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Constitutional Revolution in the United Kingdom

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The American and British constitutional traditions diverged radically in the era of the American Revolution. Americans and their numerous but politically marginalized British allies adhered to the traditional English notion that government was constrained by fixed constitutional rules and principles; they denounced the influence that the Crown exercised over the legislative branches of the government. After the Revolution, the former colonists proceeded towards popular sovereignty; a fixed, written constitution that limited governmental powers; federalism; separation of powers with checks and balances; and judicial review. The United Kingdom continued along its new constitutional path towards parliamentary sovereignty unconstrained by a fixed constitution or judicial review, centralization, and the conflation of executive and legislative power. As judicial review became a more and more prominent element of American constitutionalism, British constitutional and political commentators noted with satisfaction the flexibility of their own system, its ability to respond quickly to economic and social challenges, its direct lines of administrative authority, and its freedom from hamstringing over-legalization. By the second half of the twentieth century the British and American constitutional systems were about as different as different can be. Although the U.K. and the U.S. shared a common-law heritage, the American system had far more in common with those of civil-law democracies.

But the United Kingdom is now in the midst of the most fundamental and far-reaching constitutional change since the Reform Act of 1832, and possibly since the Glorious Revolution of 1688. All but a selected handful of the hereditary peers have been ousted from the House of Lords, giving a majority to its appointed members.[1] The government seems to be committed to making the second chamber elective as well as appointive, although it has not yet arrived at the relative proportions. Power in wide areas of public policy has been devolved to a new Scottish Parliament and a Welsh Assembly; the legislature of Northern Ireland, which exercised similar powers until its dissolution in 1972, has been revived.[2] Proportional representation has been introduced into elections for the devolved legislatures and the European Parliament, and may be incorporated to some degree into elections for the Westminster Parliament.

While the kingdom itself trends towards federalism, the European Union (EU) is developing a de facto constitution out of its constituent treaties and their amendments, moving towards a European federalism, with institutions, including the European Court of Justice, that can nullify national administrative decisions and instruct even "sovereign" parliaments to change their laws.[3] Indeed, Parliament has authorized British courts to refuse to enforce subsequently passed British laws that are inconsistent with the regulations of the EU,[4] and the courts have exercised this authority to void a parliamentary statute,[5] raising deep questions about the continued vitality of parliamentary sovereignty.[6] Britons can appeal government laws and actions to the Euro-

pean Court of Human Rights, an institution separate from the EU, which can reverse the actions and pronounce the laws inconsistent with the European Convention on Human Rights (ECHR). The Convention mandates that signatories abide by the decisions of the Human Rights court. A new Human Rights Act[7] goes into effect this month (October 2000), incorporating the Convention into British law, enforceable in British courts. They will have the power to nullify administrative acts and those of local governmental authorities. The law authorizes judges to pronounce even parliamentary enactments incompatible with the Convention, forcing a legislative review, although Parliament is not bound to repeal or revise them. In the course of adjudicating cases challenging government acts for violating the Convention, the courts are required by the Human Rights Act to treat decisions of the European Court of Human Rights as precedential authority.

Some of these changes – especially those related to Britain's membership in the EU and adherence to the ECHR – have been evolving over the past three decades. But others – the reconstruction of the House of Lords, the devolution of power to regional legislatures, and the passage of the Human Rights Act – are the culmination of demands for constitutional reform that grew in the 1980s and 1990s, revolutionizing British attitudes towards their constitution. In *The Politics of the British Constitution*, Michael Foley, a political scientist at the University of Wales, Aberystwyth, describes this revival of constitutional politics in the United Kingdom. Although it does not provide a complete picture of Britain's current constitutional revolution, Foley's study is a good place to start for a concise overview of British constitutional scholarship over the past century and current controversies.

