

The British sense of reserve has much to commend it, but it would be difficult to codify in a constitution

By Democratic Audit

*The separation of powers is a fundamental feature of many written constitutions, but few of them incorporate the supportive principle of institutional self-restraint. In this post, **Dr Aileen Kavanagh** discusses how the British sense of reserve might inform such a principle and considers the implications of including this value in a proposed UK written constitution. While reserve might be a desirable quality, however, she concludes that codifying it would be problematic.*

In fact, much of constitutional law is about *how* power to allocated, regulated and constrained, rather than being directly concerned with the content of particular policies. Even human rights (or constitutional rights) can be viewed as devices for dividing labour between the organs of the state. Of course, the idea of rights is partly grounded in important interests of individuals and the



A beefeater (Credit: Dan Coulter, (CC BY-NC-SA 2.0))

duty to treat everyone with respect. But when we look more closely, we can see that human rights are also ways of allocating, dividing and constraining power. For example, some people say that human rights mean that there are certain things that governments cannot do. And if those rights are enforced by the courts, we might say that constitutional guarantees of human rights transfer some power from the legislature or executive to the courts, because they may empower the courts to check or limit the elected branches in the event of rights-violations. Another way of looking at the issue is to think that human rights transfer power from the state to the individual. Either way, the issue is one about where power lies, how it can be allocated, divided and checked in order to protect certain fundamental values. Processes yield outcomes and if we get the processes right, then the hope is that they will yield the best outcomes for society. There is no perfect or fail-safe way of achieving this. The challenge of institutional design is to do the best we can, given the possibilities and shortcomings of all institutions.

There is one principle which undergirds the separation of powers and, as far as I am aware, does not feature prominently (or at all) in many written constitutions. This is the principle of institutional self-restraint. Whilst written constitutions can allocate and divide power between institutions, there are always grey areas at the boundaries between those institutions and the functions they carry out. In those grey areas, you have to rely on a sense of “constitutional responsibility” amongst the various institutions and power-holders that they will not overstep the limits of their powers and will respect the powers of others. As is well-known, the British constitution has survived for centuries without any formal or legally-defined demarcation of power between the various institutions and power-holders of the state. But the separation of powers is nonetheless achieved largely through the observation of political conventions and a widely accepted sense of constitutional propriety and institutional self-restraint. The division of labour between the institutions is held in place largely by this sense of constitutional propriety amongst the various political and legal elites, supported by a popular sense of what propriety entails.

Now, this sense of constitutional propriety resonates with what many people perceive to be a character-trait or norm of behaviour which is valued greatly in British society. This is *the value of being reserved*. Translated onto the institutional and constitutional plane, British reserve has much to commend it. It can be a way of managing the inevitable disagreement between institutions and avoiding open or distasteful conflict between them. Reserve and politeness oil the wheels of the system and prevent it becoming too conflictual.

The question is: can this value of reserve be written down in a constitution for the United Kingdom? Should it? There is no doubt that a written constitution for the United Kingdom could do the basic work of allocating and dividing functions between the appropriate institutions. Those kinds of provision are evident in almost all written constitutions. But what is more problematic is to try to articulate the deeper unwritten norms of institutional behaviour which undergird this power-allocation. Perhaps those norms work best precisely when they are not articulated openly? Maybe the very act of articulating them openly and explicitly undercuts their deep cultural resonance? Written rules, especially if framed in precise terms, end up telling people what they can and cannot do. My sense is that there is some cultural aversion in the UK to approaching constitutional structures and norms in this way. There may be a belief that it is altogether more desirable (and tasteful) that the various institutional actors *just know how to behave*. If so, then this may be an argument in favour of keeping this part of the British constitution unwritten.

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