
Introduction

Change, not continuity, attracts attention. Constitutional rules that remain unchanged and practices that continue become familiar, are readily taken for granted and easily pass unnoticed. Legislative constitutional changes, in comparison, are easily noticed, and their scope and frequency are ready causes of controversy.

The constitutional changes of recent decades have been frequent, far-reaching and ongoing. The European Communities Act 1972 provides for the domestic application of Community law, and the courts have accepted the implications of its primacy for statutes of the Westminster Parliament.¹ Further domestic, legal and political responses to the continuing process of constitution-building in the European Union² are to be expected. The government's constitutional modernisation programme since the Labour Party came to power in 1997 has resulted in devolution legislation, the Human Rights Act 1998, statutory provision for a Supreme Court and substantial modifications to the office of Lord Chancellor, *inter alia*.³ Legislative and other official initiatives, further, in response to the security fears following the attacks of 11 September 2001 and later atrocities have constitutional implications for the exercise and interpretation of human rights,⁴ the scope of which will become clearer in years to come.

¹ *R v. Secretary of State for Transport ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603.

² See generally J. Shaw, 'Europe's constitutional future' [2005] *PL* 132; I. Pernice and M. P. Maduro (eds.), *A Constitution for the European Union: First Comments on the 2003 Draft of the European Convention* (Baden-Baden: Nomos Verlagsgesellschaft, 2004).

³ Scotland Act 1998; Government of Wales Act 1998; Northern Ireland Act 1998; Constitutional Reform Act 2005.

⁴ See, e.g., Anti-terrorism, Crime and Security Act 2001; Prevention of Terrorism Act 2005; *A v. Secretary of State for the Home Department* [2005] 2 AC 68; [2004] UKHL 56; *A v. Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221; [2005] UKHL 71. See generally Dame Mary Arden, 'Human rights in the age of terrorism' (2005) 121 *LQR* 604.

The extent, form and frequency of the many changes have called into question the common and longstanding assumption⁵ that the constitution is characterised by gradual or evolutionary change and, further, that it remains unwritten. Certain statutes, such as the European Communities Act 1972 and the Human Rights Act 1998, have, arguably, acquired or are acquiring special constitutional status⁶ and are sufficiently comprehensive in important areas to afford some basis for Vernon Bogdanor's recent conclusion that the constitution is 'half way' to codification by 'piecemeal means'.⁷ Such a conclusion would certainly be significant and might be tempting were it not for implicit doubts and overt reactions.

The doubts are implicit in the conclusion that the process is only piecemeal and half-complete – 'a unique constitutional experiment'⁸ – thus quite unlike introducing a written or codified constitution, both in process and outcome. The doubts would seem to arise from the continuing lack of the necessary consensus within government and the real governing political will actually to bring about a written constitution as well as from caution about what may be a typical preoccupation with recent legislative change to the exclusion of earlier change⁹ and barely-noticed continuity. A few years ago, Bogdanor himself rightly recognised the lack of the required political will or consensus to go further and that it 'is of course far too early even to speculate with any degree of

⁵ See, e.g., A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (Harlow, England: Pearson Education, 14th edn, 2007), pp. 31–2; N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003), p. v.

⁶ Through judicial recognition, *inter alia*, that they cannot be impliedly repealed: *Thoburn v. Sunderland City Council* [2003] QB 151 at [60]–[64]; [2002] 1 CMLR 50; [2002] EWHC 195. But see G. Marshall, 'Metric measures and martyrdom by Henry VIII clause' (2002) 118 *LQR* 493 at 495f.

⁷ V. Bogdanor, 'Conclusion' in V. Bogdanor (ed.), *The British Constitution in the Twentieth Century* (Oxford: Oxford University Press, 2003), pp. 689–720, especially at p. 719. See also V. Bogdanor, 'Our new constitution' (2004) 120 *LQR* 242, especially at 246, 259. For Bogdanor, the increased reliance upon referenda that relate to certain statutes is also the beginning of a process by which they are accorded a distinct constitutional status, *ibid.* 246. No referendum, however, has been held in relation to the Human Rights Act 1998, presented by Bogdanor as the potential 'cornerstone of the new constitution', *ibid.* Cf. generally Anthony King's account of what he suggests are fundamental changes in *Does the United Kingdom Still Have a Constitution?* (London: Sweet & Maxwell, 2001). See ch. 2 below, especially pp. 41f.