In his first, introductory chapter, Foley describes the complacency that characterized popular and critical thought about the constitution in the mid-twentieth century. Britons, he reports, were content to describe their constitution in much the same terms that the great Albert Venn Dicey had used in the many editions of his *Introduction to the Study of the Law of the Constitution*, which first appeared in 1885.[8] In contrast to the American constitution, the British constituton was primarily descriptive rather than prescriptive. It amounted to the sum of the laws, customs, and traditions that determined how Britain was governed. Its general principles were well understood and sustained by a general consensus. Since there was little if any prescriptive content – and what prescriptive content there was not legally sanctioned – there was slight opportunity for constitutional rhetoric. The "axiomatic authority and finality" of the constitution's "core value" of parliamentary sovereignty "pre-empt[ed] the need for, and the relevance of, constitutional debate," Foley explains (p. 4). Politicians, commentators, and the public all came to see claims that government acts violated constitutional principles to be empty rhetoric. The constitution's flexibility was its virtue; constraints would obtruct effective government. This consensus began to break down in the 1970s, and, unlike previous spasms of constitutional criticism, the reform movement gathered strength over the following decades. "Interest in constitutional issues can no longer be dismissed as either intermittent pulses of popular agitation prompted by temporary political frustration, or the effect of an intellectual avant garde attempting to substitute genteel constitutionalism for 'real politics,' " Foley reports. In fact, constitutional politics "has become synonymous with the real politics of the 1990s" (pp. 7-8). Foley's citations are an excellent guide to the literature both of complacency and of recent challenge.

In his second chapter, Foley describes the British constitutional tradition, beginning essentially with the Glorious Revolution of 1688, which established parliamentary supremacy (and, in time, parliamentary sovereignty), the system from which present constitutional arrangements evolved. Foley points to the ubiquity of constitutional rhetoric during the succeeding century. Ignoring lingering notions that the constitution imposed fixed constraints on government, he stresses the centrality of the concept of "balance," which Montesquieu described as the principal safeguard of British freedoms. Such critics of government as Henry St. John, Viscount Bolingbroke consistently charged that overweening executive influence threatened liberty. The debate shifted to popular representation by the turn of the nineteenth century and culminated in the Reform Act of 1832, which began the process that led to universal male suffrage in the 1880s and full democracy in the first decades of the twentieth century.

A democratically elected, sovereign (and thus unconstrained) Parliament raised concerns about democratic despotism. Walter Bagehot stressed the importance of the "dignified" elements of the constitution – the monarchy, the rituals, the symbolism (and restraining power) of the House of Lords – in restraining democratic enthusiasms. But it was Dicey, the Publius of the modern British constitution, who offered a reassuring analysis. The sovereign Parliament was unconstrained by law, but the practical exercise of power was constrained by the constitutional principle of "the rule of law." This prin-

ciple required that government act only as authorized by law, according to the principles of the common law that protected individual rights. It required that government officers be subject to the same legal actions as ordinary citizens, who therefore could bring suit when damaged by abusive official conduct. Commitment to the rule of law pervaded Britain, especially the educated classes that actually governed, providing a guarantee against arbitrary government. Finally, Dicey pointed to constitutional "conventions" – traditional customs, rules, and behavior that had come to be considered fundamental to the governmental order. These could not be enforced by law, but the ruling elite's code of honorable conduct, reinforced by popular commitments that could be enforced at the ballot box, discouraged violations.

Foley describes criticism of the Diceyan formulation, discussing especially the contributions of Sir Ivor Jennings, the only later commentator to approach Dicey's influence, and those of Harold Laski and J.A.G. Griffith. All three criticized Dicey's stress on the rule of law, arguing that it merely justified the penchant of judges to interpret progressive legislation narrowly.

Foley demonstrates Dicey's continued, pervasive influence. But he fails to see how fundamentally the Jennings-Laski-Griffith critique affected the understanding of the Diceyan constitution. They, more than Dicey, are responsible for the prominence of unconstrained parliamentary sovereignty in mid-twentieth-century British constitutional thought – and the attenuation of the rule of law and conventions as constraints on that sovereignty. They provided the theoretical justification for the popular reaction against restrictive judicial construction of social and economic legislation, which led to the exaggerated restraint that characterized the mid-twentieth century British judiciary.[9] Moreover, Foley concentrates exclusively on constitutional commentators. He does not discuss constitutional doctrine expounded in the courts, which established Dicey's interpretation, as glossed by Jennings and his heirs, as constitutional law.

