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# **Core Principles of the Traditional British Constitutions**

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(draft)  
(forthcoming)

One of the distinguishing characteristics of the British constitutions is its indeterminacy. No clear boundary divides what is constitutional from what is not. What counts as constitutional in practice has never been codified, but is scattered about in sundry documents spanning ten centuries. The very notion of a master legal instrument that one might call ‘*the constitution*’ is alien to the British legal tradition; thus, Blackstone, the great commentator on the English common law, refers to ‘the British constitutions’ in the plural, and this classical conception of his has been adopted for this chapter, the more faithfully to express the breathing reality of the thing. It is not easy to address the question, ‘What were the British constitutions before 1989?’ when inevitably many different answers can be given about so essentially contestable an object. For if like any polity the British constitutional order could not function without a reasonably well-defined core, the margins are all as fuzzy as quantum mechanics. An organic law arisen haphazardly piecemeal in time and space must be understood in the same spirit. In this spirit this chapter provides no systematic doctrine as a benchmark to evaluate the extent and intent of change in Great Britain before the contemporary era of reform.

Nonetheless a general consensus does exist as to where the British constitution is to be found. First and foremost it is comprised in Acts of Parliament the constitutionality of which is not in dispute: Magna Carta (1215), Bill of Rights (1689), the Act of Settlement (1701), the Act of Union (1707), and the Great Reform Act (1832). It is a series of celebrated texts, beginning in the 13<sup>th</sup> century, that have made the British way of governing both pioneering and peculiar. It must be borne in mind that these documents are one strand of an ongoing part-codification of the British constitutions which, however, is not limited to Acts of Parliament. Jurisprudence or case law will be touched on as well as unwritten conventions and classic secondary sources. Uncodified constitutions bring about that the most celebrated commentaries on them which come to be taken as authoritative statements of their meaning, relied on by politicians and lawyers alike. The organisation of this chapter follows the basic principles that are at the heart of these sources of the British constitution, namely, the sovereignty of Parliament; the Union of kingdoms; the value of individual liberty; checks and balances; judicial subordination; and, latterly, membership of the European Union.

## **Parliament sovereignty**

Every significant treatise on the British constitutions identifies parliament sovereignty as a fundamental principle. The classics purport to furnish conclusive definitions of parliamentary sovereignty. As early as the 17<sup>th</sup> century, and by a man today renowned for asserting the right of judges to nullify Acts of Parliament, it was said to be ‘so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds’ (Edward Coke quoted in Blackstone [1765] 1809: 160). In the next century William Blackstone’s *Commentaries on the Laws of England* (1766-1768), the first ‘liberal’, ‘elegant’ and ‘moderate’ treatment of the constitutions (Prest 2008: p), defined it as ‘omnipotence ... to do everything that is not

naturally impossible' (pp. 160-1); a concept also summed up in de Lolme's famous maxim: 'Parliament [in England] can do everything but make a woman a man, and a man a woman' (de Lolme quoted in Dicey 1885 [1959]: 43). A little more than a hundred years later, in his *Introduction to the Law of the Constitution* (1886), A. V. Dicey reaffirmed the principle to mean 'neither more nor less than this, namely, that Parliament ... has, under the English constitution, the right to make or unmake any law whatever' (Dicey 1885 [1959]: 40).

It is capitally important to grasp, however, that the term 'Parliament' is not merely a body of popular representatives, but an inter-institutional relationship between three 'constituent parts': the Crown, and the two Houses of Lords and Commons. 'If Parliament means the Queen, the House of Lords, and the House of Commons, or in other words, "The Queen in parliament"', then, parliament sovereignty *is* the law enacted by The Queen-in-Parliament' (Dicey 1885 [1959]: 39).

In Blackstone's words 'sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal' (Blackstone [1765] 1809: 160); for 'what the parliament doth, no authority upon earth can undo' (Blackstone [1765] 1809: 160). As Dicey asseverates: '[n]o person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament' or to 'treat it as void and unconstitutional' (Dicey 1885 [1959]: 40, 91).

Dicey's formulation brings up another basic constitutional principle, that 'sovereignty' in the British sense admits of no distinction of *legal* and *political*. This entails that courts are subordinate to Parliament and have not the last word over what the law means: 'Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts' (Dicey 1885 [1959]: 40). It contrasts sharply with the American practice, that the Supreme Court owns legal sovereignty whereas 'we the people' constitute in person a putative political sovereignty quite apart from Congress, which is not sovereign at all but routinely overridden. Even the people, who for the Framers were the 'only legitimate fountain of power' (Madison 1788), are hardly ever called upon but to ratify, or not, the constitution and amendments to it. The undivided sovereignty of Parliament, however, admits of no interference from any quarter, not even the very people:

The sole legal right of electors under the English constitution is to elect members of Parliament. Electors have no legal means of initiating, of sanctioning, or of repealing the legislation of Parliament. No court will consider for a moment the argument that a law is invalid as being opposed to the opinion of the electorate; their opinion can be legally expressed through Parliament, and through Parliament alone'. (Dicey 1885 [1959]: 59)

Today the sovereignty of the Queen-in-Parliament is still the fundamental ordering principle of the Westminster Model.<sup>1</sup> Conjoined with other distinctive features – single-party majority rule, first-past-the-post electoral system, 'fusion' of the legislature and the executive branch –

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<sup>1</sup> Arguably, parliamentary sovereignty has been in decline since the mid-20<sup>th</sup> century because of Parliament's own voluntary delegation of sovereignty to competing legislative authorities, a delegation which, however, Parliament can claim back any time it wants.

it amounts to ‘constitutional republicanism’. Blackstone alludes to this idea in saying, ‘laws, when prudently framed [by Parliament], are by no means subversive but rather introductive of liberty’ ... where there is no law, there is no freedom’ (Blackstone [1765]: p). Burke, too, asserts reliance on a sovereign Parliament as a source of stability, continuity and liberty:

The people of England ... look upon the legal hereditary succession of their crown as among their rights, not as among their wrongs; as a benefit, not as a grievance; as a security for their liberty, not as a badge of servitude. They look on the frame of their commonwealth, such as it stands, to be of inestimable value; and they conceive the undisturbed succession of the crown to be a pledge of the stability and perpetuity of all the other members of our constitution. (Burke [1790] 2009: 26)

Blackstone and Burke still dominate contemporary political and intellectual discourse on the constitutions. Tory discourse on law and order is clearly redolent of Blackstone, for example. Even Labour’s discourse on constitutional change, with its emphasis on ‘restoring power to parliament’ (Brown 1992 ; Cook 2001), confirms that republicanism continues to be the main ideological current running through the British polity (though perhaps not the only one). It is no accident that British republicans offer some of the most persuasive critiques of American-style judicialisation of politics (or ‘legal constitutionalism’) as a mode of governing ethically inferior to ‘political constitutionalism’ (Bellamy 2007).

Parliament’s indivisible legal-*cum*-political sovereignty entails that many of the constitutions originated with Parliament. British ‘constitutional law’ derives from manifold sources, but Acts of Parliament are probably its chief fountainhead. The visible tip of the constitutional iceberg consists of statute law embodied in celebrated documents such as (in addition to those cited above) the Act of Supremacy (1534), the Petition of Right (1628), the Parliament Acts (1911 & 1949), the Northern Ireland Act (1972), and the European Communities Act (1972) (Norton 1982: 4).

