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Review Article

David Marquand: The Once and Future Constitution

Vernon Bogdanor, *The New British Constitution*, Oxford and Portland, OR, Hart Publishing, 2009, 330pp., hardback, ISBN 978-1-84-113149-8; paperback, ISBN 978-1-84-113671-4.

Anthony King, *The British Constitution*, Oxford, Oxford University Press, 2007, 448pp., hardback, ISBN 978-0-19-923232-1.

Iain McLean, *What's Wrong with the British Constitution?* Oxford, Oxford University Press, 2009, 400pp., hardback, ISBN 978-0-19-954695-4.

When three eminent academics publish books on the same subject in the space of three years, something is up. In the case of the books I shall discuss in this essay, however, the 'something' is far from new. All three comment on and contribute to the debate about the strengths and weaknesses of the British constitution, which has waxed and waned since the early 1970s. A peculiarly neuralgic topic then was Britain's belated accession to the European Community (EC) in 1973. Its consequences are equally neuralgic now. Other early subjects with long-term explosive power included the 1973 report of the Kilbrandon Commission on the constitution, advocating elected assemblies in Scotland and Wales; Sir Leslie (soon to be Lord) Scarman's call for a 'new constitutional settlement', including a Bill of Rights, in 1974;[1] and the 1975 referendum on EC membership. Resonant contributions to the debate included Lord Hailsham's pithy characterization of British government as 'an elective dictatorship',[2] and Nevil Johnson's lament that 'constitutional ways of thinking in Britain' had undergone a long

[1] Leslie Scarman, *English Law: The New Dimension*, London, Stephens and Sons, 1974.

[2] Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription*, London, Collins, 1978.

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retreat, which had left its political class 'floundering in a world of pure pragmatism'.[3]

These were the first swallows of a long summer. The 1980s saw the launch of Charter 88 – part pressure group, part social movement and part secular dissenting chapel – which called for a Bill of Rights and a written constitution 'anchored in the ideal of universal citizenship'.[4] The decade saw the publication of the magnificently written Scottish 'Claim of Right', drafted by a retired Scottish civil servant, Jim Ross. 'The say of Scotland in its own government', it declared, 'has diminished, is diminishing and ought to be increased.' Scots, it added in a portentous tease, had an opportunity to pave the way for the reform of the English constitution as well as of their own: 'to serve as the grit in the oyster which produces the pearl'.[5] There followed a 'Scottish Constitutional Convention', representing virtually all shades of Scottish opinion, apart from the Scottish National Party (SNP) and the Conservative Party, together with a vast range of civil associations. On St Andrew's Day (the day of the patron saint of Scotland – 30 November) 1990, the Convention unveiled proposals for a Scottish legislature, elected by proportional representation and responsible for virtually all policy areas apart from foreign affairs, defence and macro-economic management. Whatever might have been true of England, radical constitutional change had become a majority political cause in Scotland.

So far, so familiar. But the inner meaning of the story is not so clear. The grit did produce a pearl, or rather two pearls. However, they were confined to the two non-English nations of Great Britain. The devolution statutes, passed in the glory days of Blair's first term, set up a parliament in Edinburgh, empowered to pass primary legislation on most internal Scottish matters, and an assembly in Cardiff, competent only to pass secondary legislation. In a different, but related category was the Belfast Agreement that paved the way for the return of home rule to Northern Ireland, complete with entrenched power-sharing between the province's two communities through an extraordinarily innovative form of consociational democracy, quite different from the majoritarian democracy of the Westminster

[3] Nevil Johnson, *In Search of the Constitution*, Oxford, Oxford University Press, 1980.

[4] For the text of the original charter see http://www.unlockdemocracy.org.uk/?page_id=551

[5] For the text see Owen Dudley Edwards (ed.), *A Claim of Right for Scotland*, Polygon, Edinburgh, 1989.

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model. In England the only measure of devolution was the establishment of the Greater London Authority, with a directly elected mayor, splendidly equipped to stick rhetorical pins in the skin of the national government, but with few other powers.

A contorted proposal to establish an elected assembly for the northern region, with no obvious role, was heavily defeated in a referendum. Equally conservative was the government's approach to the electoral system for the United Kingdom as a whole. Despite an election pledge to hold a referendum on proportional representation the existing system survived unchanged; Lord (Roy) Jenkins's elegant report advocating a partially proportional system soon disappeared into a Downing Street *oubliette*, despite having been commissioned by the prime minister. True, constitutional radicalism won another epochal victory in a different sphere: the 1998 Human Rights Act that incorporated the European Human Rights Convention into British law. But it is a safe bet that most of the ministers who passed it soon repented of their bravery.

