Codification and Reform of the British Constitutional Arrangement

Karthik Reddy

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Introduction

The nineteenth century American judge Gideon Tucker once quipped that "No man's life, liberty, or property are safe while the Legislature is in session". As a country with a legislature freed from codified constraints, institutional checks on its power, and strong bicameralism, Judge Tucker's words convey particular importance for modern Britons.

The British Parliament is sovereign, with power virtually unparalleled in any democratic society in the world. The body may pass any law on any subject it pleases, and faces only weak institutional constraints from other branches of government. Nor is the legislature constrained by any sort of contract with the British people; the United Kingdom remains one of three nations in the world without a codified constitution that transparently delineates the relationship between the governed and their government. Instead, the British constitution is a compilation of a diverse and disjoined patchwork of historical documents, conventions, common law, case law, Acts of Parliament, and laws of the European Union.

Justice Secretary Jack Straw gestured to the vague character of the arrangement when, in 2008, he remarked: "The constitution of the United Kingdom exists in hearts and minds and habits as much as it does in law." Parliament's broad and nearly unbounded power is cause for concern for those interested in the preservation and expansion of liberty, and the current state of affairs has proven itself as an inappropriate form of modern government. The codification of the constitution, along with significant reforms that will recognize the significant structural changes in the government that have taken place over the last three centuries, is an endeavour Britain must undertake to better safeguard freedom within its borders.

Background

The government was not always in such an unbalanced and precarious position. The agreement reached between Parliament and King William III of England after the Glorious Revolution in 1688 limited the powers of the monarchy and firmly established Parliament as a central part of the English government. This system of government was different from that of modern Britain, in that it was one with significant checks and balances that effectively sought to protect liberty. The arrangement checked Parliamentary excess by dividing the legislative power among the House of Commons, House of Lords, and the Crown; in order to take effect, proposed legislation would be required to pass each of the Houses of Parliament and procure Royal Assent.

Moreover, each of the Houses of Parliament differed sufficiently in composition and constituency to ensure that both provided a significant check on the power of the other. Executive power was exercised by the Crown, which retained control over ministers; ministers were not required to be members of Parliament. Furthermore, the Crown had the power to dissolve Parliament with or without Parliamentary assent. The spontaneous evolution of a system with such institutional checks and balances may well have rendered a codified constitution unnecessary at the time, as no one branch of government could act unilaterally.

Over the following three centuries, however, this relatively balanced system of government gradually gave way for an

arrangement without checks or balances, ruled almost exclusively by the House of Commons. In the years immediately following the Glorious Revolution of 1688, the Crown exercised the veto with much greater frequency and ease than in more modern times; King William III, for example, withheld royal assent on at least six occasions.[1] Parliament gradually developed a strong resistance to the exercise of such power, and the tool was used sparingly even by the time of Edmund Burke, who observed: "The King's negative to Bills is one of the most undisputed of the Royal prerogatives, and it extends to all cases whatsoever … But it is not the propriety of the exercise which is in question. Its repose may be the preservation of its existence, and its existence may be the means of saving the Constitution itself on an occasion worthy of bringing it forth."[2]

Historian Robert Spitzer writes that its use in the United Kingdom gradually came to be seen as a "politically extreme and controversial act."[3] Similarly, the Crown's power over executive ministers was steadily usurped by Parliament. Eighteenth century statesman Sir Robert Walpole, for example, was able to "engineer control of the court" and succeeded in "enabling an aristocratic oligarchy to use Parliament to govern in the name of the Crown."[4] This change in ministerial allegiance began a gradual transformation of the power structure within the British government, which would eventually allow Parliament to directly control the executive functions of the government.

The ability of the House of Lords to effectively check the power of the House of Commons gradually diminished as well. The two Houses clashed on numerous occasions throughout the nineteenth century, notably one prompted by a proposed abolition of paper duty in 1861 and another over Irish Home Rule at the end of the century. The ongoing tension was escalated by the House of Lords' refusal to pass the "People's Budget," a redistributive budget proposed by Lloyd George. The stalemate was ultimately resolved by the Parliament Act of 1911, which replaced the Lords' veto power with the ability to delay legislation for two parliamentary terms; the legislation passed the upper House only under the threat of an addition of Liberal peers.

