A Long Look at the British Constitution

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I

Mr. William Ewart Gladstone (Prime Minister during 1868–1874, 1880–1885, 1886, and 1892–1894), writing in the *North American Review* in September 1878, declared that "... the British Constitution is the most subtle organism which has proceeded from the womb and the long gestation of progressive history".

In the introduction to the sixth edition of Strathearn Gordon's *Our Parliament* (published on the eve of the celebrations to commemorate the 700th anniversary of de Montfort's "famous parliament of 1265"), Sir Stephen King-Hall, the founder of the Hansard Society for Parliamentary Government, wrote: "Of all the institutions for which the British are famous, of all the contributions this island people have made ... there is none more noteworthy or renowned than that of parliament ... It has been the dynamic centre from which the principles and practices of the free way of life have radiated forth beyond the confines of Britain." Strathearn Gordon (in Chapter 2, "The coming of parliament") goes on to claim that "a free assembly ... existed in England over 1,000 years ago", that "a great advance in the conception of parliamentary representation" could be noted as early as 1254, that "representative institutions, much on the lines of our present parliaments" were established by 1300, and that the British Constitution emerged not so much by "the fierce test of arms and bloodshed" as by "the slower, rational and more durable test of argument, of persuasion and of experience gained by peaceful trial and error".

Was it *really* like this?

II

Speaking of the millennia before the Christian era, when "earth-quake and volcanic action and glaciers had finished their work, and our rivers had found something like their modern level", Sir Keith Feiling remarks that the work of natural forces, in making the waters of the North Sea and the English Channel /*La Manche*, had left like gazing at like: "The Rhine, Somme and Seine looking into the Humber, Wash and Thames, while the Breton peninsula, the Loire, and capes of Spain pointed to Dover, the harbourages of Southampton Water, and the western voyage round the Lizard. Here lay the inviting routes for invasions ..."[1] In the third and second millennia B. C., the invaders were for the most part from the Rhineland but also from northern France, founding settlements on the eastern coastline; between 800–450 B. C. a "perpetual arrival" settled further inland reaching the midland counties, Cornwall, and Hampshire.

The Roman legions under Julius Caesar made a brief expedition in 55–54 B. C. and this had been preceded by the arrival of Belgic tribes from the Marne and Aisne areas in about 75 B. C. There is little evidence of spiritual life at the beginning of the new age: "While the Platonic philosophy covered the Middle East, while Christ was born and suffered, and while the Stoics were elevating Rome, (the) tattooed Britons still offered human sacrifice ... the gods were many ... gods of war and thunder, or local deities of some holy well or haunted wood ... (they) propitiated the unseen by burning victims in wicker cages."[2]

The Roman era in Britain, after the occupation by Claudius in A. D. 43, lasted until the major withdrawal of military forces in A. D. 407, but neither the Roman decline nor the ascendancy of the Saxons who followed them as invaders were other than gradual in nature; "the invaders came in on every wind" but they came separately and in uncoordinated groups, and the native Britons maintained a long and stubborn resistance until the sixth century A. D.

Around 550 there was a major and decisive invasion by the Saxons who by the end of the century if they had not entirely eradicated Roman-Celtic influence had begun to build a new form of social life. By the middle of the seventh

century minor kingdoms had come into being and there were forms of government above the level of the village; for the next two hundred years these "petty dynasties" squabbled amongst themselves, the supremacy of Mercia over Wessex and Northumbria and the smaller groupings coming only gradually and all beset by fighting Welsh, Picts, and Scots without and pretenders to royal title within. The supremacy of Mercia gave way to that of Wessex, and Alfred (871–899) adopted the style of "Lord of all Albion" and "Emperor of Britain" in addition to "King of the West Saxons"; during the reign of Edgar (959–975), the shire system extended as far as the northern parts of England and most of its folk were within a feudal system of tenure and service to a local lord.

The Saxon kings and their kingdom were soon to fall to the Danes after a long period of warfare beginning with punitive expeditions in 980 and ending with the recognition of Canute (1016–1035), son of Swein, King of Denmark, as monarch of all England in 1016. In their turn, the Danes fell with the final invasion and the final conquest of England by William, Duke of Normandy (1066–1097), who became William I of England in 1066; a conquest which bound England to France for over four hundred years.

By the end of the reign of Henry II (1154–1189), the foundations of central government had been laid and the Crown had been recognised as of hereditary right; despite the long absences of Richard I (1189–1199) and the calamaties of his reign, John (1199–1216) inherited a firm framework of government. To many, the great event of John's reign was the *Magna Carta* of 1215, but the Great Charter was primarily a feudal document about baronial rights and feudal custom and the protest of the baronial tenants-in-chief a form of "legitimised rebellion". J. C. Holt began his study of the Charter with the words "In 1215 *Magna Carta* was a failure . . ." and ended it "the Charter was conceived in baronial interests", but, of course, points out that the real lesson of the Charter is that "authority should be subject to law".[3]

John died shortly after the events of 1215 and his successor Henry III (1216–1272) was nine years old when he came to the throne, leaving much scope for baronial influence during the early part of a long reign before the Barons' War of 1258–65. After the Battle of Lewes in 1264, Simon de Montfort, Earl of Leicester, called a 'parliament' to consider proposals for the curbing of the king's powers; knights and burgesses were called to this gathering to meet the baronial supporters of de Montfort. Chrimes comments sceptically ". . . it was called a parliament, but it was more of a party convention . . . and it can be taken for granted that only people disposed to support de Montfort attended."[4] The Battle of Evesham (1265) sealed de Montfort's fate, but de Monfort's 'parliament' was the precursor to meetings called in the reign of Edward I (1272–1307); however, although 1265 marks the first meeting of knights and burgesses together by common writs of summons, it could not be said to be the lineal ancestor of the present-day Parliament or to be the origin of local representation?

