

Unmasking the State

Session 3 Commentary

The constitution unit of University College London should by rights know what a constitution is all about! Just as well because in the UK, as we shall see, it's a difficult one to pin down. UCL's broad definition has the state and its major institutions at the centre. I would emphasise the phrase about governing relations with the state's citizens. You might query this because in the UK at least, we are nominally subjects rather than citizens. What I want to stress is that it is a subordinate relationship. There is the state and it governs citizens even if they are officially subjects! So it's about exercising power downwards. A hierarchy. We will unravel this during the session.

The notion of a constitution as a legal document that confers powers on state institutions is a fairly recent development, historically speaking. Usually, constitutions are written, accessible documents, amended over time. That's the case, for example, with the American constitution, the modern world's first such document. This came into force in 1788 after a lengthy process of discussion and political agreement by the states who had broken away from English colonial rule.

Why was it created? Having declared independence from arbitrary rule from England – summed up in the phrase no taxation without representation – there was no desire to replace it with something similar. The United Colonies, as they were known, were declared to be the United States. But it was in name only. The 13 states did not yet constitute a single country in terms of a unified state system. The solution was to create a federal state, with powers reserved for central bodies. States were allowed to develop their own laws. Elections were held for president and Congress. Slavery was simply not mentioned in the first constitution. This omission lay behind the civil war 75 years later and drives conflicts over voting and other rights to this day. But that's another story.

Our story is about a peculiar thing called the British constitution. Some argue that the UK doesn't have a constitution because there's no single document setting out the state's powers alongside the rights of citizens. What you do have instead is a series of laws, treaties, conventions, customs, traditions and powers. Many powers were transferred from the monarchy. These are known as prerogative powers. All this amounts to a constitution, one that is uncodified but a constitution nonetheless. Governments and state institutions draw their powers from this scattered constitution.

By way of an introduction, in most countries changing a constitution is normally a protracted and often difficult process. In the United States, for example, an amendment requires the support of at least 75% of the 50 states before it becomes law. Not in the UK. Our opaque constitution means a vote in the Parliament is enough to change the constitution. That's what happened over Brexit, which changed the UK's constitution by removing powers that had been transferred to the European Union.

After the Tory-Lib Dem coalition government took office the cabinet secretary was asked to set out the UK's constitutional framework in a single document. Though not an official, legally-binding document, the Cabinet Manual is a useful guide. You can access it by way of a link at the end of the session.

Clearly the 21st century UK state bears little comparison with that of medieval or feudal England, although some remnants of the past like the monarchy, the Privy Council and the House of Lords, endure to this day.

Constitutional laws can be traced back to attempts to restrain the military power of the Anglo-Norman monarchy established after the 1066 invasion from across the Channel. Monarchy's absolute rule was constrained only by the dependence of the crown on various powerful aristocratic-military families. In 1215 the Magna Carta became the first constitutional or legal limit imposed on the total powers of the monarch. It established the principles of due process and equality before the law and protection from excessive taxes. Magna Carta also contained provisions forbidding bribery and official misconduct. Seems like that one could do with some enforcement today! Parliament began meeting for the first time as an independent body later in the 13th century.

The first decisive political move in the direction of the modern state came with Parliament's resistance to the arbitrary rule of Charles I. He had suspended Parliament between 1629 and 1640. Parliament was eventually recalled because Charles needed money to pay the army. MPs refused to back new taxes, however, and in 1642 Charles was thwarted when he tried to arrest five of their leaders in the Commons. He fled to York and raised his standard. The war between Parliament and Crown began, and raged over Britain and Ireland for nine years. The civil wars became a struggle between the monarchy and supporters of Parliament organised in the New Model Army created by Oliver Cromwell.

In 1649, Charles I was executed after an historic trial held in Parliament, on the charge of waging war on his own people. His removal marked the end of feudal absolutism and the monarchy's claim to rule by divine right. In 1649 England became a republic with the establishment of the Commonwealth of the England. An "Instrument of Government" later adopted was the first written constitution in history and contained ideas about the separation of powers. What can be fairly be called the English Revolution – the country was a republic for 11 years – opened the door to a huge development in ideas and science.

In 1660 the Stuart dynasty was restored and the counter-revolution under James II installed an absolute monarchy once more. Matters came to a head when the James II passed by decree measures which Parliament had rejected. Parliament expelled him from the country in 1688 and invited William of Orange to take the throne, consolidating the transfer of political power from the crown to the Commons. The revolutionary 17th century finally ended in the establishment of a Protestant constitutional monarchy. Basic laws, for example, the Bill of Rights of 1689 and Act of Settlement of 1701, have been the foundation of the British constitution ever since.

Merchants and landowners were the new, unchallenged power in the land. America, Ireland, Jamaica and Barbados were already colonial possessions and the English fleet was the most powerful in Europe after defeating the Dutch. After the so-called Glorious Revolution of 1688, the mechanisms were put in place for the rapid expansion of economic activity and the oncoming development of capitalism.

What is power? Or more precisely, what is state power? We can say it is the capacity of the state acting through its institutions and agents to make changes in society that have legal authority and compulsion. You could also argue it is the capacity of the state to do nothing, to leave things as they are, to uphold the status quo. We will go deeper into the question of

power in later sessions, examining, for example, the relation between state power and capitalism.

