CHAPTER 15

Constitutions, Law and Judges

'Government without a constitution is power without right.'

THOMAS PAINE, *The Rights of Man* (1791–2)

PREVIEW

In the 1950s and 1960s, the study of constitutions and constitutional issues became distinctly unfashionable. Political analysts turned instead to what were seen as deeper political realities, such as political culture, and the distribution of economic and social power. To be interested in constitutions was to perpetuate an outdated, legalistic and, frankly, boring approach to politics, to focus on how a political system portrays itself, rather than on how it actually works. Since the 1970s, however, constitutional questions have moved to the centre of the political stage. Developed and developing states have adopted new constitutions, and political conflict has increasingly been expressed in terms of calls for constitutional reform. This has occurred because constitutional change has far-reaching implications, affecting not just how decisions are made within government but also the balance of political forces that shape these decisions. Nevertheless, there is considerable debate about how constitutions should be configured and about the nature and extent of their political significance. Such issues, in turn, have had major implications for the role of law and the position of judges. Law has widely been seen as a vital guarantee of public order, but disagreement about the relationship between law and morality, and especially about the extent to which law should uphold individual freedom, have long been core themes in political theory. As far as the position of judges is concerned, although the courts have usually been viewed as strictly separate from politics, in practice, in many parts of the world, they have acquired a growing capacity to shape public policy. This has encouraged a search for a revised balance between judicial, executive and legislative power, and also led to calls for the reform of the courts and the judiciary.

KEY ISSUES

- What is a constitution, and what forms can it take?
- What is the purpose of a constitution?
- To what extent do constitutions shape political practice?
- What is the relationship between law and politics?
- What is the political significance of the courts?
- Can judges keep out of politics? Should judges keep out of politics?

CONCEPT

Constitution

A constitution is, broadly, a set of rules, written and unwritten, that seek to establish the duties, powers and functions of the various institutions of government; regulate the relationships between them; and define the relationship between the state and the individual. The balance between written (legal) and unwritten (customary or conventional) rules varies from system to system. The term 'constitution' is also used more narrowly to refer to a single, authoritative document (a 'written' constitution), the aim of which is to codify major constitutional provisions; it constitutes the highest law in the land.

CONSTITUTIONS

Constitutions: their nature and origins

Traditionally, constitutions have been associated with two key purposes. First, they were believed to provide a description of government itself, a neat introduction to major institutions and their roles. Second, they were regarded as the linchpin of liberal democracy (see p. 270), even its defining feature. Sadly, neither view is correct. While constitutions may *aim* to lay down a framework in which government and political activity are conducted, none has been entirely successful in this respect. Inaccuracies, distortions and omissions can be found in all constitutions. Similarly, although the idea of constitutionalism (see p. 337) is closely linked to liberal values and aspirations, there is nothing to prevent a constitution being undemocratic or authoritarian. In the case of communist states and some developing states, constitutions have, indeed, been profoundly illiberal. Why then bother with constitutions? Why include in an account of the machinery of government a discussion of constitutions? The reason is that the objective of constitutions is to lay down certain meta-rules for the political system. In effect, these are rules that govern the government itself. Just as government establishes ordered rule in society at large, the purpose of a constitution is to bring stability, predictability and order to the actions of government.

The idea of a code of rules providing guidance for the conduct of government has an ancient lineage. These codes traditionally drew on the idea of a higher moral power, usually religious in character, to which worldly affairs were supposed to conform. Egyptian pharaohs acknowledged the authority of *Ma'at* or 'justice', Chinese emperors were subject to *Ti'en* or 'heaven', Jewish kings conformed to the Mosaic Law and Islamic caliphs paid respect to *Shari'a* law. Not uncommonly, 'higher' principles were also enacted in ordinary law, as seen, for example, in the distinction in the Athenian constitution between the *nomos* (laws that could be changed only by a special procedure) and the *psephismata* (decrees that could be passed by a resolution of the assembly). However, such ancient codes did not amount to constitutions in the modern sense, in that they generally failed to lay down specific provisions relating to the authority and responsibilities of the various institutions, and rarely established authoritative mechanisms through which provisions could be enforced and breaches of the fundamental law punished.

Constitutions are thus best thought of as a relatively recent development. Although the evolution of the British constitution is sometimes traced back to the Bill of Rights of 1689 and the Act of Settlement of 1701, or even to the Magna Carta (1215), it is more helpful to think of constitutions as late eighteenth-century creations. The 'age of constitutions' was initiated by the enactment of the first 'written' constitutions: the US constitution in 1787 and the French Declaration of the Rights of Man and the Citizen in 1789. The examples of the USA and revolutionary France not only provided in form and substance a model for later constitution-makers to follow, but also shed light on why and how constitutions come about.

The enactment of a constitution marks a major breach in political continuity, usually resulting from an upheaval such as a war, revolution or national independence. Constitutions are, above all, a means of establishing a new polit-

CONCEPT

Convention

A convention, in everyday language, is either a formal political meeting, or an agreement reached through debate and negotiation. A constitutional convention, however, is a rule of conduct or behaviour that is based not on law, but on custom and precedent. These non-legal rules are upheld either by a sense of constitutional propriety (what is 'correct'), or by practical circumstances (what is 'workable'). Conventions of this sort exist in all constitutional systems, usually providing guidance where formal rules are unclear or incomplete, but they are particularly significant in 'unwritten' constitutions.

ical order following the rejection, collapse or failure of an old order. In this light, the revival of interests in constitutions since the 1970s (with new constitutions being adopted in countries such as Portugal, Spain, Canada, Sweden and the Netherlands, and the issue of constitutional reform becoming more prominent in, for example, the UK, India, Canada, New Zealand and Australia) indicates growing disenchantment, even disillusionment, with existing political systems. In general, it can be said that political conflicts assume a constitutional dimension only when those demanding change seek to redraw, and not merely readjust, the rules of the political game. Constitutional change is therefore about the reapportionment of both power and political authority.

Classifying constitutions

Constitutions can be classified in many different ways. These include the following:

- the form of the constitution and *status* of its rules (whether the constitution is written or unwritten, or codified or uncodified)
- the ease with which the constitution can be *changed* (whether it is rigid or flexible)
- the degree to which the constitution is *observed* in practice (whether it is an effective, nominal or façade constitution)
- the *content* of the constitution and the institutional structure that it establishes (whether it is, for example, monarchical or republican, federal or unitary, or presidential or parliamentary).

Traditionally, considerable emphasis has been placed on the distinction between written and unwritten constitutions. Written constitutions are, in theory, constitutions that are enshrined in laws, while unwritten constitutions are supposedly embodied in custom and tradition (see p. 82). The former are human artefacts, in the sense that they have been 'created', while the latter have been seen as organic entities that have evolved through history. This system of classification, however, has now largely been abandoned. In the first place, an overwhelming majority of states now possess basic written documents that lay down major constitutional provisions. Only three liberal democracies (Israel, New Zealand and the UK) continue to have unwritten constitutions, together with a handful of non-democratic states such as Bhutan, Saudi Arabia and Oman. Moreover, the classification has always been misleading. No constitution is entirely written, in the sense that all its rules are formal and legally enforceable. Few constitutions, for instance, specify the roles of, or even mention, political parties and interest groups. Similarly, no constitution is entirely unwritten, in the sense that none of its provisions have any legal substance, all of them being conventions, customs or traditions.

