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L. W. White and W. D. Hussey

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PART I: GREAT BRITAIN

CHAPTER I

THE NATURE OF THE BRITISH CONSTITUTION

The meaning of the term 'Constitution'

The term 'Constitution' means the system of laws, or of laws and customs, in accordance with which a country is governed, and by which all its citizens are bound. When a country has a written constitution, the fundamental laws can be discovered by reading the constitutional act and its amendments. Great Britain has no written constitution. It is therefore impossible to name any one document which a person may consult and from which he can hope for enlightenment. Indeed the very term 'Constitution' means something different to every thinking Briton, for each one will place more emphasis on one function of government than on another. A famous Frenchman, de Tocqueville, realising this expressed the view that the English constitution did not exist at all.

The functions of government and the separation of powers

There is, however, a substantial basis of agreement on essentials between responsible citizens. The essential powers of government are held to include legislative, executive and judicial functions. It is also recognised that these powers should largely be exercised by different people or groups of people, but that a rigid separation of powers is impracticable. Thus the ministers who form part of the executive should not be excluded from Parliament, the executive should not be barred from influencing legislation, and the judges, while freed from parliamentary and executive control, should not be prevented from questioning the acts of the executive. All are agreed on the supremacy of Parliament, through which the will of the people is expressed, and all uphold the rule of law, that is, the application of the same law to all citizens and the equality of all citizens before the law.

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The legislative functions in Great Britain are exercised by the Queen-in-Parliament; the executive functions by the Queen's ministers, the Civil Service and the local government authorities; the judicial functions by the judges and the magistrates. Standing aside are the police and the armed forces, who have special duties in the maintenance of law and order and the defence of the country respectively, but who are subject to the rule of law. The link between all the functions of government is the monarchy.

The British Constitution has evolved step by step through the centuries. Though there have been civil wars and rebellions in Britain like the Civil War between Charles I and Parliament, and the Revolution of 1688, there has never been a complete, lasting break with traditions of the past. The British Constitution has been worked out by trial and error. Some institutions have been tried and discarded; others have been developed as the conditions of life and the social structure have changed.

Constitutional landmarks

Because the British Constitution has developed in this way, we have to consider many documents and influences when we attempt to answer the question: 'What is the British Constitution?'

There are certain great landmarks along the path of progress: Magna Carta, an agreement between King John and the barons in 1215, which was later held to guarantee certain privileges for all Englishmen; the Petition of Right of 1628, by which Parliament won from Charles I the recognition of certain essential liberties; the Habeas Corpus Act of 1679, by which the citizen's right to protection against imprisonment without any cause being shown was reaffirmed; the Bill of Rights of 1689 and the Act of Settlement, which established the supremacy of Parliament and gave the monarchy a title based on Act of Parliament, and which together incorporated many of the principles on which the modern constitution has been founded; the Catholic Emancipation Act of 1829, by which the civil disabilities of Roman Catholics were removed; the Reform Act of 1832, which began the long process of the extension of the franchise; and the

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Parliament Act of 1911, which limited the powers of the House of Lords. These are just a few of the measures which mark the evolution of the British system of government.

Custom and convention

Side by side with the laws passed by Parliament, there have accumulated many customs and conventions which are necessary to the well-being and working of the constitution, but which have never been put into writing in an Act of Parliament. These conventions are the maxims, practices and rules which regulate much of the conduct of the sovereign and her ministers, and also the procedure of Parliament. Although they are not strict law, they are obeyed as if they were laws, because there is in Britain a strong tradition of obedience to law and custom, and also a clear realisation of the part these customs and conventions play in making democratic government work smoothly and effectively. Foremost among these conventions is that which enables the Prime Minister and his cabinet to conduct the policy and business of Her Majesty's Government.