The House of Commons further limited the Lords' power with the passage of the Parliament Act of 1948, which reduced the Lords' power to delay legislation from two parliamentary sessions to one. Following minor changes in 1958, 1963, and 1999, which resulted in the transformation of the body from a hereditary to an appointed body, the Lords' lost their traditional role as the country's court of last resort, when the Supreme Court of the United Kingdom assumed the function as a result of the passage of the Constitutional Reform Act 2005.

At the same time, constitutional evolution brought about a shift in the locus of power within the House of Commons itself. The demise of the royal executive opened a void that was gradually filled by the prime minister. This shift in executive power and the emergence of mass media in the twentieth century fundamentally transformed the British system from a parliamentary democracy into a more

1 Robert Spitzer, The Presidential Veto: Touchstone of the American Presidency (Albany, New York: State University of New York Press, 1988), 5.
2 Ibid., 7.
3 Ibid., 7.
4 Christopher Vincenzi, Crown Powers, Subjects and Citizens (London, United Kingdom: Pinter, 1998), 250.

presidential system that has increased the power of the prime minister at the expense of the House of Commons.

This consolidation of power drastically accelerated over the most recent half-century, in which time the power of the Cabinet waned at the same time that public expectations of the prime minister, as well as the prime minister's control over his own party, increased. As early as the 1960s, for example, Richard Crossman and John P. Mackintosh "asserted the existence of long-term trends that had progressively inflated the power of the prime minister and correspondingly diminished the position of the cabinet as the supreme agent of government in the British constitution."[5] By that time, the prime minister could select the cabinet's members, determine its agenda and committee composition, and chair its meetings.[6] Moreover, the prime minister was simultaneously increasing its control over the party, as he came to control patronage, represent the government and party, and communicate with the people through the increasingly influential mass media.[7]

The power of the prime minister had so fundamentally changed that both Crossman and Mackintosh observed that "prime ministerial power had become so prodigious that it could only be satisfactorily grasped by reference to some feature lying beyond the scope of the traditional framework of the British constitution," namely, the presidential powers of the United States.[8] This trend toward "presidentialism" continued throughout the following decades, and public perceptions of the power of the prime minister increased accordingly, a trend reflected by the debates preceding the 2010 elections and the increasingly personalised nature of electoral campaigns.

The result of these gradual changes has been a shift from balanced and checked government into a system in which one party, the House of Commons, itself under the substantial sway of the prime minister, is left to control the executive, legislative, and judicial functions of government without any meaningful check on its power whatsoever. The lack of an effective check, together with the lack of codification, permits a system of government without any controls other than periodic elections and the potential for the extrademocratic expression of popular discontent.

Rather than benefiting Britain, the flexibility of the unwritten constitution has created an environment of instability and arbitrariness in the British legal system, leaving individual freedom and liberty to the whims of Parliament. This instability is not merely a theoretical concern, and it has been reflected by numerous examples in recent British history.

The rapidly changing relationship between the United Kingdom and the countries of England, Wales, Scotland, and Northern Ireland is perhaps most revealing example of the instability and arbitrariness of the current system. The Westminster Parliament voted to simply dissolve the Parliament of Northern Ireland in 1972, though the body had governed most Northern Irish affairs for more than fifty years. The Westminster Parliament created the Northern Ireland Assembly one year later before abolishing it in 1974, creating another in 1982, dissolving it in

5 Michael Foley, The British Presidency: Tony Blair and the Politics of Public Leadership (Manchester, United Kingdom: Manchester University Press, 2000), 13.
6 Ibid., 13.
7 Ibid., 1.
8 Ibid., 1.