Every constitution, then, is a blend of written and unwritten rules, although the balance between these varies significantly. In countries such as France and Germany, in which constitutional documents act as state codes, specifying in considerable detail the powers and responsibilities of political institutions, the emphasis is clearly on written rules. The US constitution (the world's first written constitution) is, however, a document of only 7,000 words that confines itself, in the main, to broad principles, and so lays down only a loose framework

for government. US institutions of undoubted constitutional significance, such as congressional committees, primary elections (see p. 228) and the bureaucracy (see p. 361), have simply evolved over time. Other constitutions, although not entirely unwritten, place considerable stress on conventions. For example, the ability of UK ministers to exercise the powers of the Royal Prerogative (technically, the monarch's powers) and their responsibility, individually and collectively, to Parliament is based entirely on convention.

The worldwide trend, however, is to favour the adoption of written and formal rules. Not only has the number of unwritten constitutions diminished, but also, within them, there has been a growing reliance on legal rules. Although respect for the Torah, the Jewish book of holy law, encouraged the Israelis to establish an independent state in 1948 without an authoritative constitutional document, within two years the Knesset had voted to adopt such a constitution by evolution over an unspecified period of time. The publication in the UK of documents such as *Questions on Procedure for Ministers* has given detailed formal substance to practices that were previously covered by ill-defined conventions. The passage in New Zealand of the Constitution Act 1986 (which consolidated previously scattered laws and principles), and the adoption in 1990 of a bill of rights (see p. 340), has been interpreted by many commentators as indicating that New Zealand should no longer be classified amongst the ranks of states with unwritten constitutions.

More helpful (and more accurate) than the written/unwritten distinction is the contrast between codified and uncodified constitutions. A **codified constitution** is one that is based on the existence of a single authoritative document. As pointed out above, most constitutions can be so classified, even though they may differ in the degree to which constitutional detail is specified and the extent to which other provisions are unwritten. The significance of codification is, nevertheless, considerable.

First, in a codified constitution, the document itself is *authoritative*, in the sense that it constitutes 'higher' law; indeed, the highest law of the land. The constitution binds all political institutions, including those that enact ordinary law. The existence of a codified constitution thus establishes a hierarchy of laws. In unitary states, a two-tier legal system exists, in which the constitution stands above **statute law**. In federal states, there is a third tier, in the form of 'lower' state or provincial laws. Second, the status of the codified document is ensured by the fact that at least certain of its provisions are *entrenched*, in the sense that it is difficult to amend or abolish them. The procedure for establishing the constitution, and for subsequently revising it, must therefore be in some way more complex and difficult than the procedure for enacting ordinary statute laws. Finally, the logic of codification dictates that, as the constitution sets out the duties, powers and functions of government institutions in terms of 'higher' law, it must be *justiciable*, meaning that all political bodies must be subject to the authority of the courts and, in particular, a supreme or constitutional court. This substantially enhances the importance of judges, or at least senior judges, who become, in effect, the final arbiters of the constitution, and thereby acquire the power of judicial review (see p. 347).

Uncodified constitutions, although few in number, have very different characteristics. The UK constitution, which is properly thought of as an uncodified but partly-written constitution, draws on a variety of sources. Chief amongst

● **Codified constitution**: A constitution in which key constitutional provisions are collected together in a single legal document, popularly known as a 'written constitution' or 'the constitution'.

● **Statute law**: Law that is enacted by the legislature.

● **Uncodified constitution**: A constitution that is made up of rules drawn from a variety of sources, in the absence of a single authoritative document.

Focus on . . .

A codified constitution: strengths and weaknesses

The strengths of a codified or written constitution include the following:

- Major principles and key constitutional provisions are entrenched, safeguarding them from interference by the government of the day.
- The power of the legislature is constrained, cutting its sovereignty (see p. 58) down to size.
- Non-political judges are able to police the constitution to ensure that its provisions are upheld by other public bodies.
- Individual liberty is more securely protected, and authoritarianism is kept at bay.
- The codified document has an educational value, in that it highlights the central values and overall goals of the political system.

The drawbacks or weaknesses of codification include the following:

- A codified constitution is more rigid, and may therefore be less responsive and adaptable than an uncodified one.
- Government power may be more effectively constrained by regular elections than by a constitutional document.
- With a codified constitution, constitutional supremacy resides with non-elected judges, rather than with publicly accountable politicians.
- Constitutional provisions enshrined in custom and convention may be more widely respected because they have been endorsed by history and not 'invented'.
- Constitutional documents are inevitably biased, because they endorse one set of values or principles in preference to others, meaning that they may precipitate more conflicts than they resolve.

these are statute law, which is made by Parliament, **common law**, conventions, and various works of authority that clarify and explain the constitution's unwritten elements. The absence of a codified document implies, most importantly, that the legislature enjoys sovereign or unchallengeable authority. It has the right to make or unmake any law whatsoever, no body having the right to override or set aside its laws. By virtue of their legislative supremacy, bodies such as the UK Parliament and the Knesset in Israel are able to function as the ultimate arbiters of the constitution: the constitution means what they say it means.

In the UK in particular, this has stimulated deep controversy and widespread criticism. Parliamentary sovereignty (see p. 336) has been held responsible for what Lord Hailsham (1976) termed 'elective dictatorship'; that is, the ability of a government to act in any way it pleases as long as it maintains majority control of the House of Commons. The concentration of power in the hands of the executive to which this leads, and the consequent threat that it poses to individual rights and liberties, has encouraged some to argue that the UK has no constitution at all. If governments can, once elected, act in whatever way they wish, they are surely at liberty to enlarge their own powers at will, and are thereby unconstrained by constitutional rules of any kind. In Griffith's (2010) phrase, the constitution in the UK is 'what happens'. Such concerns fuelled, in the 1980s and 1990s, a growing campaign in the UK for radical constitutional reform, which,

● **Common law**: Law based on custom and precedent; law that is supposedly 'common' to all.

CONCEPT

Parliamentary sovereignty

Parliamentary sovereignty refers to the absolute and unlimited authority of a parliament or legislature, reflected in its ability to make, amend or repeal any law it wishes. Parliamentary sovereignty is usually seen as the central principle of the UK constitution, and results from (1) the absence of a codified constitution, (2) the supremacy of statute law over other forms of law, (3) the absence of rival legislatures, and (4) the convention that no parliament can bind its successors. Parliamentary sovereignty is a strictly legal, and not political, form of sovereignty (see p. 58).

together with the Labour Party's long period in opposition (1979–97), eventually converted the party to the reformist cause. From 1997 onwards, the Blair government reshaped important aspects of the UK's constitutional landscape. Devolution (see p. 390) was introduced in Scotland, Wales and Northern Ireland; referendums (see p. 201) and proportional electoral systems were more widely used; the European Convention on Human Rights (1950) was incorporated into UK law through the Human Rights Act (1998); most hereditary peers were removed from the House of Lords; and freedom of information legislation was passed. Although this programme stops short of codification, some have argued that it has brought about a shift from parliamentary sovereignty to **popular sovereignty** (Hazell, 2008).

An alternative form of classification distinguishes between rigid and flexible constitutions. What procedures exist for amending a constitution? How easily does the constitution adapt to changing circumstances? On the face of it, codified constitutions are likely to be relatively inflexible because their provisions are in some way entrenched in 'higher' law. By the same token, uncodified ones appear to be flexible and adaptable, because laws of constitutional significance can be changed through the ordinary legislative process and conventions are, by their nature, based on conduct and practice. However, there is no simple relationship between written constitutions and rigidity, or unwritten ones and flexibility.

