

Cambridge University Press

978-0-521-29148-4 - Documents on Contemporary British Government: I British Government and Constitutional Change

Edited by Martin Minogue

Excerpt

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Introduction

I

'We must be satisfied with the soup that is set before us, and not desire to see the bones of the ox out of which it has been made.'

(Dasent, *Popular Tales from the Norse*)¹

Although the British constitution is in form unwritten, it has attracted many pens, which have produced many words of exposition and interpretation.² It is not the purpose of this brief introduction to add yet another commentary; the intention is rather to emphasise those lines of constitutional development which are still of some practical significance and to provide an essential historical context for the political and administrative changes of the last thirty years.

The bare bones of the British constitution are provided by the major political institutions: the Executive, centred on the Crown; the Legislature, centred on the House of Commons; and organised political parties, which link together the executive and the legislature. But we can not really see what the constitutional body looks like until the bones are fleshed out. The Executive, for example, is an immense complex of administrative organisations, legal structures, political concepts, influential groups, and powerful individuals. Parliament is a more orderly but intricate arrangement of law-making machinery and political power relationships; political parties are rarely monolithic, often disorganised, and have lives outside the central political arena which impinge upon the way in which they behave inside that arena. Above all, these institutions have no real existence except in terms of the behaviour of the people who inhabit them and make them work, whether well or badly. Yet the way in which people operate political institutions is determined partly, at least, by the values which they attach to these institutions and by a high level of common agreement as to the nature and significance of these values. The values are often shared on the basis of a common understanding as to the rules by which the political institutions are expected to be operated. Where there is no common agreement, or where that agreement breaks down, we shall find an area of constitutional conflict or uncertainty, which will be settled or clarified only by a resolution of the political conflict.

1 Quoted in J. R. R. Tolkien, *Tree and Leaf* (Allen & Unwin, 1975), p. 25.

2 Two useful recent works which relate constitutional developments to the political and governmental system are T. C. Hartley and J. A. G. Griffith: *Government and Law* (Weidenfeld & Nicolson, 1975); and Peter Bromhead: *Britain's Developing Constitution* (Allen & Unwin, 1974).

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It is the existence of this informal process of constitutional rule-making which gives the British constitution its curious combination of structural rigidity and behavioural flexibility. Many of the constitutional 'rules' (or conventions) change constantly as politically powerful groups adjust their relationships, both to each other and to their constituencies, in response to a changing political environment. These adjustments may produce changes in attitudes towards the role and operation of major political institutions, creating an atmosphere in which the common agreements may be renegotiated or enlarged. It is often extremely difficult to detect this process at work, but we invariably see the outcome in the form of a political action which reveals to us that a constitutional ground-rule has been reformulated. There is an interesting correspondence of method here between legal and political changes. Just as our free institutions have been said legally to have broadened down from precedent to precedent, so we can see that those institutions have also broadened down politically from precedent to precedent: each political reformulation becomes a new constitutional precedent. For example, it became clear with Mr James Callaghan's election to the leadership of the Labour party in 1976 that the monarch no longer had an effective power of choice of Prime Minister during a Labour administration. The Labour Party's attitude had been proclaimed in these terms after 1957, when the monarch was able to choose between two Conservative contenders for Prime Ministerial office; but the constitutional precedent was 1976. It is difficult to imagine, politically, that the Conservative Party would not now follow this precedent. But we cannot be certain until the situation arises in practice, and specific action confirms a new political value which is commonly accepted by the competing political groups.

On the other hand, constitutions are not always, or even often, a plain man's guide to the real world of politics. It has been said that the function of political culture is 'to eliminate troublesome enquiries by offering readymade directions for use, to replace truth hard to obtain by offering comfortable truisms, and to substitute the self-explanatory for the questionable'.³ Our view of the constitution, of the ground-rules within which the serious enterprise of power politics is conducted, is a significant part of our political culture; and if the ready-made directions for use provide us with a palatable constitutional soup, and truisms which may be comforting as well as comfortable, then we could do a good deal worse. These truisms will at least give us some indication of the existence or otherwise of a common constitutional tradition, manifested by the perceptions people seem to have of the present political system and of past political events. It is difficult to know what the outlines of such a historical tradition would look like or how pervasive it might be. We can see more readily what have been the perceptions of influential groups and actors: and it is not surprising then to discover the existence of different, partly conflicting, interpretations of a 'common' constitutional tradition. In short, politically active groups are, either specifically, or in the very broadest sense, ideological: and their interpretation of past events will often be conditioned by their present