⁸ Bogdanor, 'Conclusion' in Bogdanor (ed.), *British Constitution in the Twentieth Century*, n. 7 above, p. 719.

⁹ See generally K. D. Ewing, 'The politics of the British constitution' [2000] *PL* 405, especially at 405.

detachment upon the likely consequences of the extensive programme of constitutional reform which began in 1997'.¹⁰ A change in the political priorities of government might occur,¹¹ but the change would need to be substantial and enduring for the massive task of introducing a written constitution to be undertaken and successfully completed.

The overt reactions to many of the reforms that have occurred have been to their substance and particularly to the manner in which they have been brought about. Although, in substance, many have been successfully promoted in the cause of modernisation,¹² Eurosceptic reactions have been longstanding and the most apparent. Reactions to the reform process itself have been more recent but, for present purposes, are of similar constitutional significance, suggesting constitutional impropriety and going well beyond criticism¹³ of governmental failures to deliberate and consult. One early reaction took the form of scathing criticism of the manner in which a 'constitutional revolution' was being brought about: 'It is the muddled, messy work of practical men and women, unintellectual when not positively anti-intellectual, apparently oblivious of the long tradition of political and constitutional reflection of which they are the heirs, responding piecemeal and ad hoc to conflicting pressures – a revolution of sleepwalkers who don't know quite where they are going or quite why.'¹⁴ In particular, the measures of the government first to establish a new Department for Constitutional Affairs, abolish the Lord Chancellor's office and create a Supreme Court, announced by press release as 'far reaching reforms' – 'a substantial package of . . . reform measures' – and in relation to a cabinet reshuffle,

¹⁰ 'Conclusion' in Bogdanor (ed.), *British Constitution in the Twentieth Century*, n. 7 above, pp. 718–19, especially at p. 718. See also, Bogdanor, 'Our new constitution', n. 7 above, 246.

¹¹ Chancellor Gordon Brown, who is widely expected to succeed Tony Blair as Prime Minister before the next General Election, recently made a veiled reference to a written constitution: 'And while we do not today have a written constitution it comes back to being sure about and secure in the values that matter: freedom, democracy and fairness. The shared values we were brought up with and must not lose: fair play, respect, a decent chance in life'. Speech to the Labour Party Conference, Manchester, 25 September 2006.

¹² See generally Lord Irvine, *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays* (Oxford: Hart Publishing, 2003); Ewing, 'Politics of the British constitution', n. 9 above, especially at 428ff.

¹³ Cf. generally the wide-ranging criticisms of Lord Butler in an interview reported by Boris Johnson, 'How not to run a country', *Spectator*, 11 December 2004, p. 12.

¹⁴ D. Marquand, 'Pluralism v populism', *Prospect*, June 1999, p. 27. For a response comparable in substance but not expressed as scathing criticism, see King, *Does the United Kingdom Still Have a Constitution?*, n. 7 above, especially pp. 99–101.

and then to concede that the office should be retained although substantially modified,¹⁵ were events in quick succession that have provoked charges of ‘constitutional vandalism’ and of reforms drafted ‘on the back of an envelope’.¹⁶ These charges from within the legal profession have followed others of ‘constitutional change under anaesthetic’ and of a checklist approach¹⁷ to reform, coming from at least a few working within the media, none the less significant for the metaphoric language in which they have been couched. The ‘Just do it!’ approach of earlier programmes of privatisation appears to have been adopted for the reform of long-established institutions of government.

That the reform process itself has somehow been going seriously wrong has been clear from the overt reactions and perhaps a more general unease, but what exactly has been going wrong and whether wrong for purely political and/or constitutional reasons remain questions without clear answers. In contrast to onerous amendment provisions of a written constitution, we have the legacy of Dicey’s assertion

¹⁵ ‘Modernising government’ – Lord Falconer appointed Secretary of State for Constitutional Affairs’, Downing Street press release, 12 June 2003. For the outcome of the measures, see the Constitutional Reform Act 2005. See generally Lord Windlesham, ‘The Constitutional Reform Act 2005: ministers, judges and constitutional change’ [2005] *PL* 806; Lord Windlesham, ‘The Constitutional Reform Act 2005: the politics of constitutional reform’ [2006] *PL* 35; R. Stevens, ‘Reform in haste and repent at leisure: Ianthe, the Lord High Executioner and *Brave New World*’ (2004) 24 *Legal Studies* 1; ch. 4 below, pp. 94ff.