The early laws dealing with the rights and liberties of English (and, by later extension of British) subjects are akin to the sentiments and contents of the Preambles and Bills of Rights to be found in formal documentary constitutions. There are statutes that deal with the formation of the United Kingdom; there are statutes that provide for the limitation of the power of the Sovereign ... other statutes deal with the House of Lords, the House of Commons and Parliament as a whole, and the Established Church, with the Judiciary, and the Armed Forces, with local and devolved government, with citizenship and with emergency powers. (Norton 1982: 4)

These Acts are British constitutional milestones, which have defined the British polity at least since the 13th century. Constitutional evolution from the Magna Carta to the end of the 1700s has consisted of placing limitations on the arbitrary power of the Crown; the 1800s saw a turn to greater inclusion and democratisation; finally, in the 20<sup>th</sup> and especially the 21<sup>st</sup> century the emphasis has shifted to constraining parliamentary sovereignty itself.

Constitutional change through ratification and revision rests solely with Parliament in Britain. As legal as well as political sovereign, Parliament ‘is at once a legislative and a constitutive assembly’ (de Tocqueville 1947 [1835]: p?). Unlike in the USA and most of Europe, where *the* constitution may be vested in an *ad hoc* extra-parliamentary assembly or to ‘the people’,

the British Parliament ‘can change and create afresh even the constitution of the kingdom and of parliaments themselves’ (Blackstone [1765] 1809: 160-1). As no distinction exists between statutory and constitutional law, statutory-*qua*-constitutional law is amendable in Parliament by a simple majority like any other law.

The Queen-in-Parliament’s paramount role in the British polity has manifold implications. It is *the* symbol of national identity: ever since Parliament evolved in the 13<sup>th</sup> century out of the Great Council William the Conqueror instituted after 1066, it has been ‘the primary means through which the English forged both a sense of political unity and a national identity. To an extent unusual in European governing practice, the English Parliament came to symbolize the “political nation”’ (Loughlin 2013: 43). The Monarch in particular, that ‘dignified part’ of the constitutions in Walter Bagehot’s words, has fulfilled this role, the erosion of its prerogative powers and detachment from workaday politics serving ironically to enhance its *bona fides* as symbol of national unity. The English monarch, according to Bagehot:

seems to order, but it never seems to struggle. It is commonly hidden like a mystery, and sometimes paraded like a pageant, but in neither case is it contentious. The nation is divided into parties, but the crown is of no party. Its apparent separation from business is what removes it both from enmities and from desecration, which preserves its mystery, which enables it to combine the affection of conflicting parties – to be a visible symbol of unity to those still so imperfectly educated as to need a symbol. (Bagehot [1867] 1963: 90)

This isolation of the Crown from partisan politics has ensconced national identity, walling it off from the threat posed by EU membership (Saiz Arnaiz and Alcobarro Llivina 2013). In Britain, the EU has been perceived mainly as threatening parliamentary sovereignty, in which the Crown’s participation is but a shadow of its former self. For this very reason, however, it is in a position to conserve the national identity regardless what happens to Parliament.

Parliament’s unchecked constitutional overlordship opens the door wide to its playing havoc with the constitutions, in theory; in practice, however, this has never happened, certainly not before the advent of the Blair Government in 1997. The gradualism of constitutional change in Britain is admitted even by the most forward advocates of reform who set the Blair agenda in the 1990s: ‘From 1928, when the franchise was extended to women for the first time, until the Callaghan government of the 1970s, constitutional change did not occupy centre stage in British politics ... [despite a few reforms like the Parliament Act 1911] governments did not seek to change the fundamental architecture of the state’. Even the most sweeping constitutional changes in centuries, Britain’s accession to the EU, did not result from ‘conscious, purposive action by the government to bring about constitutional change’ nor was it conceptualised as ‘an exercise in constitutional reform’ (McDonald and Hazell 2007: 5). Somehow Parliament has admirably succeeded in avoiding all temptation to change the constitution for short-term gain.

The constitutions are in fact constantly evolving, but it is rather an unplanned, unsystematic, and incremental evolution, much like Darwinism. It is achieved through ostensibly trifling yet potentially momentous alterations made sometimes at the level of least detail of organic law, never through an American- or French-style Revolution. The British distrust the whole idea of a grand central starting-the-world-all-over-again – the reflection of a classical liberal (now called conservative) paradigm of suspicion of systematising centralism, a paradigm which has dominated British politics for most of its existence.

## The Union

The principle of ‘Unitarianism’ has been a mainstay of the British constitutions from the end of the Revolutionary period in the 17<sup>th</sup> century until very recently. The Union constituted the modern British state out of England and Scotland together with Wales and Northern Ireland. The Act of Union 1707 united the Crowns of Scotland and England. For some, the Act stands out in British history as the only self-conscious act ever addressed to the construction of national identity. For others it was no ‘conscious exercise in state-building’ (Kidd 2012), merely an unplanned consequence of the pressure to settle the political crisis caused by the childlessness of Queen Anne, the reigning monarch of both England and Scotland, lest a succession crisis reintroduced a dual monarchy and opened the door to foreign domination of a breakaway Scotland and eventually invasion (so it was feared) of England itself. To make it harder for the Scots to ungovernably reunite and so to make the Union permanent, the Scottish parliament was abolished. Yet Scottish representatives were allowed to sit at Westminster, seemingly *per* the political dictum ‘Keep your friends close and your enemies closer’. According to Colin Kidd (2012), ‘English politicians regarded the new state as the mere accession of a few Scottish members (45 MPs and 16 representative peers) to England’s long-established institutions’.

The English had been infiltrating Ireland since the twelfth century, gradually expanding their control and jurisdiction, called the Lordship of Ireland. Thus, Ireland succumbed sooner, lay under English domination longer, and suffered more than Scotland. Ireland was declared by England a (puppet) Kingdom in 1541, though great swaths of Ireland lay ‘beyond The Pale’, the area of effective English rule, even as late as the Act of Union. The Kingdom of Ireland was only incorporated into the Union in 1801, as a response to the French Revolution and the Napoleonic Wars. The Catholic inhabitants of Ireland were disqualified to participate in the government and much of the business of the Union, and later the Empire, by anti-Catholic Penal Laws which never affected Protestant Scotland or the Protestant enclave in Northern Ireland. The Irish economy hardly industrialised until after independence in 1922, at which time Northern Ireland broke away from the newborn Irish Free State to remain in the Union.

Wales was conquered outright by English invaders in the thirteenth century and, but for a brief general uprising in 1400 under Owen Glendower (the last native Prince of Wales), it has remained subject to Westminster without interruption ever since. King Henry VIII, himself a Tudor and Welshman by descent, legally incorporated Wales by Acts of Parliament in 1535 and 1542. It was an integral part of the Kingdom of England by the time of the Act of Union.