Edward I was to prove to be a powerful king whose reign marked a decisive stage in constitutional development; he knew that he needed the support of a 'third force' against the power of the baronial opposition and that weak assemblies would be of little use to him. Although summonses were issued in 1273 and 1275, the 'Model Parliament' of 1295 (comprising knights, burgesses, and clergy) was followed only four times before 1307. When they were so summoned, "We may be sure that the general aim was to strengthen the power of the Crown and to improve the efficiency of the government . . . everything depended upon the will and initiative of the Crown", and it was clear that these representatives were there to bind the obedience of those they represented.[5] This can be seen in the writs of summons from 1294 up to 1872: ". . . the said knights shall then and there have full and sufficient authority on behalf of themselves and the community of the county aforesaid, and the said citizens and burgesses on behalf of themselves and the respective communities of the cities and boroughs aforesaid, to do whatever in the aforesaid matters may be ordained by common counsel; and so that, through default of such authority, the aforesaid business shall by no means remain unfinished . . . By witness of the King, at Canterbury, October 3, 1295".[6]

Chrimes further argues that what led the House of Commons "upon the long path to supremacy in the State" – a journey taking 350 years – was probably the fact that ". . . in the fourteenth and fifteenth centuries the Commons in Parliament proved to be useful pawns to one side or the other in the unending struggle for power between the Crown and . . . the magnate opposition . . . (which) had come fully to realise the most effec-

tive way of bringing the Crown to heel was to act through Parliament,. and partly through the Commons."[7]

The removal of Richard II (1377–1399) in a *coup d'état* led by Henry Bolingbroke was later legitimised by the parliamentary recognition of the right to the succession of the hereditary line of, as he became, Henry IV (1399–1413);[8] the magnates now had both a king and a parliament amenable to their influence. As Henry IV had no serious hereditary claim to the throne, it was in the interests of the Lancastrian Kings (Henry IV, Henry V (1413–1422), and Henry VI (1422–1461)) to work with Parliament and the clergy to establish at least *de facto* legitimacy; this was helped by the military prowess of Henry V which helped to make up for the lack of constitutional right of Henry IV. Henry VI (1422–1461) became king before his second birthday and during the fifteen years of his minority power was exercised through the King in Council, in effect by the nobility; in his early manhood the King was subject to bouts of insanity, and his reign ended with the Wars of the Roses (1455–1485), his probable murder in the Tower of London in 1461, and the setting aside of the heirs of Henry IV by Parliament who also declared the reigns of Henry IV, Henry V, and Henry VI to be those of 'usurpers', and Edward IV to be the legitimate heir of Edward III. On 26 October 1460, Parliament had determined that Richard of York was the heir to Henry VI, but he died at the Battle of Wakefield in December 1460 and left the way to the throne to be cleared for Edward of York by "Warwick the Kingmaker" (Richard Neville, Earl of Warwick).[9]

During the time of the Lancastrian Kings (Henry IV, Henry V, Henry VI) the theory of the royal prerogative remained undiminished and the rule was personal, but the Yorkist kings (Edward IV and Richard III) exercised an even stronger personal rule which may have eased the way for reorganisation under the Tudors.[10] Feiling calls the period 1422–1485 a time of "national collapse" when "bloodshed . . . filled politics" for a generation, with four Speakers of the House of Commons murdered or killed in battle, and five dukes, four earls, a mass of barons and knights, Owen Tudor (the grandfather of Henry VII), the Lancastrian Prince of Wales, Richard of York (the heir to Henry VI) and his son Clarence, Edward V (1483) and his brother Richard (the sons of Edward IV and the doomed nephews of Richard III) all died violent deaths.[11] The Battle of Tewkesbury saw the final defeat of the Lancastrian cause in 1471, Edward IV (1461–1483) died at the age of forty, and the short and spectacular reign of Richard III (1483–1485) ended with his death at the Battle of Bosworth, the throne passing to Henry Tudor, Earl of Richmond, now Henry VII (1485–1509). Henry VII had a weak title to rule as did Henry IV and Edward IV and, like them and Richard III,[12] he obtained the acquiescence of Parliament to affirm and strengthen that title [13] – though no king would acknowledge that that title came from parliament; the King alone took the initiative in matters of State, appointed his Ministers, and called and dissolved parliaments.

"Tudor rule has been called despotic . . . essentially it was government by the Sovereign in Council";[14] of course, the great magnates no longer dominated the Council now that the Crown had clipped the claws of the great (". . . the fifty or so noble families, among whom the Wars of the Roses had been fought, were much exhausted and impoverished (by) . . . confiscations, attainders, judicial murders . . . the violent struggles of some two hundred years between the king and the magnates had ended in the overwhelming victory of the Crown") and Parliament presented no real challenge (". . . The docile time-serving performances of the Commons during most of the fifteenth century can hardly have enhanced its reputation as a political assembly . . . brought out only for formal legislative and fiscal purposes").[15]

To take the period 1422–1558 – from the beginning of the reign of Henry VI to the end of the reign of Mary I – Henry VI called 22 parliaments in 39 years; Edward IV, 7 parliaments in 22 years; Henry VII, 7 in 24 years (one in the last 12 years), Henry VIII, 9 in 38 years; Edward VI, 2 in 6 years; and Mary, 5 in 5 years. The King in Parliament during the reign of Henry VIII "manifested an omnicompetent power" but there was still no suggestion that the government was any other than "the King's business".[16]

The membership of the House of Commons rose from 298 in the reign of Henry VIII (1509–1547) to 467 in the time of James II (1685–1688), but the county franchise, the basis of representation, remained the same for four hundred years. A statute of the eighth year of the reign of Henry VI (1429) decreed that ". . . knights of the shire, elected to attend parliaments hereafter to be held in the kingdom of England, shall be chosen in each county by persons dwelling and resident therein, each of whom shall have a

freehold to the value of at least forty shillings a year beyond the charges on the estate . . .".[17] Such an estate would be of at least 150 acres, but, however rich they might be, the statute excluded tenant-farmers, copyholders, and women. Elizabeth I (1558–1603) created new boroughs in areas likely to return members well-disposed or submissive to her, and Charles II (1660–1685) and James II (1685–1688) "were to go to extremes in fixing borough elections . . . (and) 'packing' the Commons".[18]

J. E. Neale has shown how county seats were shared out between the great landowners, the majority of whom were members of the nobility; contested elections were rare and only came about when there were personal feuds among the great landowners and the normal routine of candidate "negotiation" and freeholders' "acclamation" broke down. Although between 1547–1584, 119 new borough seats were created and the borough seats now represented 80 % of the whole, 88 % of those borough seats were – by means of patronage – occupied by the gentry, and the seats regarded as "the private possessions of individual families". In the House of Commons, bribery was rife and payment expected (by the Speaker, the Clerk, the Serjeant, and by other Members), if passage of a Bill was to be ensured.[19]