3 Alfred Schütz, *Collected Papers II* (Martinus Nijhoff, 1964).

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intentions or future ambitions. The ‘Whig’ or the ‘Tory’ interpretation of the British constitution is likely to tell us more about Whigs and Tories than about our constitutional history.

Are there any comfortable truisms? It is dangerous to pen generalisations which are made to apply equally to the circumstances of the sixteenth and the twentieth centuries. It is almost equally misleading to talk of the ‘nineteenth century constitution’ or the ‘seventeenth century constitution’ if there is any implication that these are unique entities which bear no relation to each other. Perhaps the least misleading general proposition is that in the past four centuries there have been recurring problems in the government and politics of Britain, which have been constantly reformulated in terms of the conflicts, philosophies, political configurations, and social and economic structures of successive generations. One crucial ingredient in each reformulation has been the reception and interpretation of the previous formulation, and the associated political events and ideological debates. But another crucial ingredient is the pressure for change, the necessity to adjust ideological interpretations and political rules to the ebb and flow of social and economic movements. It has been suggested that what gives strength and permanence to our Constitution is its adaptability, its capacity to bend without breaking; an alternative view is that the Constitution simply reflects a highly developed political consciousness in a society which has been constantly sensitive to the need for change on a predictable, peaceful basis, and has created the political machinery required for the purpose. The first view sees a primary role for the Constitution itself; the second view sees the Constitution as merely a reflection of political developments. Both views underestimate the extent to which violence, or the relentless exercise of overwhelming power, have been significant at crucial points in our political history.

From the standpoint of 1976, some parts of our constitutional history seem more relevant than others. Three areas of concern today have been enduring features: relations between the executive and the legislature, the control of the executive, and the relation between the individual and the state. Two other features have been relatively newer problems: the scope and complexity of the state bureaucracy and the efficient discharge by the state of a very wide range of obligations; and the creation of representative democracy, and the associated organisation of mass political parties, a phenomenon which has transformed the earlier relationships between executive and legislature.

The executive and the legislature

A leading constitutional historian writes: ‘The essence of the Constitution today is the temporary entrustment of great powers to a small Cabinet or body of Ministers (who are members of one or other of the Houses of Parliament) who are formally appointed to office by and dismissible by the King, but who are politically responsible to the electorate, through the House of Commons, which is periodically elected on a wide popular franchise, and who are legally responsible under the Law,

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and who are served by a corps of permanent civil servants.’ It is a formula, he states, which was ‘the fruit, not of any theoretical speculation, or of any profound foresight, but of long experience of what works and what does not’.⁴ What are the ingredients of this formula?

All constitutions are principally concerned with a definition of the executive power in the state, with the question of which persons enjoy executive power, and crucially with questions of control and limitation of the executive power. There is generally an attempt to balance the need for effective government and the desire for limited government. Executive power in English history had always resided in the monarch; and much of English constitutional history is the story of how the monarch exercised this power, how constitutional restraints on autocratic monarchical authority developed primarily through Parliament, and finally how effective monarchical power was transferred to leading political groups centred on Parliament, but organised into a governing Cabinet of Ministers, with a strong first Minister or Prime Minister. The old royal prerogatives still exist in form; but in practice they are exercised either by the Prime Minister, or the Cabinet, or by Parliament acting in accordance with the decisions of a Cabinet collectively responsible to it. The monarch’s Privy Council, so strong an instrument of royal government in Tudor times, still survives, but again, it acts only in accordance with Cabinet decisions.