Various degrees of flexibility are possible, and, surprisingly, the flexibility of a constitution is not directly proportional to the formality of its procedures and rules. Whereas the US constitution has endured, albeit with amendments, since 1787, France has had, over the same period, no fewer than 17 constitutions. Similarly, amendment procedures may be more or less complex or difficult. In Australia, Denmark, Ireland and Spain, for example, referendums are used to obtain the public's approval for constitutional amendments or to ratify those endorsed by the legislature. In other cases, special majorities must be achieved in the legislature, as in the requirement in Germany's Basic Law (1949) that amendments must have two-thirds support in both the *Bundestag* and the *Bundesrat*. In the USA, in addition to two-thirds majorities in both houses of Congress, constitutional amendments must be ratified by three-quarters of the 50 states. This requirement has meant that a mere 27 constitutional amendments have been passed, with 10 of these (the so-called 'Bill of Rights') having been introduced in the first two years of the constitution's existence.

The seeming rigidity this produces is, however, misleading. Although the words of the US constitution and other codified documents may change little, their meanings are subject to constant revision and updating through the process of judicial interpretation and reinterpretation. The role of the judiciary in this respect is examined in the final main section of this chapter. Just as written provisions can allow for flexibility, unwritten ones can, at times, be rigid. While, in the UK, the conventions of ministerial responsibility have proved to be so adaptable they can almost be reshaped at the convenience of the government of the day, other conventions are so deeply engrained in the political culture and in popular expectations that their abandonment or modification is virtually unthinkable. This certainly applies in the case of conventions that restrict the political role of the monarchy and prevent monarchs challenging the authority of Parliament.

A third system of classification takes account of the relationship between constitutional rules and principles, on the one hand, and the practice of

● **Popular sovereignty**: The principle that there is no higher authority than the will of the people, directly expressed.

CONCEPT

Constitutionalism

Constitutionalism, in a narrow sense, is the practice of limited government ensured by the existence of a constitution. Constitutionalism can, thus, be said to exist when government institutions and political processes are effectively constrained by constitutional rules. More broadly, constitutionalism is a set of political values and devices that fragment power, thereby creating a network of checks and balances. Examples of such devices include codified constitutions, bills of rights, the separation of powers, bicameralism, and federalism.

government (the 'working' constitution), on the other. As early as 1867, Walter Bagehot in *The English Constitution* ([1867] 1963) distinguished between the 'dignified' parts of the constitution (the monarchy and the House of the Lords), which promoted popular allegiance but exercised little effective power, and its 'efficient' parts (the cabinet and the House of Commons). An effective constitution is one that fulfils two criteria. First, in major respects at least, the practical affairs of government correspond to the provisions of the constitution. Second, this occurs because the constitution has the capacity, through whatever means, to limit governmental behaviour.

An effective constitution therefore requires not merely the existence of constitutional rules, but also the capacity of those rules to constrain government and establish constitutionalism. As we shall see below, however, all constitutions are violated to a greater or lesser extent; the real issue is thus the significance and regularity of such violations. Some constitutions can be classified as *nominal*, in that their texts or principles may accurately describe governmental behaviour but fail to limit it. For instance, the 1982 Chinese constitution acknowledges that China is 'a socialist state under the people's dictatorship', but the constitution lacks significance because the judiciary, charged with interpreting the constitution, is kept under firm party control. Other states have sham or façade constitutions. These differ substantially from political practice and tend to fulfil, at best, only a propaganda role. This is particularly the case in dictatorial or authoritarian states, where the commitment to individual rights and liberties extends little further than the content of the state's constitutional documents.

Constitutions have also been classified in terms of their content and, specifically, by the institutional structure they underpin. This enables a number of distinctions to be made. For example, constitutions have traditionally been categorized as either monarchical or republican. In theory, the former invest constitutional supremacy in a dynastic ruler, while, in the latter, political authority is derived from the people. However, the emergence of constitutional monarchies (see p. 292), in which power has effectively been transferred to representative institutions, has meant that, apart from in the surviving absolute monarchies in states such as Swaziland, Oman and Saudi Arabia, this distinction is no longer of central importance. More widely used, though, is the distinction between unitary and federal constitutions (discussed more fully in Chapter 17); that is, the difference between constitutions that concentrate sovereignty in a single national body and ones that divide it between two levels of government.

Yet another approach is to differentiate between what are seen as parliamentary constitutions and presidential constitutions. The key here is the relationship between the executive and the assembly. In parliamentary systems, the executive is derived from and accountable to the assembly; in presidential systems the two branches of government function independently on the basis of the separation of powers (see p. 313). These different systems are examined in Chapters 13 and 14. Finally, pluralist constitutions can be contrasted with monopolistic ones. The former are characteristic of liberal democracies, in that they ensure that political power is dispersed, usually through guarantees of participatory rights and party competition. The latter are more commonly found in communist or authoritarian states where the unquestionable authority of a 'ruling' party or supreme leader is formally entrenched, thus demonstrating that a constitution and liberal constitutionalism do not necessarily go hand-in-hand.

The purpose of a constitution

Not only do the vast majority of states have constitutions, but also most institutions and organized groups have rules that have some kind of constitutional effect. This applies in the case of international bodies such as the United Nations and the European Union, and is also true of regional and provincial government, political parties, interest groups, corporations, churches, clubs and so on. The popularity of these constitutional rules draws attention to the fact that constitutions somehow play a vital role in the running of organizations. Why is it difficult, and perhaps impossible, for states and other organized bodies to function without a constitution? The difficulty with answering this question is that constitutions do not have a single or simple purpose. Rather, they have a number of functions and are used in a variety of ways. The most important of these are to:

- empower states
- establish unifying values and goals
- provide government stability
- protect freedom
- legitimize regimes.

Empowering states

Although the popular image of constitutions is that they limit government power, a more basic function is that they mark out the existence of states and make claims concerning their sphere of independent authority. The creation of new states (whether through the overthrow of colonialism, the fragmentation of larger states, or the unification of smaller ones) is invariably accompanied by the enactment of a constitution. Indeed, it can be argued that such states exist only once they have a constitition, since without one they lack formal jurisdiction over a particular territory, or a governing apparatus that can effectively exercise that jurisdiction.

The state of India can thus be said to have come into existence in the period between the granting of independence in 1947 and the adoption of its federal constitution in 1950: during this time, a UK-appointed Governor General continued to exercise supervision. In the same way, the American Declaration of Independence in 1776 initiated the process through which the USA achieved statehood, but this was not completed until the US constitution was ratified in 1789. The need for empowerment also applies to subnational and supranational bodies. In federal systems, for example, constituent provinces or states have their own constitutions in order to guarantee their sphere of authority relative to that of central government. Although the idea of a formal EU constitution was abandoned in 2005, following its rejection by the Netherlands and France, a collection of treaties – including the Treaty of Rome (1957), the Single European Act (1986) and the Treaty of European Union (1993) and the Treaty of Lisbon (2009) – have constitutional effect, in that they authorize EU bodies to intervene in various ways in the affairs of member states. This highlights the fact that, although **treaties** differ from constitutions, the former can constitute part of the latter. EU law and treaties, for instance, serve as a source of the constitution for each EU member state.

