

The Executive in the Constitution

I INTRODUCTION

This book is about the executive in the United Kingdom and its place in constitutional law. In it we investigate the central executive—the part of government that consists of ministers and civil servants organized in the great departments of state. We examine the structure of the executive, and the ways in which it co-ordinates and controls the actions of its component parts; and we try to explain the constitutional significance of what we find. We think that this is a rather unusual enterprise. The last book-length treatments of executive government by United Kingdom constitutional lawyers appeared—so far as we are aware—in the nineteen-thirties (Jennings [1936] 1959*a*; Keith 1938). The importance of the subject seems obvious, but its long-term neglect suggests that it would be wise to begin by spelling out its significance in constitutional terms. The reader who simply wants to know what the executive government is and how it regulates itself can turn at this point to Chapter 2 and those that follow it. The reader who wants to know why it is constitutionally important to know these things will, we hope, read on as we try to answer three questions.

First, why is analysis of the internal structure and co-ordination of the executive important to an understanding of our constitution?

Second, if it is important (and we shall obviously say it is), why has it been neglected for so long?

Third, how may such an analysis be related to a positive theory of our constitution? How can we sort out what is constitutionally significant about the executive from what is not?

Before we answer these questions, a further piece of specification may be useful. We naturally feel that the analysis we have to offer in this work should affect the way in which people think about the United Kingdom constitution. In particular, we want to influence the thinking of constitutional lawyers, and the book is therefore written in their language and uses concepts familiar to them such as democratic accountability and the rule of law. We do not attempt to analyse the executive's structure and co-ordinating activity in terms of any particular economic or social theory, but this does not mean that we accept the received theories of constitutional lawyers as adequate to the needs

of intelligent constitutional discussion. In the course of this chapter, therefore, we both review such theories and attempt to show both how influential concepts such as the separation of powers are challenged by modern socio-economic theory, and how ideas drawn from such theory may enrich the analytical apparatus which constitutional lawyers might use.

Implicit in this approach is the view that the constitutional order is neither self-contained nor *sui generis*. The borderline between what is and is not a constitutional issue is not given *a priori* but has to be constructed and constantly adjusted by each society, whether explicitly (in societies which give themselves codified constitutions) or implicitly (as in our own case). As a corollary, we make no assumption that the questions which arise for determination within that border are different in nature from those arising outside it, and we therefore assume, at least *ex ante*, that the same types of analysis, drawn from general social and economic theory, are applicable in both areas. Most writing by constitutional lawyers in the United Kingdom appears to us to start from the opposite position, though there are important recent exceptions (e.g. Loughlin 1992).

II WHY IS THE EXECUTIVE IMPORTANT?

1 The executive in shadow

The executive governs us; it comprises the individuals—mostly ministers and civil servants—who actually control, from day to day, the state's instruments of coercion, wealth and information (Daintith 1997a). The idea that it might not be constitutionally important would seem too bizarre to mention, were it not for the fact that the literature of constitutional law is remarkably reticent on the subject. The standard texts go on at length about the *arcana* of royal prerogative and its relationship with statutory powers. They offer careful analysis of ministerial responsibility to Parliament. They even show interest in the rather 'political' subject of the relative influence of Prime Minister and Cabinet. Yet their treatment of the formal structure of government is perfunctory, even grudging: a few pages usually suffice to deal with the status and powers of ministers and departments, with a nod at the special position of Secretaries of State (e.g. Bradley and Ewing 1997: 298–305).

Reading these standard texts, one seems always only to glimpse the executive; to see it, in some sense, as the reflection of some other organ's concerns and functions. Departmental action is viewed through the prism of how ministers account to Parliament; executive action generally

(including, in this case, the behaviour of local authorities as well as central government) is also observed through the distorting mirror of judicial review, with its parade of instances of bad and unlawful administration. Responding to judicial and parliamentary evaluation, within the confines of a collective responsibility likewise conceived in parliamentary terms, sometimes appears to be the very *work* of government, as opposed to the constitutional *discipline* to which that work must be subject. This, dominant, approach to United Kingdom constitutional law has been characterized as 'red light theory' (Harlow and Rawlings 1997), or as 'normativism', either 'liberal' or 'conservative' (Loughlin 1992). Its lack of interest in how government gets and maintains the means to govern renders it, in our view, a seriously incomplete account of our constitutional structure. Effective government is a highly problematical pursuit.

We certainly do not deny the over-riding importance of these parliamentary and judicial constraints. Indeed, we shall argue in this book that the way the executive works is being significantly changed by the shifting balance in the relative importance of these disciplines, and by the arrival of new constraints, like the law of the European Community, which now permeates almost every area of government. Unless, however, we look inside the executive, we cannot begin to understand how these traditional and new constraints really operate—or if indeed they work at all. Through proper analysis, we shall find that there is a close interdependence between such controls on the executive, which we will broadly describe as 'external', and the 'internal' controls which operate within it as part of the necessary processes of co-ordination and control entailed by its particular structure.

2 External controls and the compliance principle

One way of appreciating how this interdependence might function in practice is by taking a detour into a different field: the world of finance. Financial firms, from banks to commodities traders, have become subject to an increasingly complex mass of regulation, as their businesses have become larger, more multi-functional (what were banks are often now financial conglomerates), multi-national in their scope, instantaneous and continuous in their dealings, and exposed to significantly higher levels of client and own-account risk. An almost universal response to this phenomenon has been to underline the concern of management with regulatory compliance through the appointment of compliance officers within such firms. Their job is not just to check whether the firm is complying with the mass of national and transnational regulation to which it is subject, but much more important, to develop, install, and

monitor structures and processes for everyday decision-making which minimize the risk of regulatory breach. The compliance officer, in other words, attempts to ensure that there exist effective internal controls. If he does his job, the firm will keep out of trouble with the official regulators; indeed, assuming that official regulation is economically rational, the conduct which ensures this may also operate to the firm's general commercial benefit, as by enhancing its reputation of reliability and honesty among investors.

A commitment to an effective system of internal control is not only a necessity if a firm is to thrive in highly regulated financial markets; it is also a pre-condition if a complex official system of regulation is to work. Modern financial regulation depends crucially on the reporting by financial operators of large amounts of information which can be quickly scrutinized for anomalies; on complaints; and on occasional inspection activities. Regulatory authorizations focus on entry to business, not on day-to-day transactions. Modern regulators, in other words, have no capacity to supervise the day-to-day behaviour of financial businesses. If therefore firms do not have appropriate control and business systems, official regulation will simply break down.