Having established this baseline, Foley goes on in chapter 3 to describe what he calls the "constitutional fuels" that have fired the engine of reform. He identifies ten of these, ranging from electoral inequities that have allowed governments receiving a minority of the total vote to gain strong majorities in Parliament, to government excesses and abuses, excessive centralization, corruption and personal misconduct, such longstanding anomalies as the continued existence of the monarch and the House of Lords in a democratic society, and the effect of Britain's adhesion to the ECHR and membership in the EU. These fuels are largely independent of one another, he argues, creating a general sense of constitutional crisis but providing no over-arching theory of what is wrong, and consequently no general remedy. They also raise constitutional issues in different ways and with different degrees of intensity. Some suggest structural problems while others involve disturbing behavior; some involve long-time constitutional structures or principles while others have developed more recently; some involve particular events and generate specific reactions and reform proposals; others appear to involve more general problems, raising systematic criticism and suggesting the need for systematic change. Some events have precipitated intense reactions, while other calls for reform have been responses to more general conditions. Foley's categories seem vague and inadequately articulated. A historian is likely to find the political scientist's effort to schematize the issues along these lines forced and not very useful.

Having found the "constitutional fuels" disconnected from one another, Foley is not surprised that the various reform proposals are similarly disconnected. In chapter 4 he identifies six principal proposals: a bill of rights, devolution of authority from the central to local government, reform of the electoral system, legislation to secure freedom of information, reform of the House of Lords, and the creation of a written constitution. Integrated by no constitutional philosophy, these discrete proposals respond in varying degrees to different concerns.

Calls for a Bill of Rights, for example, respond primarily to government excesses and misuses of power and to excessive secrecy, and secondarily to concerns about centralization and to the consequences of membership in the EU and adhesion to the ECHR. Devolution, on the other hand, responds primarily to over-centralization, the inequity of the electoral system, and the excessive exercise of power that many Britons perceived in the Thatcher government's dismantling of local authorities.

Despite the disparate nature of the constitutional problems and proposals to deal with them, reformers have worked to establish some common thread. Foley refers to different rationales for reform, although it would be more accurate to say he has discerned different tropes in the rhetoric of constitutional reform. Reformers have argued that constitutional change is needed to counteract a general deterioration in the accountability and restraint of government. Foley calls this the "preven-

tionist" rationale (p. 115). He also discerns a less alarmist "correctionist" rationale, designed either to restore a lost commitment to constitutional understandings or to modernize a constitution that is no longer appropriate for modern conditions. Finally, Foley finds an "instrumental" rationale that suggests that reforming the constitution would revitalize British society generally, especially the economy. Again, Foley's citations provide an excellent entree into the contemporary literature.

Foley also concisely describes the different agencies promoting reform. Some pressure groups have urged specific reforms for many years – for example, the Electoral Reform Society, which has long campaigned for proportional representation in Parliament. Professional organizations of civil servants and local government officials have blasted governmental abuses and inefficiencies. Labor unions, long suspicious of constitutional agitation as reflecting mere bourgeois concerns, joined the campaign by the 1980s. Think tanks, like the Institute for Public Policy Research, have promoted various reforms. Funding agencies and business corporations have supported research and agitation. Leading judges have criticized the weakness of legal defenses for civil liberty in the United Kingdom, some of them calling for an "entrenched" Bill of Rights (that is, a Bill of Rights that constrains subsequent legislation). The media began to focus on constitutional issues in the 1990s, raising public awareness and concern. The minor political parties, especially the relatively influential Liberal Democrats, incorporated support for different constitutional reforms into their platforms. Finally, Foley places the organization Charter 88 in a category of its own. Dedicated to constitutional reform, Charter 88 worked to integrate various proposals for reform and to coordinate the reform campaign. Reform proponents repeatedly and consistently publicized governmental misconduct, abuses, and failure. They offered alternatives, and ultimately proposed new large-scale constitutional settlements, such as the Liberal Democrats' document "We, the People…: Towards a Written Constitution."[10] They sponsored opinion polls and publicized widely increasing public support for constitutional reform. They compared British constitutional arrangements with those of other nations. Foley pedantically refers to each of these activities as a separate "technique of advocacy"(138).