How did the monarchy lose its authoritative position? This is simple to describe, more complicated to explain. The landmark is the 1688 revolution, which more properly is a ‘revolution’ spanning the period from approximately 1629 to 1714. It is sometimes described as a bloodless revolution, but there was ample blood-letting in the Civil War of the 1640s, when Monarch and Parliament took up arms against each other; the King lost not only the war, but his head, and with him effectively died the notion that Kings were divinely ordained and could not be replaced by subjects (although the legitimacy, as opposed to the reality of such replacement continued to be debated well into the eighteenth century). Despite the royalist (and Stuart) restoration of 1660, power had shifted significantly to subjects who could control Parliament, and the 1688 revolution institutionalised this fundamental shift in relations between the executive and the legislature. This still left the monarchy with significant powers, and substantial authority, but from this point on there was a gradual if unsteady process of attrition of both powers and authority. The eighteenth century saw the full development of Cabinet government, and the transfer of chief executive status from the monarch to the most prominent of his advisory ministers. Associated with this was the development of the principle that Ministers were, both individually and collectively, answerable to Parliament for their policies and their actions. Neither Cabinet, nor Prime Minister, nor these notions of ministerial responsibility, have a legal place in British constitutional arrangements; but they were the central facts of political development within the readjusted framework of government provided by the revolutionary settlement.

4 S. B. Chrimes, *English Constitutional History*, (4th edition, Oxford University Press, 1967), p. 9.

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Walter Bagehot, writing in 1867, was the first to define Cabinet government as the 'efficient secret' of the British constitution,⁵ but since then the debate has focussed on the position and powers of the Prime Minister.⁶ This debate is closely linked to the analysis of executive control of Parliament through the operation of a rigid two-party system in which the political leadership of the majority Parliamentary party forms the Cabinet.

The struggle between the King and his subjects operating through Parliament considerably predates 1688. But it was the settlement of 1688 (specifically the 1701 Act of Settlement) which established the formal supremacy of Parliament over the executive, and supplied the practical strength of Parliament, which is its regular and continuous existence. But in discussing parliamentary control, we have always to ask, who controls Parliament? And although there have been periods when Parliament was genuinely independent in its composition, for the most part the executive has found ways of dominating Parliament through control of a majority of its members, or because of a common identity between those who were prominent in the executive and those who were prominent in the legislature. The introduction of fully representative democracy in the nineteenth and twentieth centuries (1832, 1867, and 1884 Reform Acts, and legislation in 1918 and 1928) might have been expected to reinforce Parliament. In practice, it stimulated the deliberate organisation of national political parties which competed for control of Parliament, and therefore of government. Since independent action by a Parliamentary majority would henceforth serve only to embarrass or displace the governing body which constituted the leadership of the Parliamentary majority, such action soon ceased altogether. Today, the executive controls Parliament with little real difficulty, and the complexity of modern legislative activity often means that 'the real debate is taking place outside'.⁷ Approximately one-third of the ruling party in the House of Commons will be members of the government; the remaining backbenchers have little scope for effective action against the executive. Richard Crossman, then Leader of the House, once expressed this powerlessness directly to his own Labour Party backbenchers: 'If I give you people desks, telephones, and secretaries, you will begin to think you are running something, and believe me, you are not.'⁸ It is the consciousness of the contemporary imbalance between the legislature and the executive power which has stimulated so much recent concern for parliamentary reform. Part of the concern has been to make Parliament more democratic, by restricting or altering the powers and composition of the House of Lords (ironically, one of the few cases where executive intentions have been frustrated by the legislature). But the contemporary themes are the efficient operation of Parliament and effective scrutiny of the activities of the executive. Procedural

5 W. Bagehot, *The English Constitution* (1867; see Fontana edition with introduction by R. H. S. Crossman, 1963).

6 See A. King, ed., *The British Prime Minister* (Macmillan, 1969).

7 R. H. S. Crossman, in H.C. 539, 1966–7.

8 R. H. S. Crossman, quoted by John Mackintosh M.P., in *Specialist Committees of the House of Commons: have they failed?* (The Waverley Papers, Edinburgh University Press, 1969).

