SYNOPTIC CONSTITUTIONS

Mike Simpson 2008, amended by AJE 2011

Constitutions

Preface - *a note on terminology*

Throughout, the word *"Constitution"* - with an upper case "C", denotes the written document, or codified set of basic laws, such as the 1787 American Constitution. The word "constitution" - with a lower case "c" denotes a political system, or a set of working arrangements.

In this sense, Britain can be said to lack a written Constitution, but has an informal uncodified constitution. The EU also lacks a single written Constitution – there was a major attempt to write an EU Constitution between 2002 and 2005, involving a Convention and EU Summits, but it failed to be ratified after no votes in referendums in France and the Netherlands (Blair had promised a UK referendum but claimed that the Constitution's rejection elsewhere meant one was no longer needed). However, the EU can be said to have a constitution in the form of the treaties agreed between the member countries, which set up the political institutions of the EU, and which determine the relationships between them - the Treaties of Rome, the Maastricht Treaty of European Union, and the Amsterdam Treaty of 1997. The Lisbon Treaty (agreed 2007, ratified and in force from 2009) preserved much of what was proposed in the EU Constitution but rather than being a single codified document defining the European Union, Lisbon instead provided a complicated series of amendments to the pre-existing treaties.

A similar point about other terms: It is also worth pointing out that "assemblies" and "legislatures" do not carry the same meaning, and also "executives" and "administrations" and "governments" have some distinctions in meaning. Assemblies often have a legislative function, but there is no reason why they could not exercise an executive function, (arguably, parliaments) or share the legislative function (as in the European Community). "Government" as a term can stand to mean the whole system of government, (as in American Government) or simply "the executive" (as in "the "British Government). Working across political systems, it is important to recognise how terms differ, and which are appropriate.

General

Constitutions, in the formal sense, have an origin in the eighteenth century, with the drafting of the American Constitution (1787) and the French Declaration of the Rights of Man and the Citizen (1789).

The drafting of a constitution has generally followed some political crisis - a struggle for independence, a revolution or other regime change, defeat in war, and possibly the manifest failure of an existing constitution.

The present German and Japanese constitutions were constructed after their defeat in the Second World War. The collapse of Communism in Eastern Europe led to many constitutions being drafted there in the 1990s. The failure of the French Fourth Republic in political stalemate led to the creation of the Fifth Republic in 1958.

As products of political crises, Constitutions tend to be a mixture of fudges and compromises: they are short-term political fixes. Almost all of them reflect the fears and preoccupations of the founders at the time of their conception. Some of these compromises have baleful effects today, in committing that country to a political system that suffers from all sorts of inefficiencies. It is a frequent criticism of the American Constitution that it is still eighteenth

century in nature - it so successfully divides power that the government cannot govern effectively.

There is an old complaint that drafting a Constitution gives" dead people votes", in the sense that the founding fathers influence the political system by committing it to a system that is no longer appropriate.

Britain on the other hand, has avoided the kinds of experience that other countries have had - no revolution, or defeat in war etc, and so its "unwritten" constitution has been able to evolve over time with a series of incremental changes. Beginning with the Bill of Rights in 1689, the British constitution has seen the transfer of the Royal Prerogative from the monarchy to the Prime Minister, the reduction of the legislative power of the House of Lords to one of delay, the devolution of power to the Scottish Parliament and other important changes. The basic framework of parliamentary sovereignty has remained the centrepiece of the constitution, at least until very recently. Although in theory only a majority of one is needed in the House of Commons to effect a constitutional change, in practice, constitutional changes are the product of a broader consensus - thus a referendum underpinned the devolution of power to Scotland, and all parties agree on ministers" exercise of the power of royal prerogative.

The functions of constitutions

It is the purpose of constitutions - written or otherwise - to allocate power, to provide rules concerning the exercise of that power, and, in some cases, provide guarantees of the rights and liberties of individuals.

They have some common features:

a) they allocate power between, and provide rules for the co-operation of the various branches of government - assemblies, legislatures, administrations, executives, judicial branches

b) they may allocate power and areas of legislative competence between central government and devolved, state, or local government

c) they may specify the limit of government competence (ie say what governments may not do)

d) they may enumerate the rights of citizens

e) they may identify the procedure by which they may be amended.

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1. Written and Unwritten Constitutions

Most Constitutions are written; that is to say, established in Basic law, or higher law, elevated above ordinary legislative change, and codified into a single document. They usually decorate themselves as an expression of the citizens" will, and may contain affirmations of natural rights, and thus announce themselves as assertions of popular sovereignty.

They will specify a procedure for amendment, which requires something more than ordinary parliamentary majorities. In Australia for example, there needs to be a majority of both houses of the legislature, which must be endorsed by a popular referendum.

The British Unwritten constitution

The British constitution is unwritten in the sense that it is not codified into a single document, nor entrenched in the form of basic law above ordinary parliamentary change. The New Zealand constitution is similar.

This form of constitution is the product of incremental addition, and is to be found in parliamentary statutes, informal practices, and legal precedent.

- Statutes: Parliament Acts 1911 and 1949, Scotland Acts 1998 & 2012, Criminal Justice Act 1994, Human Rights Act 1998, Fixed Term Parliaments Act 2010.
- Conventions: the exercise of the Royal Prerogative, the convention that the Speaker is non-partisan, Salisbury Convention, the newer convention that Parliament should be consulted on the commitment of British troops abroad.
- Doctrines: Doctrines of Ministerial Responsibility, and the Doctrine of the Mandate
- Legal Precedent: the corpus of case law precedents, which help to define rights as traditions in the UK.

The merits of such a constitution lie in:

- Flexibility - ease of change. The New Zealand constitution allowed a reconstruction of the country's electoral system in the 1990s. The UK's was easily changed with a Fixed Term Parliament to take account of the new Coalition situation in 2010.
- The political system is not static, or fixed by the will of constitutional framers now long dead, and thus out of date or irrelevant to the needs of the time. For example, devolution recognised the rise in national sentiment in Scotland, Wales, etc.
- The final interpretation of the constitution's meaning lies with Parliament (or the Knesset, in Israel) in accordance with the principle of legislative supremacy. The constitution means what they say it means.
- Constitutional provisions may be more respected, since they justify themselves by appeal to what has worked, rather than having been "invented" – e.g. Salisbury Convention in the UK as a means of limiting the power of the unelected House of Lords.

Written Constitutions

Written Constitutions vary greatly in length and detail. The American Constitution is only 7,000 words in total, and does no more than lay down a broad framework of government. Other countries' Constitutions, such as that of India, have a much more specific character. The German Constitution is 24,500 words in length. There are, of course, a variety of systems identified by such Constitutions - *unitary, federal, separated*. Each involves

investing in the Constitution some sovereignty, - perhaps by describing it as an expression of the people, though the general public have had been involved in drafting few Constitutions. Written Constitutions invariably contain a statement of individual rights - a *Bill of Rights*.

The merits of such Constitutions lie in:

- It is arguably a better defence against the power of government. It defines legitimate political behaviour; it does not merely describe it. A written Constitution of this type gives a warranty of *predictability* - whichever political party takes over the reins of power, there is a limit to what they may do with that power.
- The amendment as defined is usually a complex process, involving super-majorities. Thus, amendments to the Constitution are not a prerogative of the government of the day, but have 3 to be the product of consensus and bipartisanship. In some cases, amendments need to be confirmed by a popular referendum. (Australia, Ireland)
- Written Constitutions of this type are not necessarily inflexible. The American Supreme Court plays the role of applying the 1787 document to the needs of the modem age, and judicial interpretation in many cases allows the Constitution to evolve.