For 'financial firm', we can readily substitute 'executive government'. Parliament and the courts, in exercising their constitutional control functions, find themselves very much in the position of the modern financial regulator. With one important exception, in the field of expenditure audit (below, pp. 193–9), they have no capacity for continuous supervision. They rely on analogous mechanisms of large-scale information transmission, and on reactive response to complaints (whether political, administrative, or legal) and to anomalous events. Their scope for following up their interventions is strictly limited. In consequence, the effectiveness with which the values of democratic accountability and of legality are implemented in the British system depends in large measure upon the executive's being so organized and controlled as to achieve those ends. Without such organization and control, Parliament and the courts might say all the right things; indeed, by reason of the fact that there would be innumerable breaches of the relevant principles, they would be led to say them far more often than they presently do; but such utterances would not get translated effectively into corrective action and preventive re-design of systems of behaviour.

These characteristics, of financial enterprise and its regulation on the one hand, and political enterprise and its control on the other, may each be seen as an expression of a very general idea that different social sub-systems—such as law, finance, and government—operating autonomously and according to different principles, are incapable of controlling one another's operations. Control signals emitted by one system can

only be acted upon by another once translated into its own operational codes, a process which may transform them out of all recognition (Teubner 1992; compare Dunsire 1978). One means of minimizing such distortion and enabling sub-systems to interact effectively is by means of 'structural coupling', that is, the creation within such sub-systems of mechanisms which in some way reproduce the operations of other sub-systems and are therefore capable of reflecting and responding to their messages. The compliance function within financial enterprises, and the control and co-ordination mechanisms within central government which are the subject of our study, may be seen as examples of such structural coupling.

This general lesson of systems theory, that effective constitutional control of government by the other 'powers'—legislative and judicial—of the State depends on the executive's own structure and internal controls, is largely ignored by constitutional law thinking, which has tended to approach issues of control in a partial and distorted way. Consider the debate about ministerial responsibility. There is ample evidence for the proposition that this particularly British manifestation of the idea of democratic accountability of government has, since the middle of the last century, been a powerful influence shaping both the organization of government and the way it copes with the increasing mass and complexity of business. It produced a government of departments identified by function and organized as multi-layered structures which emphasize vertical transmission of information and opinion, and offer greater sensitivity to the *political* dimensions of routine administration than to other qualities such as efficiency (Royal Commission on the Civil Service 1914: 82–3; Parris 1969: chs. III and IV). Constitutional lawyers, however, have tended to neglect this structural coupling between executive organization and the procedures of parliamentary accountability in favour of issues of blame and sanction for ministers, issues which are largely irrelevant to the control system. The contemporary crisis of ministerial responsibility has little to do with blame and sanction either, but may be seen as deriving from governmental attempts to break away, for reasons of efficiency and effectiveness, from the old structures and internal controls, without acknowledging the inconsistency of these moves with the traditional procedures and concepts which constitute the external, parliamentary control (see further below, pp. 44–5). In this area there is at least debate about the importance of internal structures, in which constitutional lawyers are beginning hesitantly to join (Freedland 1995; 1996); elsewhere, notably in regard to judicial control, effectiveness is something which lawyers seem to prefer not to think or talk about. A prophet occasionally cries in the wilderness (Harlow 1976; Richardson and Sunkin 1996), but others are too busy with doctrinal chatter to hear.

3 The plural executive

A key element of the compliance function in any complex organization is its capacity to ensure that decisions taken at the centre are in fact carried out across the organization. This most basic aspect of internal control cannot be taken for granted. In the United States context, Wilson and Rachel asked in 1977 how far public agencies could produce desired social effects when the end in view required that one government agency modify the behaviour of another. They thought that this was likely to be very difficult: so difficult, in fact, that they ended by suggesting that except in certain cases—where change was not seen as threatening agency autonomy, or where it could be backed by monopoly control of a necessary resource—it might be easier for public agencies to change the behaviour of private actors than that of other public agencies (Wilson and Rachel 1977).

Any constitutional lawyer in Britain who read these interesting reflections at the time might well have been inclined to put them aside as inapplicable to a country which, after all, had a unified executive, unencumbered (in 1977 if not now) with 'independent' executive agencies, and cemented together under an unchallenged leader by the convention of collective responsibility and the discipline, and common conviction, of party politics. To do so would have been a mistake. The fact is that the United Kingdom executive is more plural than unitary. This may seem an odd way to put the matter. It is necessary because law and convention speak with different voices on the issue. Indeed, law treats the executive as both plural (operationally) and unitary (conceptually). We explore these positions in detail in our next chapter. Here, the key point to emphasize is that our executive (while still conceived of as the unitary Crown) is made up of departments, and it is normally to the heads of these departments (who are usually but not invariably ministers), and not to the government as a whole, that powers, and resources, are allocated by law.

This feature of our constitution may, as we have said, be fleetingly noticed in the textbooks, but given that they are written by lawyers, its significance is curiously underplayed. Instead, the emphasis is placed on the political capacities of control and co-ordination possessed by Cabinet and Prime Minister (below, pp. 22–3, 51–7). It is, however, precisely this dispersion of legal powers which makes those capacities vital to orderly government. The legal powers of the government as a whole are confined to those—important but rather few—which are vested in 'Her Majesty in Council' or simply in 'Her Majesty' and which will be exercised on the advice of Prime Minister and (perhaps) Cabinet. The Prime Minister, acting as such, has no legal powers, though we should

acknowledge that his conventional power over his government has the legal base of the Sovereign's rights to appoint and dismiss her own ministers, to summon and dissolve Parliament, and other such prerogatives, whose exercise he determines. A further support for this power is the portfolio he has held as Minister for the Civil Service since control was transferred away from the Treasury in 1968 (below, pp. 65–9). Other central capacities which have some legal support, such as control of the public revenue, reside in a department—in this case the Treasury (below, Chapters 4–6).