● **Treaty**: A formal agreement between two or more states, on matters of peace, trade or some other aspect of international relations.

CONCEPT

Freedom

The term 'freedom' (or liberty) means, in its broadest sense, the ability to think or act as one wishes. A distinction is nevertheless often made between 'negative' and 'positive' liberty (Berlin, 1958). *Negative* freedom means non-interference: the absence of external constraints on the individual. Freedom, in this sense, is a private sphere within which individuals are 'at liberty' to act as they wish. *Positive* freedom is linked to the achievement of some identifiable goal or benefit, usually in the sense of personal development, self-realization, or self-mastery.

Establishing values and goals

In addition to laying down a framework for government, constitutions invariably embody a broader set of political values, ideals and goals. This is why constitutions cannot be neutral; they are always entangled, more or less explicitly, with ideological priorities. The creators of constitutions therefore seek to invest their regime with a set of unifying values, a sense of ideological purpose and a vocabulary that can be used in the conduct of politics. In many cases, these aims are accomplished explicitly in preambles to constitutional documents, which often function as statements of national ideals. These ideals can vary from a commitment to democracy, freedom or the welfare state to a belief in socialism, federalism or Islam. The 1982 Turkish constitution is dedicated to 'the concept of nationalism as outlined by Atatürk', the founder of the republic, while Germany's Basic Law states a determination to 'serve the peace of the world'.

In other cases, however, these values and ideological priorities are largely implicit. Charles Beard (1913), for example, argued that the provisions of the US constitution were shaped essentially by economic interests, in particular the desire to defend property against the rising power of the propertyless masses. Similarly, it can be argued that, while the Fourteenth Amendment and Fifteenth Amendment to the US constitution acknowledge the significance of racial divisions, the constitution effectively conceals divisions that arise from social class or gender. In the case of the UK constitution, the doctrine of parliamentary sovereignty has been interpreted as a means of discouraging, or even discrediting, forms of extraparliamentary political action.

Providing government stability

In allocating duties, powers and functions amongst the various institutions of government, constitutions act as 'organizational charts', 'definitional guides' or 'institutional blueprints'. As such, they formalize and regulate the relationships between political bodies and provide a mechanism through which conflicts can be adjudicated and resolved. The Indian constitution, for instance, contains a highly detailed description of institutional powers and relationships in a lengthy document containing almost 400 articles. Despite varying in their degree of specificity and their effectiveness, all constitutions fulfil the vital function of introducing a measure of stability, order and predictability to the workings of government. From this point of view, the opposite of constitutional government is random, capricious or arbitrary government. This is precisely why constitutions go hand-in-hand with organization. Complex patterns of social interaction can be maintained only if all concerned know the 'rules of the game' and, therefore, who can be expected to do what.

Protecting freedom

In liberal democracies, it is often taken for granted that the central purpose of a constitution is to constrain government with a view to protecting individual liberty. This is why constitutions tend to be viewed as devices for establishing and maintaining **limited government**. Certainly, constitutions lay down the relationship between the state and the individual, marking out the respective

● **Limited government**: Government operating within constraints, usually imposed by law, a constitution or institutional checks and balances.

CONCEPT

Bill of rights

A bill of rights is a constitutional document that specifies the rights and freedoms of the individual, and so defines the legal extent of civil liberty (see p. 404). Entrenched bills of rights can be distinguished from statutory ones. An *entrenched* bill of rights is enshrined in 'higher' law and, thus, provides the basis for constitutional judicial review (see p. 347). A *statutory* bill of rights, or statute of rights, can be amended or repealed through the same processes as other statute laws. Unlike an entrenched bill of rights, it does not breach parliamentary sovereignty (see p. 336).

spheres of government authority and personal freedom. They do this largely by defining civil rights and liberties, often through the means of a bill of rights. The impact of liberal constitutionalism has ensured that, in many cases, 'classic' or traditional civil liberties (see p. 404), such as freedom of expression, freedom of religious worship, freedom of assembly and freedom of movement, are recognized as 'fundamental' in that they are constitutionally guaranteed. These so-called '**negative rights**' have a liberal character in that, because the state is thus prevented from encroaching on the individual, they mark out a sphere of government *in*activity.

A growing number of states have, in addition, entrenched a range of economic, social and cultural rights, such as the right to health care, the right to education and, even, the right to work. These **positive rights**, however, have caused controversy, because they are linked to the expansion, not contraction, of government, and because their provision is dependent on the economic and social resources available to the state in question. Can these rights and freedoms be thought of as 'fundamental' when there is no practical way of guaranteeing their delivery? In the Indian constitution, this is acknowledged through the qualification that the right to work, for example, is secured 'within the limits of economic capacity and development'.

Legitimizing regimes

The final function of a constitution is to help build legitimacy (see p. 81). This explains the widespread use of constitutions, even by states with constitutions that are merely nominal or a complete façade. This legitimation process has two dimensions. In the first place, the existence of a constitution is almost a prerequisite for a state's membership of the international community and for its recognition by other states. More significant, however, is the ability to use a constitution to build legitimacy within a state through the promotion of respect and compliance amongst the domestic population. This is possible because a constitution both symbolizes and disseminates the values of the ruling elite, and invests the governmental system with a cloak of legality. To make the constitution more effective in this respect, attempts are often made to promote veneration for the constitution itself, either as a document of historical importance or as a symbol of national purpose and identity.

Do constitutions matter?

The value of a constitution is often taken for granted. The existence of a constitution, so the assumption goes, provides benefits such as political stability, limited government, and guaranteed rights and liberties. Nowhere is this faith in a constitution more developed than in the USA, where it amounts, in Louis Hartz's (1955) words, to 'the cult of constitution worship'. Of course, this faith has been severely tested, not least by allegations during the Watergate crisis that President Richard Nixon had helped to cover up illegal acts by senior White House officials during the 1972 election campaign. Nevertheless, Nixon's resignation in 1974 enabled his successor, Gerald Ford, to declare that 'our constitution works', reiterating the classic sentiment of constitutionalism: 'we have a government of laws, not of men'. However, the mere existence of a constitution

● **Negative rights**: Rights that mark out a realm of unconstrained action, and thus check the responsibilities of government.

● **Positive rights**: Rights that make demands of government in terms of the provision of resources and support, and thus extend its responsibilities.

does not ensure that a government is constitutional. Indeed, there is little evidence that a constitution is a major guarantee against tyranny, still less that it offers a 'ticket to Utopia'.

Constitutions 'work' in certain circumstances. In other words, they serve their various purposes only when they are supported by a range of other cultural, political, economic and social conditions. In particular, constitutions must correspond to and be supported by the political culture; successful constitutions are as much a product of the political culture as they are its creator. This is why so many of the model liberal-democratic constitutions bequeathed to developing states by departing colonial rulers failed to take root. Constitutional rules guaranteeing individual rights and political competition may be entirely irrelevant in societies with deeply entrenched collectivist values and traditions, especially when such societies are struggling to achieve basic economic and social development.

In the same way, the various Soviet constitutions not only enshrined 'socialist' values that were foreign to the mass of the people, but also failed to develop popular support for such values during the 74 years of the USSR's existence. In the USA, as a result of widespread and institutionalized racism, the constitutional guarantees of civil and voting rights for black Americans enacted after the Civil War were often not upheld in Southern states until the 1960s. On the other hand, the 1947 Japanese constitution, despite the fact that it was imposed by the occupying USA and emphasized individual rights in place of the more traditional Japanese stress on duty, has proved to be remarkably successful, providing a stable framework for postwar reconstruction and political development. As in postwar Germany, however, the Japanese constitution has had the advantage of being sustained by an 'economic miracle'.