Key differences:

Written	*Unwritten*
Above parliamentary change; *above* politics.	Changed by ordinary parliamentary votes: *in* politics Provisions are subject to change, requiring no special procedure, or super-majorities.
Entrenched provisions are safeguarded from interference by the government of the day.	Constitutional practice subject to review by political procedure - "The Constitution is what you can get away with".
Not easy to change: **rigid**	**Flexible** Constitutional practice subject to review by Supreme or Constitutional Court.
Proscriptive and prescriptive in character Rights and Liberties often determined by Bills of Rights interpreted by judges -*judicial* determination of rights.	**Descriptive** in character Rights and Liberties determined by political process - *popular* determination of rights.

This tends to emphasise the difference between written and unwritten constitutions - on closer examination, there is much similarity: The working arrangements of written Constitutions are often to be found in statutes, conventions and case law precedents - no Constitution is entirely written. Few Constitutions specify or mention the roles of political parties, for example.

It is a convention of the American system that nine judges sit on the Supreme Court. Similarly, the practice of senatorial courtesy (the president's consultation of senators on federal appointments made within the senator's state) is also a convention. The Court's power of judicial review is established in *Marbury* vs *Madison*, that is to say, in legal precedent. Americans' rights and liberties are found in Court rulings such as *Roe v*s *Wade, Texas vs Johnson, Miranda vs Arizona.* There is an informal constitution surrounding the Written Constitution, in statutes such as the War Powers Act, the Case Act, the Budget Control and Impoundment Act, and the Civil Rights Act. It is often said that the President defines the constitution by his actions, especially in the field of foreign policy, thus the

constitution is to be found in political practice, much as it has done in Britain. Certain American institutions of political importance have evolved over time, such as congressional committees, primary elections, and the structure of the American Administration.

Similarly, the British constitution also contains written aspects, and even aspects of entrenchment - in that parts of the British constitution seem difficult to amend or abolish. It is hard, not to say impossible, to envisage the British parliament, for all its historic claim to 4 supremacy, repealing the Scotland Act against the wishes of the Scottish parliament, or the Scottish people. To this extent, this is now a permanent feature of the British political landscape, and Britain is now a federal country in all but name.

Certain features of the government of Northern Ireland can now only be changed by concluding a new treaty with the Irish Republic. This may impede the 2015 Conservative government's attempt to replace the Human Rights Act, for example.

Again, Britain's membership of the EU means that government, and the laws of the British Parliament are subject to the authority of the European Court] - in this sense, the treaties of the EU, as a nascent constitution, mean that the actions of government and Parliament are justiciable.

Parliamentary statutes have been reviewed according to their compatibility with the treaties and found to be "unconstitutional". While Britain remains a member of the EU, there is a higher, authoritative meta-law in the treaties the country has put its name to. The legislature no longer enjoys sovereign or unchallengeable authority.

2. Separated and Parliamentary/Unitary Constitutions

Constitutions differ in the extent to which they allow the concentration of power. The reason for this has much to do with the experiences of the political system before the drafting of the constitution, or its historical development. Many unitary systems around the world are a legacy of a British colonial or imperial past - India, Australia, Canada, New Zealand.

Parliamentary/Unitary systems

Parliamentary/unitary systems which consolidate power in Parliaments, and allow a fusion of legislative and executives, are common throughout the world; indeed are perhaps the most prevalent. These are systems in which the executive is drawn from the legislative - and is there because it enjoys the confidence of the majority in parliament.

In such systems, elections are parliamentary elections; there is no separate vote for a chief executive[1]. The salient feature of such systems is that, by virtue of the majority that put the government in place, the government enjoys a considerable degree of power over legislative matters, and other questions.

In Britain, despite the lack of formal safeguards against the abuse of power and responsibility, politicians have generally played by the rules of the game, and there is relatively little fear of the concentration of power. In general, European systems also tend not to fear the concentration of power, perhaps surprisingly, given that many countries experienced forms of authoritarian government in the twentieth century. Parliamentary or unitary systems exist in the majority of western European countries. There are hybrid systems in France and Russia, where some executive power is parcelled out to the President, alongside a Parliamentary system with a prime minister. Both these countries experienced difficulties between the executive and legislative (France 1958, Russia 1993) which led to that country granting greater power to the President.

Separated systems

The dispersal of power in the American Constitution is explained by the mistrust of power shared by the Founding Fathers, and the tradition of self government among the states.

In separated systems, (the best example is USA; Mexico, Brazil, Poland, Taiwan and the Philippines are other examples, and, as we have seen, France and Russia have elements of a separated system) the executive is constituted separately from the legislature, is elected by a different process, and perhaps at different times. It is quite possible for the control of one branch of government to be won by one party, and for another party to win the other branch.

In parliamentary systems, the situation in which one party commands a majority in the legislature, and another party commands the executive, cannot arise.

In addition to the separation of powers in the American system, there is an interlocking network of checks and balances. The legislative branch checks the executive and vice versa: the President's veto over legislation and Congress' veto over-ride are two such examples. Abuses of power are dealt with by the possibility of impeachment, and no branch of government can work without the other.

The constitution of the EU has some elements of a separation of powers - but one distinctively executive branch, and one distinctively legislative branch do not exist. Executive power is

[1] Although Israel is an exception. Israeli prime ministers and governments experienced difficulty in maintaining a majority in a Knesset fragmented by many political parties. In the early 1990s, a measure was introduced in which, alongside Parliamentary elections, there is a separate vote for the prime minister. This mandate empowers the prime minister, and gives him an additional authority.

shared between the Council of Ministers and the Commission. Legislative power is shared between the Parliament and the Council of Ministers.

Arguments for and against

There are a number of merits to both systems:

The advantages of separated systems:

- In separated systems, checks upon the power of one branch by the other can be effective if the two branches are in balance. Separated systems require both branches to work together they require compromise and legislative products are likely to have the support of all interested parties - very partisan measures are unlikely to pass. For example, measures such as much of the 1990s Contract with America, or 2010's Cap and Trade Bill fail to pass the legislative hurdles of a Congress which lacks the kind of leadership often present in parliamentary systems. It is hard to see such systems passing measures such as the Poll Tax (Britain, 1988).
- In the US separated system, the power of the executive is kept under control, by the system of checks and balances. (In France and Russia, there are dual executives - parliamentary checks exist on the prime ministers, and upon the appointment of ministers. Other checks exist on the President – although these are now nominal in Russia).

The advantages of unitary systems:

- Supporters of parliamentary systems suggest that separated systems prevent effective government, as they obstruct the exercise of leadership. They often fail to address, or defer difficult legislative problems such as gun control, or health care reform in the USA, and the two branches can sometimes check each other into "*immobilisme"* or "gridlock" (eg the failure of American political system to conclude a Budget in 1995 or 2013 and 2015 in time for the financial year, the problems of cohabitation in France, and the Yeltsin's difficulties, in the 1990s, in appointing Gaidar as prime minister).
- Parliamentary systems have no difficulty generating leadership, can tackle hard issues, and it is rare for the legislative process to come to a dead stop, while the government still enjoys a majority.
- Under separated systems, there might be some difficulty interpreting the separate mandates won by the different branches in elections. The American public contrives to produce divided government (Congress and Presidency controlled by different political parties is the norm, not the exception) - in such circumstances, it is hard to say what the mandate of the American people is. A similar situation sometimes occurs in the French system. The Parliamentary or unitary system has no such difficulty in determining its mandate.

3. Federal and Unitary constitutions

Before the end of the eighteenth century, all political systems, such as they were, were unitary in the sense that all political power resided at the centre of the system - there was little or no fragmentation of the power of the state. The American Constitution was the first to separate sovereignty between a central authority on one level, and constituent states on the other. Since then, many other countries have taken on a federal nature. Today, it is a feature of many large states: for example: Russia, Germany, India, Australia. For other reasons it is a feature of smaller states too: Belgium, Switzerland.