The distribution of most of a government's powers and functions among its component departments in this way, with little or no countervailing central legal power, is unusual in modern constitutional practice. The United States, with its independent regulatory agencies, might appear a much more plural administration than that of the United Kingdom; in fact, if we restrict our attention to the core executive, the United States government is among the most unitary, the constitution providing simply that 'the Executive Power shall be vested in a President of the United States of America' (Constitution, article II.1). Just how far this restricts legislative ordering of the structure of government is open to argument (compare Calabresi and Rhodes 1992 with Lessig and Sunstein 1994), but the President's legal power of direction of his Cabinet is not in issue. Elsewhere legislative attribution of functions to ministries, as in Italy, is balanced by giving the President of the Council of Ministers powers to direct the general policy of the government and to maintain the unity of its political and administrative approach (Constitution of Italy 1948, art. 95); or—as in France—the Prime Minister is given a general power of direction, in a constitutional framework which leaves the legal organization of government in its own hands (Constitution of 1958, arts. 21, 34, and 37). Only in Thailand have we come across a structure where executive power is, in strictly legal terms, more dispersed than in the United Kingdom (Bunnag 1992).

In making these comparisons we do not want to suggest that the shape of the formal law is the only factor determining the unity or plurality of the executive at the national level. What really matters, perhaps, as the determinant of the essentially plural and non-hierarchical nature of the United Kingdom executive, is the long-established fact of the distribution of the tools of government among the different departments, and the entrenched habit of their utilization on this basis. Law, especially when it emanates from Parliament (legislation) rather than from within the executive (prerogative Orders in Council), formalizes this situation, demands that changes to the distribution of functions are likewise formal and legal, and legitimates the specific interests of the department when they come into conflict with collective policy requirements.

The executive thus structured faces a chronic, and serious, problem of control of its component parts by the 'centre'. This adds a further dimension to the compliance problem already identified as a reason for looking within the executive. Legally speaking, what courts and Parliament seek to control is not a compact monolith, but a loosely structured conglomerate, with a number of co-ordinate *loci* of power and responsibility, the departments. Could democratic and legal control be effective if each such department's compliance arrangements, and responses to Parliament and courts, were entirely its own affair? Aside from the multiplication of efforts that this would involve, it would imply the avoidance of responsibility by government as a whole for the failings of one of its component parts, an outcome rejected by Parliament at least since the party system of government developed, if not earlier. If our constitution is to work, therefore, external control procedures need to be completed not just by appropriate compliance arrangements within each department, but by a system of co-ordination and control of those arrangements by the 'centre' of the executive itself.

Two examples, to be developed in detail later in this book, will show how the internal co-ordination of the executive is coupled—well or badly—with external controls.

First, legal advice (below, Chapters 7, 9). Most major departments have their own legal services. Smaller ones (and the defence departments) share the services of the Treasury Solicitor; but the Treasury Solicitor also does litigation for some (but not all) of the major departments too. There can be divergences between the advice given by legal services to their departments on similar matters. The Attorney-General, a minister, is legal adviser to the government as a whole; but whether he gets the opportunity to give advice depends on whether he is consulted by the relevant minister or ministers. Where is the obligation to consult defined and laid down? In the internal document, *The Ministerial Code* (Cabinet Office 1997*d*) (formerly *Questions of Procedure for Ministers*), which rests on the Prime Minister's conventional authority and whose contents were, until 1992, a state secret. Once given, the advice is confidential to the department which receives it. Indeed, because it is the minister and the department who are responsible for the decision to which the advice refers, the very fact of seeking the Attorney's advice is, by convention, not to be disclosed outside the executive, since to do so might dilute the minister's responsibility. These considerations are highly relevant to the operation of judicial review. They place obstacles in the way of forming and diffusing collective government views on administrative law issues, and they mean that any such views cannot be made publicly available other than through arguments presented within specific litigation, unless government makes a special decision to do so

(as on Rhodesian sanctions, on aspects of the first Maastricht Treaty, on public interest immunity after the Matrix Churchill affair). Even within the litigation framework, the Treasury Solicitor's Department, which handles most of it, may find that different departmental clients maintain different views. Exceptionally, within the field of EU law, there is machinery for making collective or centralized decisions on legal advice. Doubtless this reflects the binding and non-appealable nature of decisions of the European Court of Justice; that is to say, it represents a response of the system to the demands of a new and powerful system of control. Structural modifications to the machinery of government legal advice, reflecting the growing power of the domestic judicial review system, have come more slowly, but as we shall see, are now occurring.

A second example is offered by public expenditure information (below, Chapter 5). Parliament has long relied on the Treasury to furnish consistent and useful information, especially within the framework of estimates procedure, through which it might exercise its function of granting supply. Thus the Treasury has presented the estimates of most of the civil departments since the mid-nineteenth century (revenue and defence came later). But the Treasury, in its pursuit of value for money, wants both to make departments take greater responsibility for their own efficiency by delegation of its financial controls, and to increase its own (and hence, it would argue, Parliament's) control over the economic efficiency of departmental policy and administration by introducing new formats for financial information and new principles of accounting and budgeting (based on resources and accruals, not cash). Very much a matter of management: but this process involves switching a lot of detailed information from the estimates (a Treasury responsibility) to annual departmental reports, designed by departments and presented by them to Parliament, albeit under Treasury supervision. House of Commons Select Committees, both general (the Treasury Committee and the Public Accounts Committee) and departmental, have been most exercised about this, because they fear that this relaxation of control within the executive will lead to variation of departmental practice, difficulty in linking estimates and reports, loss of objectivity, loss of information relevant to public audit, and so on.

Examples of this kind, in which there are strong reciprocal effects between low-visibility executive norms (who owns legal advice? who controls the content of expenditure information?) and the operation of traditional controls, are multiplied in the chapters that follow. The next question we should consider here is why the visibility of these executive norms should have remained so low.

1 The political background

We have already suggested that the preoccupation with parliamentary and judicial controls as a subject of constitutional law, rather than with the activity and organization of government that is the subject of control, exemplifies the dominant tendency in constitutional law writing over the last hundred years in Britain. If we ask why writers in this tradition should view the executive much as Victorians viewed the mentally ill, as an object of restraint rather than of analysis, always at risk of 'running amok' (Wade and Forsyth 1994: 5), fear and mistrust may suggest themselves as an answer. The 'age of collectivism' was seen by Dicey as an age of danger, precisely because of the powers of social control accumulating to the executive (Dicey 1905). The consequences of this liberal suspicion of the developing welfare state have been projected, via the clarity and force of Dicey's legal analysis, into the core literature and attitudes of constitutional law, so that the essentially political shaping of its agenda is now all but invisible.

