Constitutions 2

Constitutions describe the fundamental rules according to which states are governed, be they embodied in the law, customs or conventions. They set out how decisions are made, how power is distributed among the institutions of government, the limits of governmental authority and the methods of election and appointment of those who exercise power. Constitutions also define the relationship between the state and the individual and usually include a listing of the rights of the citizen.

There are wide variations between different types of constitution and even between different constitutions of the same type. In essence, the British Constitution can be described as unwritten, unitary, parliamentary, monarchical and flexible, whereas the American one can be seen as written, federal, presidential, republican and rigid. There are qualifications to be made to this categorisation, as we shall see in this chapter.

POINTS TO CONSIDER

- What is a constitution?
- How important are constitutions?
- What advantages are there in having a codified constitution?
- How important are conventions within the British and American constitutions?
- What are the underlying principles of the British and American constitutions? How do they differ?
- How easy is it to amend the British and American constitutions?
- Is the American Constitution a perfect and timeless document?
- Why is there more talk of constitutional reform in Britain than in the United States?

General developments concerning constitutions

In recent decades, there has been a revival of interest in constitutions and constitutional matters, following a period in which study of them was often seen as dull and arid. This renewal of interest was in part associated with the collapse of dictatorial regimes in countries such as Portugal and Spain in the 1970s, and those formerly under Soviet control in Central and Eastern Europe, following the fall of the Berlin Wall in 1989. Other countries ranging from Canada to Sweden have also opted for new constitutional arrangements, in these cases to bring their original documents up-to-date to make them more in tune with the reality of their present systems of government.

Elsewhere, increased discussion of constitutional issues indicates that peoples ranging from the Australians to the Indians are seeing the need to revamp their constitutional arrangements, because of a mood of growing disillusionment with existing political systems and those who operate them. As Heywood points out, 'political conflict has increasingly been expressed in terms of calls for constitutional reform . . . conflicts assume a constitutional dimension only when those demanding change seek to redraw, and not merely re-adjust, the rules of the political game. Constitutional change is therefore about the re-apportionment of both power and political authority'. This has been true of the United Kingdom, but in the United States there has not been the same zeal for reform.[1]

What are constitutions?

Every country has a constitution of some kind, but the term is used in two different but related ways. There are many definitions of a constitution, such as that provided by the Oxford English Dictionary: 'the system or body of fundamental principles according to which a nation state or body politic is constituted and governed'. For our purposes, a working definition is: 'an agreed set of rules prescribing the organisation of the government of a country'. In other words, the constitution is concerned with the way in which decisions are made, and how powers are distributed among the various organs of government, be they central or local. It usually determines the boundaries of governmental authority, and the methods of election/appointment of those who are in power.

In a more precise and narrower sense, 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. There are many examples of such documents, for almost every country currently possesses one. The oldest one is the American Constitution, the writing of which intro-

duced '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'.[2]

Thomas Paine (1737–1809)
A radical pamphleteer at the time of the American and French revolutions, he also wrote several fiery books, notably *Common Sense* (1776), a work which had fuelled the hot flames of revolution in the months leading to the War of Independence, *The Rights of Man* (1791–92) and *The Age of Reason* (1794–95).

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 Britain institutions have developed through the ages, sometimes as a result of deliberate choice, sometimes as the result of political forces. 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. There have been serious interruptions to this – the English Civil War and Protectorate, and the American Civil War – but in neither case has the breach with tradition resulted in permanent change to the broad pattern of evolution. As far as the form of government was concerned, the status quo before the upheaval was in both cases restored. Few other countries have constitutions which have stood the test of time in this way. Many continental examples have been relatively short-lived, with France having seventeen since 1789, and Germany and Russia finding it necessary to rewrite their constitutional arrangements on several occasions.