The degree of federalism – i.e. what is retained by the centre, and what is granted to the periphery - differ, but all federal states allow the centre foreign policy roles, and responsibility for macroeconomic policy.

In unitary states, power is not distributed, but retained by the central political institutions. There may be some delegation to local governments, but the role of the periphery in these countries is one of agency. The best examples were once the UK and France, which governed its periphery with centrally appointed Prefects. Today, after devolution on either side of the English Channel, the best examples of unitary states in western Europe are perhaps the Scandinavian countries and Ireland. One might also include England within the UK where power over 50 million people is highly centralised on London.

Somewhere between these two systems (each best understood as a *range* of types), are systems that *devolve* power from the centre to local assemblies, granting considerable power or degree of independence, but retaining a nominal sovereignty at the centre. Good examples include Britain and Spain. Other countries have also introduced elected regional assemblies such as France and Italy.

How do different political systems distribute power and responsibilities between the centre and periphery?

The United Kingdom

The UK is now a fascinating mixture of different systems. In the 1980s one would have said that Britain was a fine paradigm of a unitary system, with local governments finding their powers constrained by central government controls. Since then, a number of developments have changed the system in this country. To begin with, the most obvious - the creation of the Scottish Parliament, following the Scotland Act of 1998. This devolved power from the UK parliament in education, legal, local government and other matters to the Scottish Parliament. The degree of devolution included the power to make primary legislation, and to vary the rate of income tax by up to 3% either side of the rate set by the UK Parliament. The Welsh Assembly, created at the same time, did not enjoy such a degree of devolution - it was granted executive powers only, and remains dependent upon the Treasury for its finances. In 2011 the Welsh Assembly acquired greater legislative powers, following a referendum, and Scotland has gained further financial powers under the 2012 Scotland Act, with more to follow as a result of promises made at the time of the 2014 referendum. Wales has also been promised further devolved power in the near future.

At broadly the same time, the Northern Ireland Agreement created a devolved assembly and government in Northern Ireland.

England remains the only part of the United Kingdom without its own assembly.

The UK therefore, is an interesting mixture of *asymmetric* relationships. At its centre is England, a largely unitary state, with some powers delegated to the London Assembly and its Mayor. The Welsh have a devolved assembly. The Northern Irish also have a devolved assembly and executive, which can be dissolved if the processes break down (this happened on several occasions, most notably from 2002 until 2007, when powers reverted to the

Northern Ireland Office in Westminster; such a breakdown in devolution now looks likely again in the autumn of 2015).

On the other hand, the Scottish have a Parliament. The latter distinction is important. It stresses a greater devolution of power. As has been argued elsewhere, it is also hard to envisage the UK Parliament revoking the Scotland Act against the wishes of the Scottish Parliament and Scottish people, so, for all intents and purposes, this creates, in practice, a federal relationship.

If we consider the complete picture - the wider UK- we find a much more federal relationship between the UK centre, and the Channel Islands and the Isle of Man. These historical curiosities have their own parliaments (Tynwald, States General) their own taxes, their own currencies (in currency union with the pound). They have their own independence - they are not even full members of the EU. The UK is responsible for managing the foreign affairs of these islands, but they do not have representation in the UK parliament.

The European Union

The EU as a political system, is somewhere between a federal structure and a confederacy.

Member states retain a great deal of national sovereignty, but are conceding it to an increasingly federal centre in questions such as monetary policy, and now, since Maastricht and Nice, foreign and security policy. The institutions of the EU centre have long had the power to legislate on matters to do with agricultural policy, the environment, the single market, and other areas.

Despite John Major's claims to have eliminated the concept of a "federal destiny" from the teleology of the EU, this is largely what it is becoming.

National governments have been brought into line by the European Court of Justice, which adjudicates upon member states' observance of treaties. In other words, this "Supreme Court" has had a role in federalising the EU, and enforcing the "constitution", in much the way that the Marshall Court did in rulings such as *Fletcher vs Peck*, and *Martin vs Hunters Lessee* in the early nineteenth century. Good examples of this are the ECJ's ruling on the French ban on British beef (Dec 2001), or the ruling on the British Act of Parliament - the Merchant Shipping Act of 1988 in the *Factortame* case of 1990.

The Commission is capable of making decisions that are binding upon the member states, and these decisions have a direct bearing upon citizens.

There is no provision under the Treaty of Rome, or its more recent additions, for member states to withdraw from the EU.

On the other hand, there remains a great deal of intergovernmental decision making, and other structures within the EU suggest it is still some way short of having a truly federal character. For this, the role of the European Parliament would need to be strengthened *vis a vis* the Commission and the Council, and other federal powers, such as the power to tax Europeans directly, would seem to be necessary.

The United States and the Federal Republic of Germany

Both these countries have a straightforwardly federal nature. Power is divided between the two levels of government, and each is sovereign within its own sphere. States (in the case of Germany, the Lander) have their own governments, control policies such as education, or criminal law, although both states and Lander have found that federal funds are necessary to help finance education programmes. (Both Germany and the USA have forms of what is known as *cooperative federalism* in which the central government provides much of the initiative and funds, and leaves implementation to the states.) States and Lander have a

specific representation in the upper house of federal government (the Senate, the Bundesrat). The Bundesrat is comprised in much the way the Senate was comprised before the 17th Amendment introduced direct elections in 1913.

There are looser forms of federalism - the Confederation of the Helvetican Republic (Switzerland) is a rare example of a highly decentralised country in which local cantons are more or less self-governing, with little power at the centre. Switzerland has a long historical tradition of decentralism.

Developments in the relationship between centre and periphery

Down to the 1970s, or 1980s, the drift in the balance of power between centre and periphery has, virtually everywhere, been towards the centre. Over recent years there has been an almost universal trend in the relationship between centres and their peripheries - towards an increasing role of the periphery.

- In America, this has been seen in the New Federalism of the Republican Administrations of the 1980s and 1990s, in which the role of federal government has been rolled back, and states have been revived as policy innovators. There still remains a substantial role for the federal government, but states have been the main beneficiary of the last twenty years.
- In Britain, we have seen the rise of devolved government since 1997, in the creation of assemblies for Scotland, Wales and Northern Ireland.
- Spain has also seen a change in this respect. Asymmetric devolution brought regional governments with differing powers in Catalonia, Andalusia, and elsewhere. Spain allowed its regions (autonomous communities) to decide their own level of independence. In practice, this has brought to Spain a system approximating to federalism, but retaining the framework of a unitary state. It is symptomatic of this trend to regionalism that a number of regions (Catalonia, Andalusia, the Balearic Islands and the Basque country) unilaterally declared an interest in setting up representative sports teams in 1999. In autumn 2015 a nationalist coalition won elections in Catalonia, making an attempt to negotiate independence with an unwilling Madrid the key campaign issue.
- Other countries, such as Italy are feeling the pull of regionalism. France also created regional governments, in the early 1980s, allowing some regions to become more self-governing. The island of Corsica, for example, was given self-governing status.

The one exception to this tendency towards regionalism is the European Union. The EU has undergone integration at different rates in recent years, but the tendency has always been towards a stronger centre, notwithstanding a determination to resist this, as expressed in the subsidiarity principle of the EU. Just as the power and functions of the nation-state have experienced a centrifugal pull to the periphery, there has been another, centripetal, force tugging power and functions towards Brussels.

Interestingly, the EU has encouraged the rise of regionalism, by setting up a Regional Development Fund, and distributing aid from it directly to the regions. The EU also set up a Committee of the Regions and Local Communities, in 1988. This is comprised of representatives from sub-national authorities, and although its role is advisory and consultative, it may, like other institutions of the EU, come to have a greater significance over time.