While it is the political and philosophical background of 'red light theory' which most clearly distinguishes it from alternative writings in constitutional law ('green light theory' or functionalism, as most notably represented by Laski, Jennings and Robson in the nineteen-thirties (Loughlin 1992)), the sublimation of the executive as a topic of analysis in that theory is not purely a matter of political dislike. A variety of features of long-established constitutional doctrine combine as deterrents to any lawyer tempted to look within the black box of the executive.

2 The separation of powers

The first of these is the doctrine of the separation of powers. The issue here is not that of the conformity of the United Kingdom constitution with the normative requirements of the doctrine. There are obvious difficulties in arguing that a constitution incorporating the principle of parliamentary government, in which the leadership of the majority party in the House of Commons directs the action of the executive, manifests such conformity. Only the judiciary's position in relation to other organs of government seems to approximate to those characteristics of independence, and of mutual constraint through checks and balances, that the doctrine demands. None the less, the influence of the doctrine on constitutional law thinking may be judged by the fact that even those who question its relevance to the United Kingdom often do so from the standpoint established by the doctrine itself: that is to say,

Montesquieu's idea that the primary classification of the organs of government in Britain could, as a matter of empirical observation, be made in accordance with the schema of executive, legislative and judicial functions (Montesquieu [1748] 1989: Book XI, ch. 6; cf. Vile 1967: ch. IV). What the critics call into question, whether with bold strokes (Marshall 1971: ch. V) or in fine detail (Bradley and Ewing 1997: ch. 5), is the nature of relations between the different organs of government; they do not challenge the broad characterization of functions nor the drawing of the key dividing lines between organs of government which results from it.

Even as no more than a crude labelling system for the organs of government, however, separation of powers is today called into question by new social theories such as public choice theory (Mueller 1989), which applies economic analysis to political action and is based on the premise that 'the basic motivational structure of the individual agent is viewed as constant across institutional settings, at least in the short term' (Brennan and Hamlin 1996: 607). In other words, people pursue their own self-interest, whether they are arms dealers or judges, civil servants or footballers, politicians or actors. The more sophisticated proponents of public choice do not deny that the self-interest of one who chooses public service may be differently structured from that of one who, say, goes into commerce, particularly in terms of the ordering of such goods as money, power, prestige, and the satisfactions of altruism. The theory does, however, warn, in our view rightly, against the assumption that institutional frameworks—such as those marked off by the separation of powers—necessarily either represent or produce distinctive behaviour or preferences in those who work within them. It asks us not to assume that civil servants and ministers are always hungry for power whereas judges are inspired only by disinterested concern for the rule of law.

The idea that 'perverse' motivations—such as the desire to obtain personal enrichment from office—might cut across the boundaries drawn by the separation of powers has to some extent been officially recognized in the shape of the Committee on Standards in Public Life, established in 1994. The Committee is concerned with the standards of conduct of all 'holders of public office'. It gave early consideration to questions of personal enrichment by Members of Parliament as well as by civil servants and ministers, and in the course of that inquiry promulgated a set of principles which apply indifferently across the public service (Committee on Standards in Public Life 1995: 14). Judges, however, apparently continue to enjoy an official presumption of possession of the virtues (such as honesty and integrity) urged on others by the Committee; its terms of reference define 'holders of public office' in a way which appears inappropriate to describe the judiciary.

Public choice theory, therefore, invites us, as a minimum, to avoid preconceptions about the impact of institutions, in other words to go behind the façade of the separation of powers and to examine, objectively, the characteristics of the organs labelled according to the traditional scheme. Constitutions, like economies, develop by division of labour. From specialization of tasks within the ruler's household, Western states have proceeded to erect some of those tasks into 'offices' of varying degrees of permanence and independence, and to develop particular kinds of institutions—councils, courts—to carry on others. The process of evolution did not stop in 1748 with the publication of Montesquieu's *L'Esprit des lois*, but continues vigorously today, as the spread to Europe of the device of the independent administrative agency vividly demonstrates (Prosser 1997; Cassese and Franchini 1996; Garcia Llovet 1993). Within that process, any stable pattern of specialization creates separations between agents and between functions, and implies a complex structure of dependency and autonomy. The control functions that interest us may be located anywhere in such a structure: they are not the monopoly of courts and legislatures.

While the trinity of executive, legislative, and judicial functions may be the most powerful rationalization of the specialization process that has yet been offered, it cannot by itself capture the overall significance of any given structure of government for constitutional values such as democracy or accountability. Nor does its application tell us much about individual institutions. To say that audit of public expenditure was a judicial function in the fourteenth century, an executive one in the eighteenth, and a legislative one in the twentieth, tells us little if anything about how, how well, and in whose interest, it was carried on. We should therefore resist the easy assumption that the allocations of powers and functions *within* each of the organizational blocs identified by separation of powers doctrine are less significant to the protection of constitutional values than are the relations *between* those blocs. Other possible systems for the diffusion and balancing of public power may well have equal practical importance (Mitchell 1964: 31–8; Griffith and Street 1952: 15–16). Devolution of governmental functions—to Scotland, Wales, to London—is an obvious current case. Functional allocations of power and resources within the national level of executive government are no less important.