¹⁶ ‘On the back of an envelope ... constitutional reform or constitutional vandalism?’, Seminar on the British Constitution, Lincoln’s Inn, London, 15 September 2004. To Lord Chief Justice Woolf, the announcement of 12 June 2003, preceded by what had already been ‘a torrent of constitutional changes’ ... ‘clearly indicated an extraordinary lack of appreciation of the significance of what was being proposed.’ ‘The rule of law and a change in the constitution’, The Squire Centenary Lecture, Faculty of Law, University of Cambridge, 2 March 2004, published in [2004] *CLJ* 317, especially at 319, 323. To Sir John Baker, ‘[t]he very idea of a Minister for Constitutional Affairs is an affront to the true concept of a constitution – as something above government, limiting what it may do. The creation of the new ministry on 12 June – without any prior warning or consultation – was effectively an announcement that we no longer have a constitution in that sense, that the constitution is now subject to the same kind of incessant tinkering and experiment as the management of hospitals or railways.’ ‘The constitutional revolution’, Lecture, St Catharine’s College, Cambridge, 20 April 2004, pp. 4–5.

¹⁷ Mary Riddell, a columnist for the *Observer*, speaking from the floor in the Panel Discussion, ‘The British constitution – can we learn from history?’, British Academy, London, 18 June 2003. See also William Rees-Mogg’s exclamation in response to the constitutional reform measures announced on 12 June 2003: ‘No deliberation, no forethought, no debate, no consultation.’ ‘The Supreme Court: isn’t there some law against it?’, *The Times*, 4 August 2003.

that, in the exercise of Parliament's legal sovereignty 'one law, whatever its importance, can be passed and changed by exactly the same method as every other law'.¹⁸ It is still commonly echoed today,¹⁹ indeed amplified by the critical recognition²⁰ that the parameters of government activity can be changed even without recourse to Parliament where it takes place, not under statute, but under common law, as is often the case. The reforms accord with the orthodox Diceyan emphasis on the legal changeability of constitutional law through the exercise of Parliament's sovereignty. The negative reactions they have provoked, however, are reasons to question the sufficiency of that orthodoxy, and, to the extent they suggest constitutional impropriety, the implicit understanding of the constitution by which the reform process has been improper. In a context where the constitution is still commonly assumed to be, or characterised as, evolutionary, many of these reactions are plausibly interpreted as normative expressions of sentiment still derived from traditional understandings of the constitution and to which they still owe much of their appeal.

The chapters below are written in recognition of the doubts about the many constitutional changes of recent decades and the reactions to them. Through a reformation of traditional understandings, their primary purpose is to elaborate upon a conception of a historical constitution to which change, continuity and their relative significance are central. Their secondary purpose is to respond to the Eurosceptic reaction by duly recognising both domestic peculiarities and past and present effects of European legal developments – national and supra-national – upon this historical constitution.

This book is about change and also about continuity over a long period. Although various recent statutes and cases have each been heralded as the most important since the Reform Acts of the nineteenth century or since *Entick v. Carrington* of the eighteenth,²¹ it provides an overview that does not focus on each of them. It is necessarily limited in scope. It does not, for example, deal with the important legal changes that are

¹⁸ A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th edn, 1958), p. 90.

¹⁹ Bradley and Ewing, *Constitutional and Administrative Law*, n. 5 above, p. 7; E. Barendt, *An Introduction to Constitutional Law* (Oxford: Oxford University Press, 1998), pp. 27–8, 34.

²⁰ D. Oliver, *Constitutional Reform in the UK* (Oxford: Oxford University Press, 2003), p. 7.

²¹ (1765) 19 St. Tr. 1029.

occurring in response to the recent and continuing threats to security. It also does not deal with devolution but reflects the implications²² of devolution for what an author of a work on the constitution can reasonably claim. Because of the constitutional significance of the devolution legislation of 1998²³ and, to Scotland in particular, of the Treaty of Union of 1706 and consequent Acts of Union of the English Parliament of 1706 and of the Scottish Parliament of 1707, I only suggest an understanding of the constitution from an English perspective. The historical constitution in this book's title is English in perspective and, as such, will vary in relevance or applicability elsewhere in the United Kingdom.

The approach I will take is explained in Chapter Two. In subsequent chapters, I will use it to consider the Crown as the constitution's long-standing institutional centrepiece, the increasingly-invoked separation of powers and Dicey's twin pillars of the constitution – parliamentary sovereignty and the rule of law. I have been necessarily selective of subject and focus, and, in so far as I have been selective, the approach to the selections I have made is significant and itself in special need of justification.