A second key factor is whether or not a constitution is respected by rulers and accords with the interests and values of dominant groups. Germany's Weimar constitution (1919), for example, despite the fact that it enshrined an impressive array of rights and liberties, was easily set aside in the 1930s as Hitler constructed his Nazi dictatorship. Not only did the competitive democracy of the Weimar regime conflict with the ambitions of the Nazis and conservative elites in business and the military, but it was also poorly supported by a population facing economic crisis and little accustomed to representative government. In India, under Indira Gandhi during 1975–77, and in Pakistan, under General Zia ul-Haq during 1977–81, major provisions of the constitutions were abrogated by the declaration of '**states of emergency**'. In these cases, the support of the military leadership proved to be far more crucial than respect for constitutional niceties. The UK's uncodified constitution is often said to provide unusual scope for abuse because it relies so heavily on the self-restraint of the government of the day. This became particularly apparent as the Conservative governments of the 1980s and 1990s exploited the flexibility inherent in parliamentary sovereignty to alter the constitutional roles of institutions such as the civil service, local government and the trade unions, and, some argued, substantially undermined civil liberties.

The final factor is the adaptability of a constitution and its ability to *remain* relevant despite changing political circumstances. No constitution reflects political realities, and few set out specifically to do so. Generally, successful constitutions are sufficiently flexible to accommodate change within a broad and

● **State of emergency**: A declaration by government through which it assumes special powers, supposedly to allow it to deal with an unusual threat.

CONCEPT

Human rights

Human rights are rights to which people are entitled by virtue of being human; they are a modern and secular version of 'natural rights'. Human rights are *universal* (in the sense that they belong to human beings everywhere, regardless of race, religion, gender and other differences), *fundamental* (in that a human being's entitlement to them cannot be removed), *indivisible* (in that civic and political rights, and economic, social and cultural rights are interrelated and co-equal in importance) and *absolute* (in that, as the basic grounds for living a genuinely human life, they cannot be qualified).

enduringly relevant framework; those that are infinitely flexible are, strictly speaking, not constitutions at all. The US constitution is particularly interesting in this respect. Its 'genius' has been its concentration on broad principles and the scope it therefore provides to rectify its own deficiencies. US government has thus been able to evolve in response to new challenges and new demands. The formal amendment process, for example, allowed US institutions to be democratized and, in the twentieth century, judicial interpretation made possible the growth of presidential powers, a shift of authority from state to federal government and, in certain respects, a widening of individual rights.

Such changes, however, can be said to have occurred *within* the constitution, in that core principles such as the separation of powers, federalism and individual liberty have continued to be respected, albeit in renewed form. The same is true of the reforms the Blair government introduced in the UK's uncodified constitution after 1997. In contrast, the constitution of the Fourth French Republic proved to be unworkable, because the emphasis it placed on the National Assembly tended to produce a succession of weak and unstable governments. As the constitution offered no solution to this impasse, the result was a new constitution in 1958, inaugurating the Fifth Republic, which broadened presidential power according to a blueprint devised by General de Gaulle.

THE LAW

Law, morality and politics

The relationship between law and morality is one of the thorniest problems in political theory. On the surface, law and morality are very different things. Law is a distinctive form of social control, backed up by the means of enforcement; it defines what *may* and what *may not* be done. Morality, on the other hand, is concerned with ethical questions and the difference between 'right' and 'wrong'; it prescribes what *should* and what *should not* be done. Moreover, while law has an objective character, in that it is a social fact, morality is usually treated as a subjective entity; that is, as a matter of opinion or personal judgement. Nevertheless, natural law theories that date back to Plato (see p. 13) and Aristotle (see p. 6) suggest that law is, or should be, rooted in a moral system of some kind. In the early modern period, such theories were often based on the idea of God-given 'natural rights'. This assertion of a link between law and morality became fashionable again as the twentieth century progressed, and it was usually associated with the ideas of civil liberties or human rights.

However, the rise in the nineteenth century of the 'science of positive law' offered a very different view of the relationship between **law** and morality. Its purpose was quite simply to free the understanding of law from moral, religious and mystical assumptions. John Austin (1790–1859) developed the theory of '**legal positivism**', which defined law not in terms of its conformity to higher moral or religious principles, but in terms of the fact that it was established and enforced: the law is the law because it is obeyed. This approach was refined by H. L. A. Hart in *The Concept of Law* (1961). Hart suggested that law stemmed from the union of 'primary' and 'secondary' rules, each of which had a particular function. Primary rules regulate social behaviour and can be thought of as the

● **Law**: A set of public and enforceable rules that apply throughout a political community; law is usually recognized as binding.

● **Legal positivism**: A legal philosophy in which law is defined by the capacity to establish and enforce it, not by its moral character.

Debating . . .

Is the central purpose of law to protect freedom?

At the heart of questions about the relationship between law and morality is the issue of freedom and the proper balance between those moral choices that should be made by society and enforced through law, and those that should be reserved for the individual. While liberals have typically argued that laws are only justifiable if they enlarge, rather than contract, the sphere of freedom, conservatives and others have claimed that law serves interests beyond those of the individual.

YES

Personal and social development. The classic liberal belief is that law and freedom are intrinsically related. Freedom is only possible 'under the law' (because each citizen is a threat to every other citizen) but, at the same time, the sphere of law should not extend beyond the protection of freedom (otherwise law is non-legitimate). In *On Liberty* ([1859] 1982), J. S. Mill (see p. 198) thus asserted that, 'Over himself, over his own body and mind the individual is sovereign'. Mill was prepared to accept the legitimacy of law only when it was designed to prevent 'harm to others'. This so-called 'harm principle' can be justified in two ways. First, it reflects the fact that human beings will only grow or develop if they enjoy the widest possible scope for unconstrained action, allowing them to make their own moral decisions. Second, a wider sphere for freedom promotes healthy debate and discussion, so advancing the cause of reason and promoting social progress.

Fundamental freedoms. An alternative defence for liberty-based law derives from attempts to establish freedom as a fundamental value. In Immanuel Kant's (see p. 410) view, freedom consists in being bound by laws that are, in some sense, of one's own making, as individuals should be treated as 'ends in themselves'. However, in modern political debate the notion of human beings as autonomous agents is most commonly grounded in the doctrine of human rights. Human rights are rights to which people are entitled by virtue of being human. They are therefore 'fundamental' rights, in that they are inalienable: they cannot be traded away or revoked. The doctrine of human rights implies that civil liberties – especially classic civil liberties such as freedom of speech, freedom of the press and freedom of movement and assembly – are fundamental entitlements, which are upheld for all people and in all circumstances. To treat such rights and freedoms, not as moral absolutes, but as matters of convenience, is to leave the door open to tyranny and oppression.