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. No group of men ever sat down to agree on what it should contain. Rather, it has been 'hammered out . . . on the anvil of experience', progress being based on empiricism, a practical response to prevailing need. Constitutional developments have come about gradually. Although many of the institutions have a long history, the role they play is constantly changing, which is why two writers were able to refer to the British habit of placing 'new wine in old bottles'.[3]

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 delegates at the Convention were a mix of older, experienced men and younger persons, some of whom were learned students of political philosophy. The more youthful element had matured politically during the revolutionary period and, being less tied to state loyalties than some of the older men whose attitudes had been formed before the war, they were able to think beyond the protection of state interests to embrace a wider national picture. They were nationalists intent upon building a nation, and this nation would require a constitution which was appropriate for its needs.

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 (see p. 164). As part of that compromise, the federalists gained much of what they wanted when it came to determining the form which the institutions of government would take.

Written v unwritten constitution

Written constitutions are important in states which have been subjected to internal dissension and upheaval over a long period. The American Constitution followed in the aftermath of the War of Independence, just as the Japanese and West German documents were devised after World War Two following the trauma associated with a major military defeat. They can provide no necessary guarantee of the enforcement of the principles for which they stand, but their existence serves as a reminder to citizens and those who rule of the need to abide by acceptable rules of behaviour involving an orderly approach to the conduct of affairs As such, they are a useful means of introducing a new political era after the failure or rejection of the older order.

Most constitutions are written down and embodied in a formal document. The American one is much briefer than many, having some 7000 words, expressed in seven long articles, and a mere ten pages. It establishes underlying principles, a broad framework for government. Few democratic countries today have unwritten constitutions. Apart from the United Kingdom, only Israel and New Zealand lack formal documents. Even among those countries usually classified as 'undemocratic' it is usual for there to be a clear statement of constitutional provisions.

It is misleading to seek an absolutely clear distinction between written and unwritten constitutions, and the differences between constitutions overseas

and Britain's unwritten one are easily exaggerated. Countries with written documents may find that other information becomes necessary. No single document could ever describe all the rules and principles of government, certainly not in an intelligible manner. They need to be supplemented and interpreted by other documents or in court judgements which are recorded. In the United States, such key institutions as congressional committees, primary elections and the bureaucracy have gradually evolved to fill in the gaps in constitutional arrangements and to adapt the political system to changing conditions.

Much depends upon the meaning of the terms 'written' and 'unwritten'. Most of the British Constitution is written down somewhere, so that it is technically not 'unwritten'. This is why back in 1962 Wheare could suggest that rather than an unwritten constitution, Britain had no written constitution.[4] 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. 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.

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 (for example, the 13th Amendment guaranteeing the freeing of the slaves, and their constitutional rights). 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;
- European Union Law – e.g. primary legislation as is to be found in the Treaty of Rome and the other treaties, and secondary law as is to be found in EU regulations.

Most of the British Constitution is written down in various statutes, documents and commentaries, the unwritten part comprising the common law of the land in so far as it relates to the relations between government and citizens, and conventions, those customary rules followed in governing the country and which are recognised as constitutional modes of procedure. Membership of the European Union, with its acceptance of the Rome Treaty and Union regulations provides a significant written element to our constitutional arrangements.

Conventions have greater importance in Britain than in the United States, if only because there were significant gaps in British arrangements which required some resolution. Americans have in any case a reputation for being more legalistic, so that at times in their history they have wanted to see things clearly stated and codified in law. But in America, conventions are not totally unknown. It is a convention that electors in the **Electoral College** will cast their vote for the presidential candidate to whom they were pledged on polling day in November. Normally this is the case, but on occasion this has not happened. Electors have switched their allegiance (as in 1988 when a Democrat voted for Lloyd Bentsen, the vice-presidential nominee rather than Michael Dukakis, the candidate for the presidency) or withheld their vote to make a protest (as in 2000 when a Gore-supporting Democrat from the District of Columbia cast a blank vote to make a point about the city's lack of representation in Congress).

Electoral College

A system under which a body is elected with the expressed purpose of itself electing a higher body. The best example is that of the United States, by which the Founding Fathers provided for the people of each state to elect a number of electors equal to the number of senators and representatives for that state. In nearly all states, the presidential candidate winning the plurality vote in that state receives all its electoral college votes. In usual times, the electoral college is a purely formal body which in effect confirms the decision already made by the voters in the November presidential election.