With the accession of James VI of Scotland to the English throne as James I (1603–1625) came an attempt by the king to reassert dominance over Parliament; James adopted a theory of the divine right of kingship and claimed that it was seditious to "dispute what a king may do in the height of his power". In a message to the Commons on 5 June 1604, speaking "as a father to his children", he admonished them and extracted from them an abject apology (20 June 1604) which expressed their "longing thirst to enjoy the happy fruits of your most wise, religious, just, virtuous, and gracious heart"; he castigated the Speaker in 1621, telling him to make it known that "none therein shall presume henceforth to meddle with anything concerning our government or deep matters of state". He dissolved Parliament the following year, after declaring that "we found that they misspent a great deal of time . . . to treat of our high prerogatives and of sundry things that . . . were no fit subjects to be treated of in parliament . . .", the object of his wrath being the Great Protestation of 18 December 1621.[20] From 1614–1620, he had governed without a parliament, and was in conflict with all the four parliaments that were called.

Under Charles I (1625–1649), Parliament did not sit between 1629–1640; the Common's refusal to grant financial support in an effort to gain influence over policy and their objections to the arbitrary removal of judges led to their dismissal. Charles used his prerogative powers to revive old legislation, to grant monopolies, to raise Ship Money, and to levy tunnage and poundage and successfully created sources of additional finance; however, it was on religious issues that the Civil War was fought and which led to his execution in January 1649, to the abolition of the monarchy and the House of Lords, and to the establishment of a republican Commonwealth.[21]

The Commonwealth period lasted but eleven years and the restoration of the monarchy in 1660, with Charles II on the throne until 1685, was the restoration of the relationship that existed between King and Parliament in 1640, when "the monarchy had reached the point where it found itself unable to carry on its government without the Commons in Parliament".[22] However, Charles II's reign was a stalemate in the relationship of King and Parliament with both sides engaged in an unending battle of wits, a battle in which the king proved skilful and adroit. Three years after his death in 1685, his successor James II (1685–1688) had aroused widespread opposition by his religious bigotry and his undoing of the 1660 settlement; he fled the country in December 1688. A Convention Parliament was convened (in the absence of a king and a lawfully-constituted government) on 22 January 1689; it resolved that the king had abdicated, that the throne was vacant, and drew up a Declaration of Rights (later enacted as the Bill of Rights).

On 13 February 1689, Prince William and Princess Mary of Orange accepted the declaration and were proclaimed King and Queen. On 22 February 1689, the Royal Assent was given to *An Act for removing and preventing all Questions and Disputes concerning the Assembling and Sitting of this present Parliament* (that is, the legitimisation of the Convention Parliament); then followed *An Act for the abrogating of the oaths of supremacy and allegiance and appointing other oaths* (the purpose of which was to bind all office-holders to the new regime), and the Declaration of Rights in statutory form, *An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown.* The completion of the 1689 settle-

ment was *An Act for the futher Limitation of the Crown and better securing the Rights and Liberties of the Subject* (the 'Act of Settlement') which included the determination of the succession to the throne and established the principles upon which the title to the Crown of Queen Elizabeth II is based, through the daughter of the daughter of James I. *An Act for the Union of the Two Kingdoms of England and Scotland* followed in the fifth year of the reign of Anne (1702–1714) which completed the Settlement in both countries.[23]

The supremacy of Parliament over the Crown had now been settled, but there was still a struggle ahead for the transference of the control of executive power to Parliament, for the reform of Parliament, for the extension of the franchise to all adults (this did not come about until 1928 – or 1948, if one takes into account the removal of all but formal residential qualifications), and for the curbing of the powers of the House of Lords. After the Settlement, the independence of the judiciary was assured ("... Judges Commissions be made *quam diu se bene gesserint* ... but upon the Address of both Houses of Parliament it may be lawful to remove them")[24] and the Royal Assent was not to be refused to legislation after 1707, but the Crown still had sources of patronage and "influence"[25] and Parliament was yet to control the appointment of ministries. The situation where a government could be formed and carried on by "responsible" ministers (that is, responsible to the House of Commons rather than to the Crown) and where the strength of these ministers lay in organised party support rather than royal whim and favour was still nearly a century and a half away. The 'back-lash' reaction to the French Revolution of 1789 and preoccupation with the Napoleonic Wars no doubt delayed the growth of a reform movement.

So far, the ordinary people have been invisible – what were social conditions in England during the reign of George III (1760–1820)? Half the children born in the first thirty years of his reign died before their fifth birthday; public executions for minor crimes were seen as "moral lessons" and "improving occasions", as were the pillory, the ducking-stool, public floggings, and the burial of suicides at cross-roads with a stake through their heart. The ordinary folk lived on bread (when it was available), potatoes, some Sunday meat, and plenty of beer. Superstition was rife and "The lives of the poor were still neighboured by a whole phantasmagoria of ghosts, boggarts and witches". Brutal force on the part of authority was accepted on a *sauve qui peut* basis. Most people knew "government" in the form of the Lord of the Manor rather than the Lords of the King's Council, and their governors did not see them as having a "constitutional presence"; Burke spoke of "the swinish multitude" in *Reflections on the Revolution in France,* the Bishop of Worcester, Richard Hurd, preached that "Reason stands aghast at the sight of an unprincipled, immoral, incorrigible public", and Disraeli wrote in *Tancred* of "that fatal drollery called a representative government". When Burke spoke of the "people" he meant a relatively small middle-aged group of men, well-informed, with leisure and "above menial dependence"; the rest "when feeble are the objects of protection; when strong, the means of force" (*Letters on a Regicide Peace,* I).