Arguments for and against devolved/federal/unitary governments

The case for a Federal division of powers

- Federalism is an obvious practical solution to the problems of governing large countries. In situations where the central government can seem remote and ignorant of the specific problems local to an area, Federalisn1 provides a more immediate level of government, arguably more in tune with the needs of an area. Political philosophers have argued that government is better if closer to the people.
- Federalism allows for the representation of ethnic differences. In this way, government need not seem to be the imposition of power of one people upon another. A regional tier of government allows the Quebecois to feel they have the virtues of self-government while still being Canadian. Similarly, the cultural diversity in countries such as Switzerland, Belgium and India is given recognition by federal systems.
- Federalism permits a compromise between the economic and military advantages of a large state, and the awareness of local needs of small states. In this way, it is an appropriate model for the EU, as it reconciles the need for structures to frame the increasing interdependence between countries, and yet accommodates the diversity between them.
- Federalism provides a framework in which individual sub-national governments can experiment with policy without requiring the whole country to take the policy on board - the "Laboratories of Democracy" idea (e.g. Welfare Reform in Wisconsin, mandated Healthcare in Massachusetts, Gay Marriage in Vermont).
- Federalism can adapt to changing circumstances- when major problems arise, the central/local balance can adjust to address the situation (e.g. the New Deal in the USA).

Arguments against federalism

- A truly national policy is sometimes hard to arrive at, given a federal structure. In 1996, it proved difficult to introduce gun control legislation uniformly across Australia after a gun incident in Tasmania. At the same time, in Britain, gun control legislation was introduced quickly after an incident in Dunblane, in Scotland. There are many such examples from American politics, but perhaps the best is the difficulty of establishing a national policy of civil rights across the Southern states. Many states made use of their independence under the terms of 10th Amendment to deny civil rights to blacks up until the 1950s and 1960s.
- A federal system is confusing for citizens - a practice, which is legal in one state, may carry penalties in another. To take a trivial example - American drivers must take care to acquaint themselves with the local laws concerning driving in different states.
- Under a federal system, holding government to account becomes more complex. Where different levels of government have a shared responsibility for making education provision, which should be held responsible for failures of policy?
- Under a federal system, individual states can hold the federal system to ransom, and deny to other states the chance to make reforms in the collective interest of the majority. Britain was responsible for blocking many reforms of the EU in the 1980s, including the introduction of the single currency. The only way to resolve this was to allow a fast-track, slow-track structure to develop (variable geometry).

- Federalism in the USA has helped to produce undesirable political diversity. The consequences of this are: weak national political parties, and the rise of primaries as a means of choosing candidates.

Arguments for devolution

Many of the arguments for devolution are those of federalism above. There is an obvious merit in allowing discrete communities the chance to govern themselves, to pass laws, which are appropriate to them, for government in this sense to be close to the people. In the 1980s much of the push for devolution to Scotland was a product of being an essentially non-conservative country, finding itself governed by Conservative governments, in London elected by English constituencies, pursuing policies many Scots disagreed with. In these terms, why should the Scots not be allowed the chance to make their own arrangements within the framework of the UK?

Devolution maintains the fundamental framework of a unitary government, and retaining all the advantages of a straightforward and efficient decision-making structure. There are fewer problems associated with trying to create a truly national policy. The subordinate status – i.e. the lack of true independence of the sub-national governments - allows federal government to address inequalities between regions.

On the other hand, problems could emerge from conflict over policies such as taxation, and situations might arise in which raising taxes at one level within a devolved system might lead to difficulties in macro-economic control. This has always been the British Treasury's fear: dispersing revenue-raising powers might make overall economic management more difficult.

Devolution could also end with a situation whereby different laws obtain in each region - in other words, we are back to the confusions of federalism. Different policies on university tuition fees, prescription charges, the cost of personal nursing home care, and education league tables apply in England, Scotland and Wales. This could be seen as unfair, and resented by English voters who argue that more generous social benefits in devolved areas are only possible through subsidies from the centre largely paid for by English taxpayers.

Arguments for Unitary Governments

Many of the arguments we can make are ones we have advanced above. We can perhaps emphasise the following points:

- Unitary governments, which retain some strength at the national level, permit the formation of national policy. They can address the inequalities between component parts of the nation.
- Finances can be redistributed between regions to address economic problems. For example, it was always the argument of some in Scotland that the advantages enjoyed by Scotland at Westminster and in Whitehall would be lost, if power was devolved to a Scottish Parliament - Scotland had a disproportionate number of MPs in the British Parliament, and takes a share of the national finances greater than a per capita calculation would suggest. Once power has been devolved, these benefits were harder to justify and the number of Scottish MPs at Westminster was reduced. But more to the point, it is clear that before the devolution changes Britain was doing much to address regional inequalities by virtue of its power, as a unitary system, to redistribute funds.
- None of the problems of political and legal confusion mentioned above arise under a unitary system.

- Unitary systems allow the efficient organisation of economic life, and a national response to economic difficulties (it is instructive that the closest the USA has come to a more centralised state was in the 1930s, as a response to the Great Depression).
- There is a clear line of accountability in a unitary system.

On the other hand unitary systems have weaknesses in:

- failing to give a means of expression to ethnic, religious and cultural minorities.
- being less able to respond to the demands of localisms.
- lacking any real check upon the power of the centre to rearrange political institutions at will.
- allowing a system of party political domination over politically dissimilar parts of a country.

Conclusion

There are a number of ways in which the balance between the centre and periphery can be resolved.

Each has advantages and disadvantages. Perhaps a different balance is necessary for different functions - managing and resolving the economy and its problems requires a strong centre. A strong centre is equally necessary if a state wishes to project itself in the field of foreign affairs. Many other functions, however, do not require a strong centre, and indeed may be more appropriately dealt with at a "lower" level.

There are, at the same time, powerful forces at work in the world which seem to operate in many states.

There has been a growth in distrust of, or disillusion with national politics; there has been a rise of what some have called ethnic politics, creating political separatism.

At the same time, there is a countervailing tendency to greater co-operation between states at the national level - G8 and G20 talks, EU, NAFTA, the WTO, military and security agreements like NATO, to give but a few examples.

There is also the phenomenon of globalisation - open money markets and trading arrangements for example. These two vectors form a parallelogram of forces at work upon the nation state.

Questions to consider:

Where should the balance of centralism and decentralism lie?

Discuss the merits of devolved systems of government.

Examine the merits of federal systems of government.

Discuss the view that "a federal system of government is not universally suitable".

Evaluate the view that "decentralism is everywhere an irresistible force".

What are the problems associated with asymmetric decentralism?

4. Constitutional Change: Ease of amendment and flexibility

Constitutions vary in the ease with which they can be amended.

The British constitution is famously advanced as being flexible. For many of its features, at least, it can be changed by a majority of one in the House of Commons, for this is all that is necessary to pass a new statute, and all other sources of the constitution are subordinate to statute law.

It is possible, however, that changes to the constitution can be brought about by other means.

New conventions can be established by agreement or practice.