As in Britain, when American conventions are flouted, they can be turned into law. Just as the Parliament Act gave legal recognition to the convention that the House of Lords would not reject a money bill (once the convention had been ignored), so too the Americans passed an amendment to limit the period for which a President

could serve in office. Until 1940, it had been assumed that Presidents would withdraw after two terms. Franklin Roosevelt had not done so, standing for a third and then a fourth term. The **22nd Amendment** (1947) restored the situation to what had always been assumed.

Flexible v rigid constitution

Flexible constitutions are rare. They can be altered via the law-making process without much difficulty, as in Britain. 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

22nd Amendment
Proposed in 1947 and adopted in 1951, the amendment limits a President's tenure in office to two whole terms, although if he is Vice-President he may take over as President and complete the term of the outgoing President before starting the two terms won in his own right.

Advantages and disadvantages of the differing arrangements in the two countries

America's written constitution has a number of **advantages**:

- It provides a clearer statement of the position of what is and is not constitutional. It is convenient to have a written document to which reference can be made. There are areas of constitutional uncertainty in Britain, such as the role and powers of the monarch in the event of a hung parliament (for example could a demand for a **dissolution** ever be refused?).
- American citizens are in a position to be more aware of their rights and freedoms than are the people of Britain. They can quote their constitution in defence of their liberties, especially its Bill of Rights (see chapter 3). Until recently, the British position has been notably unclear and it will still be some time before we see how British courts interpret the clauses of the now-incorporated European Convention.
- The American document may have an educational value, helping to curb the behaviour of those in government office. They will not wish their actions to be found in breach of the Constitution, and the knowledge that there is a reference point for those who are dissatisfied with the conduct of policy should help to keep them in line. The educative value of the constitution is wider than this, however. It serves as a statement of beliefs and values, and therefore helps to inform people about the ideas to which the majority of the population hold dear. In Britain, it has traditionally been easier for politicians to get away with actions which curb essential liberties, although the recent use of judicial review and the passage of the Human Rights Act has served to concentrate their minds.
- Finally, the American Constitution is more difficult to amend, for the key provisions are entrenched. Presidents cannot tamper with them at a whim, merely because of their inconvenience, as Franklin Roosevelt found out when he tried to 'pack the court' in the

dissolution of parliament
The termination of a parliament. The Prime Minister dissolves parliament by calling a general election.

changes would probably require a referendum if they have not already been submitted to the electorate in a general election.

Rigid constitutions are difficult to amend, the intention being that there is a delay sufficient to allow full discussion of any proposed change. The process of amendment is normally outlined in the constitution itself. The US Constitution is usually described as 'rigid', in that it can only be amended after prolonged deliberation. Article V reads:

> **The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall convene a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as one or other mode of ratification may be proposed by Congress.**

1930s, when it was proving obstructive to New Deal legislation. In Britain, ministers can devise new constitutional arrangements to the advantage of the governing party (such as electoral systems and plans for a revived House of Lords).

Yet against the case above, many **disadvantages** can be detected:

- Constitutions can be inflexible and rigid, incapable of being easily adapted to the needs of the day. Whereas the British Constitution is adaptable and has evolved according to circumstances, a formal document can be difficult to amend, and therefore may act as a barrier to much-needed social change. Several US Presidents have been attracted to the idea of gun control as a means of combating American crime, but they have run into fierce opposition from the National Rifle Association, which reminds people of the statement in the Constitution in Article Two of the Bill of Rights, guaranteeing citizens the right to bear arms. The Supreme Court was similarly able to restrict some of the New Deal legislation on the grounds that it was a breach of the Constitution, restricting states rights and giving too much power to the President.
- The existence of a written constitution does not necessarily provide a clear protection for people's rights. The US experience proves this, for the 15th Amendment passed in 1870 provides that: 'The right of citizens to vote shall not be denied or abridged by the US or by any states on account of race, colour or previous condition of servitude . . . Congress shall have the power to enforce this by appropriate legislation.' Yet in many states, blacks were excluded from exercising their democratic right to vote until the 1960s on grounds of illiteracy or by such devices as **poll taxes**. For instance, the Puerto Ricans of New York were long excluded by a literacy test, though of course they may have been perfectly literate in Spanish. Rights clearly depend on other things, such as the tradition of liberty in a country.

poll tax
A tax levied per head of adult population.