The story is full of unexpected twists and turns, ambiguous characters and baffling transactions. But it does not stand alone. It is part of a much longer story that figures too rarely in contemporary constitutional debate. As McLean points out, there is nothing new in intense and occasionally violent constitutional controversy. At a climactic moment in the English Civil War, more than 300 years before Scarman called for a new constitutional settlement, the Levellers drew up a draft written constitution for an English republic, guaranteeing specified human rights and explosively entitled *An Agreement of the People*. In the annals of Atlantic republicanism, the meetings in Putney Church, where the Levellers disputed with the grandees of Cromwell's New Model Army, rank with the proceedings of the Philadelphia Convention that led to the US Constitution and the Tennis Court Oath that heralded the French Revolution.

The Levellers were crushed, and for nearly 250 years they were forgotten, but that was not the end of constitutional controversy. The 'Glorious Revolution' of 1688; the Treaty of Union and subsequent Act of Union of 1707; the Hanoverian Succession and the Jacobite rebellions of 1715 and 1745; the Rockingham Whigs' struggle with George III and the King's Friends; the furious debates over the French Revolution between the governing elite and the so-called 'British Jacobins' in the 1790s; the only slightly less furious controversies over the 1832 and 1867 Reform Acts; the battle over the Irish

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Question from the early 1880s to the outbreak of the First World War; and the occasionally frenzied debate over Lords Reform that culminated in the 1911 Parliament Act were all quintessentially constitutional in character. The constitutionally uncontentious 50-odd years from the secession of the 26 counties of southern Ireland in 1921 to the ferment of the 1970s and its sequel were an aberration, not the norm.

Two great interlinked questions resounded through that story. What was the source of legitimate rule – dynastic inheritance, or property sufficient to ensure a stake in the country, or the 'people', however defined? What constitutional arrangements would provide a stable framework within which the different ethnic and religious communities of the Britannic Isles could coexist, if not in perfect amity, then at least in peace? The royalist, and later Jacobite, answers – that the monarch was the Lord's anointed by virtue of descent from a previous monarch, and that the peoples of Britain were united in and through the monarch – lost out in the struggles of the seventeenth and eighteenth centuries. The Hanoverian Succession and the defeat of the Jacobite rebellions put paid to the myth of Divine Right. The merger of the English and Scottish parliaments in 1707 and the merger of the British and Irish parliaments in 1800 showed that the Union of Crowns had not, in fact, procured a stable relationship between the communities concerned. But these changes did not dispose of the great questions. Britain did not acquire an approximately democratic suffrage until 1918 – nearly 90 years after the 1832 Reform Act. It was not until the end of the twentieth century – almost 200 years after the younger Pitt's Act of Union with Ireland – that the Belfast Agreement ended the long-drawn-out struggle between the two communities of Northern Ireland.

Britain's long march towards democratic suffrage took as long as it did because two rival understandings of political legitimacy were in conflict: even though no one still believed in the Divine Right of kings, large numbers of people, not all of them stupid or self-interested, believed that the claims of property trumped the claims of what was then called popular government. A century and a half later, that belief appears quaint at best and monstrous at worst, but it did not seem so at the time. Some of the country's most distinguished thinkers – George Eliot, Walter Bagehot, Sir Henry Maine, Thomas Carlyle and John Stuart Mill, to mention only a few – trembled at the prospect of untrammelled democratic rule. Even that radical tribune

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of the people, John Bright, had misgivings.[6] When Britain went to war in 1914, a war its governments were later to portray as a war for democracy, only 60 per cent of adult males had the vote. Even after the 1918 Representation of the People Act had enfranchised all adult males and females over the age of 30, plural voting survived. And from the 1880s until the early 1920s, the Irish Question was a central issue (sometimes *the* central issue) in the politics of Great Britain, as well as in those of Ireland. It provoked astonishing outbursts of political vituperation on both sides of the Irish Sea, split Gladstone's Liberal Party and, early in the following century, brought Ireland to the brink of civil war.[7] It did so because it too pitted rival conceptions of political legitimacy against each other: on one side the legitimacy of ethnic self-determination; on the other, the legitimacy of a legally established Union.

THE PARADOX OF DISCREPANT POWER

The three books under discussion here should be read against that backdrop. All three analyse the changes that have taken place since the 1970s, explore the thinking of their advocates and opponents and try to tease out their underlying logic. All three start from the assumption that something called an 'old' or 'traditional' constitution used to exist, but exists no longer. And all three agree that the great constitutional authorities and commentators of the past, such as Walter Bagehot, A. V. Dicey, Sidney Lowe, Sir Ivor Jennings and Leo Amery, provide the right point of departure for an analysis of that constitution in its great days, and of the debates over its subsequent fate. The contrasts between them, though, are more revealing than the similarities.