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reform has been seen, rightly, as the prerequisite for effective scrutiny. The pursuit of these aims produces a dilemma neatly expressed by a witness to the 1970 Select Committee on Procedure: ‘When you strive for greater efficiency you are interfering with the right of an opposition, which is to delay. To achieve a balance between the two is beyond anybody’s comprehension . . . most of the delays that we complain about are the rightful delays of free people in a free society using the instruments that we fashioned for them.’⁹

Democracy or bureaucracy

One defence of the imbalance between the executive and the legislature is that government must be allowed to govern, and that the efficient administration of public affairs is just as much in the interests of the citizen as the ability to obtain redress or to restrain executive action. The question of efficiency has been a surprisingly constant factor in English constitutional history. The early struggles between Parliament and the Crown frequently hinged on the question of the control of supply and taxation; and in practice this implied a concern that the Crown should not with impunity indulge in reckless or extravagant expenditure, though it was the propensity for monarchs to do just that which gave Parliament some leverage in this long negotiation. Although Charles I managed quite effectively for eleven years without parliamentary financial support, he was finally obliged to grant redress of grievances in return for badly needed finance: this redress took the form of several measures intended to restrict the royal prerogative, and to entrench the idea of a permanent legislature in some degree of balance with the executive. The constitutional proposals of 1641 were soon overtaken by the Civil War, but provided a significant guide for future constitutional debates. The greatest single landmark was the 1689 Bill of Rights, which in effect listed James II’s abuses of power, and declared them illegal. The executive accepted explicit restrictions upon its power, and the principle of Parliamentary supremacy was beyond dispute. But the revolutionary settlement also made clear that power had not simply been transferred from the Crown to Parliament; there had rather been a readjustment of the balance between these branches of government to reflect the changed realities of the political relationship between the old monarchical ‘party’ (the Tory party) and the parliamentary ‘party’ (the Whig party). Henceforth the political conflicts between these parties would focus on the Tory wish to preserve an essentially moderate constitutional compromise, and the Whig desire to give the broadest possible construction to the settlement in terms which would further extend parliamentary powers while permitting government to continue with reasonable despatch. Crudely expressed, the political balance between Crown and Parliament rested on their capacity for mutual obstruction: the Crown could dissolve Parliament at any time, and Parliament could refuse finance to the Crown at any time. The main requirement, therefore, was a system of political bargaining which would ensure

9 Lord Maybray-King, in H.C. 538, 1970–1.

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that these ultimate powers were not often used. In the eighteenth century, 'the politics of influence' became central to the maintenance of a constitutional balance, and underlay the development of political interests and factions and their coalescence into two major political parties. At first the organisation of political groups was founded on patronage; today, though political patronage still provides some lubrication for the wheeling and dealing of inner party politics, it is ideology, or at least common identity which provides the cement for party construction; and the creation of mass electoral politics through a reforming sequence beginning in 1832 and ending only in 1928 stimulated political parties to orient themselves both ideologically and organisationally to the new electorate. Today this means that a member of Parliament, though constitutionally representative of his whole constituency and its electorate, is in practice elected not as an individual but as a party supporter who must give that support when required to in Parliament. The electoral system tends to reinforce the position of the two major parties (now Labour and Conservative), who from time to time exchange the offices of Opposition and Government. Each administration is formed by the leadership of the majority party, until such time as another general election is held.

A useful consequence of this two-party system of parliamentary government is that government is relatively stable, and the transfer of power between political groups is achieved in a peaceful and orderly manner; conceivably this is the principal function of our present Parliament. An adverse consequence is that Parliament is insufficiently independent of the executive to exercise effective restraints upon executive power. The true relation between the exercise of executive authority and the restraint by the legislature of executive action is made obscure by the operation of one of the principal constitutional conventions, the responsibility of Ministers to the legislature. This convention played a significant part in institutionalising the shift of power from the monarch to Parliament and is central to the notion of the political responsibility of Ministers to the people. Two developments have conspired to weaken the effect of this convention. First, the development of party government, which means that Ministers are in essence answerable only to their own party. Secondly, the expansion of the activities of contemporary government to a point where Ministers are technically answerable for an enormous range of bureaucratic activities of which they can have no actual knowledge. Moreover, the scope and complexity of policy-making in public affairs means that civil servants are closely involved in the formulation and presentation of policy proposals. Yet Parliament has no way of compelling civil servants to answer questions about policy; and no way of obtaining redress from civil servants who have been in error.¹⁰ The weakness of the convention is now widely acknowledged, except by Ministers and civil servants, who have a vested interest in retaining a useful device for the diffusion of legislative scrutiny. When constitutional procedures become a shell for some other