- The six referendums held on the devolution of power in the UK since 1997, together with the May 2011 referendum on the AV voting system and promises of referendums on European issues, have arguably created a consensus that major constitutional changes can no longer be driven through by parliament alone.
- Since 2001 parliamentary votes have been held on committing British military forces in Afghanistan, Iraq, Libya and Syria (the last a startling and historic defeat for a Government), reflecting a new convention that this can no longer be done by the Prime Minister's prerogative power alone.
- A convention to solve the "English question" could be necessary if a future Labour Government's majority falls to a size where it becomes dependent upon Scottish MPs to pass bills concerning essentially English matters through a British Parliament. The 2015 Conservative government is currently attempting to limit the power of Scottish MPs to influence the detail of bills on English-only matters at Westminster.
- Existing conventions that govern the relationship between the Commons and Lords have already been put under strain as a more legitimate upper chamber has asserted itself more since 1998, and as coalition government in the Commons has had its mandate questioned in the Lords. In 2015 the Lib Dems in the Lords have announced that they do not feel bound by the Salisbury Convention and may oppose Conservative policies, even if they were in their winning manifesto.

New constitutional processes can be established by similar means: such as the Nolan/Neill Committee, or the Parliamentary Commissioner on Standards.

Court rulings can, within common law, establish new rights - for example the 1991 *R vs R* case in the House of Lords, which established certain rights of women within marriage for the first time.

However, the main point to consider here is that Britain does not have an authoritative "higher law" which defines the political processes and structures, and which requires super majorities, or special procedures to change. The New Zealand constitution takes a very similar form.

The European Union

The "constitution" of the European Union (the Treaty of Rome and its various Treaty revisions, including Lisbon) requires unanimity in the round of Intergovernmental Conferences that periodically review the workings of the EU.

The unanimous agreement of the member states' heads of government may not be the end of the matter, since some EU countries stipulate that constitutional changes of this kind require a referendum before enactment. Denmark, Ireland and Spain are in this category. A negative vote in any of these processes might prevent the constitutional change (for example, the Danish rejection of the Maastricht Treaty of European Union in 1992, and the Irish rejection of the Lisbon Treaty in 2008).

However, despite the cumbersome nature of this process (no super-majority can be more "super" than unanimity), the member states of the EU have, nevertheless shown it is possible to review and change a constitution regularly.

The EU constitution is also subject to development by the work of the European Court of Justice, which makes rulings on the observance of the treaties by the member states. Like the Marshall Court of the United States in the first two decades of the nineteenth century, it has favoured and· strengthened the authority of central institutions. It has developed a corpus of legal precedent, which amplifies the meaning of the treaties.

Other countries

The process of amending the Australian Constitution is typical of a mid-range of difficulty. To change it requires the following conditions: a majority of both houses of Parliament, a popular referendum achieving a majority of the states' support, and at the same time, an overall majority of the population. Only eight of 42 amendments proposed so far have surmounted these hurdles.

Other countries require higher majorities (typically two-thirds) in Parliaments (Germany, Japan, Spain). Some of these also require referenda to endorse the changes.

The United States' amendment process seems on the face of it, to be easier than many of those countries requiring the additional support of the people in a referendum. To change the US Constitution requires a two-thirds majority in both Houses of Congress, plus the support of three-quarters of the state legislatures. However, only 17 amendments have been passed since 1791.

Despite the apparent difficulty of these countries' amendment processes, in point of fact, there is, once again, much similarity between written and unwritten constitutions. The American Constitution has not remained static for two hundred years, despite the infrequency of formal amendment. It too has evolved through conventions, political practice, statute law, and court rulings. An informal constitution surrounds the American Constitution. We can illustrate this by considering the powers and role of the President in the modern age. Thus, it is now part of political practice in America for the President to submit legislative proposals to Congress to the point where he can be described as "chief legislator"; statutes such as the War Powers Act define the President's role in military affairs; Supreme Court rulings such as *US vs Nixon, Clinton vs Jones* have addressed his responsibilities. All of these have worked effectively to change or develop the constitutional role of the President. They amplify the "necessary and expedient" clause, or the Commander in chief clause, or other roles.

As we saw with the question of the written/unwritten nature of constitutions, there is much similarity between all constitutions, with differences more apparent than real.

Question: ***Should constitutions be flexible, or inflexible?***

It is the function of constitutions to provide a framework in which government operates; to set rules for its functioning, and to put limits to its power. As the expectations of government change over time, so the framework might become less appropriate.

A flexible constitution allows change, such that the power and role of government can keep up to date. To take just one example: foreign policy - one might suggest that a system that separates responsibility for foreign policy between two institutions is no longer so desirable, given the demands of foreign policy in the modem age. The power of the Senate to confirm treaties, requiring a two-thirds majority, is an encumbrance upon the process by which America concludes agreements with other foreign nations (as was shown at Copenhagen in 2009). Congressional power over the disposition of American troops (a product of their constitutional prerogatives in war making) creates uncertainty - how far can allies rely on

American commitment in resolving an international issue that requires military presence? The spectre of Vietnam, and now of Iraq, is always in the mind of American congressmen. Allies need, above all, continuity in foreign policy, and sharing the responsibility for making such policy runs the risk of creating discontinuities. The point is that shared responsibility for foreign policy - an eighteenth century preoccupation - is no longer appropriate to the very different world of the twenty-first century. Foreign policy requires a stronger executive than the American system allows.

Flexible constitutions allow the political system to *develop,* that is to evolve in such a way that institutions and processes do not become fixed, or trapped in arrangements that are no longer appropriate. The New Zealand constitution allowed a complete overhaul of the country's electoral system in the 1990s. Equally, the British constitution permits the emergence of new devolved assemblies in Scotland and Wales and an overhaul of the upper chamber in Parliament. Even the EU has shown a capacity for constitutional renewal, so as to make existing institutions work more efficiently.

On the other hand, inflexible, written constitutions - it is suggested - provide better safeguards for the rights and liberties of individuals, in that they preserve the independence of the judiciary, and enshrine rights into Bills of Rights. Constitutional or Supreme Courts protect the rights of individuals in their judgements - one could point to several well-known examples in the history of the US Supreme Court (most recently, *Synder vs Phelps* over freedom of speech). In Germany, the influence of the Constitutional Court is seen in the fact that the Government anticipates the reaction of the Court when considering new legislation. Over the last 50 years, the Court has ruled that about 5% of federal laws contravene the German Grundgesetz.

Flexible constitutions have their critics in those who suggest they do not provide sufficient safeguard against governments. They would claim that governments have a tendency to play fast and loose with the political system in general, and the rights and liberties of people in particular. There were many who suggested this was the case in the 1980s and 1990s, under successive Conservative governments in Britain. Certainly, there were many who argued that the 1994 Criminal Justice and Public Order Act was "the most serious and broad ranging assault on human rights" for many years. This act had a bearing upon the right of silence and the presumption of innocence. Suspects who exercise their right to silence during police questioning, can now find that this can be brought to the attention of a court, and that it is admissible in evidence against them. If this act were introduced by the American Congress, there is little doubt that the Supreme Court would regard it as a breach of the Fifth Amendment.

Similar points could be made about British Prevention of Terrorism Acts, including the one passed in December 2001, allowing indefinite detention of people suspected of being involved in terrorism.

At the risk of making this more complicated, there are counter arguments to all these points

- Firstly that flexible constitutions allow development: the British constitution, at least up until 1997, showed little readiness *actually* to develop, and was the last political system in the western world to retain a role for the hereditary principle, for example.
- Secondly, that inflexible constitutions protect rights: Japanese-Americans in the Second World War, and communist sympathisers in the McCarthy period found that the American Bill of Rights was of little use in protecting their rights. Edward Snowden's revelations about NSA intercepts have raised many questions about the privacy rights of US citizens.
- Thirdly, that written, inflexible constitutions protect against government abuse: the Weimar Constitution was of little use against dictatorship in the 1930s despite having an impressive array of safeguards, and guarantees of individual liberty. Countries like

Russia and China have apparently impressive rights within codified constitutions, but these cannot in reality be claimed by their citizens. Political culture may matter more for the genuine protection of rights.