3 The Crown

That constitutional lawyers think of the United Kingdom executive as quintessentially unitary must also be due, in significant measure, to the obfuscatory concept of 'the Crown', and to the power of its hold over the

legal mind by reason of its very difficulty and obscurity. From the medieval arguments about the King's two bodies (Kantorowicz 1957) to those of the last hundred years as to what might, or might not, be an 'emanation of the Crown',¹ lawyers in the United Kingdom have wrestled with the problem of the legal personification of the government as a whole; and have generally been defeated. The arena for this struggle has been one common to many jurisdictions: the need to set borderlines capable of clearly identifying the composition and actions of the state and hence the circumstances in which the privileges appropriate to state action should apply in disputes about matters like property, contracts, and non-contractual liability. The difficulties of deploying, for this purpose, a medieval conceit with early modern embellishments (such as the notion of the Crown as 'corporation sole': Maitland 1900, 1901), seem to have blinded lawyers to the significance of the mode of legal ordering of the executive in modern times, with its tendency to assign legal rights and duties to specific members of the government, rather than to that government as a whole. Instead of seeing such assignments as a direct reflection of the changing political conception of the state—a conception evolving towards plurality as a guarantee of effective democratic accountability—they have construed them, until very recently, as a kind of puzzle or paradox, alien to the inherited conceptual apparatus of 'the Crown' yet somehow to be fitted into it (see *Town Investments v Department of the Environment* 1978; Harlow 1980; and compare *M v Home Office* 1994). The pluralist tendency does not eliminate the utility of a legal conception of 'the central government', of 'the state' or of the 'public' as a whole (Marshall 1971: ch. II), though there are hopeful signs that lawyers may now be ready to think about these concepts in the light of principle and reality rather than in the obscurity of Crown learning (Allison 1997). So doing, they may be better able to appreciate the full constitutional import of the rules articulating structure and powers within the executive.

4 The lack of 'real' law

Another reason for the impression of legal unity is the low visibility of the legal rules which allocate functions, powers, and resources within the executive. The rules are a mixture of common law, Orders in Council, and legislation (both statute and statutory instruments); but even those of the latter type, most familiar to lawyers generally, are seldom such as

¹ The term was apparently coined by Mr Justice Day in *Gilbert v Corporation of Trinity House* (1886: 801); for disapproving references to its vagueness, see *International Railway Co. v Niagara Power Commission* (1941) and Lord Justice Diplock in *British Broadcasting Corporation v Johns* (1965: 81–2).

to be the object of litigation and judicial enforcement. British legal scholars, steeped in the common law, regularly play down the significance of such 'imperfect' legal rules, neglecting the considerable weight that their legal status may none the less carry in intra-governmental argument and decision-making (Daintith 1988: 16–20). David, looking across the channel from France, even suggests that in traditional theory, 'the rule contained in the statute will only be finally accepted and fully incorporated into English law when it has been applied and interpreted by the courts', and that this perspective neglects a new body of statutory administrative or *public officers' law* (as opposed to *lawyers' law*) (David and Brierley 1985: 385–6: emphasis in original). Once one moves away from questions of the structure of the executive to consider its internal control, 'real' (judicially-enforceable) law fades even further from view. In the United Kingdom, unlike continental neighbours such as France (Wiener 1996) or Italy (Cassese 1996), the vehicle of expression of such central control seldom takes the form of formal law; the appearance of such formal rules may be a sign that an external discipline, such as requirements of European Community law, has come into play. Thus the EC requirement that for the sake of transparency, government departments pay VAT on some transactions with other government departments gave rise to the Value Added Tax Act 1994, s. 41, and to various implementing rules published—unusually—in the *London Gazette*, the nearest thing we have in the United Kingdom to an *Official Journal*. Most of our material, however, is in the shape of informal guidance, minutes, even letters. Seldom does it rise to the dignity of a Command Paper; often it is not published outside government; sometimes it is still secret.

Constitutional lawyers are unaccustomed to the handling of such material, an activity which one has described, with evident distaste, as 'rummaging about in the publications of government departments and parliamentary officers and committees' (Brazier 1992: 281). How do we find our way amidst this mass of paper when, by definition, we cannot rely on familiar rules of identification and classification of legal norms? when, indeed, even the normative nature of some of the material may be in doubt? To have confidence in dealing with such material one would need the assurance of a solid positive theory of the constitution: a theory, that is, of what the constitution is, as opposed to what it ought to be. Positive theory should tell us why particular political and governmental phenomena should attract the epithet 'constitutional'. We argue, and here we come to the third of our initial questions, that the dominant trends in positive constitutional theory in Britain do not support, indeed are sometimes hostile to, treatment of the internal control of the executive as a subject of constitutional scholarship.

IV POSITIVE CONSTITUTIONAL THEORY

I divide the world
into two main classes—
those who perpetually
divide
the world
into two main classes;
and those who don't.
I prefer
The latter.

(From C. Kent Wright's anthology, *Nectar in a Nutshell* (1944))

Despite this pithy warning, let us try to divide British constitutional writers into four main classes by reference to the positive theory they espouse. We shall call them, purely for ease of reference, foxes, hedgehogs, rude little boys, and Humpty Dumpties.

For most of the twentieth century, the dominant mode of writing by constitutional lawyers has been descriptive (Daintith 1991). The description mixes historical development, current or not-so-current practice, relevant legislative and other rules, and relevant judicial decisions, in an effort to convey to lawyers, in a vocabulary they can understand, what actually happens in the discharge of the relevant branch or function of government. While what happens (or might be expected to happen) is often expressed in the form of legal rules, the normative emphasis of the writing is weak. Changes are recorded as they occur, and new practice is absorbed into the account without a great deal of discussion of its compatibility with existing rules or principles. Where important changes occur and are not reversed, the constitution may be said to be changing, much as one might record a townscape as changing, as old buildings come down and new ones are built, roads are rerouted and public spaces rearranged. There is little sense of tension between what the constitution might require and what is actually done, of its functioning as an overarching structure of norms.

Such writing does not always clearly articulate its theoretical bases, but if we probe a little we may identify two alternative theories of the constitution which might explain it. We refer to their respective holders in terms of the fable of the fox and the hedgehog. The fox, it will be recalled, knew many things, but the hedgehog knew one big thing. Critics of these orthodoxies can likewise be conveniently referred to in terms of rhyme and fable.

1 The constitution as empirical record

Foxes propound a unique British understanding of constitutions. Elsewhere, the constitution is a fundamental and comprehensive normative statement of how the nation's government must be carried on: a collective affirmation and expression of political values, which is itself a source of guarantees that those values will be respected. By contrast, the people of the United Kingdom have never felt the need to set down the principles and structure of its government in a comprehensive and ordered way. Even at times of revolution, crisis, and radical change, a partial restatement—of what was changing or to be changed—is all that has been thought necessary. The United Kingdom 'constitution' is different not just in its patchwork appearance, but in its basic nature: not a set of fundamental norms of government, but an empirical record of how the country is in fact governed. It reflects, after the fact, the decisions we may take about changing our system of government, such as—to take a recent example—shifting power from democratic local authorities to technocratic 'quangos'; it does not, as do other constitutions, provide the normative framework in which such decisions must be taken. That framework has been provided, instead, by political values which are sufficiently deeply enracinated and broadly shared to be confidently applied—by legislators, judges, ministers—to issues as they arise without the artificial constraint of constitutional reference. Dicey's third sense of the rule of law, that the general principles of the constitution are 'the result of the judicial decisions determining the rights of private persons in particular cases brought before the courts' (Dicey 1959: 195), encapsulates this style of thinking (see also Bryce 1901: vol. I 145–254).