Clearly, the UK government, and devolved governments, have a distinct power to issue directions and orders to other state bodies (whether these result in what was intended is a separate question!). The state directs civil servants, police, the armed forces and other agents, who exercise authorised power, to carry out actions and instructions.

So where does the Westminster government in particular get its powers from?

The powers of the prime minister are largely a matter of convention or custom and tradition. He/she inherits what are known as prerogative powers from the Crown and by tradition is head of the cabinet. Without the cabinet's support, it's impossible for someone to continue as prime minister. The cabinet itself began life as a sub-committee of the Privy Council, an ancient body which once advised the monarch.

Ministers are granted powers by Acts of Parliament to make regulations to give effect to the new laws. The regulations are made through what are known as statutory instruments. However, unlike the original legislation, these instruments are rarely debated or scrutinised. They cannot be amended and are virtually impossible for MPs to stop. Dr Joe Tomlinson, Research Director of the Public Law Project, said that during the Brexit withdrawal process, thousands of pages of complex laws and regulations were 'rubber-stamped'. MPs – let alone the general public - had little chance of understanding what laws were passed. "The reality", he said in a report, is that this gave the Government a free hand in law-making and Parliament provided little scrutiny."

If these sweeping powers weren't enough, Ministers also have common law and prerogative powers inherited from the Crown.

The principle of the separation of powers first set out in the American constitution of the late 18th century is a fiction when it comes to the UK. Although the executive and Parliament are nominally independent of each other, it's a different story in practice. The executive controls the Parliamentary timetable and spending plans. Crucially, it drafts and brings forward new legislation.

After the creation of a constitutional monarchy in 1688, the powers of the crown passed to Parliament. Elections - if that's what you could call them - were controlled by the landed aristocracy. Many MPs were 'elected' or more accurately chosen, by a handful of voters. By the time of the 1831 general election, out of 406 elected members, 152 were chosen by fewer than 100 voters each, and 88 by fewer than fifty voters.

Driven on by the new manufacturing class, reform became irresistible. Britain stood on the verge of revolution before the 1832 Reform Act extended the franchise and ended rampant corruption at general elections. Key parts of the modern British state like the police, civil service date from this period.

But by 1867 and the Second Reform Act giving the middle classes the vote, Parliament had lost its pre-eminence. Although still at the heart of the constitutional framework, effective power had transferred to the government of the day. Parliament by and large became a place to ratify decisions made elsewhere. And that is the case today. Unless the government has a small majority, MPs remain powerless. They are directed by their parties which way to vote and failing to do so can see them disciplined and even deselected as candidates.

The Westminster Parliament discusses, amends and passes legislation sent to it by the government. An Act of Parliament made in this way is considered supreme or absolute. It can't be challenged or disputed by the courts, for example. This is the convention of Parliamentary sovereignty, established as a result of the 17th century civil wars and the creation of a constitutional monarchy.

Devolved Parliaments have selective powers set out in Westminster legislation with their own administrative structures.

Although the monarchy is subordinate to Parliament and government, it still plays a role in the functioning of the state as a whole. Governments – or more precisely Her Majesty's Government – is formed after the formal approval of the monarch. Similarly, the dissolution of Parliament needs the signature of the monarch. The monarchy is often replaced with the term 'Crown' as the embodiment of executive, legislative, and judicial governance – the state in other words.

As we learned in session 1, the state's decisions are binding on all citizens. Government departments like education, social security, the Treasury, health and social care and so on draw up rules and regulations under legislation. They are implemented and enforced by other parts of the state such as local government and a variety of what are known as 'executive agencies'. These operate at arms length from Whitehall and include agencies like the Prison Service, Ofsted, NHS England and the Independent Police Complaints Commission. There are more than 360 arms-length agencies, with varying levels of accountability to sponsoring departments and Parliament.

The civil service runs various UK-wide and England/Wales government departments and agencies. At the head of each department is a "permanent secretary" with a hierarchy of officials below. These are accountable to ministers but not Parliament.

Police take an oath as officers of the Crown "to cause the peace to be kept and preserved and prevent all offences against people and property". In practice, this is an oath to the state. While the police are operationally autonomous, policing policy and funding are the responsibility of different departments in England and the devolved governments.

Members of the three branches of the armed forces also swear an oath to the Crown in the shape of the Queen. Funding and policy are controlled by the Ministry of Defence. Deployment of the armed forces is a political decision made by the prime minister.

To sum up, the British constitution is impossible to locate in any single place or document. This makes talking about the state even more difficult than it need be!

The inbuilt flexibility of the UK's constitution is protected by the mainstream parties precisely because it is so opaque. A project to codify the constitution was undertaken by a Commons select committee and published a draft in 2015 It fell on deaf ears. The reason is not hard to fathom. Political rule can be easier if the constitution is a little vague or uncertain.

And, unlike most countries, the constitution can be changed by a simple Act of Parliament.

And no court can declare that an oppressive law, for example, is unconstitutional. If the government wants to ban demonstrations or limit freedom of speech, it can enact legislation

without fear that the courts will intervene. New laws can simply ignore the Human Rights Act, for example.

Not for nothing is this system known by the term 'elective dictatorship'.