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. Twenty-seven amendments have been passed and as we have already seen judges have been able to give their verdict on what the Constitution actually means in practice, adapting their conclusions to the social and political climate of the day. The contrast between British experience and that of other countries with written constitutions is much greater than it is with the United States.

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. But as Benn and Peters suggest, 'democracy is not merely a set of political institutions like universal suffrage . . . and decisions by majority procedure, but also a set of principles which such institutions tend to realise'.[5] Ideals and institutions are closely connected, for the more deep-rooted are the values of broad consensus, compromise, consent, discussion and tolerance among the population, the more likely it is that the institutions and procedures of government will give expression to them. The American philosopher John Dewey, was a leading exponent of the democratic ideal.[6] He saw such a system as a superior in form and purpose to other systems, for in his view it embodies the principle that each individual possesses intrinsic worth and dignity.

The rule of law is a core liberal-democratic principle with deep roots in Western civilisation. As stated by two British constitutional experts, Wade and Philips, it means that 'the exercise of powers of government shall be conditioned by law and that the subject shall not be exposed to the arbitrary will of the ruler'.[7] 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. The phrase is sometimes used emotively with a meaning best suited to support a particular argument that is being advanced, but a certain vagueness of definition does nothing to undermine the importance of the moral ideas implicit in its use. 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. Rulers, like those over whom they rule, are answerable to it.

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

One of the most obvious differences between the two countries is the fact that one is a monarchy and the other a republic. Many American tourists now seem to admire the British Royal Family, and the colour, pageantry and quaintness that are associated with it. But when the colonists broke away from the British Crown in the War of Independence and subsequently devised a new constitution, they were not tempted to follow the British example. The difference is very visible, but yet not of crucial significance. 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 distinction between constitutional monarchies and republics is much less than in the days when monarchs exercised real power.

Unitary v federal

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. In bygone days, royal authority was extended to the component parts of Scotland, Wales and Northern Ireland, either by conquest (in the case of Wales) or by agreed union (subsequently regretted by a section of the population) in the cases of Scotland and Northern Ireland. It was a long time before recognition was given to their separate identities within the context of the United Kingdom, even if sectional sentiment in the three non-English countries has always been present and a growing factor in recent decades.

Power may be – has been – devolved to other layers of government, both local – throughout the United Kingdom – and national, in the case of Scotland, Wales and Northern Ireland. But such bodies have only the powers granted to

them, powers which may be taken away. In the words of Malcolm Shaw: 'In Britain, sovereign authority, whether exercised by King or Parliament, has always meant central authority. If Parliament is supreme, this supremacy must apply throughout the nation'.[8]

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). Although they have long accepted that many decisions are taken beyond their states, their attachment to state government remains in several cases stronger than their liking for the federal government. The official motto of Illinois still recognises their divided loyalties: 'State Sovereignty, National Union'.

Not so long ago, there were signs that such was the increasing power of Washington in the federal relationship that states' rights were being ignored or overridden. Examination questions in Britain of the 1970s went as far as to ask whether the United States was becoming a unitary country. Since the 1980s there has been a reversal of the drift towards increased central control. Today, few would question the value of the states as useful and viable political entities with in many cases a marked capacity for innovation.

In Britain, the devolution introduced in Scotland and Wales by the Blair administration has meant that a form of decentralised government is common to both Britain and America. If in broad historical terms America now has stronger central power than was ever imagined by the Founding Fathers, so Britain has a greater degree of self-government than ever before, a process not yet perhaps completed (see pp. 159–63). Writers in Britain often debate whether or not Britain is moving in the direction of federalism with a form of 'Home Rule All Round', and it does seem that Britain has moved towards a kind of 'federal devolution'. The two systems of government have in a sense drawn closer together, but the fact remains that one is unitary, the other federal and as such this is a major constitutional distinction.