The English country gentlemen governed England; in the countryside, and as a group in the House of Commons. The electoral system of the 1820s had not altered since George III came to the throne; the growing cities of Manchester, Leeds and Birmingham were unrepresented, while eleven southern counties contained half of the borough seats. In 1830, the borough of Gatton in Surrey contained six houses and was sold for a price said to be £180,000; "there were always seats of one kind or another available to someone with money".[26]

The *Act to amend the Representation of the People in England and Wales* received the Royal Assent on 7 June 1832, the second year of the reign of William IV (1830–1837). The Reform Act was not greatly to change the *composition* of the House in terms of the type of person who was returned under the new arrangements,[27] but it was the introduction of and the acceptance of principles of representation that were to lead inevitably to later widenings of the franchise. No less than 113 seats were halved (usually from two to one). The disenfranchised towns of the northern parts of England were allocated 63 seats and 62 seats went to the counties; 18 seats were given to Scotland (8), Wales (5), and Ireland (5). The county franchise now included copyholders, life leaseholders, and certain classes of tenants; in the boroughs there was now a £10 householder qualification. However, these changes "... in no sense established a democratic electorate", with the mass of the working people in the towns still without a vote, but it did enlarge the electorate by

about 50 %, that is by 217,000.[28]

In 1867, Disraeli saw through the second Reform Bill but it still left over 80 % of adult males without vote; 1872 saw the introduction of the secret ballot; in 1884, Gladstone's *Representation of the People Act* increased the electorate by over 60 %, with the *Redistribution of Seats Act* of 1885 bringing some order and equality in the delimitation of constituencies. In 1918, the Lloyd George government extended the franchise to all males over 21 years of age who had a short residential qualification and to women over thirty who were (or whose husbands were) local government electors; in 1919, the *Sex Disqualification Removal Act* made it possible for women to have freedom of entry to civil and judicial office, the professions and professional associations, the civil service, the universities, and to stand for Parliament; the *Equal Franchise Act* of 1928 gave all over the age of majority (21) the vote; in 1948, all residence restrictions were removed, and in 1970 the age of majority was lowered to eighteen years of age.[29]

III

The course of British constitutional development has seen a sequence of invasions and foreign overlords, the squabbling of petty monarchs, the struggle between the nobility and the king for supremacy, the later struggle for domination between the king and parliament, the recognition of the supremacy of parliament over the king, the decline in the "influence" of the monarch, the rise of the middle classes in terms of constitutional recognition, and, finally, the decline of the power of the House of Lords and the central place of a House of Commons elected on a basis of universal adult suffrage. For the most part there has been a fierce struggle between the advancing party and the stubborn resistance of entrenched interest; only late in the last century were the populace recognised to have a right to a constitutional presence, and it is only just over fifty years since adult suffrage was completed with the inclusion of all women.

Have we come then to the stage of popular sovereignty and democratic and representative parliamentary government, under that unique and greatly admired (mostly by the British, as there are no imitators by choice) phenomenon, the "Unwritten Constitution"?

First of all, let us finally dispose of the myth of an "unwritten" Constitution. The first sentence of the late Stanley de Smith's last book, *Constitutional and Administrative Law* (4th edn., 1981) reads, "When de Tocqueville observed that the British Constitution did not exist, few people took his remark at face value"; yet it is true that there is no single identifiable document (or even group of documents, as in Israel, for example) entitled 'The Constitution of the United Kingdom and Northern Ireland". How is this apparent contradiction resolved? There is a clear distinction between *non-existent* and *non-documentary* and de Tocqueville was undoubtedly referring to the difficulty of determining the exact boundaries of constitutional law in Britain and the constituents of the "British Constitution". Perhaps one should also deal with the problem that political scientists have with the definition of "constitution". Jean Blondel provides in his three-fold definition most of the points made in the semantic debate; this can be seen if one compares his definition to, say, those of James Bryce, C. F. Strong, Sir Kenneth Wheare, S. E. Finer, Herman Finer, Carl Friedrich, Karl Loewenstein, and Benjamin Akzin.[30] Blondel writes, "Firstly, constitution may refer – and commonly refers – to various types of imposed norms ... the word has a markedly 'prescriptive' connotation ... in this sense: a 'constitutional' rule is usually one which is particularly 'liberal', which emphasises 'restraint' in the operation of government and which gives maximum freedom to the citizens of the polity. Secondly, constitution may refer to the document ... which creates the structures which may or may not embody the norms ... Thirdly, constitution may refer to the actual organisation of the polity ... a mere description of the institutions."[31]

It seems to me that when the term "unwritten constitution" is being used in general discourse that what is meant is the *absence* of Blondel's second type. The absence of his first type would be indicated by the term "unconstitutional"; the third definition is more concerned with "the political system" which may include elements which do not appear in constitutions (for example, interest groups and even political parties in many cases).

This having been said, what concerns us here is the extent to which it is correct to refer to British constitutional arrangements as being "unwritten" – that is, not set down in formal documentary form.

Fortunately, there is a large measure of agreement amongst British constitutional lawyers as to the constituents (perhaps, "ingredients"?) of the "British Constitution".

The ninth edition of Wade and Phillips on *Constitutional and Administrative Law* lists three major constituents: *rules of law* (legislation, judicial precedent, custom), *conventional rules,* and *advisory opinions.* O. Hood Phillips says much the same: "The laws of the constitution comprise three kinds of rules: statute law, common law, and custom (especially parliamentary custom). To these we must add constitutional conventions ... The sources of the legal rules are ... statutes, judicial precedents, customs and books of authority." De Smith sums up a general agreement (or inability to disagree) with his own slightly enlarged list of sources: *legislation* (" ... by far the most important single source of constitutional law"); *common law* (customary rules, the royal prerogative, judicial decisions, common law presumptions of legislative intent); *conventions of the constitution; the law and custom of parliament; the law of the European Communities* (since 1 January 1973); and, *the "persuasive authority" of literature on the constitution.* These are all more or less revisions of Sir William Anson's pronouncement in 1886: "The constitution must be found, by those who seek it, in statutes, in judicial decisions, in custom, in convention ... but in authoritative documentary form it is not to be found".[32]

The standard authorities agree that legislation is a major source of constitutional law (de Smith says "by far the most important") and, if this is so, why should the term "unwritten" be so consistently used? Writing two years before Anson, James Bryce was urging the replacement of the term "unwritten" and distinguishing between the *common law constitution* ("not in formal agreements, but in usage") and the *statutory constitution* ("expressly set forth in a specially important document or documents").[33] Would not "part-written" or the more elegant "uncodified" be more in line with the actual situation?