I begin with King's work. But for the fact that the term is much too po-faced for King's witty, occasionally even skittish treatment of his theme, I would dub it 'magisterial'. It is certainly masterly: beautifully lucid, often funny and written in a deceptively plain, sardonic style that recalls Bagehot at his best. But whereas Bagehot was a hedgehog

[6] For my interpretation of all this see my *Britain Since 1918: The Strange Career of British Democracy*, London, Weidenfeld and Nicolson, 2008, chapter 2.

[7] There is an excellent account of this episode in McLean: see Iain McLean, *What's Wrong with the British Constitution?*, Oxford, Oxford University Press, 2009, pp. 100–25.

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who knew one big thing – that the monarchical trappings that ensured popular support for the system concealed the reality of sober bourgeois power – King is a fox who knows many little things. He is suspicious of broad generalizations, and downright hostile to 'holists' who see the constitution as a seamless web, and believe it should be comprehensively reformed. Even he, however, knows one fairly big thing: constitutions with a big 'C' must be distinguished from constitutions with a small one.

Small 'c' constitutions comprise the most important 'rules and understandings' – unwritten and written, tacit as well as explicit – that regulate the governing institutions of the country concerned. Apart from failed states, virtually all countries – dictatorships as well as democracies – have small 'c' constitutions of this sort. Hitler's Germany certainly did, and so did Stalin's Soviet Union. In a country without a small 'c' constitution there would be no stable governing institutions, only the barrel of a gun, or rather the barrels of several guns. Though King does not make the point, life in such a country would be like life in Hobbes's state of nature. Big 'C' constitutions, on the other hand, are codified: they can be consulted in any good library, they contain provisions for their own amendment and they are interpreted by authoritative constitutional courts.

The great difference between the British constitution and other democratic constitutions is not that it is unwritten: many of its provisions *are* written in statute law. It is that it is uncodified: it is a small 'c' constitution with no big 'C' counterpart. And even that difference is not as profound as is sometimes thought. Big 'C' constitutions normally coexist with small 'c' ones. As King forcibly points out, no big 'C' constitution says anything about the relevant country's electoral system; that is always a matter for the small 'c' constitution. A foreign visitor to the United States, trying to make sense of the debate over Florida's hanging chads in the 2000 presidential election, would not get much help from the nation's much-lauded big 'C' Constitution. But the issues at stake were undeniably constitutional. The same goes for a foreign visitor to France trying to make sense of the strange vicissitudes of the French electoral system.

However, the real meat of King's book lies elsewhere: in his account of the 'traditional' constitution – the constitution of the post-war period – and its misadventures since then. In King's depiction, there was a 'monumental grandeur' about it. 'The voters voted, the government governed and the voters then decided whether they

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wanted the government to continue to govern.'[8] It was a 'power-hoarding' constitution. It centralized and at the same time concentrated power and authority. It was good for accountability: British voters knew who governed them, and they had an almost unrivalled ability to 'kick the rascals out'. It was bad for deliberation and participation, though. Deliberation certainly took place, and it was sometimes of high quality. But it took place in government, not on the floor of the House of Commons, and certainly not among the wider public. The same was true of participation. Governments negotiated with organized interests: even Aneurin Bevan, one of the strongest champions of centralized power in recent British history, spent long hours negotiating with the British Medical Association before launching the National Health Service. Such negotiations took place in private, however, and government was accountable for the outcomes.

Today the traditional constitution no longer exists. Thanks to European Union (EU) membership, British governments now share power with the other EU governments, with the European Commission and increasingly with the European Parliament, whose legislative powers now equal those of the Council of Ministers. The European Court of Justice (ECJ) in Luxembourg can, and sometimes has, overruled decisions taken by the British government. More remarkably, British courts act, in effect, as agents of the ECJ in policy areas that fall within the EU's famous *acquis communautaire*. Thus, they too are duty-bound to overrule British government decisions that are shown to fall foul of EU legislation in those areas. In international trade negotiations, the European Commission speaks for the entire Union, Britain of course included; as EU Trade Commissioner, Peter Mandelson strode the international stage with an authority and panache that no British trade minister could equal. Although the panache was personal, the authority was institutional.