Perhaps there is, once again, more similarity than contrast between flexible and inflexible constitutions - what really provides the best safeguard against the abuse of the constitution, and the rights contained in it, is public vigilance, and collective commitment to the democratic values embodied in the political system.

5. The role of the Judiciary

The USA

In written Constitutions there invariably tends to be a more political role for judiciaries. If the Constitution is to be an effective "rule book" governing institutional behaviour, then there needs to be a referee. This has fallen to the Courts. For example, following the 1803 case, *Marbury vs Madison*, which asserted the power of judicial review in America, the Supreme Court has taken on a function of reviewing acts of the federal government - both Congress and President, state laws and constitutions, the Bill of Rights as it applies to individuals.

To give examples of each:

Acts of Congress: *Chadha vs INS* 1983, on the principle of legislative veto; *Printz* and *Mack* 1997, on the Brady Bill; *Citizens United vs the FEC* on political spending by companies, the overturning of the Defence of Marriage Act in 2013 (*Windsor* case), and the voiding of key elements of the Voting Rights Act in 2015 (*Shelby County*).

Acts of the President: *Youngstown* 1952, on the commander in chief clause; *US vs Nixon* 1974, on the principle of executive privilege; *Hamdan vs Rumsfeld* on the status of Guantanamo Bay detainees.

State laws: *Furman vs Georgia* 1972 on state laws concerning the death penalty; *Lawrence vs Texas* 2003 legalising gay sex.

State constitutions: *Romer* vs *Evans* 1996 on a Colorado constitutional amendment concerning gay rights

The Bill of Rights: *Texas* vs *Johnson* 1989 on first amendment symbolic free speech (flag burning)

Of course, there can be no better example of the Court being prepared to involve itself in politically loaded situations than *Bush* vs *Gore* 2000. It was long ago noted that the Supreme Court is a "political institution, an institution, that is to say, for arriving at decisions on controversial issues of national policy". The several cases over the constitutionality and detail of Obama's Affordable Care Act have reinforced this impression.

Germany and European Courts

In Germany the Federal Constitutional Court is very influential in adjudicating upon the federal constitution, acting to protect the fledgling democracy by banning extremist parties in 1950.

Article 1 of the German Constitution declares: "The following basic rights shall bind the legislative, the executive and the judiciary as directly enforceable by law". This has brought the German Constitutional Court to the forefront in protecting the rights of German citizens - when the rights of a citizen are infringed, the citizen may appeal to the Constitutional Court. As a rule, there are several thousand of these appeals per year, and the volume of such appeals has meant that a court of first hearing has been established to filter out those cases lacking in substance.

The German Court also has a role in adjudicating federal cases – i.e. those between the Federal Government and Lander governments, and between Lander governments. Few cases arise under this provision - perhaps one a year, and here is a point of difference between the German Court and the USA Supreme Court.

There is a further difference, more generally between Constitutional Courts in Europe and the USA Supreme Court. While the USA Court does not fear to involve itself in essentially political disputes and cases between the legislative and executive branches, European Courts

tend to avoid clashes with other constitutional branches and to respect the privileges of the executive and the rights of Parliaments.

Britain

However, the biggest contrast is with the British system. With the lack of a British Constitution, Britain does not, and cannot have any true process of judicial review, assessing the constitutionality of Acts of Parliament. The British Parliament is supreme, constitutionally speaking. Of course, as we have seen, a substantial part of the British Constitution is to be found in court rulings - the common law that has evolved over many centuries. Additionally, there is a role for the courts in carrying out a judicial review of *executive* acts, testing their conformity with a parliamentary statute, or even common law. (One frequently recurring example concerns Home Secretaries and asylum seekers. Michael Howard, as Home Secretary between 1992 and 1996 was ruled as having acted wrongly no fewer than 10 times.) In this way, courts can rule acts of ministers or other public bodies to have acted *ultra vires* (literally: beyond their powers). It should be noted, however, that this is consistent with the courts' recognition of parliamentary sovereignty. Although their role is not insubstantial, it is not a role remotely approaching that of the constitutional courts in Europe.

But the role of the UK judiciary has changed in three important ways since 1997. Firstly, since 2003 the appointment of judges is now handled through the Judicial Appointments Commission, instead of being by the Lord Chancellor, who was a member of the political executive. Secondly, in 2009 a Supreme Court came into being, replacing the Law Lords working as a judicial committee of the House of Lords and providing further separation of powers in the UK. And thirdly, since the 1998 Human Rights Act UK judges do review Acts of Parliament, which they can declare non-compliant with the European Convention of Human Rights that the HRA put into British law. This does not have the effect of rendering Acts of Parliament void, as Supreme Court rulings on Congressional legislation can do in the USA, but it does put considerable pressure on the government to respond by amending the law through Parliament. By the end of 2009 some 16 declarations of incompatibility had been issued (not counting those overturned on appeal), and in 12 of these cases parliament responded by changing the law, for example in the Prevention of Terrorism Act 2005, which put in place a new regime of control orders on terrorist suspects. The government is still considering the remaining rulings, which include a 2010 finding that sexual offenders should not have their names recorded on the Sex Offenders Register until death with no right of review, and a 2007 ruling that there should not be a blanket ban on prisoners' voting (this last has also been required by the ECHR and in 2015 by the European Court of Justice for European Parliament elctions). It should also be noted that the new Supreme Court will also decide on disputes relating to devolution, reinforcing its constitutional role, but it has yet to be called upon in such a case.

The ECJ and the ECHR

As we have already noted, there is an increasing role for European Courts (that is to say, the ECJ and the ECHR) as "constitutional" courts. The *ECJ* is an EU institution and rules on disputes between member states, and between member states and the Brussels institutions. Cases include the Courts' ruling on the French ban on British Beef 2001, or more historically, the 1979 *Cassis de Dijon* case (which is, properly: *Rewe-Zentrale* vs *Bundesmonopoleverwaltungfiir Branntwein.*[2]*)* More recently in 2011 the ECJ has found that

[2] The *Cassis de Dijon* case has been followed by a large number of similar cases upholding free trade within the European Community, including many cases brought by the Commission against member states' governments. The French ban on British beef provoked one of these - *Commission vs France* 2001

men and women cannot be discriminated against in pricing car insurance or calculating pension annuities.

The ECHR (not an EU institution, although all EU member states have to have signed the European Convention on Human Rights that it upholds) is having an important effect in Britain in introducing a rights culture which some (for example, Paul Craig in *Constitutional Futures* (ed. Robert Hazell) suggest will mean that the ECHR will come to play the role of a constitutional court, and that, following the Amsterdam Treaty, legislation concerning human rights will increasingly emanate from the Community. An ECHR ruling in 2005 that prisoners could not automatically be denied the vote is still being contested by the UK, where the House of Commons voted to defy the European Court in 2011. Another ECHR ruling in 2008 found that the UK could not continue to hold DNA samples from everyone who had been arrested, even if they were not subsequently charged or were tried and acquitted.

These courts not only have a bearing on Britain, and the role of subordinate courts in that country, they also have a bearing upon the "constitution" of the EU.

Questions

The two issues to address here are:

1. What determines the role judiciaries play?

2. How far, and to what extent, should courts have a role in shaping constitutions?

To answer the first question: What determines the role judiciaries play? We have already commented that judiciaries play a role in deciding constitutional questions where there is a written Constitution.

- In countries with unwritten constitutions, and where there is a parliamentary role in deciding what the constitution means, the role of judiciaries is subordinate. They have a role perhaps in interpreting the law, subject to the intent of the law and its clarification by parliament, and they have a role in review of acts of the executive, but they recognise the sovereignty of Parliament.
- In other countries, the judicial review role of judiciaries is much wider, and is a product of a constitutional grant of power, or precedent, or both. In these cases, the Constitution grants a role to the judiciary to step in and determine the meaning of the Constitution, or leaves it to the courts to determine the constitutional legality of political practice.