1986, creating yet another in 1998, dissolving it in 2002, and creating it in its present form in 2007. The Westminster Parliament reconvened the Scottish Parliament in 1999 after a 292-year repose, and convened the National Assembly for Wales during the same year, though the latter was not allotted parity with its Scottish and Northern Irish counterparts. This hodgepodge of frenzied Parliamentary action neglected to address the issue of England, which continues to be governed wholly by Parliament. Whereas in a more balanced system, such dramatic changes would have proceeded more carefully, Parliamentary supremacy produced a policy of devolution that was unequal and capricious.

There are other examples of such problems. After a spat of political disagreements with the Greater London Council, Margaret Thatcher was able to pass the Local Government Act 1985 by a simple majority vote in Parliament, which dissolved the city's government altogether. Similarly, the power of the Labour government of Tony Blair was not subject to checks or balances, and simple majority votes in Parliament radically redefined the boundaries of state power with respect to civil liberties. The Blair government was able to secure twenty-eight day detention without charge,[9] the ability to impose control orders on people not convicted of any crime,[10] power to monitor all forms of communication in the country,[11] and the authority to stop and search individuals without the burden of demonstrating suspicion.[12]

While it is true that the imbalance of power that supports the arbitrariness and impulsivity of the current governing process is not itself an indictment of uncodified constitutions per se, current Parliamentary excess is unlikely to be checked by a mechanism other than constitutional codification; small, piecemeal changes will not address the deep structural imbalance that threatens liberty in this nation. Further issues unique to the unwritten nature of the constitution plague Britain as well. There remains significant ambiguity about what constitutional conventions exist, and when they are applicable. Prime Minister Stanley Baldwin, who led the nation in the 1930s, observed:

> it would be very difficult for a living writer to tell you at any given period in his lifetime what the constitution of the country is in all respects, and for this reason, that almost at any given moment … there may be one practice called 'constitutional' which is falling into desuetude and there may be another practice which is creeping into use but is not yet constitutional.[13]

This confusion over constitutional convention is problematic, as situations do arise in which no course of action is prescribed by the constitution, such as the uncertainty of procedure following the returns from the 2010 general election.

Codification of the constitution

Codification of the British constitution, even codification that does not alter the structure of state in a significant way, provides three remedies to the current situation. Firstly, and most importantly,

9 Terrorism Act 2006, London: HMSO.
10 Prevention of Terrorism Act 2005, London: HSMO.
11 Regulation of Investigatory Powers Act 2000, London: HMSO.
12 Terrorism Act 2000, London: HMSO.

13 Stanley Baldwin, House of Commons Debate, 8 February 1932, cited in Stuart Weir and David Beetham, Political Power and Democratic Control in Britain: The Democratic Audit of the United Kingdom (London, United Kingdom: Routledge, 1999), 304.

the codification of the constitution would elevate a written document to supreme status, displacing Acts of Parliament as the supreme law of the land. As demonstrated by the gradual rise of the House of Commons and the recent examples of boundless and arbitrary lawmaking, there no longer exist sufficient checks and balances in government to render Acts of Parliament suitable for such supremacy.

A codified constitution, and a judiciary equipped with the power of judicial review to ensure adherence to the constitution, would act as a ring around Parliament, however broad or narrow such constraints may be, that would act to confine its actions and provide explicit limits on government power, replacing the implicit checks on the Commons that have gradually been eliminated over the course of the preceding three centuries. Some such confines already exist informally, such as the desuetude of bills of attainder and *ex post facto* legislation throughout the preceding two centuries. Yet these are not real limits and must be codified, as Parliament has legitimately passed such legislation in the past, and retains the power to do so due to Parliamentary sovereignty.

Second, codification of the constitution would slow the rapid changes in the structure of government that has accelerated in recent years. For example, the unsettled and volatile status of legislatures in Wales, Scotland, and Northern Ireland would be resolved, the powers of government would be delineated, and a great deal of arbitrariness would be eliminated as further change would presumably proceed through a more levelheaded and controlled amending process, a significant improvement to the system of majority vote in Parliament that can radically alter the structure of government overnight.