The United Kingdom was thus cobbled together haphazardly from a series of Acts of Union each one of which is idiosyncratic. The terms of union exhibit no uniformity, nor could they be expected to do, given that the Acts were made at different times by different Governments. Yet the Union has worked quite smoothly as an organic complex for hundreds of years. It has stood the test of time as one of the most fundamental principles of the British constitutions:

[T]he fundamental principle underpinning the Union has until now remained intact namely, that each part of the United Kingdom has its say over the affairs of all other parts of the UK, and that each part shares the problems of the whole and shares the resources required to meet them. It is this unitary, rather than federal, arrangement which ensures that there is no conflict of power – or confusion of democratic accountability. We are free of the kind of paralysing disputes between national parliaments and regional parliaments, or between state

governments and federal governments, that are so common in other political systems. (Hague 1998: 12)

This *status quo* began to be sporadically disturbed, first in certain jurisprudence of the 1950s, then in the 1970s, when Scottish devolution emerged onto the political agenda, and again in the 1990s, when devolution was actually implemented. One of the critical junctures in this more recent evolution was the much-cited *MacCormick v Lord Advocate in Scotland's Court of Session* (1953), brought to court by a Scottish nationalist challenging the title 'Elizabeth the Second' on the grounds that the Queen was not the second Elizabeth of both Scotland and England, and thus contravened Article 1 of the Treaty of Union:

That the Two Kingdoms of Scotland and England shall upon the first day of May next ensuing the date hereof and forever after be United into One Kingdom by the Name of Great Britain And that the Ensigns Armorial of the said United Kingdom be such as Her Majesty shall appoint and the Crosses of St Andrew and St George be conjoined in such manner as Her Majesty shall think fit and used in all Flags Banners Standards and Ensigns both at Sea and Land. (Union with England Act 1707)

As there had never been a Queen of Scots called Elizabeth, so it followed that there could not now be an Elizabeth II of Scots. The court rejected the petition as 'unsound and indeed extravagant' in challenging the Queen's entitlement under the Royal Titles Act of 1953 to style herself as she thinks fit simply by royal proclamation. Parliamentary sovereignty means that no court of law in the UK may so disregard an Act of Parliament as to sanction a deed done under its authority; and the lawsuit must fail. In the words of Lord Guthrie:

The principal argument against the competency of the petition was that section 1 of the Royal Titles Act, 1953, gives the authority of statute to such style and titles as Her Majesty may think fit for use in the United Kingdom, and to the issue by her for that purpose of a proclamation, and that it is incompetent to challenge in Court the validity of a proclamation made under the authority of an Act of Parliament. (*MacCormick v Lord Advocate* 1953 SC 396, 1953 SLT 255)

What was to acquire special significance, however, in an otherwise routine answer to a vain petition were the heterodox views on parliamentary sovereignty expressed by Lord President Cooper in the decision of the court:

The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his *Law of the Constitution*. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland

and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions. (*MacCormick v Lord Advocate* 1953 SC 396, 1953 SLT 255)

Lord Cooper's *dicta* have come to enjoy popularity in the Scottish legal circles, in particular, and have 'inspired a non-Diceyan reading of the British constitution' (Kidd 2012). Cooper is considered by his admirers to have –

raised the far from pedantic issue of whether the Union should be referred to as the Act of Union (for it was not simply an Act of the English Parliament) or as the Treaty of Union (an international agreement between sovereign powers, whose monarchs – Queen Anne of Scotland and Queen Anne of England – just happened to be the same person). Although the Union had been negotiated by Treaty, the Scottish jurist, Sir Thomas (T.B.) Smith, noted that the Treaty had immediately lost any standing in international law with the expiry of its two parties, Scotland *and* England, in 1707. The Union was, perhaps, best described as an ensemble of Acts of Union, passed by two sovereign parliaments, including the Acts for the security of the Churches of Scotland and England. (Kidd 2012)

Cooper's reasoning was taken up in later court cases challenging Parliamentary sovereignty, such as *Gibson v Lord Advocate* (1975), as well as by legal scholars attempting to revise the doctrine to make it compatible with the constitutional status they believe the Act of the Union deserves:

The growing acceptance in Scotland of the ideas first revived by Lord Cooper means that politicians, jurists and commentators ... are finding it difficult to capture the shifting registers and shades of meaning deployed in constitutional idioms [in Scotland]. In particular, the English political classes seem oblivious of ... the claim to a distinctive Scottish tradition [...] In practice, when the two kingdoms of Scotland and England united in 1707 the English political elite ... silently adopted the constitutional principles of the larger partner. Thereafter the constitution of Great Britain operated on the basis of the principles of 1688, the doctrine of parliamentary sovereignty enshrined in the Glorious Revolution. It is still unclear what the Scottish understanding of sovereignty was at the time of the Union of 1707, and how far and in what ways it departed from English conceptions of sovereignty. Nonetheless, a distinguished lineage of Scottish jurists, politicians and historians has made the point that the idea of popular sovereignty can be found in Scottish political thought from the Declaration of Arbroath in 1320. A consensus has emerged within the Scots intelligentsia that ... the country's indigenous constitutional tradition has been one of popular, rather than parliamentary sovereignty. In other words, before 1707, sovereignty resided in the people – and it has never ceased to do so, notwithstanding the assumptions of ... orthodoxy and the unfortunate fact that popular sovereignty



was submerged ... for a long period after 1707 until its modern resuscitation and authoritative restatement by Lord Cooper in the 1950s. (Kidd 2012)

The rejoinder is that all this is so much Scottish nationalist revisionism. The soft underbelly of Cooper's reasoning is his insistence that Scotland and England merged as equals and his denial of the contrary: 'as if all that happened in 1707 was that Scottish representatives were admitted to the parliament of England'. But that is exactly all that did happen, and the Scots themselves provide the best evidence of this fact, as witness, for instance, the statement in the House of Commons by the Scottish Baroness Michie of Gallanach (1934-2008), recalling the laments of the Scottish high officials of the day:

The Scottish claim for the restoration of its own Parliament is indisputable. It was a dark day in our history—28 April 1707—when the Scottish Parliament met for the last time and Chancellor [of Scotland, Earl] Seafield summed it up with the melancholy words: Now there's ane end to ane auld song. (HC Deb 23 November 1987, vol 123, cc29-113)

The Scots were not so willing to be merged – why else are they so resentfully nationalistic to this day? Or, put another way, why did the Parliament in Edinburgh cease operations while Westminster, after admitting a smattering of Scottish MPs, continued business as usual? The Scots joined the Union in a power relation of subordination to England, having little choice but to submit to its constitutional principles. And the English have always taken this so much for granted that it did not even cross Blackstone's or Bagehot's or Dicey's minds to raise it as an issue.

That might now be changing under the force of circumstances that neither the Scots nor the Westminster establishment is able to control; so that the recrudescence of an alleged Scottish constitutional tradition might be nothing more than a contemporary manifestation of the drive for independent nationhood by the intelligentsia, projected back on an imaginary past. The Declaration of Arbroath was made by noblemen and relevantly states merely that the nobility would choose another king if Robert the Bruce proved unfit (he was at the time excommunicated for killing a rival at an altar in church). It is no more a basis of popular sovereignty than the original Magna Carta; that is, it could have evolved in that way later on, but was no such at the time it was written. In fact, it might even have been inspired by Magna Carta. Did Magna Carta evolve into popular or parliamentary sovereignty? Nearly everyone would say "parliamentary". It took the American Revolution against both King and Parliament to change that. It is true that the Scots were indeed also fighting for their independence from England, but what they produced in doing so was *this* Declaration, not the American Declaration of Independence. What Scottish nationalists of today seem to be doing is projecting their agenda anachronistically back in time. The nationalist Scots in challenging the traditional meaning of the British constitution might be just trying to precipitate a constitutional crisis so as to create the opening they need to break away completely from the Union.