Sources of the Constitution

Where then shall we find the British Constitution? First it is to be found in numerous Acts of Parliament: in some the workings of Parliament are made clear; by some the powers of the sovereign are defined; by others the position of the judges and the courts of law has been safeguarded; by still others the individual citizen is protected. Secondly, it is affected by documents like Magna Carta, which was drawn up before Parliament existed. Thirdly, it has been influenced by the commentaries written by great constitutional lawyers and historians, in which are to be found interpretations of acts and customs. Fourthly, it has been modified by the verdicts of juries of ordinary men and the decisions of learned judges, and finally it includes customs as old as, or older than, history, derived from the common law, the ancient custom of the realm. It is clear, therefore, that no one, not even in a life-time of study, could read the whole of the British Constitution.

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Features of the Constitution

Great Britain is a monarchy. The whole work of legislation and government is carried out in the Queen's name. The Army, Navy and Air Force are hers, and the law is her law. But in her capacity as head of the state she always acts through her ministers, as will be explained in chapter II. The Queen's ministers at the head of the executive are dependent upon parliamentary support, but in their turn control the programme of Parliament, and initiate most of the legislation. Thus, the functions of legislature and executive are so interwoven that it is impossible to disentangle them.

The Government is further controlled by the rule of law. This means that it and its officials are bound by the ordinary law like other citizens. There is no special code of rules that applies to them only, and there are no special courts to hear cases arising from the actions of officials in the discharge of their duties.

The judges and the courts of law are independent of the Government. Their independence was established long ago by the Act of Settlement of 1701. No judge need fear dismissal for political reasons, nor will he be asked to express political opinions. He holds his office during good behaviour, and such is the tradition of his high office that he gives his judgments without fear or favour.

Great Britain, being a small country, can easily be governed as a unit—it is a 'unitary' state. There is no special Parliament for Scotland or Wales, though there is a Parliament for Northern Ireland with considerable powers, and there is a Secretary of State for Scotland and a Standing Committee of the House of Commons which deals with all Scottish matters. As a result of increasingly strong demand a minister has been appointed to look after Welsh affairs, and it may not be long before there is a Secretary of State for Wales.

There is nothing in the British Constitution that cannot be changed by the passing of an Act of Parliament. No special machinery is necessary; there is no referendum to the people; there is no court that can declare illegal any Act passed by Parliament. The constitution is

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quite fluid or flexible. Thus the British Constitution is designed for practical government rather than to conform to theoretical principles.

Constitutions in the Commonwealth and Empire

Within the Commonwealth and Empire there are countries in every stage of development. The great countries of the Commonwealth are sovereign states united through common allegiance to the monarch. They are governed in accordance with constitutions originating from acts of the Parliament at Westminster. But, as will be shown in part II of this book, they are free to develop their own way of life and traditions, and to set up their own machinery for constitutional change if they so desire. In the Crown Colonies, and in those parts of the Empire whose stage of development is approaching Dominion status, a wide variety of forms of government is to be found. These will also be examined in part II.

The British and American Constitutions contrasted

A contrast of the British Constitution with that of the United States of America will serve to emphasise the constitutional points made in the foregoing paragraphs. The American Constitution is written. Its framers had before their eyes the Britain of the eighteenth century, and incorporated in the clauses of their constitution what they thought to be the best of the principles of British government. They were much influenced by the treatises on government and the natural rights and liberties of man of the great English philosopher, John Locke.

We can see at once how the American Constitution differs from the British. We can read it in a few hours. The original constitution and all its amendments would fill only a dozen or so pages of this book. We should, of course, have to read many more books to know how its clauses have been interpreted, but we should find the first impressions we had gained were little changed. Some of its features could not be applicable to Britain, for America is a vast country, too big an area to be ruled as a single unit. Even at its beginning the United States consisted of thirteen states, all jealous of their rights

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and proud of their origins. It therefore had to be a federation whose organisation and institutions made it easy for new states to be admitted on equal terms with the old. The desire of the states to preserve their individuality made them suspicious of the power of the central government. They therefore limited its powers to those given it in the constitution, and checked its activities by rigidly separating the legislative, executive and judicial functions. Further, they gave to the highest court of law of the federation, the Supreme Court of Justice, the duty of watching over the constitution, and declaring illegal any law which conflicted with it. The separation of legislature and executive was accomplished by forbidding the President's ministers to sit in either house of the legislature. This prevented the development of anything like the British cabinet system. The President was established as the executive; his ministers were his personal nominees and responsible to him; he was invested with very wide powers, much more extensive than those exercised by the sovereign in Great Britain even in the eighteenth century. Finally the constitution can only be changed by an elaborate process including a referendum to the people.