EU membership has done more to dig the grave of the traditional constitution than any other development in post-war British history, but there are other gravediggers as well. An increasingly stroppy judiciary also wielded a formidable shovel. The growth of judicial review, the judiciary's increasing willingness to take heed of doctrine and practice in other jurisdictions and (above all) the Human Rights Act transformed the relationship between government and the

[8] Anthony King, *The British Constitution*, Oxford, Oxford University Press, 2007, pp. 351 and 47.

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courts. Judges were no longer 'lions under the throne'. They ceased to defer to the executive, as most of them had done for most of the first 60 years of the last century. With growing self-confidence and frequency, they challenged it in the name of over-arching principles that trumped the wishes of governments and parliaments. Conflicts between the judiciary and the government of the day were almost inevitable; and in the last two terms of the Blair government they became increasingly bitter. In an ironic echo of the early-modern period, two understandings of legitimate power were in contention: the legitimacy of popular election versus the legitimacy of a supra-political rule of law.

Lesser gravediggers included devolution, the ejection of virtually all hereditary peers from the House of Lords and an increasing recourse to the popular referendum. Over a wide range of questions the writ of central government in London no longer runs in the non-English periphery of the British state. The nominated peers who now make up the vast majority of the upper house are as stroppy as the judges, fairly powerful and very unpredictable. And it has come to be accepted that issues of serious import – issues that would count as constitutional if we had a big 'C' constitution – can be settled only by the sovereign people in all their majesty, voting in a referendum, and not by the once-sovereign and omnicompetent Westminster Parliament. Power-hoarding has given way to power-shedding and sometimes to power-sharing.

The result, King thinks, is a paradox: 'the paradox of discrepant power'. Governments still govern in what seems to be the old way. The people still expect them to do so, and punish them if they dislike the results. But, in reality, British governments have never had less power. In place of the small 'c' constitution of the past there is a 'mess'. Yet – a final twist of King's paradoxical screw – the mess is tolerable, or at least unavoidable. 'Holists' who think it should be replaced by a new and comprehensive big 'C' constitution should save their breath to cool their porridge. Outside the chattering classes, there is no demand for a new constitution. In any case, there is no guarantee that a new constitution would make things better; it would probably make them worse. Unlike the United States in the late 1780s or France in the late 1950s Britain is not going through a constitutional moment. The answer to Lenin's question, 'What is to be done?' is 'Nothing'. King is not a constitutional Pangloss. He does not think that 'all is for the best in the best of all possible worlds', but

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he does think that all is for the least bad in a world of imperfection and danger.

A CONSTITUTIONAL STATE?

At which point, enter Bogdanor. He has become Britain's leading authority on the constitution; his book is a summation of his life's work. He covers much the same ground as King, but in a very different way. Where King exudes a robust Bagehotian confidence, Bogdanor is cautious and even tentative. And whereas King's approach is analytical rather than normative, Bogdanor's is both. For him, a constitution – even an uncodified one such as Britain's – is more than a set of rules. It is a set of rules that derive their force from principles of some kind, however fuzzy and ill-defined. Partly because of this, his treatment of the 'old constitution' (his term for King's 'traditional constitution') is much less respectful than King's, and his treatment of the latter's 'mess' much more radical.

As he depicts it, there was nothing particularly grand or monumental about the old constitution. It was certainly 'peculiar', both in the sense that it was unlike other constitutions and in the sense that it was odd or queer. But, as Ernest Bevin once said of the Council of Europe, its peculiarity was a Pandora's box, full of Trojan horses. Partly because it was uncodified, and partly because it had evolved slowly over a very long period, many of its most important provisions – for example, the provision that the monarch cannot veto legislation agreed by both houses of Parliament – were conventions rather than laws. As such, they were fluid, unsettled, intrinsically contestable and in the last resort uncertain. There was no neutral and authoritative body to settle conflicts over their interpretation. Such conflicts could be settled, if at all, only through political struggle, like the bitter struggle that settled the conflict over the powers of the House of Lords between 1909 and 1911, not through a judicial process of any kind. The conventions depended on 'political vicissitudes' and, as a result, they provided only a frail restraint on executive power – and equally frail protection for minorities threatened – as minorities are always prone to be – by the tyranny of the majority.

There was in fact a paradox at the heart of the old constitution. Bagehot and Dicey, its great nineteenth-century analysts and champions, presupposed a limited state. They took it for granted that the

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old, nineteenth-century constitution and the limited, nineteenth-century state were different sides of the same coin; that the understandings that the old constitution embodied and fostered were state-limiting understandings. That was true when Bagehot and Dicey wrote, but in the twentieth century the understandings acquired a radically different flavour. Because the old constitution was politics-based rather than law-based, because its conventions reflected the ever-changing balance of political power rather than fixed principles, it became the ally of the self-aggrandizing state of the twentieth century when the political pendulum swung away from state limitation to state extension. The old constitution did nothing to limit the remorseless war of attrition that successive central governments waged against local government, to impede their repeated attacks on intermediate institutions, or to protect the public domain of citizenship and service from state-induced marketization and privatization. It positively facilitated them.

