery for the exercise of public power, but establishes an *order* by which public power is itself to be constrained. Some constitutional rules express social or political values that are thought important to preserve, or that help to maintain a balance between different institutions of government, or safeguard

minorities or protect individual rights. These rules, we may say, have 'something fundamental' about them and are distinguishable from much that is circumstantial, temporary, simply convenient or merely mechanical in the constitution.

This distinction, however, is not straightforward. There is often disagreement about what is vital in the constitution and what is inessential. It is easy to fall into a very conservative way of regarding the constitution and to categorise what is old and traditional in our rules and practices as necessarily to be cherished and preserved, although no longer conformable to a changed society, a transformed public consciousness and new conceptions of justice and morality. There is a contrary tendency to view the whole constitution in an instrumental way, holding all its rules to be equally malleable or dispensable in the interest of immediate political ends or administrative convenience.

Profound changes in society and politics in the past century created stresses in Britain's historical constitution, but a lack of consensus, together with official inertia or satisfaction with the status quo, for a long time inhibited thoroughgoing constitutional reform. The response to revealed defects was to adjust or tinker with the constitutional mechanism, sometimes without due deliberation or debate, rather than to redesign the system. Towards the close of the twentieth century questions were increasingly raised about the suitability of the constitution to the political realities of the post-industrial, multi-racial, multi-party, relatively non-deferential and egalitarian (if still unequal) society which Britain had become. We find Samuel Beer observing that 'the new stress on participant attitudes and behaviour collides with values anciently embedded in the political system' (*Britain Against Itself* (1982), p 112). Constitutional rules which had seemed deeply rooted were coming under critical scrutiny – for example, the electoral system, rules for maintaining governmental secrecy, and the law and conventions which regulate the working of Parliament. Government was seen to be over-centralised and insufficiently controlled.

In response to such criticisms and dissatisfactions, the Blair Government, taking office in 1997, launched an ambitious – but not comprehensive – project of constitutional reform, which we consider in the final section of this chapter. In their own ways the Brown Government (2007–10) and the Coalition Government (2010 to date) each continued to place questions of constitutional reform prominently on their political and legislative agendas, as we shall see in more detail later in this chapter.

The still uncompleted reform project has given a renewed impetus to constitutional debate and it is timely for us to ask what in the British constitution has outlived its usefulness, what needs reform and what expresses fundamental values that it is important to maintain and strengthen?

## (a) Fundamentals, fluidity and safeguards

It may be expected that Parliament, the government and the courts should have a particular concern for rules that reflect fundamental values, upholding

them against prejudice or transient passions and departing from them only on the strength of open and principled argument.

Unfortunately this expectation is sometimes disappointed: we identified a particularly disturbing example of this in our preface. The abrogation by Parliament of long-established rules that may be deemed fundamental is not always supported by full investigation or convincing justification. This criticism has been made, for instance, of the abolition by the Criminal Justice Act 1988 of the defendant's right of peremptory challenge of jurors and also of the abolition by the Criminal Justice and Public Order Act 1994 of an accused person's 'right of silence', which had 'stood out as one of the proudest boasts of Britain's commitment to civil liberties' (Geoffrey Robertson, *Freedom, the Individual and the Law* (7th edn 1993), p 32). Proposed legislation to restrict the right to trial by jury – regarded by Lord Denning as 'the bulwark of our liberties' (*Ward v James* [1966] 1 QB 273, 295) – attracted similar criticism, and the Government was compelled to make significant concessions to overcome opposition in the House of Lords and secure the enactment of the Criminal Justice Act 2003.