CHAPTER II

THE SOVEREIGN

The Crown and the Sovereign

The sovereign represents all aspects of government, since all government is in her name. The powers of the sovereign are twofold: those that appertain to the Crown, and those which the sovereign possesses as a person. The term 'Crown' itself is sometimes used to mean 'the sum total of governmental powers', and sometimes it is applied to the kingly power itself, so that we have to be very discerning both in the use and in the understanding of the term.

The Crown in its widest sense represents all that is essential for the administration of the state, its legislative, executive and judicial

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functions. These functions have in the course of centuries been transferred from the sovereign to the nation, which in turn acts through a ministry dependent on a parliamentary majority. Parliament, the Government, and even the Opposition are the Queen's, and so are the laws and the judges, and all acts of government are carried out in her name. The majority of the powers that hundreds of years ago were exercised personally by the sovereign are now used on her behalf. But while surrendering direct power, the sovereign has retained influence derived from convention, prerogative, respect, and the personality and character of the sovereign herself.

In law, the Queen can do no wrong. Whatever functions she performs, except on purely ceremonial and social occasions, she carries out at the request and on the responsibility of her ministers. There is, therefore, a wide divergence between the nominal and the actual powers of the sovereign. The powers of the Crown are related in the chapters that follow. In this chapter we shall examine the influence and prerogatives that remain with the Queen as a person.

The title to the Crown

The Queen's title to the Crown is derived from the Act of Settlement 1701 which said, 'The Crown shall remain and shall continue to the said most excellent Princess Sophia and the heirs of her body being Protestant.' The following is the text of the proclamation read at the accession of Queen Elizabeth II:

Whereas it has pleased Almighty God to call to his mercy our late Sovereign Lord King George VI, of blessed and glorious memory, by whose Decease the Crown is solely and rightfully come to the High and Mighty Princess Elizabeth Alexandra Mary:

We, therefore, the Lords Spiritual and Temporal of this Realm, being here assisted with these His late Majesty's Privy Council, with representatives of other Members of the Commonwealth, with other Principal Gentlemen of Quality, with the Lord Mayor, Aldermen, and Citizens of London, do now hereby with one Voice and Consent of Tongue and Heart publish and proclaim, That the High and Mighty Princess Elizabeth Alexandra Mary is now, by the death of

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our late Sovereign of happy memory, become Queen Elizabeth II by the Grace of God, Queen of this Realm, and of Her other Realms and Territories, Head of the Commonwealth, Defender of the Faith, to whom Her Lieges do acknowledge all Faith and constant Obedience with humble Affection, beseeching God by whom Kings and Queens do reign, to bless the Royal Princess, Elizabeth II with long and happy Years to reign over us. God save the Queen.

The Queen and the executive

The executive government is the Queen's agent; all its actions are performed in her name and all its powers derive from her. But such is the practice of the constitution that she performs no executive act except through a minister, who is personally responsible to Parliament for that act.

When William III and Mary II became joint sovereigns after the abdication of James II, they chose as their ministers whomsoever they wished, irrespective of party. As the cabinet system developed in the eighteenth century, the custom grew up of the monarch's choosing a Prime Minister who in turn selected his ministers from his own party and submitted their names to the King for approval. Even in his choice of Prime Minister the sovereign was not unrestricted, for the government of the country could not long be carried on unless the man he chose commanded a majority in the House of Commons. Today the Queen must in practice choose the leader of the most powerful party in the House of Commons as her Prime Minister. She may offer objections to a minister whose name the Prime Minister submits to her, in which case he may substitute another. But persistence in such an objection on the part of the sovereign would produce a serious constitutional crisis.