Albeit without saying so in so many words, Bogdanor shows that that paradox was the true gravedigger of the old constitution. The extended state became a greedy state, forever biting off more than it could chew: over-hyped attempts to raise the rate of growth, ill-thought-out experiments in economic planning, measures of wage restraint that backfired, reorganizations of local government that served no obvious purpose. By the 1980s the *Marxisant* left of the Labour Party and the New Right of the Conservative Party seemed bent on making it an overmighty state. Labour's platform in the 1983 election – the notorious 'longest suicide note in history' – promised, among other things, sweeping nationalizations, industrial democracy, a massive boost to demand and exchange controls. For its part, the Thatcher government sought, as Nigel Lawson put it, to use state power to 'change the entire culture of [the] nation'[9] – to replace the collectivist, dependency culture of the past with an entrepreneurial one. In principle, Thatcher and her colleagues wanted a small state, a late twentieth-century version of the night-watchman state of the nineteenth century. But that was for the future. Here and now, they needed a powerful and determined state to batter down the obstacles in their path. The parallel with the totalitarian state of Stalin's Soviet Union, ferociously sweeping

[9] Nigel Lawson, *The View from No.11: Memoirs of a Tory Radical*, London, Corgi Books, 1993, p. 64.

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away the obstacles to the stateless Communist utopia of the future, is as striking as it is unnerving.

The result was a long, slow backlash that eventually transformed what Bogdanor calls the 'public philosophy'. It began on the political left. First, the Social Democratic Party broke away from the then hyper-statist Labour Party, to merge with the Liberals a few years later. Later, the mainstream Labour Party – first rather cautiously under Kinnock, then a little more outspokenly under John Smith and finally under Blair – adopted a programme of constitutional reform that seemed to presage a turn away from the party's statist traditions, and that toppled the old constitution from its perch. As Bogdanor interprets it, the outcome is not a 'mess'. It is a 'new constitution', embodying new understandings and based on new principles. In contrast to the essentially social-democratic understandings that prevailed for most of the twentieth century, Bogdanor thinks, these new understandings are liberal. Britain has become what he calls a 'constitutional state' – in other words a state based on the separation of powers, where the 'sovereignty of parliament is slowly coming to be replaced by the sovereignty of the constitution'.[10] In the boldest stroke in his book and, for me, the boldest stroke in any of these books, Bogdanor adds that this new constitution does not go far enough. Britain has become a constitutional state, but it has not yet become a popular constitutional state. The reforms of the Blair years have redistributed power, but they have redistributed it between political elites, not between elites and people. 'We have left Egypt', Bogdanor concludes evocatively in his final paragraph, 'but remain some distance from the Promised Land.'[11]

Like other prophets before him, Bogdanor is not sure of the detailed geography of the Promised Land nor of its inhabitants' likely behaviour. But he is certain that participative democracy will supplement representative democracy of the sort Britain has known since 1918. On the route map towards it, the single transferable vote, party primaries and the referendum will be notable milestones; each of them will help the people to wrest power from the political class. But they do not exhaust the participative repertoire. They could (and Bogdanor thinks they should) go hand in hand with a more radical

[10] Vernon Bogdanor, *The New British Constitution*, Oxford and Portland, OR, Hart Publishing, 2009, p. 285.

[11] Ibid., p. 310.

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innovation: citizen assemblies, chosen by lot to formulate proposals on such matters as the electoral system, as was recently done in British Columbia and Ontario, and selection by lot for local and parish councils. To the obvious objections that ordinary citizens are not competent to make political decisions in this way and that, in any case, most of them do not want to participate in their making, Bogdanor crisply replies that similar objections were made to widening the suffrage in the nineteenth century and that, if they are valid, then the case for democracy of any kind is invalid.

Nearly 70 years ago, the high Tory statesman and All Souls Fellow, L. S. Amery, famously wrote that British democracy was 'democracy by consent', involving 'government of the people, for the people, with but not by the people'.[12] For Bogdanor, democracy as defined by Amery is not democracy at all. Democracy, he insists, *does* mean government by the people. That will be the governing principle of the popular constitutional state that is now under construction. It will be the people, not the politicians, who will complete the building.