NO

Order over freedom. The flaw in the liberal theory of law is a failure to recognize that law exists, primarily, not to defend freedom, but to uphold order; and that, by widening freedom, order can be put at risk. In this view, liberals can only argue that the protection of freedom should be set above other considerations because they embrace an optimistic model of human nature in which people are portrayed as rational and moral creatures. Citizens can thus be endowed with freedom because they can be trusted, in normal circumstances, not to use and abuse their fellow citizens. Conservatives, in contrast, adopt a pessimistic, even Hobbesian, view of human nature, but one which they argue is more realistic. As individuals are greedy, selfish and power-seeking creatures, orderly existence can only be maintained through strict laws, firm enforcement and, where necessary, harsh penalties. 'Soft' laws or the treatment of civil liberties as fundamental freedoms threaten to bring about a descent into crime and delinquency.

Enforcing morality. Instead of promoting personal and social development, unrestrained freedom may damage the fabric of society. At issue here is the moral and cultural diversity which Mill's view permits, or even encourages. A classic statement of this position was advanced by Patrick Devlin in *The Enforcement of Morals* (1968), which argues that there is a 'public morality' which society has the right to enforce through the instrument of law. Underlying this position is the belief that society is held together by a 'shared' morality, a fundamental agreement about what is 'good' and what is 'evil'. In particular, Devlin argued that Mill's notion of harm should be extended to include 'offence', at least when actions provoke what Devlin called 'real feelings of revulsion', rather than simple dislike. The central theme of such arguments is that morality is simply too important to be left to the individual. Where the interests of society and those of the individual conflict, law must always take the side of the former.

CONCEPT

Rule of law

The rule of law is the principle that the law should 'rule', in the sense that it establishes a framework to which all conduct and behaviour must conform. This requirement applies equally to all the members of society, be they private citizens or government officials. As such, rule of law is a core liberal-democratic principle. In continental Europe, it has often been enshrined in the German concept of the *Rechtsstaat*, a state based on law. In the USA, the rule of law is closely linked to the status of the constitution as 'higher' law and the doctrine of 'due process'. In the UK, it is grounded in common law and implies that a codified constitution is not needed.

'content' of the legal system: criminal law is an example. Secondary rules, on the other hand, are rules that confer powers on the institutions of government. They lay down how primary rules are made, enforced and adjudicated, thus determining their validity.

In view of the crucial role that law plays in regulating social behaviour, no one can doubt that it has immense political significance. Nevertheless, questions about the actual and desirable relationship between law and politics – reflecting on the nature of law, and its function and proper extent – have provoked deep controversy. Much of our understanding of law derives from liberal theory. This portrays law as the essential guarantee of civilized and orderly existence, drawing heavily on social-contract theory (see p. 62). In the absence of the state and a system of law – that is, in the 'state of nature' – each individual is at liberty to abuse or threaten every other individual. The role of law, then, is to protect each member of society from his or her fellow members, thereby preventing their rights and liberties from being encroached on. However, the notion that the central purpose of law is to protect freedom has provoked deep controversy (see p. 343).

As this protection extends throughout society and to every one of its members, law has, liberals insist, a neutral character. Law is therefore 'above' politics, and a strict separation between law and politics must be maintained to prevent the law favouring the state over the individual, the rich over the poor, men over women, the ethnic majority over ethnic minorities, and so on. This is why liberals place such a heavy emphasis on the universal authority of law, embodied in the principle of the rule of law. This view of law also has significant implications for the judiciary, whose task it is to interpret law and adjudicate between parties to a dispute. Notably, judges must be independent, in the sense that they are 'above' or 'outside' the machinery of government and not subject to political influence.

THE JUDICIARY

The judiciary is the branch of government that is empowered to decide legal disputes. The central function of judges is therefore to adjudicate on the meaning of law, in the sense that they interpret or 'construct' law. The significance of this role varies from state to state and from system to system. However, it is particularly important in states with codified constitutions, where it extends to the interpretation of the constitution itself, and so allows judges to arbitrate in disputes between major institutions of government, or between the state and the individual.

The significance of the judiciary has also been enhanced by the growing importance of international law. The International Court of Justice in the Hague (formally known as the World Court) is the judicial arm of the United Nations. It provides a forum in which disputes between states can be settled, although, as international law respects the principle of sovereignty, this requires the consent of all parties. The International Criminal Court (ICC) has revived the idea established by the 1945–46 Nuremberg trials of **war crimes** or 'crimes against humanity'. The ICC has indicted and arrested a number of people for mass crimes including, in 2001, the former Yugoslav president, Slobodan Milosevic. In

● **War crimes**: Acts that violate international conventions on the conduct of war, usually involving either aggressive warfare or atrocities carried out against civilians or prisoners of war.

CONCEPT

Neutrality

Neutrality is the absence of any form of partisanship or commitment; it consists of a refusal to 'take sides'. In international relations, neutrality is a legal condition through which a state declares its non-involvement in a conflict or war. As a professional principle, applied to the likes of judges, civil servants, the military and other public officials, it implies, strictly speaking, the absence of political sympathies and ideological leanings. In practice, the less exacting requirement of impartiality is usually applied. This allows that political sympathies may be held as long as these do not intrude into, or conflict with, professional or public responsibilities.

addition, there are international courts with regional jurisdiction, such as the EU's European Court of Justice in Luxembourg and the (unrelated) European Court of Human Rights in Strasbourg.

One of the chief characteristics of the judiciary – in liberal-democratic systems, its defining characteristic – is that judges are strictly independent and non-political actors. Indeed, the ability of judges to be 'above' politics is normally seen as the vital guarantee of a separation between law and politics. However, this image of the judiciary is always misleading. The judiciary is best thought of as a political, not merely a legal, institution. As central figures in the legal process, judges play a vital role in such undeniably political activities as conflict resolution and the maintenance of state authority. Although judges are clearly political, in the sense that their judgements have an undeniable political impact, debate about the political significance of the judiciary revolves around two more controversial questions. First, are judges political in that their actions are shaped by political considerations or pressures? Second, do judges make policy in the sense that they encroach on the proper responsibilities of politicians?

Are judges political?

Certain political systems make no pretence of judicial neutrality or impartiality. For example, in orthodox communist regimes, the principle of 'socialist legality' dictated that judges interpret law in accordance with Marxism–Leninism, subject to the ideological authority of the state's communist party. Judges thus became mere functionaries who carried out the political and ideological objectives of the regime itself. This was most graphically demonstrated by the 'show trials' of the 1930s in the USSR. The German courts during the Nazi period were similarly used as instruments of ideological repression and political persecution. In other states, however, judges have been expected to observe strict political neutrality. In states that subscribe to any form of liberal constitutionalism, the authority of law is linked to its non-political character, which, in turn, is based on the assumption that the law is interpreted by independent and impartial judges.

External bias

Judges may be political in two senses: they may be subject to external bias or to internal bias. External bias is derived from the influence that political bodies, such as parties, the assembly and government, are able to exert on the judiciary. Internal bias stems from the prejudices and sympathies of judges themselves, particularly from those that intrude into the process of judicial decision-making. External bias is supposedly kept at bay by respect for the principle of **judicial independence**. In most liberal democracies, the independence of the judiciary is protected by their security of tenure (the fact that they cannot be sacked), and through restrictions on the criticism of judges and court decisions. However, in practice, the independence of judges may be compromised because of the close involvement of political bodies in the process of judicial recruitment and promotion.