### **Liberty as core value of the British constitutions**

Parliament is 'the place where absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitutions of this kingdom' (Blackstone [1765] 1809: 160). This illimitable supremacy of a single organ of the State is in theory prone to degenerate into tyranny and loss of liberty, yet not only has Britain eschewed tyranny for most of its history,

but Parliament supremacy has coexisted with and arguably even enhanced personal liberty. In his compendious review of the British constitutions, LSE Professor Martin Loughlin singles out the peculiarly British equilibrium, straddling centuries of history, between the ‘authority’ embodied in hierarchical command by the Crown and individual liberty: ‘What it is brilliant about the British constitution is that authority and liberty are in conflict with each other ... constitutional development and evolution has been driven by the struggle between them (Loughlin 2013: 24).

Liberty has emerged as perhaps the core constitutional value of the British polity. It is rooted in Magna Carta (The British Library No date), the ‘starting point of English constitutionalism’ (Blackburn 2013: 360), now universally celebrated as the mother of liberty, constraining sovereign power *inter alia* by defining and enshrining timeless principles and procedures of justice. Clause 20, for instance, lays down that the State has no right to ruin a freeman because its officers dislike him: ‘For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood’. Clause 39 summarises the principles of the rule of law and trial by jury:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

For the first time the rule of law was made an end in itself by the framers of a constitutional law; the upshot was a ‘medieval precedent for the concept of limited government and the rule of law generally across European and modern Commonwealth states’ (Blackburn 2013: 360). The barons who negotiated it evidently intended its provisions to reach far beyond their own interests, as witness the Charter’s preamble: ‘TO ALL FREE MEN OF OUR KINGDOM we [the King] have also granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs’. Magna Carta has served to check and balance the sovereign power ever since, providing both a symbolic and substantive base for reaffirming and elaborating individual liberties in subsequent constitutional acts. The Petition of Right for example followed in the footsteps of the Magna Carta, constraining even further the royal power by ‘ensuring against taxation of any form except such as was imposed by Parliament’; prohibiting imprisonment ‘without due case’ (due process); and providing a check on martial law (Hindley 2008: 282). The Habeas Corpus Acts of 1640 and 1679 drew on Magna Carta principles and are among the most important acts in the constitutional history of all times, echoed in Dicey’s remark that they ‘declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty’ (Dicey 1885 [1959]: 199). So much of the British constitutions have been built on the Great Charter that even today it remains their core component: ‘the first petition presented by the commons to the monarch at each new parliament is a request that the Great Charta be kept’ (Woolf 2005). Its worldwide influence has consecrated it as *the* constitutional document that makes the British constitutions unique.

After the Magna Carta, the principles of justice on which liberty rests were reasserted in the Declaration of Right 1688, when a Convention of Parliament moved to contain the royal power after the encroachments of James II, who ‘by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom’ (Constitution Society No date). The

Declaration amounted to a contract between Crown and Parliament, formally ratified in 1689 as the Bill of Rights<sup>2</sup> or ‘An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown’. It declares the rights of parliament and of persons; of parliament by enacting that without its consent the King may not suspend or make laws, raise taxes, or keep a standing army; of persons by decreeing that the King may not pack juries with loyalists, or impose “excessive bail” on criminal defendants. Its consequentialness is such that the Bill of Rights has been considered ‘the cornerstone of our constitution, as reinforced, explained, improved, and in its fundamental principles for ever settled’ (Burke [1790] 2009: 16-7). It continues to command respect, as witness the empirical fact that no court has yet deemed it overridden by any more recent statute and it is unlikely ever to do so unless the contrary should be clearly spelled out by Parliament (Maer and Gay 2009).

Given its deep-rootedness in British constitutional history, it is no surprise to find that liberty is a *leitmotif* running through many classical works or remarks on the British constitutions. In Burke’s words, ‘You will see that Sir Edward Coke, that great oracle of our law, and indeed all the great men who followed him, to Blackstone, are industrious to prove the pedigree of our liberties’ (Burke [1790] 2009: 32, 297). The tradition has spread abroad, as witness all the reverential references to English liberties to be found in Montesquieu, Voltaire, de Lolme, de Tocqueville, Dicey *etc.* Montesquieu, for instance, refers to England as being *the* one nation ‘where liberty is most esteemed’, and which ‘has for the direct end of its constitution political liberty’ (Montesquieu 1914 [1777]). Blackstone discusses at length, inferring from what must have been the empirical reality of the time, the ‘rights of Englishmen’ to personal security, to personal liberty, and to private property (Blackstone [1765] 1809: 128). And De Tocqueville remarks, ‘it is impossible to think of the English as living under any but a free government’ (p). Dicey refers to a right to personal freedom, defined as ‘a person’s right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification’ (Dicey 1885 [1959]: 208). Even today it is said that ‘England is no country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden’ – a favourite maxim in contemporary discourses on the constitutions.<sup>3</sup> This is liberty understood in the classical Liberal sense of ‘freedom from control by others’, especially by laws and government (Loughlin 2013: 91, 95).

The organic evolution of liberty has consisted in placing one restraint on the sovereign power after another over centuries, so that in the fullness of time the result is liberty for the ordinary individual to have his own way clear of micromanagement from the top down. This is liberty of a practical kind and is confirmed by British history itself. Britain has always been liberal. In Europe it shone like a light without ever trying to impose itself on the others as if it were universally enjoined. This is surely due to the fact that in Britain liberty evolved and emerged organically rather than being laid down paradigmatically by an act of self-will:

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<sup>2</sup> It is unlikely that the Bill of Rights of 1689 would be called a Bill of Rights today as the prerogatives gained through it by Parliament are part of the constitutions whereas the Bill of Rights in the USA pertains only to the states and the people subordinate to Federal power. Although called a Bill of Rights, it is mainly about the privileges and immunities of Parliament.

<sup>3</sup> A Wikipedia entry notes that ‘in Germany, the opposite applies, so “everything which is not allowed is forbidden”; in France “everything is allowed even if it is forbidden”; whereas in Russia “everything is forbidden, even that which is expressly allowed” [http://en.wikipedia.org/wiki/Everything\\_which\\_is\\_not\\_forbidden\\_is\\_allowed](http://en.wikipedia.org/wiki/Everything_which_is_not_forbidden_is_allowed).

Our oldest reformation is that of Magna Carta ... the antient charter ... of King John, was connected with another positive charter from Henry I [the Coronation Oath of 1101 which spelled out some of the feudal rights and obligations], and ... both the one and the other were nothing more than a re-affirmation of the still more antient standing law of the kingdom ... [this] demonstrates the powerful prepossession towards antiquity, with which the minds of all our lawyers and legislators, and of all the people whom they wish to influence, have been always filled; and the stationary policy of this kingdom in considering their most sacred rights and franchises as *inheritance*. (Burke [1790] 2009: 32, 279)

Comparing the unwritten British with the written Belgian constitutions, Dicey affirms Burke in commenting that '[t]he security which an Englishman enjoys for personal liberty does not really depend upon or originate in any general proposition contained in any written document'. Quintessential constitutional documents such as the Magna Carta and the Petition of Right have rather been regarded as providing merely a 'record' of already existing rights (Dicey 1885 [1959]: 207).