In other words, the nature of the constitution is critical in determining the role of the courts.

But other factors are at work.

- The principle of judicial restraint is here important. As we have seen, courts in European countries tend to avoid entering the political thicket, where they could find themselves in conflict with elected institutions, and without a mandate to stand on. In America, there is a similar, though fairly recent tradition of *stare decisis* - that is to say, let the decision stand.
- The Supreme Court has tended to leave existing rulings (the best example is the 1973 *Roe vs Wade* decision on abortion) alone, although it has certainly overturned some important rulings in the past (*Brown* overturning *Plessey vs Ferguson*, New Deal reversals, *Adarand Constructors* overturning *Bakke* on Affirmative Action, *Lawrence vs Texas* 2003 overturning a 1986 decision on gay rights). The Rehnquist Court

tended to show restraint in ways rather like the courts in European countries, with one notable exception to this being the *Bush vs Gore* ruling in 2000.[3]

- However, in recent years liberal commentators (e.g. Jeffrey Toobin, in *The Nine* and in several *New Yorker* articles) have argued that conservative justices have been increasingly willing to overturn precedents and impose their own preferences, a form of judicial activism which was once associated with liberal justices. Such critics would point to the appointments of Chief Justice Roberts and Justice Alito by President George W Bush as shifting the court in a more conservative direction, and cite cases such as *Gonzales vs Carhart* 2007 (which allowed states to place some restrictions on abortion rights, overturning *Planned Parenthood vs Casey),* and *Citizens United vs FEC* 2010 (which recognised corporate bodies as having rights to free speech including expenditure on political campaigns).
- On the other hand, if the state is federal, more cases will tend to arise as conflicts between states, and between states and central government, arise. This draws the Courts into an essentially political realm by virtue of its role in federal matters.

Q2. How far and to what extent should judiciaries play a role in shaping constitutions?

As we have seen, judiciaries play a role in shaping constitutions by making judicial rulings that have a bearing upon the constitution in one form or another. This might be through the judicial review of acts of government, or rights cases. The question is: to what extent *should* judiciaries play these roles?

The case against:

- Judiciaries are mostly unelected[4] and thus have no mandate to involve themselves in essentially political matters, which are best decided by politicians. In some countries using constitutional courts, there is a fear that they are becoming "third chambers of the legislature". In such cases appointments to the judiciary are political in character, which makes this point more acute. In America, several appointments have been made for ideological reasons - virtually all are made with a view to shaping the courts and their decisions. In Britain the appointment of Lord Donaldson in 1980 as Master of the Rolls was controversial for similar reasons.
- There is a belief that judiciaries tend to be out of touch with ordinary people. There is a long-standing criticism of the judiciary in Britain that it is socially exclusive and poorly representative. Studies have shown that it is very homogenous, and is overwhelmingly white, male, upper-middle-class, public-school and Oxbridge educated. In America, recent Presidents have been alive to the criticism that the Supreme Court has been unrepresentative, and lately appointments have included 2 women, and other appointments can be said to represent Hispanic-Americans, and Jewish-Americans. In the past, its membership was dominated by upper-middle class White Anglo-Saxon Protestants; with the replacement of John Paul Stevens by Elena Kagan in 2010, none of the current nine justices meets that exact description. And the courts recognition of gay rights in a successive series of cases suggest that the Justices respond to shifting public opinion – although they never say so in their opinions!
- Many argue that courts, when they try to be judicially active, deal with cases that should properly be left to legislative bodies. There are many who take this view in the

[3] This explains why the 2000 *Bush vs Gore* ruling was so controversial. The majority that ruled "for" Bush had to that point been the majority in favour of showing restraint, and staying out of what were essentially state matters; the state in this question being the state of Florida, and its electoral recounts.

[4] Courts do not have the power of executing their judgements, and to this extent, Alexander Hamilton's claim that they are "the least dangerous branch" is true. The government can always seek to change the constitution if it fails to agree with the interpretation offered by the court.

USA, where some states in America allow the popular election of judges. In other states, the state legislatures elect judges.

- The Republican right traditionally advocates judicial restraint as a way of preventing courts from making policy, although with more frequent conservative majorities in Supreme Court it is liberals who are increasingly accusing those justices of activism and urging restraint as a way of shoring up past liberal precedents (e.g. on abortion rights, campaign finance law, voting rights).
- There are doubts about the independence of the courts; amongst other things they tend to show a bias towards property and established interests.

The case for:

- The courts are a safeguard against the tyranny of a majority. They are the embodiment of the principle of the rule of law, and the best way of containing the power of the other branches of government.
- The judiciary can act in an independent way, according to the principle of judicial independence. This independence is guaranteed in some systems, by the security of tenure of judges. (Lifetime appointments in the case of the US Supreme Court, fixed but secure tenures in other constitutional courts). Judges may only be removed in extraordinary circumstances by a formal process of impeachment (this has only been successfully done eight times in the History of the US federal judiciary, most recently with the conviction by the Senate and removal from office of Judge G Thomas Porteous of Louisiana in December 2010; no US Supreme Court Justice has ever been successfully impeached, although Abe Fortas resigned in 1969 after an impeachment investigation had begun). Courts cannot be "fixed" in liberal democracies - the rule of law does not regard the government as somehow special or different.
- There are further safeguards within the system. Although judges may take one view, juries are famously independent-spirited. Thus, in the 1985 *R vs Ponting* trial, the jury freed Ponting from a charge of breaking the Official Secrets Act, despite the judge's heavy indication they should convict.
- Sometimes courts have a fearlessness that other elected bodies do not share. This was arguably the reason that the Warren Court in America stepped into the question of segregation with the *Brown vs Board of Education* ruling in the 1950s. Because the court did **not** have a constituency, and therefore votes to lose, it was able to take the view that it did. It is hard to see that the US Congress would have voted for a federal extension of marriage rights to all gay couples.

  The Dutch Supreme Court has produced important case law on issues such as abortion and euthanasia, areas in which the Parliament has been reluctant to legislate.

Other questions:

i) Evaluate the view that "the principle of judicial independence is valuable, but unattainable".

ii) Assess the claim that the social composition of the judiciary does not affect the decisions they take.

iii) Contrast and explain the role played by judiciaries in reviewing constitutions.

6. Constitutions and the Executive

One of the main functions of constitutions is to put a limit to the power of governments, and to the power of the executives in particular. What provisions exist within constitutions to do this, and how effective are they?

The US Constitution

The Declaration of Independence catalogues a long list of complaints against the British executive - George III and his cabinet. It was in revolt from an arrogant and imperious executive that the United States was created, so it is no surprise that the 1787 Constitution contains many provisions guarding against tyrannical power of executives.

- These include the checks and balances between the three branches - the veto and the veto override, the power of appointment and the Senate's power to confirm appointments, the power to conclude treaties, and the Senate's power to ratify them.
- There are also specific denials of power within the Constitution - such as: the clause asserting that: no money may be drawn from the Treasury except in consequence of appropriation made by law (in other words, money must be spent only as authorised). The same section (Art I Sect 9) also denies the power to suspend habeas corpus.
- Specific powers are granted exclusively to Congress, such as the power to declare war. There is also an expectation that the President should *"faithfully* execute the laws". In other words, he is expected to adhere to the spirit of the laws as passed, and interpret them differently.
- The Bill of Rights contains general constitutional guarantees against the government.