By the Anti-terrorism, Crime and Security Act 2001 Parliament authorised the indefinite detention without trial of non-British nationals who were suspected of being international terrorists. To forestall challenges to the adoption of this power, the Government derogated from Article 5(1) of the ECHR (the right to liberty and security of person). Derogation is allowed by the Convention (Article 15) if strictly necessary in the event of a 'public emergency threatening the life of the nation'. In *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, it was held by the House of Lords that the Government's derogation on this ground went beyond what was strictly necessary and was unlawful. It was further held that section 23 of the Act, the provision for detention, was incompatible with Article 5(1) of the Convention. The case resulted in Parliament re-legislating, replacing the scheme of indefinite detention without trial with a system of 'control orders', themselves deeply controversial from a human rights point of view (see the Prevention of Terrorism Act 2005). (These matters are more fully considered in chapter 11.)

Judicial decisions, too, may undo what had been thought fundamental. Here follows an example of judicial subversion of a fundamental rule – although happily it was only a temporary aberration, and after a time the rule was restored.

The writ of habeas corpus (meaning 'thou shall have the body brought into court'), for securing a judicial inquiry into the legality of a person's detention, has its origin in early common law and a series of Habeas Corpus Acts. The efficacy of the writ of habeas corpus will often depend in practice on the onus of proof, and the courts established the rule that the custodian must prove, to the satisfaction of the court, the circumstances alleged to justify the detention. This rule, in assuring effective protection of the right of the individual to

personal freedom, certainly has the appearance of 'something fundamental': it was expressed as follows by Lord Atkin in *Eshugbayi Eleko v Government of Nigeria* [1931] AC 662, 670:

> In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.

However, in a number of cases arising under the Immigration Act 1971 the courts reversed the rule as to onus of proof in habeas corpus proceedings, holding that the onus was on the applicant to establish that his or her detention was unlawful. It was further held that this onus could be discharged only by showing that the immigration authority – the immigration officer or the Secretary of State – had *no reasonable grounds* for reaching the conclusions on which the detention was based. (See *R v Secretary of State for the Home Department, ex p Choudhary* [1978] 1 WLR 1177 and *Zamir v Secretary of State for the Home Department* [1980] AC 930.) The effect of these rulings was, as Templeman LJ observed in *R v Secretary of State for the Home Department, ex p Akhtar* [1981] QB 46, 52, to deny 'the effective recourse of an individual to the courts which administer justice in this country'. Must we not say of this judicial deviation, in which the courts overturned the rule of the Habeas Corpus Acts and robbed the individual of an effective remedy for unlawful detention, that it violated fundamental constitutional principle? In *Khawaja v Secretary of State for the Home Department* [1984] AC 74, the House of Lords restored the true principle, holding that the burden of proof rested on the custodian and that the issue was not whether there were reasonable grounds for the decision to detain, but whether the detention could be justified in law.

To whom are we to look for the defence of what is fundamental in the constitution – for the preservation of 'constitutionalism'? In the first place, the courts have a cardinal role to play in upholding fundamental principle, although, as we have just seen, they have themselves the capability to re-interpret or displace constitutional rules, which itself calls for vigilance: *quis custodiet ipsos custodes*? (who will guard the guardians?). We rely upon the courts to maintain fundamental legal rules against excessive zeal or malpractice of administrators and others who exercise public power, but their role as constitutional guardians is necessarily limited. They are restricted, as regards legislation, by the doctrine of parliamentary sovereignty (see chapter 2); and they work within a tradition (itself resting on a fundamental idea of the constitution) of judicial restraint, for they are, after all, unelected, largely unaccountable and not especially qualified to resolve issues of political judgment and policy. In recent years the courts have, however, found a new boldness in developing the principles of judicial review, and an eminent constitutional lawyer declares that they have brought about a 'renaissance of administrative

law' in asserting their power to control public authorities (Sir William Wade, *Constitutional Fundamentals* (rev edn 1989), ch 5). The balance between a proper judicial restraint and a legitimate judicial activism remains a critical feature of the constitution. (See further chapters 10 and 11.)