The English conception of the origins of liberty is, then, the opposite of an abstract theory of liberal universalism that typically implies an entrenched constitution and bill of rights. The idea that the right to personal freedom is guaranteed by written constitutions, which implies that 'personal liberty is a special privilege insured ... by some power above the ordinary law of the land', is seen by Dicey as 'an idea utterly alien to English modes of thought, since with us freedom of person is not a special privilege but the outcome of the ordinary law of the land enforced by the courts' (Dicey 1885 [1959]: 207). Indeed, written constitutions have more often than not been perceived in Britain as inimical to liberty: 'When the source of personal liberty is located in written constitutions, those rights can be suspended and repealed' (Loughlin 2013: 90). The durability of English liberty rests on the fact that it can only be destroyed by 'thoroughgoing revolution in the institutions and manners of the nation' (Dicey 1885 [1959]: p). 'Constitutional liberalism' might thus be inferred as another durable and defining feature of the British constitutions.

### **The British system of checks and balances**

An obtrusive question is how is liberty to be preserved under a form of government where parliament is uncontrollable and capable of extinguishing liberties altogether? For Blackstone Britain's peculiar institutional arrangement was the answer. Before the professionalisation of political parties in the 20<sup>th</sup> century, slippage toward tyranny was in practice kept in check by the mutual checks exerted, not by separate, co-equal 'branches of government' as in the USA, but by the social classes – the monarch, the lords and the commons – who constitute the *locus* of sovereignty only when united *qua* 'the King in his Parliament'. According to Bagehot, as 'separate, coordinate authorities' (Bagehot [1867] 1963: 98), each of the sovereign constituents has power to veto the acts of the other two, forestalling encroachments pernicious to its own liberty. In Blackstone's eloquent words:

[As t]he executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly the lords spiritual and temporal which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour and their property; and thirdly

the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregated body, actuated by different springs and attentive to different interests, composes the British parliament, and has the supreme disposal of everything; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous. Here then is lodged the sovereignty of the British constitution ... in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconvenience of either absolute monarchy, aristocracy or democracy ... If it were lodged in any two of the branches: for instance, in the king and house of lords; our laws might be providently made, and well executed, but they might not always have the good of the people in view; if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford; if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. (Blackstone [1765] 1809: 50-1)

It is now widely believed that the Monarchy is in steep decline since Blackstone's days, and is no longer capable of playing a role in public policy-making. Even as long ago as the mid-19<sup>th</sup> century, one of the foremost expounders of the British constitutions could go so far as to say the following:

The popular theory of the English Constitution involves two errors as to the sovereign. First, in its oldest form at least, it considers him as an 'Estate of the Realm', a separate co-ordinate authority with the House of Lords and the House of Commons. This and much else the sovereign once was, but this he is no longer. That authority could only be exercised by a monarch with a legislative veto. He should be able to reject a bill, if not as the House of Commons rejects them, at least as the House of Peers rejects them. But the Queen has no such veto. She must sign her own death-warrant if the two Houses unanimously send it up to her. It is a fiction of the past to ascribe to her legislative power. She has long ceased to have any. (Bagehot [1867] 1963: 98-9)

That might be an exaggeration even in the 21<sup>st</sup> century; indeed, much about the constitutions has always been essentially, perpetually contested, especially the customary and conventional side of it that has never been codified by statute. The Monarch's veto has not actually been used since 1708, when Queen Anne withheld Royal Assent from the Scottish Militia Bill, yet it was never formally abolished either. More will be said below about the contestability of the British constitutions; suffice it to say for now that, most of its role in workaday politics fallen

into disuse, the Monarch no longer palpably checks the Commons or Lords. For that matter, the Lords have ceased to exert any significant check upon the Commons, too. This has left Parliament in a state, theoretically, of unstable equilibrium whence it might slip the leash and turn tyrannical. The Left in particular wishes to see the Monarchy abolished (Minogue 1993: 16). Whether they would know how to forge a substitute equilibrium of the quality and durability that Blackstone described is one of the most important strategic questions haunting the reform movement.

Dicey, too, saw liberty of Englishmen preserved by the ‘delicate set of balances’ that underlie the Westminster system (Loughlin 2013: 33). These balances resulted from the interactive relations between the three pillars of the British constitutions: parliament supremacy, the rule of law, and constitutional ‘conventions’. Dicey’s views on parliamentary supremacy resemble Blackstone’s. Conventions he treats-of at length as one pillar sustaining the otherwise fragile balance between the sovereignty of parliament and the rule of law.

Conventions are unwritten ‘customs, practices, maxims, or precepts’ which guide the behaviour of those subject to the constitutions, chiefly in the discharge of discretionary powers by the Crown and its ‘servants’ (*viz.* ministers), ‘without the necessity of applying to Parliament for new statutory authority’ (Dicey 1885 [1959]: 422-3). They are reputed to embody the ‘constitutional or political ethics’ of the British polity, their end-purpose being to direct officials to exercise their powers ‘in the spirit of liberty’ (Dicey 1885 [1959]: 417; Loughlin 2013: 33). Others have said conventions are: ‘the flesh which clothes the dry bones of the law’, ensuring the ‘efficacy’ of formal constitutional rules (Jennings 1959: 81, 113); an ‘informal means of updating the constitution’ (Blackburn 2013: 359); and a means to settle constitutional disputes (Leyland 2012: 25). This last is particularly important as obviating the need for the third party arbiter that in many European jurisdictions is performed by a politics-judicialising Constitutional Court (Parau 2012). If so much of the proper functioning of the constitutions depends on conventions, it ought to be of concern that ‘they are in a state of decline, increasingly being superseded by an *ad hoc* code of practice’ (Blackburn 2013: 359).

Lying in that informal ‘grey area’ between the codified and the obsolescent, conventions may be difficult to identify (Norton 1982: 7). Respecting the powers of the Monarch, for example, it is still true today that:

If any one will run over the pages of Comyn’s *Digest* [*A Digest of the Laws of England*] or any other such book, title ‘Prerogative’, he will find the Queen has hundred ... powers which waver between reality and desuetude, and which would cause a protracted and very interesting legal argument if she tried to exercise them. There is no authentic explicit information as to what the Queen can do, any more than of what she does. (Bagehot [1867] 1963: 99)

Prominent constitutional conventions include the requirement that all legislative bills to be properly and effectively enacted must receive Royal Assent; that money bills originate in the House of Commons; that the House of Lords does not reject a budget that has passed the Commons; and that international treaties are presented to Parliament twenty-one days before ratification (the Ponsonby Rule replaced in 2010 by the Constitutional Reform and Governance Act 2010).

Unenforceable in courts of law, conventions have tended to be treated as binding nonetheless (Marshall and Moodie 1967). What causes protect them from trespass remains an unresolved mystery. Dicey thought that the Member of Parliament is ‘internally limited’ by ethics or ‘the

moral feelings of the time and the society to which he belongs' (Dicey 1885 [1959]: 80). Respect for conventions might also be held in place by a general perception that conventions are legitimate constitutional norms, and that violating them would amount to no less than 'the rusting of the constitutional machine' (Norton 1982: 7). Binding force might also derive from fear of impeachment or of public opinion (Dicey 1885 [1959]: 431). The latter might exert an unseen check through fearlessly denouncing self-serving unconventional conduct; reinforcing the conventions that are beneficent to the many. This implies that many of the constitutions are little more than the odd convention that has won popularity because it serves the interests of many; for example, it is likely that public opinion is all that prevents Parliament abolishing the monarchy, or lengthening the term of office of MPs or disenfranchising some parts of the populace (Dicey 1885 [1959]: 79). Respect for convention if sufficiently broad-based would constitute an 'external limit' on what popular representatives dared. Locke's republican view that the people constitute the ultimate sovereign may have influenced Blackstone to urge that they are 'the supreme power to remove or alter the legislative, when they find the legislative act contrary to the truth reposed in them' (Locke quoted in Blackstone [1765] 1809: 161). Without averring the implication that any enduring moral truths repose in them, Dicey shares this view:

[T]he will of the electorate, and certainly of the electorate in combination with the Lords and the Crown, is sure ultimately to prevail on all subjects to be determined by the British government ... the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country ... The electors can in the long run always enforce their will ... [Parliament] is limited on every side by the possibility of popular resistance. (Dicey 1885 [1959]: 73, 79)

The conclusion that public opinion holds the conventional constitution together presupposes a deep respect for conventions, as a popular cultural norm, undergirds the public's opinion. The consequence must be that the stability of conventions cannot be relied-upon in nations where such respect does not exist.