Judges in the USA supposedly hold office for life on condition of 'good behaviour'. Supreme Court judges, however, are appointed by the US president, and these appointments are subject to confirmation by the Senate. This process has,

● **Judicial independence**: The constitutional principle that there should be a strict separation between the judiciary and other branches of government; an application of the separation of powers.

since F. D. Roosevelt's battles with the court in the 1930s, led to a pattern of overt political appointment. Presidents select justices on the basis of party affiliation and ideological disposition, and, as occurred to Robert Bork in 1987, the Senate may reject them on the same grounds. The liberal tendencies of the Warren Court (1954–69), and the more conservative inclinations of the Burger Court (1969–86), the Rehnquist Court (1986–2005) and the Roberts Court (since 2005), have thus been brought about largely through external political pressure.

Politics may also intrude into the US judiciary due to the practice found in most states of choosing some, most or all of their judges through contestable popular elections, some of which are openly partisan. Supporters of this practice argue that democracy requires that the electoral principle should apply as much to those who interpret law as to those who make law. Otherwise, judges are accountable to no one, being able to act according to their own views and preferences, rather than those of the public. On the other hand, critics of elected judges point out not only that elections inevitably draw judges into partisan politics, and so make judicial neutrality impossible, but also that selecting judges on the basis of popularity may compromise their expertise and specialist knowledge.

UK judges were traditionally appointed by the government of the day, senior judges being appointed by the prime minister on the advice of the Lord Chancellor. However, the 2005 Constitutional Reform Act not only removed the appointment of judges from the political arena by establishing a Judicial Appointments Commission, but also significantly strengthened judicial independence through the creation, in 2009, of the UK Supreme Court, in place of the appellate committee of the House of Lords. The *Conseil Constitutionnel* (Constitutional Court) in France, which is empowered to examine the constitutionality of laws and can, thus, restrain both the assembly and the executive, is subject to particularly marked political influence. Its members have, in the main, been politicians with long experience, rather than professional judges. The French president and the presidents of the National Assembly and the Senate each select one-third of the members of the Court, party affiliation often being a significant factor.

In Japan, the Supreme Court is effectively appointed by the cabinet, with the high judges being selected by the emperor on the nomination of the cabinet. Prolonged Liberal-Democratic Party (LDP) domination in the post-World War II period meant, however, that the LDP packed the Court with its own supporters, ensuring that it remained firmly subordinate to the Diet. One of the consequences of this was that, despite widespread **gerrymandering** in favour of the LDP in rural districts, the Supreme Court was never prepared to nullify election results, even when, as in 1983, elections were declared to be unconstitutional because of the disproportionate allocation of seats (Eccleston, 1989).

Internal bias

Judicial independence is not the only issue; bias may creep in through the values and culture of the judiciary as easily as through external pressure. From this perspective, the key factor is not so much *how* judges are recruited, but *who* is recruited. A long-standing socialist critique of the judiciary holds that it articulates the dominant values of society, and so acts to defend the existing political

● **Gerrymandering**: The manipulation of electoral boundaries so as to achieve political advantage for a party or candidate.

CONCEPT

Judicial review

The power of judicial review is the power of the judiciary to 'review', and possibly invalidate, the laws, decrees and the actions of other branches of government. In its classical sense, the principle stems from the existence of a codified constitution and allows the courts to strike down as 'unconstitutional' actions that are deemed to be incompatible with the constitution. A more modest form of judicial review, found in uncodified systems, is restricted to the review of executive actions in the light of ordinary law using the principle of *ultra vires* (beyond the powers) to determine whether a body has acted outside its powers.

and social order. This tendency is underpinned by the social exclusivity of judges and by the peculiar status and respect that the judicial profession is normally accorded. Griffith (2010) argued that this conservative bias is particularly prominent in the UK's higher judiciary, and that it stems from the remarkable homogeneity of senior judges, who are overwhelmingly male, white, upper-middle-class, and public school and 'Oxbridge' educated. Similar arguments have been used to suggest that judges are biased against women, racial minorities, and, indeed, any group poorly represented within its ranks.

Although the US Supreme Court has included a nominal black judge since the 1950s and in 2012 contained three female judges, its membership has generally been dominated by white Anglo-Saxon Protestants drawn from the USA's middle and upper-middle classes. On the other hand, in states such as Australia attempts have been made to counter such tendencies by making the judiciary more socially representative. For instance, since the 1980s, Australian judges have been recruited from the ranks of academics, as well as lawyers. Nevertheless, even critics of the judiciary recognize that there is a limit to the extent to which judges can be made socially representative. To achieve a judiciary that is a microcosm of the larger society, it would be necessary for criteria such as experience and professional competence to be entirely ignored in the appointment of judges.

Do judges make policy?

The image of judges as simple appliers of law has always been a myth. Judges cannot apply the so-called 'letter of the law', because no law, legal term or principle has a single, self-evident meaning. In practice, judges *impose* meaning on law through a process of 'construction' that forces them to choose amongst a number of possible meanings or interpretations. In this sense, *all* law is judge-made law. Clearly, however, the range of discretion available to judges in this respect, and the significance of the laws that they invest with meaning, vary considerably. Two factors are crucial here. The first is the clarity and detail with which law is specified. Generally, broadly-framed laws or constitutional principles allow greater scope for judicial interpretation. The second factor is the existence of a codified or 'written' constitution. The existence of such a document significantly enhances the status of the judiciary, investing it with the power of judicial review. In the case of the US Supreme Court, it has turned the court into, as Robert Dahl (1956) put it, 'a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy'.

The Supreme Court's significance as a policy-maker has been evident throughout US history. In the late nineteenth century and early twentieth century, for example, Supreme Courts wedded to *laissez-faire* principles used the doctrine of **due process** to strike down welfare and social legislation: in particular, the court blocked much of Roosevelt's New Deal programme in the early 1930s. It was only after the so-called 'court revolution' of 1937, following the appointment of pro-New Deal judges such as Hugo Black and William O'Douglas, that the shift to economic and social intervention gained judicial endorsement. During the 1950s and 1960s, the court, under Chief Justice Earl Warren, made landmark liberal decisions such as *Brown* v. *Board of Education* (1954), which rejected segregation in schools as unconstitutional, and *Baker v Carr* (1962), which required that legislative constituencies in the USA be of uniform size.

● **Due process**: Conduct of legal proceedings strictly in accordance with estabilised rules and principles, linked to ensuring a fair trial.

POLITICS IN ACTION . . .

Bush v Gore: the US Supreme Court substitutes itself for the electorate?

Events: The 2000 US presidential election, held on 7 November, was contested between Vice President Al Gore, the Democratic candidate, and Texas Governor George W. Bush, for the Republicans. Having initially conceded defeat in a close-fought election, Gore retracted his concession in the early hours of 8 November, as uncertainty grew over the result of the election in Florida, whose 25 electoral college votes would have given either candidate the overall majority needed to win. Doubts of various kinds had surfaced about the accuracy of the count, not least linked to the working of the punch-card ballots used in Florida. In these circumstances, Gore requested hand recounts of votes in four of Florida's counties, and the Florida Supreme Court eventually ordered a state-wide recount of ballots. The US Supreme Court heard two cases, both known as *Bush v Gore*. In the first, the Court granted a temporary delay in enforcing the Florida Supreme Court's order and, in the second, which concluded on 12 December, the Court ordered that the Florida recount be stopped. Gore, as a result, withdrew his objections to the electoral outcome and Bush duly became the 43rd president of the USA. It is generally believed that had the state-wide recount gone ahead, Gore would have won Florida and the presidential election.