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

Apart from the respective arrangements affecting the relationship between the centre and the regions and localities in the two countries, there are also significant difference in the relationship between the different branches of government in Britain and America. 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.

Andrew Heywood explains the distinction well:

> **A Parliamentary system of government is one in which the government governs in and through the assembly, thereby 'fusing' the legislative and executive branches. Although they are formally distinct, the assembly and the executive (usually seen as the government) are bound together in a way that violates the doctrine of the separation of powers, setting Parliamentary systems clearly apart from Presidential ones.**[9]

Most liberal democracies – ranging from Australia to Sweden, from India to New Zealand – have some kind of parliamentary government, often of a Westminster type. Historically, Britain had an era of legislative supremacy over the Executive. The situation evolved into one in which there was a relatively even balance between the two branches. The suggestion is that we have now moved towards executive supremacy. The Executive tends to dominate the Legislature, because the party and electoral systems usually produce a strong majority government, what Lord Hailsham called 'an elective dictatorship'.[10]

Executive

The branch of government responsible for implementing or carrying out public policy and the laws of the state. The Executive is today much involved in formulating policy and laws.

Legislature

The branch of government that makes law through the formal enactment of legislation.

Parliamentary government appears to imply that government is checked by the power of Parliament, which examines, criticises and checks its activities via such methods as Question Time and the use of select committees. Ministers are individually and collectively responsible to Parliament, and should resign if the administration has been defeated on a Vote of Confidence (as happened with the Callaghan Government in 1979).

The term suggests that Parliament has real power. This may have been an accurate description in the mid-nineteenth century, when there was much cross-voting and governments were often brought down by an adverse vote in the House of Commons. That rarely happens today, for power has passed to the executive branch, and in a crisis (such as the Westland affair in 1986) all Tory MPs supported the Government. Such is the strength of party discipline today. Also, it is very difficult for Parliament to control the executive, because government is so vast and complex. MPs are so inadequately equipped and lacking in time that they cannot monitor its work really effectively.

Presidential government does not refer to the fact that America has a President rather than a monarch as head of state. As Heywood explains: 'A presidential system is characterised by a constitutional and political separation of powers

between the legislative and executive branches of government'. A presidential system is one in which the Executive is elected separately from the Legislature, is outside of and in theory equal to it. The President is chosen by the people rather than from the legislative branch, and acts as Head of the Government as well as ceremonial Head of State.

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. Its position in the Constitution is in theory of paramount importance, even if in reality we live in an age often described as an elective dictatorship, with power having passed from the Legislature to the Executive. American experience is different, and the Legislature is not constitutionally supreme. The Legislature and Executive are in theory constitutional equals, even though at different times Congress may have seemed to be stronger than the Presidency and at others the White House dominant over Capitol Hill.

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. Michael Howard, as Conservative Home Secretary, imposed minimum prison sentences for burglars and hard-drug dealers, as well as automatic life sentences on rapists and other violent offenders who commit a second offence. His Labour successor, Jack Straw, made inroads into the principle of trial by jury. 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. The opening words of the American document establish this clearly: 'We the People of the United States . . . do ordain and establish this Constitution'. They echo the ideas associated with the French writer and philosopher Jean Jacques Rousseau, who argued that the best form of government was one that reflected the general will of the people, which was the sum total of those interests that all citizens had in common.

In America, ultimate power rests with the people and has done so ever since the republic was established. The elective principle is well established at every level of authority in the United States, with more than one million posts being subject to such popular control. Britain was an established country long before it was an established democracy and the notion of power resting with the people has been slower to take root. In the final analysis, the people do have the ultimate say because they can 'throw the rascals out' in a general election. Governments are aware of the need to secure re-election and this induces caution as they create and develop their policies. But it is a representative democracy which has been slow to adopt any methods of direct democracy, such as the use of initiatives and referendums. The emphasis has always been on politicians making the decisions and the voters giving their general verdict at periodic intervals.