One deeply rooted convention that constrains Parliament likely more than any other is respect for the rule of law, 'the legal spirit' that Dicey saw predominating in England, setting it apart from the rest of Europe (Dicey 1885 [1959]: 196). It consists in the 'absolute supremacy or predominance of regular law as opposed to arbitrary power', such that 'a man may with us be punished for a breach of law, but he can be punished for nothing else' (Dicey 1885 [1959]: 202). Equality before the law is entailed:

[E]very man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals ... With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. (Dicey 1885 [1959]: 193)

### **The doctrine of judicial subordination**

The protection of liberty depends not only upon the behaviour of elected politicians and State officials, but also, and especially, upon the courts of law. The origins of the latter, however, stem from the royal prerogative:

And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown ... In all these courts, the king is supposed in contemplation of law to be always present; but as this is in fact impossible, he is represented by his judges, whose power is only an emanation of the royal prerogative. (Blackstone 1827 [1765–1769]: 21-2)

Since the 17<sup>th</sup> century Parliament has taken steps in its own right to strengthen the role and independence of the courts through enactments like the Habeas Corpus Acts. Originating as a prerogative writ of the King in the 12<sup>th</sup> century, the Acts of 1640 and of 1679 refashioned a procedure for bringing defendants to justice without delay. *Habeas corpus* means ‘have the body [of the accused before this court]’; its end-purpose is to ensure that ‘every one who without legal justification is placed in confinement shall be able to get free’ (Dicey 1885 [1959]: 216).

If courts are to safeguard liberty, their independence must be paramount. It is considered so important as to constitute a fundamental principle of the British constitutions (Norton 1982). Assent to judges’ independence of the pleasure of the Crown was formalised as a condition for acceding to the throne of Great Britain by the Act of Settlement (1701), which forbade the arbitrary dismissal of judges by the King or his counsellors; who thereby became removable only with the consent of Parliament, with the added security of salaries to be paid from the public purse: ‘Judges Commissions be made *Quamdiu se bene gesserint* [as long as he shall behave himself well] and their Salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawfull to remove them’ (Act of Settlement (1700) CHAPTER 2 12 and 13 Will 3). A further boost was given to judicial independence in 1761 by the abolition of the inherited practice, lawful under the Act of Settlement, of ending judges’ commissions upon the death of the king, that made their renewal dependent upon the will of the new king (Haynes 1944).

Judiciary independence in Britain has always been understood in pragmatic terms as plain decisional independence. England might even be said to be the *locus classicus* of decisional independence without more. Judges arrive at their decisions on their own, immune from the imposition on them of the contrary preferences of others:

The Act of Settlement of 1701 secured the independence of the judiciary, although one in which it was accepted that the common law performed a subordinate role with respect to parliamentary statute – a role in which statutory provisions were interpreted as to their meaning and application and not reviewed as to their validity by reference to any higher law or body of legal principle. (Blackburn 2013: 360)

Judicial subordination features prominently even in authoritative legal treatises on the British constitutions. Comparing explicitly the independence of the courts in Britain to that of courts in the United States twenty years after the Civil War, Dicey poignantly spells out the distinction between the two common law jurisdictions:

Our judges are independent, in the sense of holding their office by a permanent tenure, and of being raised above the direct influence of the Crown or the Ministry; but the judicial department does not pretend to stand on a level with



Parliament; its functions might be modified at any time by an Act of Parliament; and such a statute would be no violation of the law. The Federal Judiciary, on the other hand, are co-ordinate with the President and with Congress, and cannot without a revolution be deprived of a single right by President or Congress. (Dicey 1885 [1959]: 156)

One must wonder, however, whether it was really the United States that had the better of it. Considering that the British state, certainly in the 18<sup>th</sup>-century, was a mixed government of monarchical, aristocratic and democratic organs and principles, it is thought-provoking that a Blackstone could fear lest, were judges to make themselves super-ordinate – as Constitutional Courts have done in much of Europe, – *all* government should be destabilised:

I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. (Blackstone [1765] 1809: 91)

Surprisingly, then, British legal history does exhibit some few renowned cases where judges purported to set aside Acts of Parliament. Judicial review as we know it today originated in England in fact. The first to lay express claim to such a prerogative was Sir Edward Coke, the greatest jurist of the 17<sup>th</sup> century whose writings on common law remain classics even today. In *Dr. Bonham's Case* [1610] 8 Co. Rep. 107, 114 (CP) he wrote:

[I]t appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.

If, as Coke claimed, the supremacy of the Natural Law over Acts of Parliament ‘appears in our books’, then judicial review of some kind must have been customary in the ages before Coke wrote in 1610. In fact, however, no judge before Coke ever laid explicit claim to such a power; hence judicial review before Coke must have been a pure ‘social construct’, a routine behaviour embedded in the culture which was designed by no one in particular, which no one thinks to question, and which none may even notice. Note that ‘controul’ in the lingo of Coke meant ‘check and balance’; he seems to imply, ‘we judges “control” Parliament; we have the effective power to interpret the law so as to neutralise its obnoxious features; we may contain and restrain its injustices in the manner of jury nullification’. Coke only wrote of controlling Parliament, but King James was canny enough to appraise the implications of judicial review for his own prerogatives, and, removing Coke from the Court of Common Pleas, ‘kicked him upstairs’ to the Court of King’s Bench, where Coke could be controlled by the King.

His successor, Lord Chief Justice Henry Hobart, however, only continued and even expanded Coke’s precedents in favour of judicial review. In *Day v. Savadge* (1614) Hob. 84 (CP) he stated: ‘[A]n act of parliament made against natural EQUITY, as to make a man judge in his own cause, is void in itself.’ In Hobart’s view, natural equity overrode Acts of Parliament; judges could void an Act altogether if they could not contain its harm through interpretation.

In *Sheffield v. Ratcliff* (1615) Hob. 338 (CP), he justified judicial review as deriving from ‘that liberty and authority that judges have over laws, especially ... statute laws, according to reason and best convenience, to mould them to the truest and best use.’ Hobart was evidently asserting an inherent power of judicial review that is always available.

