

British constitution

[Law](#), [Constitution](#)



Indeed ‘constitution’ can be defined as a document having a special legal sanctity which sets out the framework and the principle functions of the organs of government within the state and declares the principles by which those organs must operate. Nowadays only three countries do not have a written constitution: the United Kingdom, Israel and New Zealand. Though Britain does not have a codified constitution we denote that they have safeguard ensuring the good functionality of the country. Let us take a look about the power and weakness of these ‘garde fou’.

The middle age encompass one of the most exciting periods in English History. One of the most important historical events of the Medieval era is the Magna Carta. It is a document that King John of England (1166-1216) was forced into signing on June 15, 1215. He was reluctant into signing the charter because it greatly reduced the power he held as the King of England and allowed the formation of a powerful parliament.

Owing the pressure put by the Barons he was compelled to do so. The Magna Carta also known as ‘The Great Charter of The Liberties of England’ became the basis for English citizen’s rights. We can also say that with the introduction of the Magna Carta it was the beginning of the end of the monarch total power in England. The charter was an important part of the extensive historical process that led to the rule of constitutional law in Britain.

Doctrine of Supremacy of Parliament

The Parliament in the United Kingdom has developed over more than nine hundred years during which the House of Commons and the House of Lords surfaced and evolved.

The Bill of Rights (1689) form part of this evolution and empowerment of Parliament. The Bill of Rights is an act of the Parliament of England passed on 16 December 1689; it was a restatement in statutory form of the Declaration of the Convention Parliament to William and Mary in March 1689 inviting them to become joint sovereigns of England.

It principally lays down limits on the power of sovereign and sets out the rights of Parliament and rules for freedom of speech in Parliament, the requirement to regular elections to Parliament and the right to petition the monarch without fear of retribution. The Bill of Rights also described that the monarch alone could not pass or repeal laws without Parliament's consent. We can also say that the Bill of Rights did not as much lay out rights of the people in the UK but restricted the rights of the monarch, as the Magna Carta did before. The doctrine of Parliamentary Sovereignty means that Parliament is empowered in theory to make or unmake any law, including those touching upon fundamental freedoms and rights.

In fact, the Government is given a 'carte blanche' to enact any law it wants to and that its power is largely limited by a) conventions, b) independence of backbenchers c) public opinions. Generally, the courts cannot overrule its legislations and no Parliament can pass laws that future Parliaments cannot change. Parliament sovereignty is the most important part in the UK uncodified constitution. According to AV Dicey the word sovereignty is used

to describe the idea of ‘ the power of law making unrestricted by any legal limit’.

Dicey in ‘ Law of the Constitution (1885)’ commented ‘ in the theory Parliament has total power. It is sovereign’. He states a number of reasons as how this is possible. Firstly Dicey points out that Parliament is capable of passing laws on any subject without legal restriction therefore it is sovereign. This principle is derived from the election of the Members of Parliament (MPs), by the electorate which gives them authority to represent and pass legislation on their behalf. Dicey’s second argument is that no parliament can bind the future Parliament Hence, laws made by the current Parliament can be repealed or amended by consecutive Parliaments.

Thus, according to Dicey’s views the Parliament is sovereign in the UK, but some factors might contradict this statement. First argument might be that UK joined the European Union in 1973 by signing the European Communities Act 1972. The European Community law has to be given primacy over domestic UK law under requirements of the European Community Law. The institutions within the European Community are allowed to make laws which the UK has to apply in its courts as long as it affects the UK regardless of whether Parliament wishes it or not.

The Human Rights Act 1998 incorporated into the British law is a first of its kind and is derived from the European Convention of Human Rights (ECHR) that had to be adopted by all the member states of the European Community. Thus it is harder for Parliament to exercise its sovereignty in such situations where the political and civil rights maybe infringed by legislation being proposed.

Another general threat to Parliament sovereignty is the purposive approach that judges have started to adopt in the interpretation of statutes. The courts had to implement this approach in interpreting European Community Law under European Communities Act 1972. Hence, judges focus not mainly on the strict view of law but interpret it keeping in mind what legislative would have intended. In conclusion it is obvious that in a modern society Parliament sovereignty cannot be apply fully and Britain is not an exception. His adherence to the European Community and the incorporation of the Human Act has ‘weakened’ the Parliament sovereignty but it still the supreme law authority in UK.

Doctrine of Separation of Powers

The doctrine of Separation of Powers was formulated in the mid-eighteenth century by the French Jurist Montesquieu who posited that for a state to function properly, power within it should be so distributed as to contain inherent checks and balances. He identified three distinct powers of government: the Legislative, the Judiciary and the Executive.

* The Legislative arm of the state should no more and no less than formulate laws for the State to function properly. It should be unconcerned with matters of authoritative interpretations and application.

* The Judiciary should be the interpretative arm of the state which should be the authoritative source of interpretation of the law and should be unconcerned with legislation. Hence, if a dispute arose between an individual and another individual or between an individual and the State, the matter should be resolves by the Judiciary.

* Finally, the Executive should be the arm of the state empowered to devise ways and means of carrying out policy of government and govern the State according to the law and the interpretation given to it by the courts.

