

# A written constitution for the United Kingdom?

By Dawn Oliver

The UK is almost unique in not having a written constitution, a single document which contains most of the most important rules of the system of government and which has specially protected legal status. Why? Britain has been fortunate in not experiencing a "constitutional moment" when a new constitution was needed since the restoration of the monarchy after Cromwell's Commonwealth in 1660 and the eventual "glorious revolution" of 1689 which transferred much of the power of the monarch to Parliament.



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Of course there are many rules in the British system that are enforceable by the courts. As far as obedience to the legal rules is concerned, the rule of law – in the sense that the executive is subject to the law in most of what it does – is deeply embedded in the culture. It has almost never been seriously contemplated in recent years that the government and other public bodies are above the law or could refuse to obey a court order.

But one of the rules of the British constitution is that Parliament has legislative supremacy. It is this rule that differentiates the UK from most, but not all, other systems of government. Thus, if Parliament were to legislate in breach of important principles such as the rule of law or human rights, our courts would uphold that rule. From time to time, and notably in the recent *Jackson* case, courts in the UK have hinted that they might refuse to give effect to an Act of Parliament which undermined the system in a fundamental way. But so far that has not happened, and in my view it is most unlikely to happen. If it did, it would pit politicians and the courts against one another and the legitimacy of the courts could well be damaged – and with it the rule of law. The doctrine of parliamentary supremacy thus places a very great responsibility on politicians not to abuse their legislative power. In his *Gleanings of Past Years*, Gladstone noted that: "The British constitution presumes, more boldly than any other, on the good faith of those who work it." I suggest that it is this cultural aspect of the system which explains how the UK manages without a written constitution.

There are also many informal

rules in the UK which complement the law by setting out how public bodies should behave and what should happen if these informal rules are breached. These include constitutional conventions (e.g. individual and collective ministerial responsibility to Parliament, and the Sewel convention (which limits the House of Lords' power to block legislation based on commitments in the election manifesto of the government party) and a great many codes (e.g. the Ministerial Code, the Civil Service Code), statements of principles (e.g. the Seven Principles of Public Life), and Memorandums of Understanding (e.g. on relations between the UK government and the devolved bodies in Scotland, Wales and Northern Ireland). The fact that these rules have no legal force again places considerable responsibility on politicians and public bodies. Why are these rules obeyed? Again in my view it is because of the Gladstone insight, the fact that the system relies on what has also been called a "good chaps" theory of government. The fact is that all parties, plus the general public and the press, expect good conduct of public bodies, and there is public revulsion when they misbehave, and the knowledge of this element of public opinion reinforces the willingness of politicians and others to comply with these requirements.

Discussion arises in the UK from time to time as to whether the country should adopt a written constitution. Broadly speaking, if a document called a Constitution were to be adopted, the choice would be between a document which simply states the present position, or one which seeks to reform and then entrench a reformed system. As far as a document which simply states the present position is concerned, while this might be possible it would be difficult to achieve agreement on what to include and what to exclude. Would it only include legally enforceable rules? Would the conventions of individual and collective ministerial responsibility be included, together with the fact that they are not legally enforceable? If the purpose of writing down the present

arrangements was to make them accessible to "ordinary people", only the basic and most important principles would be included, but a very confusing picture would be conveyed by the document if it did not include reference to ministerial responsibility. If the document were detailed and lengthy it could be incomprehensible to ordinary people.

It would be difficult to find broad agreement across the political spectrum on the wording of even the most well established basic principles of the system, and it would be virtually impossible to prevent various groups from coming up with proposals for reform. If it were felt that a written constitution should go beyond articulating the main rules of the present system and set out a reformed system, there would be controversy about what if anything is wrong with the present system and what if anything needs to be reformed, and how. In the absence of urgency, my own sense is that it would be very difficult, even impossible, to get agreement between the parties or between the UK and the devolved bodies on matters such as: *whether the Supreme Court should have the power to set aside "unconstitutional" legislation passed by the Parliament; whether there should be a new British Bill of Rights, and if so what it should contain; whether there should be a separate legislature and executive for England; whether there should be an explicit right to secede for Scotland and the other devolved bodies in the UK; whether the Upper Chamber should be elected; whether the Church in England should continue to be established, what that involves (and whether there should be representatives of the Church of England - and of other faiths - in the Upper Chamber if it were not entirely elected); whether the monarchy should be reformed or abolished.*

Even if agreement were reached between the main parties and the devolved bodies on these and many other issues, the next problem would be securing the legitimacy of such a document among the public. There would be debates about whether a referendum should

be held before the written constitution was adopted. My own sense is that in the absence of some disaster or crisis or other urgency the turnout in a referendum would be low and the vote would probably be 'no'. Even if the vote were 'yes', if the turnout were low the new Constitution might not be regarded as legitimate for long, or even in the short term. Together, these arguments provide strong leverage to those who are against a written constitution for the UK. It also suggests that agreement on a constitutional venture remains a distant prospect.



**The constitutional moment.** The signing of the US Constitution, Philadelphia, 1776. In Britain, for obvious historical reasons, a similar constitutional convention never occurred. Painting by Howard Chandler Christy (1873-1952)