Both Coke and Hobart were undertaking judicial review in a sense traditionally associated with classical Liberalism or Whiggism, a tradition which modern English courts continue to uphold only in relation to administrative power. It is a vision of the role of courts that sprang from the supremacy of the ecclesiastical or ‘consistory’ courts in the Middle Ages. In times past the Church as keeper of a Higher Law asserted, and for centuries actually wielded supremacy over the secular powers and their lawcourts. Out of this fact arose the precedents of common law holding that ‘equity’ (originating in the jurisdiction of the ecclesiastical Court of Chancery) overrides ‘law’. By the 17<sup>th</sup> century this strain of mediaeval thought, which metamorphosed into Natural Law theory, prevailed practically over all of Europe. Coke named it ‘natural equity’ and Hobart ‘common right and reason’.<sup>4</sup>

It remains the case that Coke’s and Hobart’s precedents have had to yield in latter days to the doctrine of parliamentary supremacy; Blackstone’s treatise contributing much to reaffirm it:

Lord Chief Justice Hobart has also advanced, that even an act of parliament, made against natural justice, as to make a man a judge in his own case, is void in itself ... I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature. His province is to interpret and obey the mandates of the supreme power of the state. And if an act of parliament, if we could suppose such a case, should, like the edict of Herod, command all the children under a certain age to be slain, the judge ought to resign his office rather than be auxiliary to its execution; but it could only be declared void by the same legislative power by which it was ordained ... what has been done by parliament can only be undone by parliament. (Blackstone [1765] 1809: 41)

In the United Kingdom today, judges neither dominate Parliament or Crown (by contrast with much of today’s Europe), nor are co-equal with them as in pre-Civil War America (Stevens 2001 ; Parau 2012). There has never been a rule in the British constitutions requiring Crown or Parliament to obey any judicial decisions at all. Even decisions of the final court of appeal, the Appellate Committee of the House of Lords, may be amended or overridden by statute:

[J]udicial legislation might appear, at first sight, inconsistent with the supremacy of Parliament. But this is not so. English judges do not claim or exercise any

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<sup>4</sup> In modern times some theorists (notably positivists like H. L. A. Hart) have objected to the existence of such a Higher Law; nevertheless, the concept continues to be respected in practice wherever judicial review is practiced. The positivists have tried to refute the idea of a Higher Law by pointing to the disagreement over what it consists in; if a Higher Law really existed, there will be no disagreement over it. It is a stubborn fact of human nature (Pinker 2002), however, that we all have the same moral sense or sense of justice, the rejoinder to the legal positivists being that we never doubt we are being injured when we are receiving the injury.

power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges. Judicial legislation is, in short, subordinate legislation, carried on with the assent and subject to the supervision of Parliament.<sup>5</sup> (Dicey 1885 [1959]: 60-1)

Judicial subordination sets Britain apart from much of Europe, where an analogous tradition of judicial subordination has been superseded since 1945 by the novel supremacy especially of Constitutional Courts, which have so enlarged their power in some countries of Europe as to exert control even over the internal proceedings of parliament. Nothing of this sort has ever transpired in Britain:

Each House of Parliament has complete control over its own proceedings, and also has the right to protect itself by committing for contempt any person who commits any injury against, or offers any affront to the House, and no court of law will inquire into the mode in which either House exercised the powers which it by law possesses'. (Dicey 1885 [1959]: 55)

Even the constitution of a Supreme Court for the United Kingdom by the 2005 Constitutional Reform Act has not altered the principle of judicial subordination, a conspicuous token of which is that by the very terms of the Human Rights Act, the Court is expressly forbidden to nullify Acts of Parliament on the grounds of incompatibility with its enumerated rights; it can only issue a declaration of incompatibility which is not even binding on the parties to the case (s. 4(6)), leaving any resolution entirely up to Parliament's discretion. Judicial subordination remains the accepted norm then: 'The courts accept the validity of Acts of Parliament and thus validate the concept of parliamentary sovereignty ... they do not directly challenge legislation, part of their role is to interpret statutes under established rules of statutory interpretation' (Leyland 2012: 21).

### **Parliamentary sovereignty under threat?**

Although the doctrine of parliamentary sovereignty continues to hold sway, a question and debate has arisen in academic and legal circles as to whether any surge of judicial activism has happened to Britain that might be undermining the supremacy of Parliament, even before the Human Rights Act (1998). As long as three decades ago, commentators noted increased pressures for an entrenched Bill of Rights which would empower judges to strike down Acts of Parliament American-style. Judges have certainly become more willing to subject acts of the administrative state (if not so much the Executive Cabinet) to judicial review (Norton 1982: 135).

The expansion of grounds for review did surge in the 1960s right in tandem with the expansion of the administrative state. *Ridge v Baldwin* [1964] AC 40 became the opening

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<sup>5</sup> The extraordinary term used by Dicey – 'judicial legislation' – is owing to the circumstance that the common law, as the English judges have elaborated it, rests on an historical and jurisdictional basis of 12<sup>th</sup>-century royal legislation which the descendants of the Conqueror enacted unilaterally at their own discretion by issuing 'writs' (*viz.* trespass, trespass on the case, *assumpsit*, *vi et armis*, etc.), until Parliament asserted itself in the 13<sup>th</sup> century to prohibit any further writs being invented. The king's judges elaborated the existing writs, however, gradually expanding new jurisdiction, especially through the spillover of their existing jurisdiction.

wedge of judicial review of administrative acts. It nullified the personnel decision of a local constabulary as *ultra vires*, widening the scope of the common law doctrine of natural justice (*i.e.* procedural fairness) to sweep-in administrative law. *Padfield v Minister for Agriculture, Fisheries and Food* [1968] UKHL 1 created a precedent that courts may enjoin or constrain ministerial discretion lest its wanton exercise frustrate the purpose of Parliament (as judicially construed). In *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 the House of Lords ruled that even statutory ouster clauses purporting to exclude the courts from reviewing administrative decisions cannot withstand if error of law (especially so-called ‘jurisdictional error’) has misled administrators into acting *ultra vires*. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (‘the *GCHQ* case’) the Lords established that the Royal Prerogative itself is subject to judicial review insofar as delegated to ministers. Far from being ‘revolutionary’, as some have claimed, this is in fact hardly unprecedented: Coke had ruled as early as 1607 in *Case of Prohibitions* that the Monarch has not a royal prerogative to sit in his own person as judge, superseding the lawcourts; and in *Case of Proclamations*, that he may not invent new prerogative powers not already recognised by the courts. The British variant of judicial activism remains notably milder than its European counterparts; claims that the British judiciary has developed ‘extensive powers of judicial review’ cannot be accepted at face value (e.g. McDonald and Hazell 2007: 5).

Prior to 1990 the greatest challenge posed to parliamentary sovereignty sprang not so much from domestic as from European courts. Accession to the EU in 1975 has been *the* greatest constitutional change of modern times (Bogdanor 2009) – far more consequential than the Blair Government revisions after 1997, all of which took place well within the framework of parliamentary sovereignty. The European Communities Act (1972), however, made EU law not merely an important source of British constitutional law, but one that in case of conflict quite expressly subordinates Parliament to the EU and its European Court of Justice:

For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court. (European Communities Act 1972, s. 3(1))

This seemed to create an anomaly in the British constitutions in that Parliament had enacted a statute purporting to control Parliament itself, future statutes to the contrary notwithstanding; even though future Acts of Parliament are supposed by convention to override past ones.

Of course, Parliament retains the ulterior sovereignty to repeal the 1972 Act. Failing that, its ‘sovereignty’ in EU-related matters hinges on whether British judges, in cooperation with the European Court, uphold the supremacy of EU law (Alter 2001). Because of the ‘direct effect’ of EU law – see *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62 – which empowers natural and legal persons to sue for their rights under EU law in the courts of the EU’s member states, the courts have become the bodies that more often than not give effect to EU law, and in the process they may invalidate domestic legislation. This direct if possibly unintended consequence of accession to the EU was driven home to Her Majesty’s Government in the *Factortame* cases.