Secondly, we depend on the political actors themselves to observe the 'rules of the game': ministers, civil servants and parliamentarians operate in a framework of generally well-understood procedures which are designed to make the governmental machine work not merely efficiently but with respect for fundamentals. A veteran parliamentarian showed an awareness of this in remarking: 'We have no constitution in this country: we have only procedure – hence its importance' (Mr St John-Stevas, HC Deb vol 991, col 721, 30 October 1980). Procedures, it is true, may not hold up in a time of crisis. Admitting this, JW Gough nevertheless asked whether, in 'a time of crisis or of embittered emotions', we should be 'any safer with laws, even with fundamental laws and a written constitution' (*Fundamental Law in English Constitutional History* (1955), p 212). The observance of procedures is checked in certain respects by parliamentary select committees – such as the Public Accounts Committee and the Select Committee on Standards and Privileges in the House of Commons and the Constitution Committee in the House of Lords – and by the Comptroller and Auditor General, the Committee on Standards in Public Life, the Parliamentary Ombudsman and the Commissioner for Public Appointments. (See further chapter 9.)

Thirdly, and in the last resort, we depend on the force of public opinion, pronounced in the general verdicts of elections and expressed in more specific ways through the media, political parties, public protest and private interest groups and organisations of many kinds. A valuable role is performed by those organisations, such as Liberty (the National Council for Civil Liberties), that exist for the purpose of defending individual rights. (See further chapter 8.)

Part of the problem, perhaps, is a lack of certainty about what truly is fundamental to our constitutional order. We may wish to claim that trial by jury, the right to silence or habeas corpus are fundamental values inherent in the constitutional order, but on what basis can such a claim actually be grounded, beyond one's own desire? How can an argument be made, either legally or politically, that this value or that right is so fundamental to our sense of constitutionalism, whatever that may mean, that it should remain untouched by legislative amendment or judicial re-interpretation? As we have already mentioned, and we as we shall see further below, the British constitution has been subject to considerable and significant reform in recent years. Much of the reform is, in our view, both welcome and overdue. But the current climate of reform poses in stark form the question of whether there is anything that ought to lie beyond the reformers' reach. Is anything sacred, or is the entirety of the British constitution 'up for grabs'? (For an intriguing analysis,

see Murkens, 'The quest for constitutionalism in UK public law discourse' (2009) 29 *OJLS* 427.)

Sir John Baker (a Cambridge law professor), reflecting on these questions in an absorbing analysis, warns that the government 'constantly tinkering with constitutional arrangements as a routine exercise of power and without regard to the consequences', *even if many of the changes are themselves desirable*, may lead to 'the dismal reflection that we no longer have a constitution, in the sense of a set of conventions which set the bounds of executive power and keep the government within those bounds' (Sir John Baker, 'Our unwritten constitution' (2010) 167 *Proc Brit Acad* 91, 117). If the government no longer exercises constitutional self-restraint, then to whom must we turn for safeguards? Sir John's answer is a traditional one in the British context: this is Parliament's role, he argues, and, in particular, it is the role of select committees ('one of the most fruitful reforms of the last thirty years') and of the House of Lords (which has 'become the principal defender of constitutional liberties, and arguably the more significant legislative chamber, albeit at the cost of endangering its own existence'). A written constitution might help, he argues (p 108), although it would not necessarily do so:

> In practice the true function of a written constitution is not so much to improve the clarity of the rules as to empower the highest court to strike down legislation according to its own interpretation of the words. The question is therefore whether the time has come to transfer more power to the judges, on the footing that the political constitution has broken down beyond repair. This is far from straightforward, since we cannot assume that the traditional juristic standards of the judiciary will be maintained once they have a political role.

The ongoing tensions (or, if you prefer, the balance) between the parliamentary aspects of our constitution and its judicial aspects is one of the central themes of contemporary constitutional debate in Britain, and we shall touch on it throughout this book.

## 2 The constitution, the state and the nation

Definitions of the constitution often focus on the concept of the state and its organs. For example, Hood Phillips and Jackson's *Constitutional and Administrative Law* (8th edn 2001), p 5, defines a constitution as:

> the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen.

Regarded from the perspective of international law the UK is undoubtedly a state, but our constitutional system has been constructed largely without the use of the concept of the state. In Britain there is no legal entity called