Third, codification would accumulate centuries of constitutional procedure and tradition into one, readily available document that could be accessed and referred. This would illuminate and decode the obscure and unfamiliar parts of the constitution, freeing scholars, members of the government, and, perhaps most importantly, the general public, from the uncertainty that currently defines much of the constitution.

As mentioned above, a codified constitution need not imply radical change in government. The one-year-old Supreme Court of the United Kingdom could continue its judicial functions with the mere addition of the power to review Acts of Parliament to ensure conformity with the codified constitution. Alternatively, the House of Lords could reassume its former judicial duties along with this new competency. Judicial review could be established implicitly, in the same manner that judges examining Acts of Parliament have issued “declarations of incompatibility” with the European Convention of Human Rights; Parliament has, indeed, responded to such declarations since the incorporation of the Convention into British law. The House of Commons’ broad policymaking powers could continue, and the status quo on the issue of devolution accepted until future action was undertaken.

Similarly, the Crown could be accommodated under such an arrangement, and would maintain its informal and formal duties and privileges. Limits on government power that already exist in statutory law could be translated into constitutional restraints such as accepting twenty-eight days as the upper constitutional limit on detention without charge. Codification could be used as a

tool not to remake government, but simply to strengthen the rule of law, increase stability, elucidate the powers and limits of government, and prevent the recession of future government into a more intrusive or authoritarian form.

Nevertheless, more than the mere codification of existing conventions and the displacement of Parliamentary sovereignty with constitutional government, the codification of the constitution would be a great opportunity to reform the structures of the British government to reflect the way in which it has changed, and to conclude ongoing conflicts. Here, three issues of reform must be undertaken: the issue of devolution must be resolved; the system of strong checks and balances that once existed must be restored; and the powers of the Prime Minister must be clearly delineated.

The devolution of significant power to governments in Scotland, Wales, and Northern Ireland, described briefly above, is an issue of inequity that remains unresolved. After 1999, when legislatures convened in the three aforementioned countries of the United Kingdom, England became the only country in the UK without its own parliament; the country continues to be governed by the Westminster Parliament. This arrangement permits members of Parliament from the other three countries to decide matters of policy pertaining solely to England, though English members of Parliament have no such ability to decide Scottish, Welsh, or Northern Irish issues. Similarly, the National Assembly for Wales still lacks the degree of power that is exercised by parliaments in Northern Ireland and Scotland.

In addition to issues of political representation, there exists a substantial imbalance with respect to public expenditure in the United Kingdom. The Barnett Formula, which continues to govern the allocation of fiscal resources in the United Kingdom despite having been designed to address political considerations in the 1970s, allocates a disproportionate amount of United Kingdom funds to Scotland, Wales, and Northern Ireland at the expense of English taxpayers. This system produces inequality and breeds resentment over issues such as university tuition and free home care, and even Lord Barnett, the author of the formula, has expressed unease at the current situation: “It made life a little easier for me and the constant problems I had in cutting public expenditure, to say 'they get a certain amount, leave me alone and you carry on'. I never anticipated that it would last very long.”[14]

Devolution in the United Kingdom has proceeded in a haphazard manner and has produced an unstable and unequal system that breeds resentment and fuels nationalistic sentiment. The creation of an English parliament, along with the strengthening of the powers of the National Assembly for Wales, could solve this problem by eliminating the political imbalance and paving the way for devolution of fiscal power to the four countries. This would permit each to be fiscally and politically autonomous in a manner similar to that of each of the fifty American states, save for defense and other programs that must be administered on national level. Whatever the details of the resolution to the issue of devolution may be, the inequality and volatility of the system today must be

14 The Lord Joel Barnett, cited in Lissa Cook, “Does Scotland get its fair share?” BBC News, http://news.bbc.co.uk/1/hi/uk_politics/7196486.stm (23 July 2010).

corrected in some fashion. Constitutional reform provides an avenue to accomplish this necessary task.

