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Law



The on-going debate about the British Constitution that whether it should be codified or uncodified has made people perplexed. Currently, United Kingdom has an uncodified constitution; only parts of which are entrenched. Many assume that having an uncodified constitution is better than having a codified constitution and visa a versa. There is a large disagreement on whether existing United Kingdom arrangements are desirable, or whether a codified constitution of some kind should be adopted. For some the uniqueness of United Kingdom's constitutional arrangements itself is a strength; for others it is a weakness (Bogdanor, 2009; 4). There are many strengths and weaknesses within the constitution which make it how it is today. Therefore, this essay will provide the reader with the synopsis of the British Constitution and critically assess the advantages and disadvantages of the United Kingdom's uncodified constitution. Constitution can be defined as ' a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government within the state that declares the principals by which those organs must operate' (Bradley and Ewing, 2007; 4). Constitutions can be codified or uncodified depending on the country. For example United States and India have a written constitution, whereas United Kingdom, New Zealand, Israel has an uncodified constitution. Another definition which defines the constitution is ' It is used to describe the whole system of government of a country, the collection of rules which establish and regulate or govern the government' (Wheare, 1966; 1). The British Constitution is often assessed from an historical perspective. Its antiquity and continuity are frequently emphasized. The prolonged existence of the constitution may be considered as cherished in its own right. A review

of prerogative powers issued by the Labour government in 2009 stated: ‘ Our constitution has developed organically over many centuries and change should not be proposed for change’s sake’ (Review of the Executive Royal Prerogative Powers, 2009; 29). On the other hand it may be held that the UK constitution is ready for change of some kind, in particular through codification. Opponents of an uncodified constitution argue that United Kingdom lacks a formal codified document, in other words there is no single document with a special legal status which comprehends of all the principal and rules regarding the goals of the country. If we refer to the first definition mentioned above, it is clear that UK does not possess a constitution, as British Constitution lacks a single formal constitutional document. Although, United Kingdom does, however have a constitution, as seen from the second definition as above, clearly stating ‘ collection of rules’ governed by the institutions. Perhaps in a codified constitution, law becomes more definite. Laws are arranged in an analytical form to prevent conflict or contradictions which superficially makes law stable and simple. Codification means having clear rules which can be way easier to read in one single document than an uncodified one (Ryan, 2010; 19). It would also create less misunderstanding about the significance of constitutional rules and also greater certainty then can be enforced. This is the argument for ambiguity which is a weakness of the constitution. Parliament can pass or repeal any law that it chooses which can sometimes act as an advantage or a disadvantage in the British Constitution. There is no legal restraint on the legislation, which brings into light the parliamentary sovereignty that exists in the British political system. The aspect of parliamentary sovereignty can cause a problem some time and

can often lead to excessive state power (Bradley, 2011; 7). There are different outlooks drawn by the traditionalists and the modernist view. Traditionalists argue that parliament is legislatively able to judge or deal with all matters, without any consultation from any branches of the government, so parliament being the supreme authority is the finest thing in the British Constitution. Whereas, the modernists like Heuston and Marshall asserts, whilst there are no limits on Parliament as to subject matter and forming legislation, parliament can do whatever it feels like is good for people of the country. As Dicey considers, parliamentary sovereignty has both positive and negative impact. On the positive side, it means that all Acts of Parliament, whatsoever, would be followed by courts. On the negative side there is no person who can, make rules which supersede or derogate from an Act of Parliament (Dicey, 1959; 11). For instance, the Terrorism Act 2006 passed in the aftermath of the bombing in London, provided and extended the time of the terrorist suspects which could be held in jail without any trial for 14-28 days. Similarly, The Counter Terrorism Act 2008 and Terrorist Asset Freezing Act 2010 was created to restrict individual freedom by introducing the bill that had powers to allow the detention and questioning of suspects for up to 42 days without charge (Brazier, 2008; 158-9). This contradicts the notion of liberty which was created to protect human rights. Although in this situation government is trying to protect individuals from terror, but it does not justify encroaching unnecessarily on individual rights and freedom. Therefore, if the objective of passing a law is to safeguard individual rights and liberties and the avenue to achieve these objectives are the same that affect individual rights and liberties, then the question that should be asked here is-whether

we have chosen the wrong means? Change is very difficult or unlikely in a rigid constitution or written constitution. It is difficult to alter any law to keep up with the fluctuations that transpire in society every day. In some countries like United States and France, where they have a codified constitution, there are legally entrenched constitutional laws that cannot be abolished or are legally more difficult and follow a certain procedure to repeal. The United States constitution demands a certain procedure which must be followed in order to change the rules (Garnett and Lynch, 2012; 127). For instance in US a majority of two thirds in the Congress and then three fourth of the states must approve the amendment. However, in British Constitution, no special features are laid down for the amendments of measure or constitutional law. All bills have to go through the same stages in both Houses of Parliament and are subject to simple majority voting (Finer, Bogdanor and Rudden, 1995; 40). Thus, the inflexibility of the codified constitution leads to a stagnation which is not favourable in a country. Therefore, the notion of flexibility is a huge advantage to the British Constitution. Protection of the constitution from short term amendments is known as entrenchment. As the British constitution is flexible therefore, in the United Kingdom it is not possible to entrench the constitution because parliament is sovereign and makes all the decisions. In other countries the rights of the individual are contained in a Bill of charter of rights, therefore rights sometimes can be difficult to alter (Garnett and Lynch, 2012; 130). In this case uncodified constitution has a huge advantage over codified constitution. In the British constitution, one can make changes, whenever they discover an error in the functioning of the government. In contrast, in