The ease of constitutional change

The flexibility of the unwritten British Constitution makes constitutional change relatively easy to accomplish. Amending it is no different in essence to passing a law relating to homosexuality or the health service, for example, although there is a growing practice that divisive constitutional issues might be put before the relevant electorate in a pre-legislative or post-legislative referendum. Many such changes to the Constitution have been carried out in recent years, as we shall see in the next section. Few have aroused much difficulty in their passage, although reform of the House of Lords continues to be a thorny issue.

In America, the constitution has been amended on 27 occasions by the passage of a constitutional amendment (a complicated process as the experience of the Equal Rights Amendment shows), but there is another way by which change can

Passing a US constitutional amendment

Any proposal requires approval by a two-thirds majority in both houses of Congress, in the same session, or the approval of a special national constitutional convention convened by two-thirds of the state legislatures. (No such convention has ever been summoned.) Any amendment passed by Congress or a special convention must in addition be ratified by three-quarters of the state legislatures or by ratifying conventions in three-quarters of the states. In 26 cases, constitutional amendment has been brought about by Congressional action and state legislature ratification. The 21st Amendment, which repealed the 18th and therefore ended the experiment of prohibition) was proposed by Congress, but ratified by state conventions.

When campaigning groups such as the National Organisation for Women (NOW) urged the passage of an Equal Rights Amendment to introduce equality of rights under the law irrespective of gender, the amendment was approved by the necessary two-thirds majority in both chambers of Congress, in 1972. But not enough states were willing to ratify the measure. The original deadline (March 1979) was extended by more than three years, but by the end of June 1982 only 35 states had given their support. Three more would have provided the necessary three-quarters majority for a constitutional amendment. Bearing in mind that the original proposal for an ERA was put before Congress in 1923, the difficulty of achieving change is apparent.

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). These were landmark decisions which significantly changed the law. Not for nothing did Chief Justice Evans Hughes remark back in 1909 that 'the constitution is what the judges say it is'.

In Britain, 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.

Recent experience of constitutional reform

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.

All of these developments had a significant impact on the British system of government. The need for constitutional renewal was frequently discussed by academics and commentators. A constant theme among would-be reformers was the need to halt the centralisation of power, which was perceived to be a growing trend in British politics. Arrangements which had once been regarded as near-perfect were becoming the cause of uncertainty and disquiet.

Growing interest in constitutional reform in Britain

The Liberal Democrats and their predecessors have had a long-standing commitment to constitutional reform, but more significantly the cause was embraced by Labour in the 1990s. During the period of the Major administration of 1992–97, the opposition parties began to agree, clarify and popularise their proposals for constitutional change. Conservative ministers were broadly united in wishing to preserve existing arrangements intact, their only wish being to retrieve some powers which had drifted to Brussels.

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 theme of constitutional renewal has never commanded much interest among the voters, but it has appealed to

the chattering classes: middle-class intellectuals, journalists, lecturers and teachers in disciplines such as the law and politics.

The Blair government and the constitution

Before the 1997 election, Tony Blair re-affirmed his belief that 'building a proper modern constitution for Britain is a very important part of what we are about'. Since then, action has been taken in many fields, and the programme of constitutional change is well underway. 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. Such deference is indicated by poll findings and other statements of popular opinion. They indicate that Americans are both familiar and content with their constitutional arrangements. 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.[11]

On becoming President in 1974, Gerald Ford observed that 'our Constitution works'. He was speaking in the aftermath of the Watergate Crisis, which led to the downfall and ultimate resignation of President Nixon. Nixon was judged to have been involved with a cover-up and various illegal operations, and thereby to have abused his position. As Americans firmly believe in the idea that 'we have a government of laws, not of men', Ford and many other Americans saw his removal as a vindication of their Constitution. It had served to protect freedom, restrain the behaviour of those in high office and define the limits of executive power.

Given such widespread approval of the form of government, it is not surprising that America has not shown the same interest in constitutional reform. Very few people publicly advocate radical changes in the structure of government established in 1787. Those who would tamper with it have to make a strong case for change and tend to talk in terms of restoring it to its original glory rather than making fundamental alternations.