10 The classic instance is Crichton Down, when the Minister of Agriculture was compelled to resign, and senior officials found culpable by a public enquiry suffered nothing more punitive than a transfer to other departments. For an account, see R. D. Brown, *The Battle of Crichton Down* (Bodley Head, 1955).

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reality, they become dangerously archaic, obstruct the progress of constitutional change, and bring constitutional procedures into disrepute.

The state and the individual

This point leads directly to the problem of government which has been a feature of constitutional growth since earliest times: the problem of control. All constitutional activity in the end relates to the wish to limit the arbitrary authority of powerful individuals or groups and to prevent the unrestricted exercise by individuals or groups of the formidable powers of the state. The growth in the scale of operations of the modern state and its penetration of most areas of individual activity have given a special character to the problem of control in the twentieth century. Earlier in English history, the struggle to control arbitrary authority centred partly on Parliament, partly on the assertion of a system of law which provided some degree of protection to the individual. The operation of the rule of law and the principle of equality before the law have been the main safeguards of individual rights, which nowhere find explicit expression in constitutional terms. The judiciary and the courts occupy a significant role in upholding the rule of law, and one of the central features of the revolutionary settlement was the entrenchment of judicial independence by the 1701 Act of Settlement. Today, the rule of law is so much part of British political culture that people are rarely fully conscious of the benefits of such a system; by comparison, constitutions elsewhere which make considerable formal provision for the protection of individual rights and liberties have failed to give full protection in practice, because of the absence of a deeply-embedded tradition of rule of law. Nonetheless, there is cause for concern about the individual citizen's relationship with the state in contemporary Britain. In the face of bureaucratic action, the citizen has two traditional channels of redress: through the courts and through Parliament. Yet the weakness of Parliament in relation to the executive makes it an uncertain support for the aggrieved citizen, and the complexity, delays, and expense associated with the judicial process makes it an unlikely resort for the average citizen. In the absence of a system of clearly defined public law, or of clearly defined and readily available channels of redress against the state administration, the average citizen may feel helpless, frustrated, baffled, or alarmed.¹¹ There is the clear danger that the citizen will feel alienated from the state, despite the considerable benefits derived from large-scale government. The distrust of government and its servants is not new: and perhaps a healthy distrust of big bureaucracies is a natural and self-protective posture. But government itself could do much more to obtain acceptance and co-operation. British government is bedevilled by secretive attitudes to its own work, a 'secrecy . . . founded on a fear of effective criticism'.¹² The 'King's government' has always been secretive; and the

11 The attitude survey carried out by the Royal Commission on the Constitution (and summarised in their *Report*, Cmnd. 5460, 1973) provided evidence that these feelings are widespread.

12 J. A. G. Griffith, *Parliamentary Scrutiny of Government Bills* (Allen & Unwin, 1974), p. 257.

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'King's servants' have always employed the rule of confidentiality in their own interest as much as in the interest of the state. But undue secrecy is not in the interests of the modern state and its citizens, not only because of the fragility of the instruments of redress against arbitrary executive action, but because the complexity of public affairs requires considerable openness in the policy-making process. Secretiveness has damaging effects upon the executive itself: 'Very often a "secret" classification on a paper is no more than a way of drawing attention to its importance; and a draft with no security marking has little chance of being taken seriously. It becomes more important to keep one's thoughts on policy confidential than to get them right.'¹³ Perhaps this has always been so: but getting policy right is today more significant for larger numbers of people than was the case when policy-making was the province of autocratic monarchs and a few trusted advisers. The very scale of contemporary government and its activities makes more necessary a precise definition of the powers and obligations of the state, and the rights and duties of the citizen. Statute law provides only a partial definition; and the arguments for a new Bill of Rights look stronger as government expands. Control and restraint of the arbitrary exercise of state power remains a central concern of British constitutional debate, but just as the relation of state to subject has taken new forms, so must there be new forms of restraint and new instruments of redress; alternatively we must follow a sound tradition and adapt the old forms and the old instruments to new situations and new requirements.