As discussed above, the unwritten checks and balances that previously existed to counter the power of the House of Commons have gradually eroded over time, and the United Kingdom is now subject to uncontrolled Parliamentary supremacy. While a written constitution that merely codifies existing conventions and draws only loose constraints on the power of Parliament would certainly be an improvement over the current system, constitutional reform that limits Parliamentary and prime ministerial power would better protect liberty.

One way to accomplish this would be to separate legislative and executive functions in the government by formally recognizing the emergence of the presidential system that has emerged in the United Kingdom. As discussed before, the distinction between legislative and executive functions of government has gradually been blurred, and the powers of both have migrated to 10 Downing Street. There is great danger in consolidating so much power in the Prime Minister and the cabinet, especially under the current system in which there exists no coequal judiciary.

The best and simplest solution to the unhealthy dominance of the executive branch might be to formally separate it from the legislature, by introducing direct prime ministerial elections. The duly elected Prime Minister would then appoint ministers and secretaries of state, who would not be members of the legislature. This would have a number of advantages. Firstly, it would make it possible to have government ministers with more experience and expertise than is possible under the existing parliamentary system. More importantly, it would make it clear that the parliament's main role is to scrutinize legislation and check executive power. Political career advancement would come from, say, heading committees – not from toeing the government line.

Criticisms

Critics of calls to codify the British constitution claim that it will do no more to constrain government or to protect liberty and rights than does the current system or, alternatively, that it will replace Parliamentary sovereignty with the supremacy of unelected judges, who will proceed to write British law in an unaccountable and unchecked manner. Both claims are unfounded.

First, written constitutions codify the limits of government, which provide a general outline to the members of the various branches of government, as well as the to the general public, of what government may or may not do. This drawing of boundaries enables judiciaries and citizens alike to recognize and arrest government excess, should it appear to threaten liberty.

The case of the European Convention on Human Rights is an example of the success of constitutional codification in safeguarding rights. Despite the contentious nature of the European Convention on Human Rights and the infringements of British sovereignty that it has created, the document is a written and accessible part of the British constitution, and is one of few tools that may be used by British judiciaries to question Parliamentary action. Judiciaries in the United Kingdom, as well as the European Court of Human Rights, have been able to effectively police Parliamentary conformity with respect to the document. Most recently, for example, the House of Lords, acting in its former judicial capacity, invalidated on

grounds of incompatibility with the Convention indefinite detention in *A and Others v. Secretary of State for the Home Department* [2004], and the use of control orders in *Secretary of State for the Home Department v. JJ and Others* [2007].

The second concern, that activist judges would legislate from the bench, is similarly overstated. The British judiciary has, for years, decided cases in accordance with the supreme law of the land, which, for the last three centuries, has been defined by Acts of Parliament. Judicial review would alter the judiciary's role only insofar as the codified constitution would replace the arbitrary dictates of Parliament as the supreme law of the land; the function of the judiciary would not change, and the court of last resort would remain bound by the law. English judicial tradition has, throughout the preceding centuries of legal development, developed a concept of judicial duty that recognises a strong distinction between the role of legislator and judge, which confines the latter "to exercise only judgment, not will."[15] This well-developed judicial history would act together with pressures from other, co-equal branches of government, each of which would endeavour to keep the others within the confines of constitutional government, in order to prevent for judicial lawmaking of a scope even remotely similar to that which exists in Parliament today.

Conclusion

Britain's government has transformed radically in the 322 years since the Glorious Revolution. Over this time, parliamentary has become virtually omnipotent and the Office of Prime Minister has accumulated a power unparalleled in most modern democracies. The UK needs a codified constitution that reverses these changes and limits the powers of parliament and the Prime Minister, and balances the two against each other to prevent legislative excesses such as those seen under the last Labour government. A codified constitution would bring stability to the legal system, address long-standing inequalities in the current constitutional arrangement, and create a permanent legal bulwark against overbearing government in the United Kingdom.

15 Philip Hamburger, Law and Judicial Duty (Cambridge, United States: Harvard University Press, 2008), 160.