

# Against a written constitution

By

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### Constitutional reform

No one enjoys radical change quite as much as constitutional lawyers. When Gordon Brown hinted that one of the projects of his premiership might include the production of a written constitution for the United Kingdom, he could be sure of a warm welcome from within the faculties of law and politics. The project is attractive to academics for many reasons: there is the fun of debating abstruse constitutional issues, the chance of bringing certainty to areas long characterised by vagueness, and, perhaps, the opportunity to take a privileged role in the construction of the constitutional foundations of the state. But before we let our enthusiasm sweep us forwards, it is worth stepping back and considering the dangers and difficulties such an enterprise would encounter. The United Kingdom is in the unusual position of having an unwritten constitution that works passably well—sufficiently well, at least, to allow us to consider whether we want a new constitution. Most other states which have produced a written constitution, in contrast, have had little choice: when a territory gains independence or there is a radical break with the old constitutional order, the creation of a written constitution is almost unavoidable.

This paper attempts to flesh out some of the most important arguments against introducing a written constitution for the United Kingdom. They seek to show that the adoption of such a document would be a hazardous affair; that it risks forcing through unpopular or concealed changes to the constitution, that it risks shifting political power from democratic institutions towards the judiciary, and that it risks unnecessarily provoking a destabilising constitutional crisis. Having set out the objections to a written constitution, the weight of the argument then shifts to its advocates: given that a written constitution is not necessary, they must show that its benefits outweigh its dangers.

### **The uncertain mixture of codification and reform**

One of the many interesting ambiguities that has emerged from the debate so far is the complicated interplay between codification and reform. Would the new constitution simply be a formalised restatement of existing constitutional rules, or would the opportunity be taken to reform some parts of the constitution?

Much of the excitement surrounding the project has been generated by the wide possibilities it affords for radical change and improvement of the constitution. Lord Hailsham's assertion, pressed back in the late 1970s, that a written constitution was needed to protect us against a stealthy communist takeover now seems, perhaps, less compelling,<sup>1</sup> but many other claims have

<sup>1</sup> Lord Hailsham, *The Dilemma of Democracy* (London: Collins, 1978), pp.139–140.

been made for the possible virtues of a written constitution. Perhaps we should have fixed-term parliaments,<sup>2</sup> give judges the power to strike down unconstitutional legislation,<sup>3</sup> create an elected House of Lords,<sup>4</sup> require the Commons to vote before Britain goes to war<sup>5</sup>; perhaps we should adopt all of these reforms, some of them, or a different set altogether. It is not the purpose of this paper to argue for or against any of these measures. There are many areas in which the British constitution would benefit from change, but the question to be answered by advocates of a written constitution is why these various changes should be treated as a package. Some constitutional reforms do require wide systemic changes; they affect several areas of the constitution at once. So, for example, the incorporation of the European Convention on Human Rights necessitated changes to the role of the judiciary, to the practices of Parliament, and, as well, altered the rights of the citizen. The Human Rights Act 1998 was, of necessity, presented as a package of inter-connected constitutional changes; the different parts of the Act were bound together and depended on each other for their effectiveness. Whilst Parliament, when considering the Bill, could make superficial changes to it, it could not alter its fundamental elements without rejecting the whole thing. In contrast, there is no obvious reason why a person who supported, say, an elected House of Lords should also think that judges should be empowered to overturn statutes, nor why an advocate of fixed-term parliaments should believe the Commons should have the right to decide on military action. These various mooted reforms are not connected, and, consequently, it is difficult to see why they should be combined into one document. If, as is probable, there were ultimately a referendum on the new constitution, the public would be presented with a collection of unrelated changes which they could either accept as a package or reject in its entirety. It is possible that widely unpopular changes might then be passed on the back of other reforms. There might, for instance, be a sizable majority strongly against fixed-term parliaments, but they might reluctantly vote for the constitution because of their support for an elected House of Lords. Tying unconnected changes together runs the risk that unpopular reforms may be foisted by the drafters on the public, changes that would not have occurred had each separate element been separately debated.

If, on the other hand, the aim of a written constitution is simply to formalise the existing constitution, the point of the enterprise is thrown into doubt. There is little to be gained from such a project. Indeed, the fundamentally vague line between description and evaluation ensures that it would never be possible merely to describe the constitution. When constitutional lawyers disagree, as they invariably do, about the content of the constitution, it is rare that one of them has made a straight-forward mistake about a statute, case

<sup>2</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (London: Mansell Publishing, 1991), p.73.

<sup>3</sup> Lord Scarman, *Why Britain Needs a Written Constitution* (London: Charter 88, 1992), p.2.

<sup>4</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom*, p.97.