Significance: The Supreme Court's capacity to terminate the election of 2000 and, in essence, deliver the presidency to George W. Bush derives from the system of judicial review that operates in the USA. The US constitution makes no mention of judicial review, but, arguably, embodies the logic that made its emergence inevitable. As the constitution laid down legal standards for the behaviour of government institutions, these needed to be supervised or policed, and the judiciary (more specifically, the Supreme Court) was the only institution equipped for this purpose. In the case of *Bush v Gore*, the Supreme Court determined that the actions of the Florida Supreme Court were not compatible with the US constitution because they did not afford Bush the 'equal protection of the laws', as stipulated in the Fourteenth Amendment. The judgement has been defended on the grounds that, in a context of deep and continuing uncertainty, the matter simply had to be resolved. In blocking the Florida recounts, the Supreme Court was acting to bring an end to a damaging period of political insecurity. The exceptional nature of the case was acknowledged in the ruling itself, which stipulated that it should not be used as a precedent for future cases.

However, the Supreme Court has been accused of 'judicial misbehaviour' on at least three grounds. First, many have argued that the Court simply overreached itself. Not only has its interpretation of the equal protection clause of the Fourteenth Amendment been questioned, but a belief in states' rights, embodied in the Tenth Amendment, would suggest that the matter should have been settled not by the US Supreme Court, but by the Florida Supreme Court. Second, given the profound implications of the judgement and the deep controversy surrounding it, the Court demonstrated worrying divisions, the split decision, 5–4, meaning that the outcome was determined by a single vote. Previous landmark judgements have usually been decided unanimously. Third, and most seriously, it has been claimed that the ruling was motivated by considerations of partisan political advantage. Each of the five Justices who supported it had been appointed by Republican presidents and were judicial conservatives, who usually supported states' rights and, above all, judicial restraint. Critics have therefore suggested that these Justices had either acted to promote the advantage of a particular political party, or that, by installing a Republican rather than a Democrat in the White House, they were increasing the chances of further conservative appointments to the Court in the future.

In many cases, the Supreme Court was ahead of Congress and the presidency, often paving the way for later legislation, as in the case of the civil rights reforms of the mid-1960s. Similarly, the Supreme Court upheld the constitutionality of abortion in *Roe* v. *Wade* (1973), at a time when elective institutions refused to address such a deeply controversial issue. Although the **judicial activism** of this period subsequently subsided, reflecting the impact of the conservative appointments of Republican presidents such as Nixon, Reagan and George Bush Sr, the Court continued to exert influence; for instance, in allowing the gradual reintroduction of capital punishment and growing restrictions on the right to abortion. Nevertheless, perhaps the most politically significant of Supreme Court judgments came in December 2000, when the court effectively resolved the disputed presidential election in favour of George W. Bush (see p. 348).

If judges are policy-makers, they must operate as part of the broader machinery of government and within constraints established by the political culture and public opinion. The difficulties the judiciary may encounter in fulfilling its role as guardian of the constitution were demonstrated by the battle between Indira Gandhi and the Indian courts in the 1970s. Despite its written constitution, the balance between US-style judicial review and Westminster-style parliamentary sovereignty in India has never been fully resolved. Amid mounting criticism of Prime Minister Gandhi's autocratic leadership style, in June 1975 the Indian High Court declared her guilty of electoral malpractice and disqualified her from political office for five years. Although the Indian Supreme Court suspended the disqualification pending an appeal, within days Gandhi declared a 'state of emergency', allowing for the arrest of hundreds of her political opponents and for the introduction of stiff censorship. Even though the judiciary was able to restore its authority after the lifting of the emergency in March 1977, it has subsequently practised greater self-restraint and has been reluctant to challenge the government of the day so openly again.

The view that judges are policy-makers is less persuasive in the absence of a codified constitution. Where the constitution is unwritten, judges lack a legal standard against which to measure the constitutionality of political acts and government decisions. The UK Parliament is therefore sovereign, and the judiciary is subordinate to it. Before the Glorious Revolution of 1688 in the UK, judges were prepared to set aside acts of Parliament when they violated common law principles, as occurred in *Dr. Bonham's Case* (1610). The revolution, however, established the supremacy of statute law (law made by Parliament), a principle that has only subsequently been challenged by the courts in relation to the higher authority of EU law. The power of judicial review can, nevertheless, be applied in a narrower sense in the case of executive powers that are derived from enabling legislation. In such cases, the principle of ***ultra vires*** can be used to declare actions of ministers, for instance, unlawful. Indeed, since the 1980s there has been a marked upsurge in judicial activism in the UK, highlighting the growing political significance of judges. This growing activism reflects both the spread of a 'human rights culture' within the UK judiciary and anxiety about the misuse of executive power that flows from the absence of effective constitutional checks and balances in the UK. The Human Rights Act (1998) has bolstered this trend by widening judges' capacity to protect civil liberties in relation to terrorism and other issues, often leading to clashes with ministers.

● **Judicial activism**: The willingness of judges to arbitrate in political disputes, as opposed to merely saying what the law means.

● ***Ultra vires***: (Latin) Literally, beyond the powers; acts that fall outside the scope of a body's authority.

SUMMARY

- A constitution is a set of rules that seek to establish the duties, powers and functions of the institutions of government and define the relationship between the state and the individual. Constitutions can be classified on the basis of the status of their rules, how easily their rules can be changed, the degree to which their rules are observed in practice, and the content of their rules and the institutional structure that they establish.
- Constitutions do not serve a single or simple purpose. Amongst their functions are that they empower states by defining a sphere of independent authority, establish a set of values, ideals and goals for a society, bring stability, order and predictability to the workings of government, protect individuals from the state, and legitimize regimes in the eyes of other states and their people.
- There is an imperfect relationship between the content of a constitution and political practice. Constitutions 'work' in certain conditions, notably when they correspond to, and are supported by, the political culture, when they are respected by rulers and accord with the interests and values of dominant groups, and when they are adaptable and can remain relevant in changing political circumstances.
- Questions about the actual and desirable relationship between law and politics are deeply controversial. Liberal theory, sensitive to civil liberties and human rights, tends to emphasize the limited province of law operating simply as a means of guaranteeing orderly existence. The conservative view, however, emphasizes the link between law and social stability, acknowledging that law has an important role to play in enforcing public morality.
- The separation of law from politics is accomplished through attempts to make the judiciary independent and impartial. Judicial independence, however, is threatened by the close involvement of political bodies in the process of judicial recruitment and promotion. Judicial impartiality is compromised by the fact that nowhere are judges representatives of the larger society. In western polyarchies, for instance, they are overwhelmingly male, white, materially privileged and relatively old.
- As judges impose meaning on law, they cannot but be involved in the policy process. The extent of their influence varies according to the clarity and detail with which the law is specified and the scope available for judicial interpretation, and according to the existence or otherwise of a codified or written constitution, which invests in judges the power of judicial review.

Questions for discussion

- How useful is a constitution as a guide to political practice?
- What factors determine the level of respect that rulers show for their constitution?
- Are uncodified constitutions doomed to be ineffective?
- Do codified constitutions and bills of rights merely lead to the tyranny of the judiciary?
- Should law be rooted in 'higher' moral principles?
- Is it desirable that law be separate from politics, and if so, why?
- How scrupulously is judicial independence maintained in practice?
- Does it matter that the social composition of the judiciary does not reflect that of society at large?
- Should judges be elected?

Further reading

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