‘ In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself’

This statement of Montesquieu gives a clear idea of the role that should be played by a government. The three powers must stick to their role to ensure good functionality in society, any overlapping between these powers will endanger the constitutional rights of the citizens.

‘ When Legislative power is united with executive power in a single person or a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically’

Likewise, the judicial powers must be separate from both the other two. If joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the face of the oppressor. The Parliament is sovereign in its legislative function, the Executive holds exclusive power to formulate and execute policies of government and the Courts are independent in their interpretation of the law assume they know and respect their demarcation lines and mutually respect it in both theory and practice.

The reality may well be different. Parliament may not live and die for the people which it is supposed to act. It may, in the hands of some turn out to be a handy machinery to legislate for certain vested political, party, group or even individual interest. The Executive may, for its part, instead of acting fairly and independently, do just the bidding of the tyrannical majority in Parliament. Likewise, the Judiciary may end up living just for itself, the professions (Bench and the Bar), blissfully unconcerned with what happens to the actual delivery of justice to the community.

In UK the overlapping between the Legislative and the Executive powers is distinct. Walter Bagehot (1826–77) qualified as a lawyer, but went into business as a journalist and founded The Economist magazine. In his view, the nineteenth-century British constitution was characterized by the fusion, not the Separation, of powers—with the Cabinet at the epicentre. He observed: ‘ The secret of the working of the British constitution is nearly complete fusion of the Legislative and Executive powers’.

This comment made in 1867 is still quite accurate, when the government enjoys a majority in Parliament therefore; the power of the Prime Minister is subject to fewer checks than it would be under the constitutions of other democracies. This is merely one reason why the British Prime Minister is often said to be an 'elected dictator'. The presence of the Lord Chancellor in the Cabinet further reduces the separation of powers, because, as head of the judiciary, he is entitled to preside over the Lords, the final court of appeal from the courts of the UK.

As discussed earlier the supremacy of Parliament in Britain proliferate the blending of Legislative and Executive. Laws passed through Parliament

though ‘ bad’ cannot be void by the courts and this can give rise to social instability and weakened equality in society.

Rule of Law

The notion of the rule of law can be traced back to at least the time of Aristotle who observed that given the choice between a King who ruled by discretion and a King who ruled by law, the latter was clearly superior to the former. In more recent times, it is Albert Dicey who is credited with providing the logical foundation upon which the modern notion of the rule of law is based. He laid down the principles of the rule of law in his 1885 book *An introduction to the Study of the Law of the Constitution*.

“ It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law courts; the ‘ rule of law’ in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals”

Dicey stated that the rule of law comprises three elements. In the first place, according to Dicey, it meant that no one should be punished except for a distinct breach of the law as established in an ordinary legal manner before the ordinary courts of the land. Obviously such element will

demonstrate the absence of arbitrary, discretionary or prerogative power of restraint vested in the executive.

Secondly according to Dicey's theory, no man should be above the law and, indeed, every man should be subject to the ordinary law of the ordinary tribunals. Thus Dicey's principle applied equally to prime minister and government ministers as to the citizens. Such argument will guarantee equality of each and everyone before justice.

Thirdly, Dicey argued that constitutional principles in the United Kingdom, such as the right to personal liberty, resulted from judicial decisions rather than the principles of an overarching constitution, and that it is through judicial decisions that private individuals sought a determination of their rights. According to such a principle, the constitution was "judge made".

Dicey's principle sounds good in theory but in practice unfortunately it is not respected fully. His first point of view concerning arbitrary judgement regrettably prevails, as not everyone know really their rights and de facto law remains something quite complex and not easily accessible by the lower classes. Lord Bingham summarizes it very well in quote below.

"I think that there are a number of ingredients.... the rule of law; it doesn't have a precise meaning. When it was used in an Act of Parliament two to three years ago, there was no statutory definition on can realise why not. But there are I think certain important ingredients, for example if you and I, and all of us, are expected to obey the law and to exercise our rights at law it needs to be possible with reasonable means to discover what the law is.

There are thousands of pages of new legislation every year, thousands of pages of ministerial regulations.”

Second point of view of Dicey concerning equality among each and everyone in Britain is questionable. With not a proper separation of power and the sovereignty of Parliament the ruling bodies are invulnerable before law. The tendency of the executive to govern through discretionary power has increased. Hence, it is unambiguous that many bodies do enjoy special powers.

Although few will argue with the first two principles, the third principle is actually quite contentious as it is incompatible with the notion of a written constitution since such constitution would be above the courts. Unlike a written constitution, the British Constitution isn't actually written down anywhere but rather is the result of centuries of legal precedent. Dicey called this a judge-made constitution and he viewed this form of constitution to be superior to a written one.

Undeniably we can argue that UK constitution can be describe as an ‘unwritten constitution’, but it will be best described as ‘partly written and wholly uncodified’. England is a mature society, a precursor in his way of governing. As has been mentioned above, its salient principles and pillars have been accumulated over a great number of years, and today, its fundamentals are based not over documents and texts, but on ideas and precepts. Though criticize the Parliament has a dynamic interaction with British society. Its openness to gradual development and transformation, has indeed rendered the political system of the United Kingdom well off without any need of codifying in a single document present or future laws.