<sup>5</sup> A. Grice, "Brown May Bring In a Written Constitution", *The Independent*, May 11, 2007.

or convention. Each will have an adequate grasp of the bare constitutional material which is the subject-matter of the dispute, but each will have a different understanding of the point of the rule under discussion—a difference which may be connected to a broader dispute about the proper aims and good functioning of the constitution as a whole. Drafters who were mandated to describe the constitution would, more or less knowingly, be compelled to evaluate it, and shape it in light of those evaluations. A written constitution that purported merely to restate the current position would inevitably contain constitutional reform by stealth; hidden change effected without proper public debate.

### **The shifting of power to the courts**

Constitutional scholarship often splits into two opposing camps: pro-court versus pro-parliament. The pro-court party want to see the constitution shaped and policed by the courts. Judges should prevent the state from infringing people's rights, and should also, perhaps, uphold obligations between and within institutions: stopping Parliament legislating in matters given to the devolved assemblies, for instance, or reinforcing the conventions of ministerial responsibility. The pro-parliament party believes that political power can only be legitimately exercised through democratic institutions. Judges should, as far as possible, stick to applying the laws legislatures produce, and should strive not to distort the political processes of the constitution. And then there is the non-aligned group, amongst which I include myself, who see merit in each approach, and believe that both the courts and legislatures must play a significant part in the legal and political life of the constitution. In the debate about the content of a written constitution considerable controversy will arise between these two camps: to what extent will judges be required to enforce the content of the new constitution?

Supporters of increased judicial power often remind us of Lord Hailsham's description of the United Kingdom as an "elected dictatorship".<sup>6</sup> Not only does Parliament possess, it is claimed, legally unchecked power, it is an illusion to think that the exercise of this power is blessed with the sanctity of democracy. True political power lies in the hands of the executive, who then dominate a supine Parliament. We need then a written constitution in order to rebalance the constitution, empowering the judges to provide checks and balances against a supposedly sovereign Parliament. The continued popularity of this description of the constitution is surprising. Even if it was a fair accusation when advanced by Hailsham, it is far from an accurate picture of the contemporary constitution. In recent years Parliament, and the executive, have become ever more constrained by the courts and other constitutional institutions. The European Communities Act 1972, the Human Rights Act 1998 and the devolution legislation all provide legal and political limits on Westminster. Many of these legal limits are in the hands of the judiciary: through rules of interpretation,

<sup>6</sup> Hailsham, *The Dilemma of Democracy*, Ch.20; Scarman, *Why Britain Needs a Written Constitution*, pp.6–7.

hierarchy, and through the new remedy of the declaration of incompatibility, judges already exercise a significant level of control over Westminster. In addition to the courts, the devolved institutions and some of the institutions of the European Union provide political constraints on Westminster: checking its power, scrutinising its actions. None of this amounts to a blanket argument against conferring further specific powers on judges, but the claim that we need a written constitution to shift power away from Westminster to rebalance the constitution is outdated: the rebalance has already occurred.

A further difficulty with appointing the judges as the policemen of the constitution is that many of its parts appear inherently non-justiciable. Take ministerial responsibility, for instance. Ministerial responsibility is the cornerstone of the UK constitution, connecting the executive and the legislature. To a considerable extent it is already codified, and many of the conventions that regulate the relationship between ministers and Parliament can be found in the Ministerial Code.<sup>7</sup> It is hard, though, to see how a court could enforce these conventions. How could a court decide when a minister had failed to give a satisfactory answer to a parliamentary question, or when her conduct in office was so poor that she should resign or be demoted? How could a judge separate those errors of judgment that were personal from those that show the minister is not fit for office? And, even if these conundrums could be resolved, what sort of remedy could the court offer, and to whom? The bulk of ministerial responsibility, like many other conventions, could not be turned into court-enforced law. It shapes and is shaped by a political relationship between Parliament and the executive, a relationship that changes over time, depending on the relative strengths of each institution. Having an outside institution, the courts, step in and try to enforce the convention would change it in radical and unpredictable ways.

It might be objected that codification does not require juridification: we could draw up a constitution that set out key constitutional conventions, but which did not permit judges to enforce them.<sup>8</sup> A large portion, perhaps even the bulk, of the proposed constitution might then not be enforceable by the courts. Such a document would raise two concerns. First, there is a risk that the courts would not accept such a limitation on their powers, or would seek ways around it; the notion that rights should be paired with legal remedies is widespread. Secondly, if a constitution was drafted that succeeded in not adding to the power of the judiciary, and the bulk of its provisions were legally unenforceable, it then becomes hard to see much utility in the enterprise. It could not even be argued that the supposed constitution would clarify key conventions, as the conventions could evolve whilst the written “constitution” remained constant. Perversely, the façade erected by the written constitution might make it harder to understand the content of the actual constitution, not easier.