RAINBOROUGH REBORN?

McLean is another radical, but of a curious kind. His book begins with a flourish of trumpets, but ends with a damp squib. Where Bogdanor evinces a slightly reluctant respect for the old constitution, McLean treats it – and its great laureate, Dicey – with blistering contempt. For McLean, the old constitution was always incoherent nonsense, and Dicey a pedlar of contradictions. As he tells the story, the Treaty and Acts of Union (Acts in the plural, because there was a Scottish Act as well as an English/British one) flowed from a bargain between the English and Scottish states – or, rather between bargainers purportedly acting for those states. It was not an equal bargain; Scotland was poorer and weaker than England. But the English needed union with Scotland as much as the Scots needed union with England: without it, their northern frontier could never be secure.

In any event, both sides were content with the outcome: otherwise it would not have been a bargain but a diktat, and that it most certainly was not. The Scottish bargainers secured what was, for them,

[12] L. S. Amery, *Thoughts on the Constitution*, Oxford, Oxford University Press, 1964, p. 21.

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a crucially important concession: a commitment that all incoming monarchs of the newly united kingdom would 'inviolably maintain and preserve' the 'true Protestant religion' of Scotland, and the Presbyterian form of church government that went with it. The English/British Act, however, declared that incoming monarchs would be duty-bound to swear, in their coronation oaths, to 'maintain and preserve inviolably' the doctrine, worship, discipline and government of the Church of England – not only in England, but in Wales and Ireland as well. It was a manifest fudge, of course: as McLean tartly points out, it is not possible for two different protestant religions to be true at the same time. If the Presbyterian protestantism of Scotland is true then by definition the Anglican protestantism of England must be false.

Did this matter? And does it still matter? McLean's answer to both questions is a resounding 'Yes', and he argues his case with captivating *brio*. Both parties to the union were happy with their fudge, and in the secular age we now live in it is doubtful if many people, on either side of the border, are even aware of it. But the sophistry over logically incompatible ecclesiastical establishments was part and parcel of a greater fudge that looms ever-larger in today's constitutional angst. The union between England and Scotland, as McLean puts it, 'awkwardly merged' two different constitutional traditions. Central to the English tradition was the doctrine of parliamentary sovereignty or supremacy, as set out by Blackstone in the eighteenth century and Dicey in the nineteenth. But that doctrine was not central to – was not even part of – the Scottish tradition. Ever since the Declaration of Arbroath in 1320, politically conscious Scots have cherished a rather misty notion of popular sovereignty instead. Perhaps inevitably, however, the English tradition swamped the Scottish one. South of the border, at any rate, the new British Parliament was treated, for all practical purposes, as the sovereign English Parliament writ large. For English constitutional lawyers, McLean's 'awkward' merger was not a merger at all: it was a takeover.

The consequences did not become fully apparent until our own day, but they were portentous. In a notorious passage, Dicey distilled the essence of the English tradition with brutal clarity. The doctrine of the 'legislative supremacy of Parliament', he wrote, 'is the very keystone of the constitution'; none of the 'limitations alleged to be imposed by law on the absolute authority of Parliament has any real

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existence'.[13] It followed that no parliament could bind its successor; and that, if an Act of Parliament, however trivial, conflicted with a previous Act, however important, the previous Act would be, to that extent, repealed. The Act of Union was no exception; logically there could be no exceptions. It followed that the guarantees of Scottish exceptionalism given in 1707 were worthless: the Scots had been sold a pup.

If Dicey was right, the English doctrine had been imposed, through an extraordinary sleight of hand, on the unconquered Scots, as well as on the conquered Welsh and the partially conquered Irish. One result (beautifully displayed in the current British government's European Union Bill) is the deep-seated Euro-sceptic assumption that sovereignty pooled is sovereignty lost: if a mysterious and alien entity known as 'Brussels' acquires new competences, the EU member states have somehow been diminished. Another is that Bogdanor's new constitution is as incoherent as the old one. The authors of the Human Rights Act and the devolution statutes drove the proverbial coach and horses through the doctrine of absolute parliamentary sovereignty, and then bent over backwards to show that they had done nothing of the sort. The devolution statutes are effectively entrenched in political practice, but not in law. The rights set out in the Human Rights Act are not entrenched at all. Since they are taken from the European Human Rights Convention, of which Britain is a signatory, they would still apply to British citizens if the Act were repealed. The fact remains that the Act could be repealed, or amended in pointless, confusing or malicious ways, if Parliament (in other words, the government of the day) so wished.