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. Term limits do fall into this category, but despite being a high-profile part of the Republican Contract for America programme in the 1994 election, they have failed to materialise.

Conclusion

Constitutions are important in all countries for they affirm the basic principles according to which they should be governed. In the overwhelming majority of cases, they are written documents, although even where this is not the case the country can still be regarded as having a constitution. They are legally supreme, often difficult to amend and frequently short-lived. In Britain and the United States, they have survived well, even if on this side of the Atlantic there has been interest in and the implementation of a programme of constitutional reform.

Most written constitutions contain a declaration of rights, as does the American one. In Britain, there has traditionally been no such protection of liberties, although the passage of the Human Rights Act (1998) has changed the situation. However, as we see in the next chapter, the mere existence of a constitution and some form of Bill of Rights is no guarantee that essential freedoms will be respected. Liberty ultimately depends more on the political culture of any country than on any particular documentation.

What matters more than whether a constitution is embodied in a single document or not is whether it works effectively. The mere presence of a written constitution is no guarantee that the power of government is appropriately constrained. At any one time, a dozen or so of the world's written constitutions are in full suspension, in many others their provisions are systematically ignored. In both Britain and the United States, there is a basic consensus about how governing should take place. When that consensus is absent, no system of government, whatever the nature of its constitution, is likely to endure.

The constitutions of Britain and the USA: a summary

	Britain	*US*
General characteristics	Unwritten/uncodified Flexible/easy to amend	Written/codified More rigid/less easy to amend
Constitutional principles	Commitment to democracy, rule of law Monarchical government Unitary system, with devolution Parliamentary system Fusion of powers Parliamentary sovereignty	Commitment to democracy/ rule of law Republican government Federal system Presidential system Separation of powers Popular sovereignty

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4 K. Wheare, *Federalism*, Oxford University Press, 1947 (reissued as Federal Government, 1963).
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7 E. Wade and G. Philips, *Constitutional Law*, Longman, re-issued 1998.
8 M. Shaw, *Anglo-American Democracy*, Routledge and Kegan, 1968.
9 As note 1 above.
10 Lord Hailsham, *The Elective Dictatorship*, BBC Publications, 1976.
11 T. White, 'The American Idea', in *New York Times Magazine*, June 1986.

USEFUL WEB SITES

www.constitution.org/cons/natlcons.htm The Constitution Society. Constitutions of several countries are provided in an English version, with some commentary.

For the UK

www.ucl.ac.uk/constitution-unit Constitution Unit. Research centre relating to constitutional reform in the UK, with a valuable update section dealing with progress on constitutional reform.

www.lcd.gov.uk Lord Chancellor's departmental site. Coverage of constitutional issues in England and Wales.

www.charter88.org.uk Charter 88 site, with extensive information on constitutional reform, plus useful links.

www.democraticdialogue.org Democratic Dialogue. Northern Ireland-based think tank – includes information on constitutional matters.

For the USA

www.nara.gov/education/cc/main.html. National Archives Classroom web site. Many key historical documents on American government can be found here, notably the Declaration of Independence, the Constitution etc.

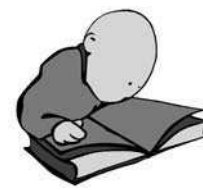
www.access.gpo.gov/congress/senate/constitution/toc.html. Congressional Research Service, Library of Congress.

tcnbp.tripod.com/index1.htm US Constitution Resource Center Index. Links to on-line resources about the American Constitution. On-line copy of Constitution, annotated with commentary and relevant Supreme Court cases etc.

www.constitutioncenter.org. National Constitution Center. Useful starting point for study of the US Constitution.

www.americanstrategy.org/foundations.html American Strategy. Introduction to American constitutional history.

SAMPLE QUESTIONS



1. Does the written constitution of the United States make the country harder to govern than Britain?
2. Discuss the view that the British Constitution is too flexible and the American Constitution is too rigid.
3. Do the similarities between the British and American constitutions outweigh the differences?
4. In what ways and to what extent do the US and UK constitutions shape political practice?