In addition to these formal constitutional constraints, a number of other, informal provisions have been added on to "flesh out" the formal provisions. These include provisions mentioned earlier, such as the War Powers Act and the Budget Control and Impoundment Act, passed in the belief that the President had exceeded his proper constitutional authority in the "Imperial Presidency" period.

The British constitution

There are few formal constraints upon the British Executive, given the nature of the British system, and the absence of a written Constitution. No formal checks and balances exist, and executive dominance of a Parliament that is sovereign ensures that the government is free from many controls that exist in other countries.

Still there are nevertheless some provisions limiting governments:

- Doctrines of Ministerial and Collective Responsibility, which require ministers to be individually and collectively responsible for policies and actions taken. This has been much at issue in recent years, with ministers surviving what would seem to be clear-cut cases where policies failed. The best recent example of this is the survival of Norman Lamont after Britain's exit from the exchange rate mechanism in 1992. Still the principle is an important one, suggesting ministers' ultimate responsibility to Parliament.
- The Rule of Law, which suggests that governments are as much subject to the law as anyone else. This means that ministers may be subject to judicial review of their actions.

- The Doctrine of the Mandate, which sets a limit to the measures a government has a right to introduce, and has some practical impact in the Lords (the Salisbury Convention states that the Lords will not seek to veto measures that were in a government's successful election manifesto; it was recently been called into question by the advent of a Conservative-Lib Dem coalition, much of whose programme for government was in neither party's manifesto).
- In order to pass bills into law, and for other purposes, such as its very survival, the government needs a majority. This is not a constitutional check so much as a political check, but it is the most powerful check upon the government. The denial of a majority to a government, or even its possibility, is irresistible.
- Other checks include elections - and the need to be re-elected. There are various internal checks, such as the power of the Lords.

The European Union

The executive power is shared, in the institutions of the EU, between the Council and the Commission. The Council makes all decisions concerning any new initiatives, and the Commission makes directives accordance with the competences granted to it by Treaty.

Thus, whatever "constitutional" checks exist must check the power of these institutions.

- The Treaty of Amsterdam contained many new provisions against the power of the Commission. The original Treaty of Rome gave the EP the power of sacking the Commission, but only as a collective, not individually. However, following the resignation of the Santer Commission in 1999, it is clear the EP has a lot of power if only in bringing the Commission before the tribunal of public opinion. In both 2004 and 2009 the EP succeeded in rejecting individual nominees to the Commission, after committee hearings and by making it clear its objections were such that it was prepared to veto the whole Commission if the nominees were not withdrawn. As far as the President of the Commission is concerned, the appointment of the President is now ratified (or rather, co-elected) by the European Parliament. This strengthens the democratic legitimacy of the President, and makes his role much more that of a European head of government.
- The introduction and extension of the co-decision process in which the European Parliament plays an important part in the legislative process, elevates it to a role from which it can check the Council. In the Amsterdam treaty, it gained 23 new cases of co-decision, on top of 15 granted in the Maastricht Treaty. The Lisbon Treaty further extended its power over areas such as agriculture, energy policy, immigration and EU funds, although taxation and industrial policy still lay outside its power.
- Furthermore, the EP was granted "the power of the purse" - the right to adopt the budget, and control its execution in the CFSP. In the future, important decisions can no longer be taken without the Parliament.

Question: *How effective are constitutions in limiting the power of executives?*

The *nature and origins of constitutions* is important in any answer to this question, but other factors are important too.

How does the nature and origins make a difference? The British constitution, and the Israeli constitution - in which there is legislative supremacy, rather than supremacy vested in a constitutional document - allow Parliament to say what the constitution means. In the modern

age in which Parliaments have become more and more controlled by executives, through disciplined political parties, this means that there are few constitutional checks on the power of the executive. Parliamentary sovereignty allows the erection of an *elective dictatorship,* as Lord Hailsham put it, in 1976. This comment, of course, was calculated for its shock value, but it draws attention to some important points. Here, it suggests that there are really very few constitutional checks upon the executive. There is an important illustration: in the discussion, during the autumn of 2001, whether to send troops to Afghanistan, and how to react to the Taliban and to Al Qaeda, some MPs were very critical of the fact that they were unable to get a parliamentary vote on this. Of course, British foreign policy is conducted under the royal prerogative, and this is not subject to parliamentary checks.

It may be argued that the only substantial checks upon the executives in such systems are *political* checks - the possibility that Parliaments might deny the governments their majorities.

On the other hand - the nature of the Constitution in the USA – i.e. one specifically drafted with the fear of tyranny in mind, is important to the limits placed on the power of the executive. But it should be noted that the penumbra of the informal constitution is quite as important, if only for the fact that the American Constitution, being only 8 000 words, is merely a framework document, and cannot prescribe the totality of the checks upon the President. The President must work in a political as well as a Constitutional framework. Sometimes, even in the American system, the Constitution is "what happens". To illustrate this: the present writer learnt the following in conversation with John Sununu, Chief of Staff to President Bush in 1990-1. Before the Allied attack on Iraqi forces to liberate Kuwait, there was a vote in Congress to endorse American military action. There was a question of what the consequences might have been if this, relatively tightly won, vote had not supported the President. Sununu was emphatic - the President would have ordered the military into action anyway. This suggests that, even in the American setting, the President often determines the meaning of the Constitution by his actions.

The origin of the European constitution is also important - the Inter-Governmental Conferences, which decide the treaty revisions, are comprised of the same heads of governments that also work as the Council of Ministers, so there has been reluctance to concede too much to the Parliament as a check upon their power. There are now some important checks, as we have seen, but only as a result of concessions made by the heads of governments. We should note again the importance of *political* checks - the Santer Commission *resigned* in 1999 as a consequence of political criticism largely from within the European Parliament; it was not dismissed.

What other factors are at work in limiting the power of executives? One would have to say that *the depth of the democratic tradition and the political culture* is very important. It is often claimed that the Weimar Constitution failed in 1933 because the depth of democratic values and commitment to due process were shallow in post-war Germany. Too many powerful groups and factions allowed the executive to seize dictatorial power. A similar point might be made about events in Russian politics in the 1990s, where the president (Yeltsin) was given greater powers over the Duma, and the appointment of ministers (1993). In India under Indira Gandhi, and in Pakistan under General Zia ul-Haq, major provisions of these countries' Constitutions were set aside (abrogated) by the declaration of a national "state of emergency"[5]. In these last three examples, the support of the military was more crucial than the Constitution in deciding the outcome of the situation. The executives won more power notwithstanding the provisions of the Constitution.

[5] In Britain, in December 2001, the government passed a major anti-terrorism act the provisions of which allowed the police to detain indefinitely any suspected terrorists. To pass this act, it was necessary to abrogate from the European Convention of Human Rights, and in order to do this, it was necessary to declare a similar state of emergency.

Perhaps the most crucial thing in limiting governmental power is whether there is a "primacy of law" in the state. Is there a recognition of the rule of law? As the framers of the American Constitution urged - it is important to "have a government of laws, not of men". However, the mere existence of a Constitution does not guarantee the constitutionality of government.

In conclusion, what makes constitutions effective in limiting executives? The nature of the constitution is important - there is no doubt that the American President is more limited in his office than a British Prime Minister, who exercises his power under the royal prerogative, and by virtue of a majority in parliament that is sovereign. The constitution of the EU provides few formal processes to check the power of the Commission and Council. But we must note there are important checks upon governments within politics, and that the political culture prevalent within a system is perhaps more critical to whether executives can be kept in check. Even in democratic political systems this is important. Constitutions work in this respect only if dominant groups wish it to work, or if the public is vigilant in upholding the rule of law.

Other questions:

How far do constitutions actually describe the workings of a political system?

How solid are conventions in providing a constitutional framework? Do Constitutions protect rights?