Yet Dicey, the great laureate of absolute and unfettered parliamentary supremacy in the 1880s, executed a complete U-turn less than 30 years later. He was passionately opposed to Irish Home Rule, and insisted, with ever-growing stridency, that the Asquith government's Home Rule legislation would be illegitimate unless approved in a popular referendum. Normally, he wrote, loyal citizens were duty-bound to obey the law of the land, but they were obliged to do so only when the law in question was 'the clear and undoubted expression of the will of the nation'. The Home Rule legislation did not express that will; it had been forced through Parliament by a 'combination of

[13] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, London, Macmillan, 1950, pp. 68–70.

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discordant parties' in a process akin to revolution. The seeming majority that carried it was not a true majority. Parliament, in short, was not, in all circumstances, absolutely sovereign after all.

The chapter in which McLean tells the story of Dicey's volte-face is entitled 'The Contradictions of Professor Dicey', but the reader cannot help wondering if the contradictions were Dicey's alone. Sixty years later Enoch Powell, as intransigent a proponent of absolute parliamentary sovereignty as Dicey himself, called for a referendum on EC entry on the grounds that Parliament alone was not entitled to carry it into law. He claimed that 'the very stones' of the Palace of Westminster would 'cry out against us if we dared such a thing'.[14] Two questions follow. Perhaps the English tradition is not as monolithic as it seems? Perhaps lurking within it is a ghostly notion of popular sovereignty, akin to the Scottish one?

Be that as it may, McLean's alternative to parliamentary sovereignty is just that: popular sovereignty. That raises another great question: how would, or should, the sovereign people use their sovereignty? What would a constitution avowedly based on popular sovereignty look like? At this point McLean's imagination falters. He offers three proposals: an elected or largely elected second chamber, an elected head of state and church disestablishment. The first is now small potatoes. As McLean himself points out, most of the political class as well as most self-appointed constitutional experts are for it. A majority of the general public are probably in favour as well, though only mildly. In a referendum it would be probably be carried, on a low poll. It is hard to see what difference it would make to the relationship between ordinary citizens and the political elite. Elections for the head of state, on the other hand, would make a mighty change to the symbolic accoutrements of the British constitution – and one that the vast majority of the British people would almost certainly oppose. As for church disestablishment, it would surely be greeted with a gigantic yawn.

McLean ends with a splendid evocation of Thomas Rainborough's plea on behalf of the 'poorest he that is in England' during the Putney debates on the Levellers' draft constitution. Yet I cannot help feeling that a twenty-first-century Rainborough would find more emotional sustenance in Bogdanor's vision of participatory and active citizenship than in McLean's elevation of form over content.

[14] McLean, *What's Wrong with the British Constitution?*, p. 187.

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PULLING TOGETHER

It is time to pull the threads together. Two deserve attention here: one labelled 'legitimacy' and the other labelled 'Europe'.

Legitimacy first. As I argued earlier, rival conceptions of legitimate rule have lain at the heart of the constitutional struggles that have punctuated British history from the seventeenth to the twenty-first centuries. As that implies, legitimacy is a very slippery term. Sometimes it is used descriptively, sometimes normatively. In the first sense, legitimate rule is rule that is supported (or perhaps merely accepted) by the ruled. Unfortunately, Hitler's Nazi regime was legitimate in that sense, not perhaps at the very beginning of his chancellorship, but certainly for most of the 1930s and well into the wartime years. When I first visited the United States in the late 1950s, segregation was legitimate in that sense, at any rate in the Deep South, though not north of the Mason–Dixon Line or in the minority black community south of it. Today, that conclusion seems shocking, even revolting. Yet the normative alternative usage runs into the obvious difficulty that norms differ. Legitimacy, in other words, is inherently contestable, and the contests cannot be settled by majority vote – not least because the very fact that it is in contention makes it virtually impossible to agree on the appropriate population for judging it.

What has this to do with the debates to which my three authors have contributed? Simply this: today, regimes of all stripes claim to be democratic. The current Russian regime insists that theirs is a 'sovereign democracy'; Iranian ayatollahs speak of 'Islamic democracy'. The Soviet satellites in East and Central Europe claimed to be 'people's democracies'; Singapore's effectively one-party state has been dubbed a 'social democracy'. Over most of the globe, including in countries that few outsiders would consider democratic, what Bogdanor calls the 'public philosophy' holds – or purports to hold – that democracy is the only legitimate form of rule. As King puts it in a chapter mordantly entitled 'Democracy Rampant', the very Zeitgeist is democratic. To describe an institution, or a practice, or an opinion as undemocratic is to condemn it. To suggest that democracy might not be suitable in a given institution or sphere of life is 'automatically to put oneself on the wrong foot'.[15] Always and everywhere, democracy is A Good Thing, with a capital 'A', 'G' and 'T'.