2 The constitution as one 'grand idea'

Constitutional hedgehogs have a different reason for treating the constitution as a structure of facts rather than of norms. They find, in the United Kingdom constitution, a key normative principle which, by its very nature, pre-empts the possibility of any other principles of equal status—or, for that matter, of any status superior to that of ordinary legislation. For most writers this is, of course, the principle of parliamentary sovereignty. On this view, since there is no legal check on Parliament's capacity to change by legislation any existing law or practice, propositions about, say, the 'constitutional' relations of central and local government (as in Elliott 1981*b*) can only be understood as being descriptive of existing practice and values, since they enjoy no greater protection against change than any other norm—as we have

recently seen (Loughlin 1994). Indeed, it is argued by Grant that any other understanding admits the danger of 'an unhappy process of inductive reasoning in which description unconsciously becomes translated into norm, and in which constitutional "conventions" are invented to serve the political arguments of the day' (Grant 1989: 254).

A maverick among hedgehogs is John Griffith, who in 1963, to the confusion of students ploughing through their standard texts, coined the phrase 'if it works, it's constitutional' (Griffith 1963), and who in 1979 went on to proclaim (1979: 19) 'Everything that happens is constitutional. And if nothing were to happen, that would be constitutional also.' Though these appear as statements of an extreme descriptivist slant—even effectiveness has been abandoned as a test by 1979—they are in fact associated with a slightly less parsimonious account of a core normative structure for the constitution than that normally offered in the shape of parliamentary sovereignty. This account is unorthodox in placing the executive, not Parliament, at the centre of discussion. It treats as the 'heart' of the constitution the right of the government to take any action it thinks necessary for the proper government of the United Kingdom, subject to not infringing legal rights except so far as permitted by statute and prerogative, to the need for the legislative consent of Parliament for any change in the law and, perhaps also to be seen as part of this core, to compliance with applicable European Community law (Griffith 1979: 15). While the emphasis on executive initiative makes this a much more realistic representation of United Kingdom government than is evoked by parliamentary sovereignty, its author shares with Grant the aim of debunking any claims to discover constitutional norms outside the extremely skeletal structure he describes.

3 The constitution as fiction

In recent decades the dominance of these tendencies has waned under sustained attack. The first group of critics have been likened—by one of their number—to the little boy in the fairy tale who noticed that the emperor had no clothes on and, being unsophisticated, said so, to general embarrassment. These people react to both foxes and hedgehogs by saying that for the British to think their government is clothed in a constitution is pure self-deception. Some, like Ridley, argue that we have never had a 'real' constitution, that is, an act establishing or constituting our system of government, made by an authority outside and above the order it constitutes, having an authority superior to that of other laws, and being entrenched in some way against ordinary processes of legal change (Ridley 1988). The immense range of historical and contemporary national constitutional practice renders suspect, however, any

such attempt to claim that a particular form of constitution is somehow more authentic than others (Wolf-Phillips 1972). An alternative formulation is to say that what the foxes describe did once have real normative force, of the kind claimed for the rule of law by Dicey, but that political and social change have now completely eroded it (Johnson 1977: ch. 3; Siedentop 1990). In both cases the suggestion is that we cannot today rely upon the constitutional—or better, non-constitutional—practice of the past; a new constitutional settlement is needed, which should be formal and explicit (cf. Institute for Public Policy Research 1993).

4 The constitution as a structure of values

A second critical tendency takes a step beyond the position of the rude little boys, asserting the existence, in and for the United Kingdom, of a constitution which is not merely descriptive in character. It may not meet the formal criteria advanced by Ridley, but it functions as a true system of obligations laid on public actors. It is to be discovered and defined through the delineation of a number of basic principles or values which, it is alleged, inhere in our constitution, and against which actual legal rules, or constitutional conventions or practice, are to be measured. These procedures present some of the problems which troubled Alice when she met Humpty Dumpty in *Alice through the Looking Glass* ('when I use a word, it means just what I choose it to mean'). Those who argue in this way rely on a number of different theoretical bases, such as collective consumption theory (McAuslan 1983), immanent critique (Harden and Lewis 1986), or a theory of the nature of law (Allan 1993). Their selection of values or principles, varying from one author to another, is inherently open to question (Daintith 1993). Chosen values, like 'open and accountable government' (Harden and Lewis 1986), or 'openness, fairness and impartiality' (McAuslan 1988), may not be precise enough to guide decision-making in practice or to test its legitimacy.

Despite these difficulties, it is clear that this is the only one of the four approaches so far described which might be capable both of accommodating norms of executive self-management as part of the constitution and of providing tests for distinguishing them from bureaucratic and political disciplines. Constitutional foxes and hedgehogs both believe that it is irrelevant or impossible, in the United Kingdom, to define a system of constitutional norms; rude little boys say that there exist no norms to be identified. To attempt this book would be pointless without the belief that norms generated within the executive might properly form part of the constitution. We think that the Humpty Dumpties are right to be convinced of the existence of a United Kingdom constitution

which consists of a stable and effective set of norms, diverse both in form and in weight, and of much greater richness than the crude monoliths offered by traditional theory. In particular, we see no reason to follow the hedgehogs in denying the adjective 'constitutional' both to norms that are not wholly immune to modification by parliamentary legislation and to norms which may not be susceptible to third-party (especially judicial) enforcement.