There is yet another point to be made. There are over 150 national constitutions in the world (not all in force, regrettably) and a study of them reveals that the great majority of them have conventional rules, judicial decisions, and organic laws to supplement the working of the "documentary constitution" in practice. The United States constitution does not tell the whole story of the American political system – the political parties are not mentioned, the "judicial review" role of the Supreme Court stems more from tacit acceptance of *Marbury v. Madison* (1803) than constitutional authorisation in the text, and the method of electing the President does not represent the intentions of the Founding Fathers in practice though it is followed in law. The great authority of the Prime Minister in the Republic of India could not possibly be realised from the fleeting reference to that office in the longest and most detailed constitution in existence (the Yugoslavs are a very close second in this); in all the hundreds of pages, no reference to political parties will be found. Many more examples could be cited to show that Britain is not alone in having non-documentary or extradocumentary elements in the constitutional system other than the formal constitutional documents.

To revert to the British example. Not only is there a case for calling it an "uncodified" rather than an "unwritten" constitution, but it can be argued that the "written" legislative element in the British constitutional system is far greater than commonly thought – if one is to judge common thought by reference to most textbooks – and that this legislation, if systematically classified, provides the skeletal framework (and some of the living flesh) of a "written" constitution for Britain.

A survey of world constitutions reveals a striking similarity in the internal arrangement of the texts, and there are a number of chapter headings which *mutatis mutandis* appear in the great majority of constitutions. These are *Basic rights and liberties, The formation and components of the national territory, Nationality and citizenship, The Sovereign Power, The legislature, The Executive Power/The Government, National finance and taxation, The judiciary, The armed forces, Local government* (regional, state, provincial, municipal), *Overseas territories, Emergency powers,* and *Constitutional amendment.*

Using these as a classificatory scheme for British legislation which is akin to the content of the majority of national constitutions (which vary in length and detail, the mean being about fifty pages and two hundred articles), one can construct the outlines of a "written" British Constitution.[34] Under *Basic rights and liberties* one could include the operative parts of *Magna Carta* and its later confirmations (for example, Article 29, the "due process" provision), the Bill of Rights (1689), the Act of Settlement (1701), Acts of the reigns of Edward I, Henry IV, Henry V, and Henry VI concerning the liberties of the church and the subjects and for the protection of life and proper-

ty, several statutes concerned with the writ of *habeas corpus,* and the Acts converned with the removal of racial and sexual discrimination. However, the British approach here is of "residual rights"; that one may do as one pleases provided that the law is not broken or the rights of others infringed.[35]

The formation of the United Kingdom could include the statutes concerned with the incorporation of Wales with England, the union of the kingdoms of England and Scotland and the union of Great Britain and Ireland, the creation of Northern Ireland and the Irish Free State and the subsequent Acts concerning Northern Ireland. *Nationality and citizenship* is a clearly defined area of legislation.

There are very many Acts concerning *The Sovereign* which deal with the status of the Crown, the limitations upon the power of the Crown, the Sovereign as Head of the Commonwealth, the succession to the throne and royal marriages, the Regency Acts, the Abdication Act of 1936 (Edward VIII), and financial and other provisions relating to the Royal Family. There are also statutes concerned with the constitution and competence of the Privy Council. There are numerous statutes concerned with *Parliament;* the basic character of the legislature, its powers and privileges, the duration, convening, dissolution and prorogation of Parliament, the calling of emergency sessions, the election and (dis)qualifications of members of the House of Commons, Ministers of the Crown and Officers of the House of Commons, the powers and functions of the House of Lords and its membership and disclaiming of hereditary title. The section on the *Executive* is surprisingly uninhabited; the powerful figure of the Prime Minister is all but invisible, but there are statutory provisions for his or her salary and for an official country residence, and general provisions for the number of permitted Ministers in the Commons, their salaries, and their constitutional status. This is an area where constitutional conventions play a major part.

National Finance and Taxation is, as one might expect, better served for there are statutes concerned with the basic principles of public taxation and the public accounts, the duties of the Treasury, the office of Comptroller and Auditor-General, the Bank of England, the Consolidated Fund and the Civil Contingencies Fund, the National Debt, and the departments of Inland Revenue and Customs and Excise. The *Armed Forces and Civil Defence* are provided for in general statutory provisions as are the police forces.

Statutes provide for the governing principles of the *Judicial System,* the Supreme Court of Judicature, the House of Lords as a Court of Appeal, the Judicial Committee of the Privy Council, and Courts Martial. There exists legislation for the basic administrative structure of *Local Government,* the supervision of local government areas, and exchequer grants for the purposes of local authorities. In addition to a series of individual national Acts of Independence for the countries of the *Commonwealth,* there are statutes providing for the establishment of the Commonwealth Secretariat, for countries leaving the Commonwealth (Burma, Somaliland, South Africa and Pakistan), and for the remaining non-sovereign territories within the Commonwealth.

Emergency Powers are exercised under the Emergency Powers Act of 1920, as amended in 1964; a Proclamation of Emergency can be made in the event of abnormal weather conditions, natural disasters, major breakdowns of plant or machinery, stoppage of essential supplies from abroad, or a combination of any of these with industrial action. The 1964 amendments confirmed the permanence of Defence Regulations authorising the use of military personnel on agricultural work or other urgent work of national importance.

There are no special procedures for the *amendment* of "constitutional law" as, in this respect, "constitutional law" is no different to "ordinary law"; it enjoys no special authority nor does it exercise any special superiority.

To summarise this part of this article: first, the British are no different to the majority of other countries in their possession of a combination of non-documentary and documentary elements in their constitutional arrangements; secondly, the documentary (legislative) element in British constitutional arrangements is extensive enough in number and breadth of coverage to be comparable with many formal documentary constitutions; thirdly, the description of British constitutional arrangements as an "Unwritten Constitution" is at best inaccurate, at worst, absurd.

Finally, we come to consider "the Westminster model" of government, both the domestic version and the export model.