<sup>7</sup> *Ministerial Code: A Code of Ethics and Procedural Guidance For Ministers* (London: Cabinet Office, 2007).

<sup>8</sup> O. Hood Phillips, *Reform of the Constitution* (London: Chatto & Windus, 1970), pp.147–149.

### The precipitation of constitutional crises

Normally, certainty and clarity are desirable features of a legal system. Criminal law, for instance, ought to strive to be as clear and as plain as it can be. However, in certain circumstances a lack of clarity and the presence of uncertainty can be a benefit.<sup>9</sup> This is particularly true in parts of constitutional law and practice where uncertainty may mask, and allow us to avoid, a costly and unnecessary political choice. There are several examples of such useful vagueness in the British constitution. Perhaps one of the longest standing concerns the jurisdiction to determine the scope of parliamentary privilege, an entitlement which has been asserted by both courts and the Commons. Both have been able to maintain their incompatible claims by studiously avoiding forcing a resolution of the question.<sup>10</sup> The legal relationship between Britain and the European Union is similarly unclear, with the boundaries between Parliament and the European institutions, and the British courts and the European Court of Justice, left ambiguous. This relationship is one of the key parts of our contemporary constitution, so how might a written constitution delineate it? Let us consider three possibilities, which embody very different balances of power between the various institutions.

First, the “Europhile model”, a model which is broadly in line with the claims of the European Court of Justice.<sup>11</sup> Under this model, European law takes effect within the United Kingdom simply because the United Kingdom is a member of the European Union. European law would be supreme over all domestic law—including the provisions of the new constitution. The European Court of Justice would be entitled to determine the interpretation of European law and, additionally, whether a particular question fell within the scope of European law. National courts would be bound to follow all of its rulings.

Second, the “German model”, a model which is broadly in line with the position adopted by the German Constitutional Court in the Maastricht decision.<sup>12</sup> Under this model, European law would take effect within the United Kingdom’s legal order through the new constitution. It would take precedence over conflicting rules of ordinary domestic law, including statutes, but would not take precedence over the constitution itself. National courts would be bound to follow the rulings of the European Court of Justice only when those decisions were compatible with the constitution. Further, the court might also be entitled to determine whether the decisions of the European Court of Justice fell within the jurisdiction allotted to it by the domestic constitution.<sup>13</sup>

<sup>9</sup> For extended discussion of these points, see N.W. Barber, “Legal Pluralism and the European Union” (2006) 12 E.L.J. 306.

<sup>10</sup> See Barber, “Legal Pluralism and the European Union”; J. Chafetz, *Democracy’s Privileged Few* (Yale University Press, 2007).

<sup>11</sup> K. Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001), Ch.1; J. Weiler, “The Autonomy of the Community Legal Order”, in J. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999).

<sup>12</sup> *Brunner v The European Treaty* [1994] C.M.L.R. 57.

<sup>13</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom*, p.105.

Thirdly, the “Eurosceptic model”, a model favoured by many national politicians. Under this model, European law would take effect in the United Kingdom legal system by virtue of the European Communities Act 1972, which would be referred to, or incorporated within, the new constitution. European law would take precedence over parliamentary statutes where the statute was ambiguous, or where it appeared that Parliament had not intended to enact a law that conflicted with its European obligations. The primary duty of national courts would be to give effect to Parliament’s intentions as embodied in statute, and the decisions of the European Court of Justice would only bind national courts so far as they were compatible with this duty.

There are many other possible constructions of the relationship between Britain and Europe; indeed, for simplicity, each of our three models conflated a number of distinguishable issues. It is not possible, at present, to identify definitively which of the three most accurately captures Britain’s relationship with Europe. In the seminal case on the impact of European Law, *Factortame (No.2)*,<sup>14</sup> the House of Lords carefully avoided the opportunity to clarify the relationship. The majority of the judges did not address the constitutional issues raised by the Merchant Shipping Act 1988. Lord Bridge was the only one to speak to the issue. In a much-quoted passage he wrote that there was “nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply”.<sup>15</sup> This statement could be reconciled with any of the three models set out earlier—even the first, Europhile, model, given that the supremacy of the European Court of Justice is a rule of Community law.

Of course, it is not even clear which institution—the British courts, the European Court of Justice, Parliament or the authors of the treaties—could authoritatively determine the legal force of European law. Like the parliamentary privilege example mentioned earlier, much of the uncertainty turns on this very question. There is a temptation to assume that there must be one institution that has the legal—or political—authority to determine the issue, and a constitutionally correct answer that institution should give.<sup>16</sup> But the answer to the question may turn on the nature of the crisis and the broader political context in which the crisis arises. It may not just be hard to determine how this fundamental constitutional question would be answered, there may not be an answer to be determined. Indeed, if we are lucky, the crisis may never arise. Whilst grand disagreements over the fundamental lines of authority in the constitution look important, they may be of little practical significance, provided the parties in the dispute agree on the rest of the laws within the system. The dispute over the jurisdiction to determine the scope of parliamentary privilege has continued for well over a hundred years, and has caused few difficulties in that time.