On the first point, we remark, by way of example, that the structural constraints on legislative alteration of certain norms (such as the limits on what legislation Parliament may consider in the absence of a recommendation from the executive: below, pp. 108–9) are the equivalent of provisions which figure prominently in codified constitutions. A neglected task of constitutional lawyers in Britain is to identify those constraints and test their strength. On the second, we note that the possibility of third-party enforcement is not in general a pre-requisite either of the existence of a norm as such nor even of its effectiveness. This is readily recognized in constitutions, and in constitutional scholarship, outside the United Kingdom. True, the tide is now running in favour of enforcement through constitutional courts, but we should not forget how recently they have arrived on the scene in Europe (Cappelletti 1984), nor the fact that in the home of constitutional judicial review (*Marbury v Madison* (1803)), debate about the significance and effect of executive and legislative interpretation of their own—and each other's—constitutional competences is still very much alive (Alito *et al.* 1993). More generally, the idea of self-enforcing norms is now a commonplace in social science analyses of legal obligations (Telser 1980). There is nothing incongruous or utopian in arguing, as does Harden (1991), that Parliament's legislative authority might be subject to constitutional restriction, notwithstanding the inability of the courts to review legislation. (Whether it actually is so subject, and if so what the restrictions are, are trickier matters.)

V THE EXECUTIVE IN A RESOURCE-BASED THEORY OF THE CONSTITUTION

We therefore need to provide an account of co-ordination and control within the executive in terms of its constitutional significance, without falling into the trap of writing our own personal constitution for the United Kingdom. Unlike the Humpty Dumpties, we do not think that this task can be attempted through the identification of constitutional principles and values. Such principles and values are, of necessity, normative in nature. How can one say whether a given principle or

value forms part of our *positive* constitution? One approach is to ask for some process of official declaration—by a Royal Commission, perhaps (Brazier 1992)—though even here the issue of acceptance is not straightforward. The Nolan Committee's 'Seven Principles of Public Life'—selflessness, integrity, objectivity, accountability, openness, honesty, leadership—represent a ringing declaration, but are they 'official'? Neither the House of Commons nor the government referred to them in its responses to the report (Oliver 1995). Pending such a definitive declaration, the question whether a principle or value has been received as a norm of that constitution must be a matter for empirical enquiry. In a country lacking a codified constitution, such an enquiry raises questions of extraordinary difficulty, notably as to the criteria of reception that should be viewed as sufficient. If the criteria are formal (if, for example, we say that a single legislative reference suffices to import a principle), then this approach may be indistinguishable from one of pure description. If the criteria are substantive (a certain period of acceptance? a certain degree of popular consent? etc.), the constitutional explorer finds herself forced to provide further justifications for their selection, as well as evidentiary rules, in what can easily become an infinite regression of argument.

We do not intend, by raising these objections, to question the essential place of values in constitutional discourse. We would expect constitutional lawyers to be energetic proponents of the protection of human rights and of democracy, of openness and fairness in government, even—why not?—of efficiency and effectiveness in government; to argue about the extent to which existing legal and other rules reflect such values; and to seek change when the rules fail to do so. All this, however, is the discourse of critique and reform, and our objection is only to reliance on values and principles to underpin a *positive* theory of the constitution, a theory of what it is as opposed to what it ought to be. Our preferred approach, therefore, is to address ourselves directly to the task of finding empirical evidence of constitutional rules. In the sphere of the executive, as we have already indicated, such rules may as often be informal, or based on established practice, as formal. Our assumption will be that in the absence of discernible conflicts with rules of superior status (which is not necessarily a simple concept in the United Kingdom legal order), or of inconsistency with rules and practices of similar weight, these rules do in fact form a coherent ensemble which represents a part of the United Kingdom constitution. Subject therefore to the acceptance of general principles relating to the hierarchy of legal sources, this is a strictly inductive approach; we make no assumptions as to the existence or operation of general principles, though we expect to find many such principles made manifest in the rules and practices we

examine. Broadly speaking, therefore, we view our task as expository of the constitution in an area hitherto little studied, and leave to others the task of suggesting improvements or reforms in the light of preferred principles or values.

Even this limited enterprise, restricted to the elucidation of the positive constitution in this area, cannot go forward in a satisfactory way unless it is grounded on some coherent positive theory. This is not just a matter of intellectual coherence; a positive theory is also imperative as a guide to determining whether particular rules or practices are of constitutional significance or not. *Our approach to this issue is grounded in the conception of the state as an associative enterprise for the control of a territory in the interests of the security and well-being of its people, and of the constitution of the state as a set of rules for obtaining, allocating, and deploying the resources it requires for this purpose.* States are, of course, not the only forms of associative enterprise, nor, in our view, are they innately supreme as forms of such enterprise. Such paramountcy as they enjoy is due to the fundamental nature of the services they perform, notably in providing the conditions of material and economic security, and to the monopoly in the use (or threat of use) of physical force that this provision entails. Today, however, it is clear (as perhaps it was not fifty or a hundred years ago) that this paramountcy is under threat from a variety of sources. The increasing powers and range of functions possessed by the international and regional economic organizations like the European Union or the World Trade Organization; the power obtained by private financial operators, individually or collectively, through the creation of means for the instantaneous worldwide transmission of both information and wealth; and the acceptance of global standards of conduct in many areas such as pollution and human rights, are but a few of these (Sassen 1996; Strange 1996).

While the idea of the state as one among many forms of social enterprise has considerable value as a corrective to claims of an exclusive legitimacy in the exercise of power, and has contributed productively to economic theories of constitutional development, its particular importance for us is the emphasis it gives to two facts: first, that the state, like all other enterprises, requires resources in order to fulfil its (self-appointed) tasks (Montemartini 1900; Auster and Silver 1979); and second, that without stable rules determining how those resources are to be obtained, allocated, and deployed, it is unlikely to enjoy much success or to develop very far (North 1981; North and Weingast 1989; McGuire and Olsen 1996). We have developed in some detail elsewhere the notion that the powers of the state derive from its possession of the means to exercise force, of wealth, and of means of information and persuasion, along with the idea that these resources are independent of any particular system of law (Daintith 1997a).

The resources are in other words *pre-constitutional*; they will be found in every state, whether despotic or democratic, and it is the manner in which they are organized by the constitution which will determine the state's political characteristics. It follows that our resource-based definition of a constitution is in no way prescriptive of its content, and admits totalitarian constitutions alongside liberal ones, autocratic constitutions alongside democratic ones. Such characteristics are a function of the constitution's rules about the obtaining and deployment of resources. A constitution will be seen as autocratic and oppressive if it permits the acquisition of state wealth through taxation without popular consent, democratic (in this respect at least) if it insists for this purpose on authorization by an elected legislature. A constitution will be seen to place a different value on free speech and assembly according to whether it envisages the application of state force to protect them, or merely forbids its application to restrict them, or indeed envisages or mandates such restrictive application.