IV

There is a conventional view that that the British system of parliamentary government ("the Westminster model") is such that its benefits should be shared with the countries of the Commonwealth (who do not like the Commonwealth to be called the "British" Commonwealth, by the way) as they come one by one to independence and self-government. This view can be contested in two grounds: first, that serious criticism can be made of the system at Westminster and that it is unlikely to be freely imported elsewhere as it stands; and, secondly, that although at independence the "Westminster model" was widely exported to the now 48 members of the Commonwealth, the present constitutional arrangements of many of these countries differ greatly from both the idealised and the actual system as carried on in Britain.

The idealised view of the British system is that, under a Head of State insulated from politics, generally admired, and with long and varied experience, the government of the day is presided over by a Prime Minister who is the leader of a party that has been given a parliamentary majority by a mature electorate who have participated in free and open elections. Parliament debates the great issues of the day, controls national expenditure and taxation, criticises government policy as an aid to its improvement, scrutinises the work of the central administration, and ensures the redress of collective and individual grievances. The Prime Minister heads a government composed of a Cabinet of her senior ministers and about eighty non-Cabinet ministers all bound to a policy "mandated" by the electorate; the Prime Minister and all her colleagues must justify their actions and their policies before Parliament, and if Parliament withdraws its confidence, they must resign, and face the stern judgement of the electorate upon their stewardship. Each minister has departmental responsibility and can be called to account for the working of his department before Parliament; if incompetence or maladministration be proved then the minister will be called upon to resign either by the Prime Minister or by the direct action of Parliament. Failure to tender resignation will be followed by peremptory dismissal.

The Queen as Head of State gives overall stability to the political system and the Prime Minister as Head of Government is one who has served a long apprenticeship in Parliament in high offices of state and who has been freely chosen as the leader of a party which has the confidence of the nation. The "Unwritten Constitution" has the virtue of flexibility and permits the wide use of constitutional conventions, both permitting and facilitating evolutionary consensual change. Finally, the House of Lords composed of Lords Temporal, Lords Spiritual, Lords of Appeal, and Life Peers (that is, hereditary peers, archbishops and senior bishops, law lords who sit as the final Court of Appeal, and life peers nominated by the Prime Minister after consultation and recommendation) provide a forum removed from party ties and considerations, where the experienced and distinguished perform functions of assistance, advice, continuity, and, when needed, a measure of restraint on the popularly-elected transient majority in the House of Commons.

What is the reality? The extension of the franchise, the growth of national mass parties, and the development of the mass media have changed the nature of general elections which have become "a gladiatorial contest between the party leaders". The majority of the electorate are only marginally politically conscious, and the personalisation of political issues and allegiances reflect this. The voting pattern for the parties is so uniform throughout the country that the influence on a constituency of a particular candidate is insignificant; candidates without the support of a major party can expect to fail and minor or *ad hoc* or single-interest parties can expect to be swept aside. Nearly eighty parties contested the June 1983 General Election, but of the 650 seats being contested, 606 were taken by the two main parties, 23 by the Liberal-Social Democratic Alliance, 4 by the Scottish and Welsh Nationalists (the 17 Northern Ireland seats being dominated by 15 Unionists of varying shades), and the other seventy-odd parties gained none. Although a system of proportional representation would have greatly increased the number of seats for the Liberal-SDP Alliance at the expense of the Conservatives and Labour Party, even the most severe form of proportional representation would have not done more than give one or two seats to three or four minor parties.

Elections are not mandates for comprehensive manifestos and the electors often vote against a party rather than for the winning party; the 1983 election result was seen as a reprimand to the Labour Party for its internal squabbling and its ineffective (though personally engaging and likeable) Leader and a pat on the back for the Prime Minister for what many saw as her energetic and

decisive leadership. The only mandate that most electors give to newly-elected Members of Parliament is to support the Party and its Leader; certainly, the Prime Minister expects, and usually gets, the unswerving support of the mass of the parliamentary majority party and the entire hundred or so members of the Government that she forms. The supremacy of the Prime Minister is further enhanced by her authority to obtain (or threaten to obtain) a dissolution of Parliament, the probability of rebel Members being disowned and replaced by their constituency parties, the feelings of loyalty to one's party and the fear of giving aid and comfort to the opposition parties. Whatever the formal constitutional conventions and party rules, the Prime Minister is in effective control. Not only does he or she have the authority to appoint and dismiss or advance or relegate Ministers, but there is also access to the patronage system for honours, awards and selection of candidates for high public office. The appointments and preferments policies of the present Prime Minister has shown the influence that can be borne in these matters.

The former belief that the Prime Minister was *primus inter pares* ("first among equals") has given way to the realisation that the office-holder is *primum mobile* ("the first mover"). The Prime Minister dominates the cabinet, its members wait upon a summons; there is control and prior approval of the agenda from the Prime Minister; the working of "collective responsibility" can neutralise and isolate a recalcitrant Cabinet minority who have no choice but to "shut up or get out"; the Prime Minister has access to a wide network of policymaking Cabinet committees, and "deals" can be made in inter-departmental committees, cabinet committees, or between the Prime Minister and individual ministers. Business laid before the full Cabinet has often been the subject of previous informal agreement between a minority of that Cabinet in order that opposition may be circumvented or outmanoeuvred.

The electorate have no say in the process of candidate selection in the two major parties; that is, in 606 of the constituencies in the last General Election, the Member of Parliament was chosen by around fifty to a hundred party activists and elected by probably less than 50 % of the electorate. Mrs. Thatcher did well to gain 51 % of the votes in her constituency in June 1983, but 31 % of her constituents did not vote at all and, of those that did, 49 % voted against her. In seats where there was a strong Liberal-SDP challenge to the major parties, the winner often gained far below a majority of the total votes cast; to give some examples, in Aberdeen South (Conservative) the winner gained only 38.9 % of the votes, in Alyn and Deeside (Labour) 40.3 %, in Amber Valley (Conservative) 41.7 %, in Argyll and Bute (Conservative) 38.6 %, and in Bradford North (Conservative) 34.3 % and Bradford South (Labour) 37.5 %. This situation where the winning candidate gains less than 50 % of the votes cast occurs in nearly half of the seats in the present House of Commons; the record is probably held by the Labour member for Carmarthen, Dr. Roger Thomas, who gained only 31.6 % of the votes cast in his constituency. Although the Conservatives gained an impressive majority in terms of seats won (397 out of 650), they gained only 46 % of the votes cast and only 11.7 million of the total electorate of 35.1 million; 27.5 % of the electorate did not vote at all.