By its champions *Factortame* is reputed as ‘unquestionably the most important constitutional case of the 20<sup>th</sup> century’ (Thomas Cooper 2011). Certainly the UK government, which

bitterly fought the plaintiff's claims to the end, believed and said that it was 'the most significant legal development' since the Bill of Rights 1689 (Thomas Cooper 2011). The facts are that the EU, having established a Common Fisheries Policy before the UK's accession, had imposed a fishing quota which gave citizens of each member state a right to fish in the waters of other member states. This right was extended to Spanish fishermen by treaty in 1980 before Spain's accession, who used the UK's antiquated vessel registration laws to poach the UK fishing quota. Parliament reacted with the Merchant Shipping Act 1988, *inter alia* requiring fishing vessels to be 75% owned by British nationals. Factortame, a UK-registered yet Spanish-owned fishing vessel company, sued in British court seeking an injunction against the UK government, on the grounds the Act violated their rights of free movement of persons and capital under the Treaty of Rome (1957). In 1989 the High Court referred the case to the European Court after observing that, the claims of right being in doubt, a British court would have to preserve the *status quo ante* in deference to Parliament; yet it granted Factortame's petition for an *interim* injunction barring enforcement of the Act pending the European Court's decision. The Court of Appeals then reversed the High Court, admonishing that the latter had failed to appreciate the 'constitutional enormity' of enjoining a government to act 'contrary to the ... will of Parliament when the unlawfulness of [its will] has yet to be established'. Although UK courts must enforce EU law, they must not 'override national law in favour of what is no more than an alleged ... Community right'. The House of Lords upheld the Appeal Court (in principle): British courts cannot mandate disapplication of an Act of Parliament, nor did the High Court (or any UK court) have jurisdiction to enjoin the Crown. If the European Court should deny Factortame's claim, such an injunction would have 'conferred ... rights directly contrary to Parliament's sovereign will' during the interim; but if upheld, it is solely the judgment of the European Court which should have disallowed Parliament's will, not the decision of any UK court. At the same time, the Lords conceded that some overriding principle of EU law might confer rights even to interim injunctive relief, and so referred the case to the European Court after quashing the interim injunction (R (Factortame Ltd) v Secretary of State for Transport (No 2) [1992] 1 AC 603).

The European Court of Justice sided with Factortame on every issue, including empowerment of the UK courts to pre-empt the Crown and Parliament. EU law is so overriding that national courts are duty-bound to disapply or enjoin the acts of its parliament or its executives if there is even the prospect of a conflict with EU law. In the UK legal context, where international law has no effect until enacted by Parliament and no status higher than other statutes, this rule has the effect (in theory) of privileging the European Communities Act 1972; contrary to the principle that Parliamentary sovereignty is illimitable even by previous Parliaments, hence a subsequent Act implicitly repeals a prior in case of conflict. Prominent Law Lords, however, have opined that the offending Merchant Shipping Act 1988 purported all along to give effect to EU fishery regulations and was never intended to repeal the European Communities Act in whole or in part, but if they ever encountered an Act of Parliament clearly intended to repeal the 1972 Act – even if, perhaps, only in part – they would be obligated to enforce it.

The departure of the *Factortame* precedent from the tradition of Parliamentary sovereignty is quite unmistakable, but the net result is often exaggerated by its enthusiasts. The *Factortame* rulings in effect constituted a national judiciary the agents of the European Court against the political branches of a member-State government. This did vest extraordinary powers in those courts, yet only in relation to matters of EU law. *Factortame* has been compartmentalised to

that extent: there is little sign that any British judges project extending such powers to Acts of Parliament generally and, judging by the intensity of the controversy swirling around the EU in UK politics, they could expect a swift reaction if they tried.

*Factortame* illustrates one of the unintended consequences of Britain's membership of the EU for the British constitution and parliamentary sovereignty. None of this was anticipated by the British political elites who closed the deal with the European Community:

The motivation for membership of the European Community was political and economic. At the time of joining, there was little appreciation of the full constitutional implications of membership (including, apparently, on the part of those responsible for negotiating entry). It was only later, with some notable court cases in the 1990s (the *Factortame* and EOC cases) that the implications began to be more fully appreciated. The outputs of Parliament could be set aside by the courts, something that ran counter to the Diceyan doctrine of parliamentary sovereignty. Parliament itself had provided for this, and could revoke it, but it is a necessary consequence of the European Communities Act 1972. The constitutional implications of later treaties also were usually only appreciated after the event, notably so in the case of Margaret Thatcher and the Single European Act [which, like all the treaties that followed, transferred more competences to the EU]. In terms of grasping the constitutional implications of European treaties, it is a case of [British political elites] running in order to catch up. (Norton 2003: 445-6)

It is noteworthy that British political elites have generally been lukewarm to EU membership, the judicial preference for the EU notwithstanding. One veteran of British politics, Lord Philip Norton, notes what must have been his first-hand observations as of the late 1980s:

The Labour Party favour[ed] withdrawal, the Conservative Party remain[ed] committed to membership though without exhibiting the zeal witnessed under Mr Heath's leadership [which oversaw Britain's accession to the European Communities], and only the [marginal] Social Democratic and Liberal Parties remain committed with some fervour to the EC ... It may well be the case that Britain remains a member of the EC for better or worse, with most people in Britain assuming it to be for the worst. (Norton 1992: 171)

The greatest cleavage, however, has always divided the elites from the masses, a rift which has deepened of late, as witness the recent electoral successes of the United Kingdom Independence Party (UKIP), whose *raison d'être* is to move Britain's withdrawal from the EU. It has forced the governing Conservative-Liberal coalition in power since 2010 legally to bind itself to an "in" or "out" referendum on the EU. (The EU Referendum Bill is currently being debated by Parliament.) Forty years after Britain's accession, the loss of Parliamentary and national sovereignty remains a point of contention.

## **Conclusion**

The United Kingdom has 'a constitution' only as a matter of customary law, the chief pillars of which are called 'constitutional conventions' in British legal parlance. Over and above this nothing exists but organic statutory law. The British constitutional 'profile' is none the less discernible, and for long ages was never seriously contested. Both Kingdom and Empire have

been governed well enough (and many would say, better than most) under one of the world's most robust governing models. The stability of the resulting polity was firmly rooted in the social facts of Britain: an ancient hereditary monarch, an aristocracy of wealth and education, and a rising population of thrifty, risk-taking commoners.

Gigantic events have occurred since the classic plan of British governance was laid *ca.* 1700: the Industrial Revolution, the rise and fall of the British Empire, two ruinous World Wars in Europe, and the European Union which was brought into being to prevent another such war. These events taken together have so altered and reshaped the social facts of Britain as to call into question the permanence of the present order. The monarchy is demystified, its powers vestigial; the aristocracy is a shadow of its former self. The commoners are the only potentate left standing, although even they may find themselves increasingly hemmed in by the rise of non-majoritarian institutions at home and abroad.

At this juncture the British constitutions stand at the crossroads, and Blackstone's prediction is revealed to be prophetic: 'For if ever it should happen that the independence of any of the three [Monarch, Lords and Commons] should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution.' If these potentates prove no longer adequate to their purposes, then regardless how much good might have come of letting them live, as a pragmatic matter they will surely be swept away.

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