II

'Something new is necessary for every man and every nation. We may wish, if we please, that tomorrow shall be like today, but it will not be like it. New forces will impinge upon us; new wind, new rain, and the light of another sun; and we must alter to meet them.'

(Walter Bagehot)¹⁴

Political institutions are like people in one respect: they have a long life, marked by growth, progressive change, ageing, and decay. But unlike people, political institutions can be rejuvenated, and so live longer; we might say that in the process they become new institutions, and so re-enter a familiar cycle. But they might in many respects retain some of their earlier forms or characteristics, so that the reality of the new institution is clothed in older garments. Such discontinuities of form and content can be misleading to the ordinary observer; yet this apparent discontinuity fulfils a useful practical purpose: it enables changes to occur and be accepted with the minimum of social and political dislocation. People accept what is new more readily if it has a comfortingly familiar appearance. But the discontinuities of form and content are a headache to the political scientist, anxious to disentangle the 'real' from the 'unreal' characteristics of political systems. Indeed many political scientists decide to ignore the 'unreal' elements and concentrate on the 'real'

13 S. Brittan, *Steering the Economy: The Role of the Treasury*, (Penguin, 1971), p. 63.

14 W. Bagehot, 'Physics and Politics', *Collected Works*, vol. VII, p. 76.

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elements in political systems. In doing so, they make an over-confident jump to the position that formal institutions are mere superstructures of real political systems and have no useful place in the analysis of political systems. This view results from the tendency to treat political institutions as if they had no history. That this tendency arises from a laudable desire to understand and explain political phenomena 'as they really are' does not alter the fact that impatience with the history of 'things as they are' is a sort of intellectual illiteracy. It is an approach which, apparently pragmatic, leads unerringly to a level of abstraction far removed from actuality; an approach which, searching for clarity, leads only to obscurity or opaqueness. The failure derives from the inability to comprehend the real life of formal institutions, their reflection of political values and ideas, and the essential continuity of this interaction over long periods of time. The process by which changes occur involves both formal and informal phenomena; the informal phenomena invariably provide the basic material of change, but the formal phenomena often provide the crucial evidence of the reconstitution of that material. In short, we frequently recognise change by the formal appearance; though we can only explain change by analysis of the informal process, which is likely to be compounded of social, economic, political and intellectual events and movements.

Change in British government over the past thirty years has been astonishingly many-sided. There have been major changes in the organisation of central government, the administrative machinery for planning public expenditure, the management and structure of the Civil Service, the structure of local government, the machinery for redress of grievances, Parliamentary committees and procedures, the internal organisation of public corporations, the health and water services, and not only in the whole national structure of constitutional government, but in the external relations of the national structure. The whole period might be described as a period of transition from one clearly defined and understood, but outdated system of government, to a new system of government as yet shadowy and imprecise, were it not for the surprising fact that all these changes in our governmental arrangements have been emphatically unsystematic. Change has been spontaneous and piecemeal, in some areas quite drastic, in other areas only marginal. At no point has there been any appearance of a master design into which the many pieces of the jigsaw could be fitted. Perhaps the notion of a master design is unrealistic, since to obtain such a controlling scheme of things would have required a massive political negotiation and a remarkable degree of consensus over a wide range of constitutional and administrative issues. Yet in a political system, by definition, even one change in one part of the system must have consequences for related parts, and (logically) for all the other parts. In a controlled process of change, the consequences for the whole system of a change in a part of the system must be predicted if the outcome expected from the change is to be the actual outcome; otherwise the process of change will do no more than produce unanticipated consequences and leave the system in disarray. It is not difficult to imagine the problem of controlling the process of change when many reforms take place simultaneously, or in rapid succession. The more piecemeal and *ad hoc* the process, the