Perhaps some words also on the social structure of the House of Commons – that is, how socially representative is it? The statistical analysis for the 1979–1983 House of Commons shows that of the 635 members, 103 were lawyers, 52 were journalists and authors, 74 were teachers and lecturers, 30 were farmers and landowners, 85 were company directors (82 of these were Conservative members), 87 were mangerial executives; there were only 59 associated with working class occupations – of these, 27 were trade union officials, and only one of this 59 was a Conservative member. 330 were graduates of either Oxford and Cambridge (Conservative 169, Labour 58); 50 Conservatives and 1 Labour member were educated at Eton College, the figures for other other public schools being respectively 145 and 20. Many professional and business people in the House treat politics as a part-time profession and morning sittings have always been actively discouraged; the business of the House does not start for most members until after 4 pm and ends most days just after 10 pm; many members arrive on Monday evening or Tuesday morning and leave by Thursday evening; the House does not sit during about four to five months of the year.

V

In brief, the actual "Westminster model" is that of authoritarian single-party governments in a House of Commons dominated by the Prime Minister and composed largely of disciplined parties

with most votes in the House of Commons being highly predictable; every three or four years there is a general election held under a crude simple majority electoral system with minimal participation by the electorate in the choice of who shall be their candidate, though they do have the choice between the candidates who are chosen by the party activists; between 20 % to 30 % of the electorate do not vote at all. Governments rarely fall as a result of a vote in the House of Commons and resignations under "ministerial responsibility" are almost as rare. The vast majority of legislation proposed by the government of the day is passed; it is rare, indeed it is wellnigh impossible, for legislation to be passed of which the governing party does not approve.

Orthodox constitutional theory bestows the individual member with independent action and does not regard him as the representative of the party without which he would not have been elected; over-dependence on the wishes of his constituents would probably lead him into conflict with the party in parliament. The parties are not seen as the formers of policy for the governing party; that is a task reserved for the parliamentary members of the parties. Though this orthodoxy has been challenged in recent years within the Labour Party, the majority of the parliamentary Labour Party implicitly accept it; there is little challenge of substance from the other leading parties.

How many constitutional advisers would dare to propose this version of the "Westminster model" to countries newly-independent or engaged in major constitutional revision?

The "export model" of the Westminster system (that is, something akin to the idealised model) has not met with great success in the post-1950s, though it flourishes in New Zealand, Australia, Canada, and India in a recognisable form. It has either failed (Pakistan), been rejected (Tanzania, Zambia, Nigeria), or changed in major respects. Within a short time of independence, the African Commonwealth countries replaced the Governor-General-parliamentary system based on the British system for a presidential-republican system. The majority of Commonwealth states (about two-thirds) have rejected the need for a second chamber – an essential part of the traditional Westminster system? – and in nearly 20 countries the President or Prime Minister is directly elected or elected by the legislature.

The actual institutions and the working of government in most of the Commonwealth countries bear only a superficial resemblance to the original "export model". The Carribbean countries, with their traditional loyalty to and affection for Britain, which remains undiminished despite British immigration and citizenship laws, are more recognisably "British" in their constitutional arrangements, and it is in this area of the Commonwealth that bicameralism flourishes. There is a marked similarity in their constitutions (from Jamaica in the 1960s onwards) and such an obvious influence from Colonial Office officials and Inns of Court-trained local advisers that I am tempted to introduce the new concept of "the Whitehall model" to describe this group. However, the Caribbean countries have tended to adopt, as is possible in parliamentary systems with disciplined parties, the authoritarian overtones of the real "Westminster model" – perhaps we could not have expected to keep it hidden for ever?

Footnotes

[1] Sir Keith Feiling, *A History of England from the coming of the English to 1918* (1950), pp. 3–4.
[2] Feiling, *op. cit.*, pp. 5–8 *passim.*
[3] J. C. Holt, *Magna Carta* (1965), pp. 1, 292.
[4] S. B. Chrimes, *English Constitutional History* (3rd edn 1965), pp. 103–4.
[5] *ibid.* pp. 108–9.
[6] F. Palgrave (ed.), *Parliamentary Writs* 2 vols. (1827–1834), Vol. 1, pp. 28–31; Carl Stephenson and Frederick Marcham (eds), *Sources of English Constitutional History: A selection of documents from A.D. 600 to the present* (1937), pp. 159–160.
[7] Chrimes, *op. cit.*, pp. 110–113.
[8] Eleanor C. Lodge and Gladys A. Thornton (eds), *English Constitutional Documents, 1307–1485* (1935), pp. 27–32 (concerning the charges laid against Richard II, the commission appointed to depose the King, and the claim of Henry of Lancaster to the throne); and Stephenson and Marcham, *op. cit.* pp. 250, 275 (concerning the Parliament of 1399 and its consideration of "the deposition of the same King Richard . . . the record and process of the renunciation by King Richard" before it was "unanimously agreed that deposition of the said King was abundantly justified" and that Henry of Lancaster "should reign over them" (*Rotuli parliamentorum* (1783), III, 415–34).
[9] See Lodge and Thornton, *op. cit.*, pp. 34–6 (extracts from *Rotuli parliamentorum* (1783), V, 376–8 on the consideration of the title of Richard of York in 1460); also Stephenson and Marcham, *op. cit.*, quoting passages from *Validation of Lancastrian Acts*

(1461) ("Henry IV, of his son Henry V, and of his son Henry VI, recently in succession *de facto* and not rightful kings of England . . . the pretended kings").

[10] Lodge and Thornton, *op. cit.*, pp. 6–7.

[11] Feiling, *op. cit.*, pp. 295–314.

[12] Stephenson and Marcham, *op. cit.*, p. 272 n.1.

[13] *ibid.*, pp. 298–9.

[14] Sir George Clark, *English History: A survey* (1971), p. 187.

[15] Chrimes, *op. cit.*, pp. 122–8 *passim.*

[16] Chrimes, *op. cit.*, pp. 132–3; Clark, *op. cit.*, pp. 188–9.