Walter Bagehot in his famous book *The English Constitution* wrote, 'The constitutional sovereign is understood to have three rights, the right to be consulted, the right to encourage, and the right to warn.' The Queen has opportunities of influencing policy before the final decision has been reached. A note of cabinet proceedings, and also all documents of importance are submitted to her. The sovereign thus

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has the opportunity of becoming better informed on matters of state than many cabinet ministers, as her understanding of affairs widens with experience. Her ministers will not set her advice aside rashly, but once the policy has been decided upon, she will not interfere with the responsibilities of her ministers.

The sovereign's views are expressed in private in the course of her frequent contacts with her ministers, especially with the Prime Minister, whose duty it is to keep the Queen informed of events, and where necessary to explain and amplify the information given to her in official documents. Her opinions must not be made public, for, if she were drawn into the arena of public controversy, constitutional monarchy in its British form could not continue. That the sovereign often has opinions, likes and dislikes, has been made very clear by the publication of the letters of Queen Victoria, who at first regarded the Whigs as 'her' party, and later entered heart and soul into partnership with the conservative Disraeli, whom she had once referred to as 'detestable'. No doubt other instances of the sovereign's personal influence will be revealed when the inner secrets of the reign of King George V are made known.

There has been no clear case of the dismissal of a ministry by the personal action of the sovereign since 1783, when the efforts of George III to rule through the King's Friends were drawing to a close. Even Queen Victoria had to accept as ministers those whom the electorate favoured.

The Queen and the legislature

The sovereign law-making body is the Queen-in-Parliament; no Act is valid until it has received the royal assent. There is no law that forbids the Queen to exercise her right of veto, or refusal to sign, but as it is 250 years since the right was exercised, custom has established that it shall not be used. As the Queen's ministers now control the passage of all legislation, it is clear that refusal to sign a bill would be tantamount to the rejection of her ministers' advice and would precipitate a grave crisis which might be fatal to the monarchy. The signing of a bill constitutes a legislative act by the Queen. She also

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performs legislative acts within certain fields by proclamation and orders in council, but these too are only made upon the advice of the ministers.

Parliament is nominally dependent upon the sovereign since she summons it and dissolves it, and may prorogue it at the end of a yearly session, but in each case she acts on the advice of the Prime Minister. The needs of government require money, which can only be obtained by the passage of the yearly Finance Bill, and the maintenance of the Army and Air Force is also dependent upon an annual bill, so that there is no possibility that there will be a long gap between the sessions of Parliament.

There was a time when the sovereign could sustain the Government of the day in its hour of need by the creation of peers. This was done by Queen Anne to secure the passage of the Treaty of Utrecht in 1713. It was threatened on the advice of the King's ministers in 1832 at the time of the Great Reform Bill, and again in 1910-11 when it seemed that the Lords might throw out the Parliament Bill.

The Queen, the judges and the administration of justice

In the earliest days of kingship, one of the most important functions of the monarch, perhaps the most important, was the dispensing of justice. In medieval times the executive, legislative and judicial functions were indivisible and indistinguishable, and were all exercised by the King and his immediate advisers, but gradually the powers came to be separated. In early Stuart times, when the courts of law had long been firmly established, there were instances of royal pressure upon judges to obtain decisions favourable to the Crown, and these became a major issue in the struggle between King and Parliament. In the Act of Settlement (1701) it was enacted that the judges should hold office during good behaviour: 'quamdiu se bene gesserint', and that they could only be removed on an address by both Houses of Parliament. The judges to-day are still Her Majesty's judges, but the sovereign appoints them on the advice of the Prime Minister or the Lord Chancellor.

Criminal prosecutions, or prosecutions by the state, are still