Stable rules for the control and management of the executive's resources thus constitute the object of our inquiry. This definition may look more all-inclusive than it really is, so a little further elaboration may be excusable.

'Stable rules', as discussion earlier will have hinted, are not in our view limited to formal legal rules. 'Constitutional conventions' are included: or at least, such of them as can be described, in the formulations of Wheare (1953: 10) and Jennings (1959*b*: ch. III), as being followed out of a sense of obligation, as opposed to representing mere usage or working practice. Some of the rules we describe in this book may indeed look very different from the examples of constitutional conventions commonly given; but though the inner regulation of the government's public expenditure system doubtless lacks both the glamour and the grandeur of the rules (if rules they be) governing the selection of a Prime Minister in a hung Parliament, it may arguably possess greater influence on the democratic control of governmental policy choices.

On the other hand, not everything in the ordinary books of constitutional law, nor everything that is important, or perhaps even crucial, to the way a particular government works, can be brought within the rubric of 'stable rules'. The most notable exception is perhaps the day-to-day working of the Cabinet system, a source of endless fascination for political scientists and—with less obvious justification—for constitutional lawyers too. People bring a variety of concerns to the study of the way the Cabinet system works and the relative power and influence of its participants: some want to make broad characterizations of the British 'system of government' in terms of its 'Prime Ministerial' or 'Cabinet' character (Mackintosh 1962; Crossman 1972); some want to expose specific bits of bad practice to inspection and thereby to improve

modes of government decision-making (Foster and Plowden 1996: chs. 10, 11; Foster 1997). In either case the material with which they grapple has little normative content; it is about the way a particular administration—which really means a particular Prime Minister—sets out to tackle the job of co-ordinating the work of government. Some Prime Ministers, like Mr Blair (1997–) may make much of their intentions in this respect, some little; most, not excluding Mrs Thatcher (1979–90), find that the practices they install do not necessarily produce the results they anticipated (Mount 1992; James 1994; Jones 1992). In themselves, these constantly shifting styles of work of Cabinet and Prime Minister—what papers circulate, what committees meet, what Cabinet gets to consider or decide—fall clearly on the non-constitutional side of the line Ferdinand Mount draws between the proper concerns of the constitutionalist, and the organization of the executive: ‘making government work better’ (Mount 1992: 156). We do not discuss them. Our topic is rather the structure of lasting rules and institutions within which these co-ordination styles are exercised. Those lasting rules of course evolve, both through deliberate change to accommodate the way a particular administration wants to go about its work, and through the solidification of practice accepted over time in sets of precedents, of which what is now called the *Ministerial Code* is the pre-eminent example (Cabinet Office 1997*d*: Lee 1986). In this way the working practices (and the working mistakes) of one generation in government may shape the constitutional environment of the next.

In a comprehensive discussion of the constitution it would be important to analyse its basis in the deployment and control of resources from first principles, demonstrating, for example, how long-standing and still fundamental constitutional rules developed as responses to resource-related issues. Examples would be the attempt at democratic control of executive maintenance of the means of exercising force, through the requirement of annual legislative approval of maintenance of a standing army (Bill of Rights 1689), or the early assertion of parliamentary control over taxation as a means of supplementing established sources of royal wealth (*ibid.*). But since we are not trying to write constitutional history, and aim to concentrate on the executive’s management of its resources *within the framework of ‘external’ constitutional controls*, we propose to adopt a more synthetic approach in which we focus on resources in the terms on which they are today accessible to the executive. It is, for example, a well-established principle that the executive cannot coerce its subjects, save in highly exceptional circumstances of extreme necessity (*Case of Proclamations* 1611; *Burmah Oil Co. (Burma Trading) Ltd v Lord Advocate* 1964), without the authority of parliamentary legislation. In practical terms, therefore, and under our specific constitution as it exists

today, law, rather than force, is the resource to which the executive must get access. While starting from resources as the raw material of the United Kingdom's constitutional organization, we therefore assume, in laying out the general plan of our discussion, the institutions through which those resources are obtained. Chapter 2 thus addresses the allocation of resources in the most general terms, by considering the rules, both internal and external to the executive, that discipline its organizational structure. We then go on to consider successively the *personnel* of the executive (Chapter 3), its use of *funds* (Chapters 4–6), its *legal institutions* (Chapter 7), and their activities in *law-making* (Chapter 8) and in *legal advice and interpretation* (Chapters 9–10). Such a tripartite division (people, money, laws) has also been used for the analysis of substantive policies of government, which may at different times and under different circumstances find it easier to deploy one kind of resource than another, or may regularly employ them in complex combinations (Rose 1982; Hood 1983).

In conducting our own analysis we shall naturally make reference to the basic constitutional rules—such as legislative consent both to taxation and appropriation of public funds—which condition the whole action of the executive; but our aim is not to discuss those rules for their own sake, but for the way in which they support or constrain the executive's internal organization and regulation of its actions. We shall also notice (Chapter 11) that the executive may adopt systems of internal control—such as the Citizen's Charter programme and the Code of Open Government—which cut right across the use of different kinds of resources, and which may be seen as possibly complementing, possibly substituting for, related external controls traditionally operated by Parliament and the courts.

Throughout our discussion, we shall be looking for evidence (or refutation) of the characteristics of the executive and its internal ordering which seem to be of particular significance to the United Kingdom constitution. We have already signalled the importance which may attach to the plural character of the central executive (above, pp. 6–9), its articulation as a series of co-ordinate functional authorities. We address the way this characteristic affects control of different resources, and how it is affected in its turn by the changes to departmental structures and functions engendered by the 'new public management' in the form of executive agencies and contracting out of tasks. Likewise, we have noted the apparent informality and low legal visibility of the executive's internal ordering processes (above, pp. 13–14); we shall see if these persist amid the 'legalizing' environments of the European Union and of judicial review. A third theme, identified in our opening pages (above, pp. 3–5), is of the possible interdependence between the

internal controls which are our subject and the more familiar external controls by courts and Parliament. How extensive is that interdependence? how symmetrical? Do the judicial power and the legislative power stand in the same relationship to the executive in this respect? These are the key issues to which we shall return in our conclusions in Chapter 12.