the codified constitution, once a decision has been made the same decision might follow again. Thus meaning the bad decision will be continued because of the time taken in a codified constitution to change. This could be seen as a credit to its flexibility, since society has also been transformed and it can familiarise with the changes quickly (Williams, 1988; 13). The idea of political entrenchment also has some disadvantages in the British Constitution. The British Constitution does not follow the laws made by themselves and can change as per their own convenience. According to Dicey, 'legislation cannot be legally entrenched and protected from repeal' (Ryan, 2010; 148). In situation like this where the parliament wants to repeal the legislation of Human Rights Act of 1998, they can easily change it whenever they feel like. Although, in this case it would not be able to do that as for the parliament it will be difficult to muster the support from electorate to remove the laws. For instance, in 1931, parliament passed the statute of Westminster which stated, that 'no UK Statute will be passed after the commencement of this Act shall extend to the law of a dominion. (Australia, Canada, New Zealand, Terror free state, Newfoundland) Unless the dominion in question requested and consented to that legislation' (Ryan, 2010; 138). In short, United Kingdom could simply abolish this law and proceed to legislative for on the above dominion against their permission. Therefore, constitutional conventions cannot legally bind Parliament. Another case which can be taken into consideration is the establishment of the Scottish Act in 1988. It was established, as to United Kingdom Parliament will not pass laws in matters of Scotland. Seemingly, as a constitutional convention, it is merely a political statute of the constitution and as such Parliament could choose to ignore it

and solely pass legislation for Scotland without the consent from the Scottish Parliament (Halmai, 2012; 185). United Kingdom is called a unitary state where power is accumulated in the centre unlike the other federal states where they follow a pattern of decentralization of power called separation of powers. British Constitution does not follow a pure separation of powers with each branch of state completely separated (Pek, 2008; 1995). There are different opinions about separation of powers, as for some having no clear separation of power is an advantage and for some disadvantage in the British Constitution. There is an overlap of the legislature and executive by the parliamentary executive drawn from the legislature that is the parliament. The Prime Minister and most of his ministers are members of Parliament and sit in the House of Commons. Therefore, executive is always present at the heart of Parliament. Some might think that it is an advantage to the constitution as UK's amalgamation of executive and legislature provides stability and efficiency in the working of the government. For example, Prime Minister is usually both head of executive branch and leader of the majority party in the legislative which gives executive more freedom than a President usually enjoys in a presidential system of government (Kingdom, 2003; 29). Parliament may give law making powers to the government through powers to draft secondary or delegated legislation. This can release, parliament from the heard to inspect small technical details, while maintaining the safeguard of parliamentary approval. As Gordon Brown once said, this system helps the British government from stagnation as can be seen by American constitution when congress, senate and President cannot agree on what needs to be done (Budge, 2007; 34). In contrast, the

executive existence in Parliament may essentially promote scrutiny provided that the necessary procedures are in place. For example, Question Time can be a central procedure for holding the executive into account and keeping a check on them by the legislature. Although the law can be amended when required, before 2003 the Lord Chancellor was the senior judge and was a member of the cabinet as a senior ranking government minister. He was also a member of the upper House in Parliament, where he performed both function of speaker and a senior government spokesperson. Therefore Constitutional Act 2005 reformed the office and gave clarity and effect to the doctrine of separation of powers. Lord Chancellor could no longer act as a senior judge and was removed from the judicial process. There was a creation of Supreme Court in the United Kingdom and Lord Chief Justice became president of the courts of England Wales (Benwell and Gay, 2011; 8) . As noticed from above, the branches of the state often overlaps each other thus making the constitution weak. Similarly as United Kingdom has a monarchical constitution, the Crown or the monarch is involved in all the three branches of the government. The monarch is the head of the government and without its assent a law cannot be passed. As Dicey states the positive aspect is that the Queen can pass any law it chooses in the Parliament. But on the other hand no court or body can question a statute. The monarch being the head of the state, sometimes limit the power of judiciary (Dicey, 1959). United Kingdom judiciary is constitutionally limited. Judiciary cannot challenge or invalidate Acts of Parliament. Rather nobody can challenge the Act of Parliament in the British Constitution. According to Lord Neuberger, it is ' an absolute privilege and is of the highest

constitutional importance' (Gay and Horne, 2011; 3). Any attempts by the courts to contravene in parliamentary privilege can be unconstitutional. No court orders can restraint or hinder parliamentary debate or proceedings. Although, in recent years the traditional judicial defence towards Acts of Parliament had to be revisited in light of European Law (Ryan, 2010; 435). European law has intense effect on United Kingdom's uncodified constitutional arrangements in particular. The European Communities Act 1972 gave European Union preference over UK law. This act also gave the power to influence European Union laws on United Kingdom. For instance Judgement of European Courts on Human Rights has an impact on United Kingdom. It has affected the constitutional code of the judges in relation to making laws and has convened European law rights on individuals that are imposed on the domestic courts. To emphasise, it has affected the classic doctrine of parliamentary sovereignty since 1973 as Parliament cannot now simply pass any law that it chooses to if that law will violate European Union law (Garnett and Lynch, 2012 ; 131). To conclude, from the evidence mentioned above, United Kingdom constitution has both advantages and disadvantage and has gone through many radical changes since 1979, which depicts British constitution still has some potential. Although the most flourishing democracies base their institution on a written constitution, however British constitution should not be tampered as it has served Britain for centuries now. How much these factors affect the constitution and whether or not it should be changed is to be decided by the individual that is assessing it, as many people have different opinions on what does and does

not work within the constitution. Looking at both arguments there are strong cases for both views on wheather the UK should have codified const or not.