[15] King, *The British Constitution*, p. 252.

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No doubt, it is. But is it the only good thing? I think Bogdanor is right in saying that Britain's public philosophy is becoming liberal rather than social-democratic. What he does not say is that liberalism and democracy have often been uncomfortable bed fellows. For liberals, freedom has always been the key value, not majority rule. A long line of liberal thinkers, from De Tocqueville and John Stuart Mill onwards, has warned that popular government, Bogdanor's 'government by the people', might spawn a new and dangerous form of tyranny: the tyranny of the majority. For De Tocqueville, the chief safeguard against majority tyranny was a dense network of civic associations, of the sort he found during his visit to America. For Mill, it was arduous training in the disciplines of self-government, starting on the local level. However, both preached the need for constant vigilance in defence of freedom – and particularly for freedom to propagate unpopular causes, and for unpopular minorities to live their lives as they wished. If they and others like them were right – and I believe they were – there is a built-in tension between that good thing, democracy, and that other good thing, liberty.

Platitudes, no doubt: but necessary platitudes. If the history of Britain in the last 30 years has taught us anything, it should have taught us that democracy can easily degenerate into the 'managed populism' recently analysed by Richard Rose,[16] and that such a populism can easily overwhelm the pluralism that is fundamental to a liberal society. Therein lies the inner meaning of Margaret Thatcher's reign in the 1980s and of Tony Blair's in the 2000s. Only time will tell whether Cameron will follow in their footsteps. It is not difficult to devise institutional checks and balances to guard against managed populism. However, they are unlikely to suffice without a further change in the public philosophy, drawing on the vision of Roman liberty – of liberty as freedom from domination – that inspired writers as various as John Milton, G. D. H. Cole and the syndicalist authors of *The Miners' Next Step*. The great question for the future of British democracy is whether our public culture is still rich enough to sustain such a change.

Now for the second thread – the thread labelled 'Europe'. For what is true of Britain is true of many, perhaps most, other member states of the European Union and, for that matter, of the Union itself.

[16] Richard Rose, *The Prime Minister in a Shrinking World*, Cambridge, Polity Press, 2001.

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Right across the continent, old, pre-modern ethnic communities are coming out from under the Westphalian nation-states that once seemed to epitomize modernity. For Scotland and Wales read Lombardy, Catalonia, Flanders, the Basque country, Slovakia, Corsica and even Brittany. All EU national governments share power with Union institutions and their fellow national governments, while national courts act as agents of the Luxembourg court and national legislatures as transmission belts for EU legislation to pass into national law. Everywhere, EU membership has transformed the small 'c' constitutions of the states concerned, just as it has in Britain. The new, liberal public philosophy that Bogdanor discusses is, to a large extent, a *European* philosophy. As I pointed out earlier, the rights conferred on British citizens by the Human Rights Act are *European* rights. My three authors focus overwhelmingly on Britain. Yet the story they tell is the story of the end of British exceptionalism.

It intersects with another European story: the story of what has come to be called the 'democratic deficit' in EU governance. This second story is long and complex, and it does not need rehearsal here. Its plot-line is cruelly simple, though. The European Union has been an astonishingly successful agent of democratization: the most successful in European history. Thanks largely to it, totalitarian dictatorship – indeed, dictatorship per se – has been banished from the European continent. But, by a terrible paradox, its own institutional structure violates the democratic principles it has helped to embed in around half of its member states.[17] Yet that structure weighs ever more heavily on its member governments and their parliaments, courts and peoples.

Its weight is not an accident. The 'European project' was designed, quite explicitly, to procure an 'ever-closer union' between the peoples of Europe. It has always been a process, not a destination; it still is. It has had some rough passages lately, but it has transformed the politics of the European continent, and turned the intergovernmental Community of the early days into a quasi- or proto-federation. Sixty years after the Schuman Plan, Europe is probably more integrated than was the United States in 1850. (To take only one example, there are no slave states in the EU.) As the anguished debates over the fate of the Euro-zone and its implications for the EU

[17] More than half, if you include the democratization of Spain, Portugal and Greece as well as that of the 12 new member states in East and Central Europe.

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constitution have made clear, the process is still under way. Britain may not be going through a constitutional moment, but the European Union is almost certainly on the verge of one. If such a moment occurs, Britain will be caught up in it as fully as the other 26 member states of the Union. On present form, the next chapter of British constitutional history is likely to be written on the continental side of the Channel.

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