²² See generally D. Feldman, 'None, one or several? Perspectives on the UK's constitution(s)' [2005] *CLJ* 329, especially at 346ff.

²³ See the references at n. 3 above.

A historical constitutional approach

Amidst competing notions of the constitution and various approaches to understanding it or addressing related concerns, any notion or approach requires justification. For much of the twentieth century, Dicey's analytical approach, if not necessarily the content of his analysis, predominated but, I will suggest, proved significantly problematic. In this chapter, I advocate a historical constitutional approach through a reorientation of Dicey and in relation to other approaches that are prominent in current constitutional debates.

Dicey's analytical approach

In *Law of the Constitution*, Dicey described his approach to the subject of constitutional law in considerable detail. He famously presented his professorial duty as that of an expounder:

At the present day students of the constitution wish neither to criticise, nor to venerate, but to understand; and a professor whose duty it is to lecture on constitutional law, must feel that he is called upon to perform the part neither of a critic nor of an apologist, nor of an eulogist, but simply of an expounder; his duty is neither to attack nor to defend the constitution, but simply to explain its laws.¹

He expressly distinguished the legal from the historical view of the constitution. He relegated the historical view in legal study so that lawyers might properly study 'the law as it now stands' and not 'think so much of the way in which an institution has come to be what it is, that they cease to consider with sufficient care what it is that an institution has become'.² Dicey's approach was not simply intended for the study

¹ A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th edn, 1959), pp. 3–4.

² *Ibid.* pp. 15ff, especially at pp. 15, vii.

and teaching of law. He suggested the significance of his analytical method in his *Law and Opinion in England*:

A Court, when called upon to decide cases which present some difficulty, is often engaged – unconsciously it may be – in the search for principles. If an author of ingenuity has reduced some branch of the law to a consistent scheme of logically coherent rules, he supplies exactly the principles of which a Court is in need. Hence the development of English law has depended, more than many students perceive, on the writings of the authors who have produced the best text-books.³

Dicey's approach was intended to benefit the student, the lawyer and the judge.

Influenced by the scientific rationalism of the nineteenth century, Dicey aspired to a scientific approach in pursuit of a consistent and logically coherent scheme of legal rules and principles. His method⁴ was that of observation and objective description through the composition of sets or categories and the division or subdivision of their components. He presented his law of the constitution as a formal scheme of sets and distinctions: between one set of laws 'in the strictest sense' and a second set of rules consisting mainly of conventions; between parliamentary sovereignty and the rule of law as the constitution's two fundamental features; between the positive and negative dimensions of parliamentary sovereignty; between the rule of law's three meanings, and so on.⁵

Dicey's analytical method was confounded by three problems – fidelity, ossification and insularity. First, a method that pretended only objectively to describe a scheme of rules and principles could not prescribe or maintain fidelity to that scheme. The constitution's appeal or its source or sources of fidelity were left analytically obscure or indistinct, as was the normative force of a judicial or other claim that official conduct be constitutional or unconstitutional. The problem of their obscurity was to increase as the constitutional complacency that Dicey could still presuppose⁶ was variously undermined during the twentieth century.⁷

³ A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 2nd edn, 1914), p. 365. See generally R. W. Blackburn, 'Dicey and the teaching of public law' [1985] PL 679, especially at 681ff.

⁴ See generally M. Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992), pp. 13–17; C. Harlow, 'Disposing of Dicey: from legal autonomy to constitutional discourse' (2000) 48 *Political Studies* 356.

⁵ *Law of the Constitution*, n. 1 above, especially at p. 23. See, e.g., *ibid.* pp. 23–5, 40–1, 183–4, 202–3.

⁶ See *ibid.* pp. 3–4. ⁷ See ch. 8 below, pp. 186ff.

Secondly, Dicey's analytical scheme of sets and distinctions was rendered static by his relegation of the historical view and consequent focus on constitutional form, not formation. It was imposed upon an evolving constitution at a relatively arbitrary and fleeting moment – the moment of analysis. In proportion to the considerable extent Dicey's analysis remained constant in necessarily multiple editions of the same analytical textbook, enjoyed influence or acceptance and continued to be applied, it ossified or encapsulated a changing constitution.