[17] Stephenson and Marcham, *op. cit.*, pp. 276–7; Lodge and Thornton, *op. cit.*, p. 167.

[18] Chrimes, *op. cit.*, p. 134.

[19] J. E Neale, *The Elizabethan House of Commons* (1949); reviewed in *English Historical Review* 65 (1950) by Lawrence Stone.

[20] Stephenson and Marcham, *op. cit.*, pp. 418–24, 427–431; Chrimes, *op. cit.*, pp. 140–6; Feiling, *op. cit.*, pp. 441–55.

[21] See Stephenson and Marcham, *op. cit.*, pp. 516–23, for the records of the trial of Charles I and the establishment of "a Commonwealth and Free State"; Chrimes, *op. cit.*, pp. 146–56; Feiling, *op. cit.*, pp. 456–92.

[22] Chrimes, *op. cit.*, p. 152; Feiling, *op. cit.*, pp. 535–43.

[23] C. Grant Robertson, *Select Statutes, Cases and Documents . . . 1660–1832* (4th edn 1923), pp. 104–57, 161–79; Stephenson and Marcham, *op. cit.*, pp. 598–615.

[24] *Quam diu se bene gesserint* means that judges were to hold their offices subject to "good behaviour"; see Stephenson and Marcham, *op. cit.*, p. 612 and Grant Robertson, *op. cit.*, p. 156.

[25] See the article, "The waning of the influence of the Crown", in *English Historical Review* 62 (1947).

[26] See Feiling, *op. cit.*, pp. 787–802; R. J. White, *Waterloo to Peterloo* (1957); Norman Gash, *Politics in the Age of Peel: A study in the technique of parliamentary representation, 1830–1850* (1960); Michael Brock, *The Great Reform Act* (1973); and F. B. Smith, *The making of the Second Reform Bill* (1966).

[27] S. F. Woolley, "Personnel of the Parliament of 1833", in *English Historical Review* 53 (1938).

[28] Stephenson and Marcham, *op. cit.*, pp. 723–5.

[29] Stephenson and Marcham, *op. cit.*, Section XIV; Grant Robertson, *op. cit.*, pp. 327–346; F. B. Smith, *op. cit., passim.* Other readings relevant to the foregoing discussion are Sir David Lindsay Keir, *The Constitutional History of Modern Britain, 1485–1968* (9th edn 1969); William Stubbs (ed. H.W.C. Davis), *Select Charters and other illustrations of English constitutional history* (up to 1307) (9th edn reprint 1966); Mark Kishlansky, *The rise of the New Model Army* (17th century) (1980); Paul Slack (ed.), *Rebellion, Popular Protest and the Social Order in Early Modern England* (16th–18th centuries) (1983); G. R. Elton, *England 1200–1640* (1969) (a guide to historical sources); C. S. Emden, *The People and the Constitution* (1933); John Bowle, *The English Experience: A survey of English history from early to modern times* (1971); André Maurois, *A history of England* (1937); G.R. Elton (ed), *The Tudor Constitution: Documents and Commentary* (2nd edn 1982); W.C. Costin and J. Steven Watson, *The Law and Working of the Constitution: Documents 1660–1914* 2 vols. (1952); Walter Bagehot, *The English Constitution* (1867) – see the Fontana 1963 edition with the introductory Essay by R.H.S. Crossman on the growth of prime ministerial government; finally, a work of wit and wisdom, G.R. Elton *Modern Historians on British History, 1485–1945: A critical bibliography for the period 1945–1969* (1970).

[30] James Bryce, *Studies in History and Jurisprudence* (1901) (1884 lectures), I, p. 195; C.F. Strong, *Modern Political Constitutions* (6th edn 1963), p. 12; Sir Kenneth Wheare, *Modern Constitutions* (2nd edn 1966), p. 12; S.E. Finer, *Comparative Government* (1970), pp. 145–6; Herman Finer, *The Theory and Practice of Modern Government* (4th edn 1962), p. 116; Carl J. Friedrich, *Constitutional Government and Democracy* (4th edn 1968), pp. 171, 133; Karl Loewenstein, *Political Power and the Governmental Process* (1957), pp. 123–5; Benjamin Akzin, "On the stability and reality of Constitutions", in Roberto Bachi (ed), *Studies in Economic and Social Science* (1956), III, 314–5.

[31] Jean Blondel, *An Introduction to Comparative Government* (1969), p. 266; Leslie Wolf-Phillips, *Comparative Constitutions* (1972), pp. 7–9.

[32] E.C.S. Wade and G. Godfrey Phillips, *Constitutional and Administrative Law* (9th edn by A.W. Bradley 1977); O. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (6th edn 1978); S.A. de Smith, *Constitutional and Administrative Law* (4th edn 1981); Sir William Anson, *The Law and Custom of the Constitution* (3 vols) (1886; 5th edn by M.L. Gwyer 1922). Those most eminent commentators, Dicey and Jennings, have not been overlooked and their contribution should be read in full: A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885; 10th edn with introduction by E.C.S. Wade 1962) *passim,* and, both as a commentary on Dicey and for its own contribution, Sir W. Ivor Jennings, *The Law and the Constitution* (1933; 5th edn 1959) *passim.*

[33] Bryce, *op. cit.*, I, pp. 148 *et seq.;* see also Leslie Wolf-Phillips, *op. cit.*, pp. 10–17 and references 15–22 on p. 51.

[34] This is done in greater detail in Leslie Wolf-Phillips (ed) *Constitutions of Modern States* (1968), Chapter 10; the 300 statutes listed there under classified headings can be found in the following official publications of Her Majesty's Stationery Office (HMSO), London: *Acts of Parliament of Scotland*

(1424–1707); Statutes Revised; Public General Acts and Church Assembly Measures (annual volumes); *Statutory Rules and Orders and Statutory Instruments Revised; Statutory Instruments* (annual volumes); also consult *Chronological Table to the Statues; Index to the Statutes in Force;* and *Index to Government Orders: Subordinate Legislation – the Powers and their Exercise.* See Wolf-Phillips, *ibid.*, p. 183 for a note on the citation of statutes after the *Acts of Parliament Numbering and Citations Act, 1982.*

[35] Wade and Phillips (ed Bradley), *op. cit.*, p. 442 and note 4 on p. 446.