It might be argued that clarity in this area would be a good thing: people are entitled to know where constitutional power lies within the system. Perhaps

<sup>14</sup> *R. v Secretary of State for Transport Ex. p. Factortame (No.2)* [1991] 1 A.C. 603.

<sup>15</sup> *R. v Secretary of State for Transport Ex. p. Factortame (No.2)* [1991] 1 A.C. 603 at 658.

<sup>16</sup> See the discussion of this temptation in P. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, 2005), p.313.



the process of producing a written constitution could provide an opportunity for us to debate these issues, and resolve the allocation of power in the system. Further, it might be desirable to address these questions without the looming presence of a particular crisis to cloud our judgement. Against these thoughts, though, must be weighed the benefits that ambiguity can bring.

First, the sort of inconsistency described here may amount to a political compromise; a tacit agreement to disagree.<sup>17</sup> It allows supporters of ECJ supremacy and supporters of national supremacy both to claim victory; conversely, and perhaps even more importantly, it avoids either constituency having to admit defeat. Whilst these parties cannot reach a compromise through the adoption of an agreed middle course, these ambiguities provide a compromise framework within which their inconsistent claims can co-exist. Provided that the practical conflict within this model remains unrealised, and actual disputes are avoided, this can provide a stable, even a long-lasting, form of settlement. The settlement avoids unnecessary and potentially destructive conflict, and allows the protagonists to work together on beneficial projects where agreement exists.

Secondly, these ambiguities could provide a form of what Alison Young and I have described as “constitutional self-defence”.<sup>18</sup> A rule of constitutional self-defence is one which empowers an institution to protect itself against other constitutional bodies. For instance, legislatures are given judicial powers over their members to stop the encroachment of the courts, judges often run the administrative side of the court process to protect the autonomy of the judicial branch from the executive. Sometimes these measures are more aggressive, giving one institution a weapon it can use against another: for instance, giving one legislature the power to strike down the acts of another legislative body. Competing claims to supremacy arm national and European courts with weapons that may help ensure mutual respect and restraint. If the potential conflicts were realised, generating disagreement about the law which applied to individuals, all sides in the dispute would pay a price. Whilst it is unclear who will win, each side has an interest in avoiding the contest. The risks of actual conflict provide incentives for each party to strive towards a harmonious interpretation of the law. It encourages the ECJ to interpret European law in a manner that will be palatable to national courts,<sup>19</sup> and, at the same time, discourages national courts from blindly insisting on the primacy of national rules. In short, the competing supremacy claims may serve to create an atmosphere of co-operation between these courts, where each side has an incentive to respect the position and traditions of the other.

<sup>17</sup> See generally, M. Maduro, “Europe and the Constitution: What If This Is As Good As It Gets?” in J. Weiler and M. Wind (eds), *European Constitutionalism Beyond The State* (Cambridge University Press, 2003).

<sup>18</sup> N.W. Barber and A.L. Young, “Prospective Henry VIII Clauses and their Implications for Sovereignty” [2003] P.L. 112.

<sup>19</sup> As evidence of this see, perhaps, J. Coppel and A. O'Neill, “The European Court of Justice: Taking Rights Seriously?” (1992) 12 L.S. 227, though see also J. Weiler and N. Lockhart, “‘Taking Rights Seriously’ Seriously: The European Court and its Fundamental Rights Jurisprudence” (1995) 32 C.M.L.Rev. 51 and 579.

Britain's relationship with Europe is not the only area of the constitution marked by useful ambiguity. The constitutional relationships between the Monarch and Prime Minister, between the Prime Minister and his cabinet, and between the executive and the legislature all have significant areas of uncertainty within them. Some of these uncertainties may be undesirable and should be resolved. But many serve to give each institution a plausible constitutional argument against the other body, an argument that may serve as a bargaining chip in a political struggle, buying respect and moderation.

### **Conclusion**

Britain is one of a very few states which lack a written constitution, but this bare accident of history does not provide an argument for us to adopt one. Britain's constitution has, by and large, been a success. It has produced stable government and—in terms of democracy, transparency, human rights and the provision of social welfare—it compares reasonably favourably with many other constitutions. Those calling for change in particular areas often make a strong case: the House of Lords is in desperate need of reform, for instance, and the English Question continues to dog the devolution settlement. But these specific issues do not show a need for wholesale reform of the entire system. Unless advocates of a written constitution can show a need for systemic change, for a new constitutional settlement, it is hard to see what we will gain by undertaking the exercise. This paper has sought to show, however, what we will risk.

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