Thirdly, focusing on constitutional form, not formation, Dicey's analytical method neglected the dynamic interaction of political communities and their respective constitutional forms. Dicey knew much of other jurisdictions, and frequently referred to them, but his references were principally illustrative and served an insular purpose. He expressly used federalism in the USA, for example, as an opposite with which to illustrate and emphasise English unitarianism through the exercise of Parliament's central and supreme legislative power.⁸ He similarly used French *droit administratif* to demonstrate how it is different from, indeed incompatible with, the English rule of law.⁹ In these and numerous other examples, he presented other jurisdictions, not as actual or potential sources of influence, but as anti-models with which to demonstrate the peculiarity of the sets of rules and principles and accompanying distinctions that made up his analytical scheme of the English law of the constitution.

A descriptive analytical legacy

The many constitutional changes¹⁰ since the publication of the tenth edition of Dicey's *Law of the Constitution* – changes in government and governance, the impact of European Community law, devolution, the passing of the Human Rights Act 1998, doctrinal shifts in the meaning and significance of parliamentary sovereignty and the rule of law etc – have all aggravated the problems of fidelity, ossification¹¹ and insularity,

⁸ *Law of the Constitution*, n. 1 above, ch. 3.

⁹ *Ibid.* chs. 4, 12. See J. W. F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford: Oxford University Press, rev. pbk. edn, 2000), pp. 18–23.

¹⁰ For a sense of the scope of these changes since the mid-1980s, compare the various editions of J. Jowell and D. Oliver, *The Changing Constitution* (Oxford: Oxford University Press, 1985, 1989, 1994, 2000, 2004).

¹¹ An analytical scheme is imposed or designed at the fleeting and relatively arbitrary moment of analysis but, if it is to retain relevance, must itself include practices or conventions that change and rules or principles that formally allow for legal change. One obvious

described above. They raise two related questions. First, what remains of the sets of rules and principles and accompanying distinctions encapsulated in Dicey's analytical scheme to serve as a distinctly legal and/or political object of fidelity? Secondly, how do remnants of Dicey's analytical scheme remain both relevant and still peculiarly English in a constitution subject to increasing European legal influence?

Many explicit and implicit current references to the constitution, betraying the loss of much of its appeal and normative force, are Dicey's descriptive analytical legacy. The 'unwritten constitution' is a simple negative and strictly inaccurate descriptive term in common discussion. The constitution is variously described in constitutional law texts, often in unflattering terms. In one, it is depicted as 'a jumble of diffuse statutes and court rulings, supplemented by extra-legal conventions and practices'.¹² In another, it is a spider's web – 'a more subtle and varied network of relationships [than previously understood] between laws or rules of different kinds and from different sources' – in the process of being spun with Parliament at its centre.¹³ It is understandably said to be an unclear and unreliable basis for public debate on constitutionality or a judicial ruling that official conduct is 'unconstitutional',¹⁴ a term described elsewhere as having 'no defined content'.¹⁵

example is parliamentary sovereignty through respect for which law can be changed by Parliament. A second related example is the developed doctrine of *ultra vires*. It is analytically significant as a flexible and formalistic device by which judges can develop the grounds of judicial review and thus the rule of law, supposedly as authorised or intended by Parliament, in determining what is beyond an authority's powers. An analytical scheme, however, that incorporates the doctrine of *ultra vires* provides for change in the rule of law by presupposing a rigid judicial conception of parliamentary sovereignty, clearly evident in Sir William Wade's identification of a judicial revolution when that conception changes, ch. 5 below, pp. 110ff. Flexibility in the rule of law's future development is secured by ossifying parliamentary sovereignty, both as conceived at the moment of analysis and as presupposed thereafter. See generally C. F. Forsyth (ed.), *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000); M. Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001); P. P. Craig and N. Bamforth, Review article of *The Constitutional Foundations of Judicial Review* by M. Elliott, 'Constitutional analysis, constitutional principle and judicial review' [2001] *PL* 763; T. R. S. Allan, 'The constitutional foundations of judicial review: conceptual conundrum or interpretive enquiry?' [2002] *CLJ* 87.

¹² E. Barendt, *An Introduction to Constitutional Law* (Oxford: Oxford University Press, 1998), p. 33.

¹³ D. Oliver, *Constitutional Reform in the United Kingdom* (Oxford: Oxford University Press, 2003), p. 357. For Dawn Oliver's comprehensive and non-metaphoric descriptive definition, see *ibid.* p. 6.

¹⁴ Barendt, *Introduction to Constitutional Law*, n. 12 above, pp. 30ff.

¹⁵ A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (Harlow, England: Pearson Education, 14th edn, 2007), p. 26.