Defenders of traditional constitutional arrangements offered spirited rebuttals. Foley recounts their efforts to counteract the growing reform movement in chapter 5. As he did in describing the reformers' rationales and techniques, Foley categorizes the defenses. There is a positive defense of the virtues of the traditional system; there is a "concessionary defence" (p. 163) that admits shortcomings but proposes only minor revisions. Then there are "negative defences" (p. 170) that attack the intelligence and motivation of the critics or warn of the unforeseen consequences of tinkering with fundamentals of the system. None of these techniques have proved effective.

Although a historian will find these chapters informative about recent British constitutional history, she or he may find the effort to analyze by categorizing and schematizing less effective than a historical approach would have been. Foley's analysis fails to convey the way in which events built upon one another, the way that different institutions and individuals interacted. He demonstrates how public awareness of constitutional issues grew, but he does not relate that development to specific events and reactions.

It is the co-incidence of abuses and complaints, of proposals for change, that has linked discrete calls for reform into a movement. History, not logic, tied the reform movement together, and that is a crucial element that Foley's political-science approach fails to convey. Moreover, in stressing the politics of constitutional reform, Foley slights the ways in which the constitution was changing even as the battle raged. He notes judges' public calls for increased protection of civil liberty, but he entirely ignores the increasing activism of the judiciary. He describes the growing influence of the EU and its European Court of Justice on Britain, but he does not point out clearly the challenge they present to the whole idea of parliamentary sovereignty, nor how they and the European Court of Human Rights they have created introduced enhanced notions of judicial review into the British system. He never mentions the Parliament's effort to entrench EU law in the United Kingdom, nor the courts' acquiescence. Foley does not consider the constitutional implications of the use of referenda to determine public policy, nor of the concept of the "mandate," both of which imply popular rather than parliamentary sovereignty, laying the theoretical basis for an authority that could bind Parliament.

Growing public pressure culminated in the Labour Party's decision to make constitutional reform a central promise of its 1997 election manifesto – the reintroduction of "constitutional politics." Foley describes Labour's longstanding distrust of the issue and the slow process by which moderate, "New Labour" leaders came to appreciate its political appeal. Perhaps more important, con-

stitutional reform provided a basis for electoral cooperation with the Liberal Democrats, who turned their fire on the Conservatives. Foley provides a detailed account and analysis of Labour's strategy, the role of the Liberal Democrats, and the response of Prime Minister John Major and his Conservative party. He concludes that Labour was torn between its desire to harness a clearly popular issue, and its fear that the Conservatives would once again paint them as reckless radicals, threatening British traditions. In the end, the Conservatives tried to make defense of the constitution a Major issue, but they did so too late. They could not rouse public fears on an issue that Labour had downplayed.

Foley's conclusion looks forward to the role Foley expected constitutional politics to play in a Labour government. The first Queen's Speech – the equivalent of the U.S. President's annual message to Congress – promised the wide-ranging reforms noted in the introduction to this review. But Foley reports widespread distrust of Labour's intentions among reformers and in the media; he expects any government to be reluctant to limit its own power, and he predicts that Labour's victory itself will deflate public support for constitutional change. Changes will have unforeseen effects, necessitating further changes. The results may be uncomfortable. In the end, Foley predicts that the public will tire of dealing with so fundamental an issue. One cannot help but feel that constitutional reform in Britain has already proceeded further than Foley expected, but there certainly is every reason to think he is right that it may lead in uncomfortable directions and that a reaction may set in. The devolution of powers to the Scottish Parliament is bound to raise issues of jurisdiction between it and the Westminster Parliament that may not be resolvable by an exercise of the latter's claimed sovereign authority. It has already raised the "Midlothian Problem," which asks why Scottish representatives can vote in Parliament on domestic matters affecting England while English representatives can no longer vote on domestic matters affecting Scotland.

In sum, *The Politics of the British Constitution* provides an excellent summary of the politics of constitutional reform in the United Kingdom in the past twenty years and an excellent introduction to the literature. Concentrating on the politics of reform, it does not offer a complete overview of the dramatic constitutional changes taking place, because some of those changes are occurring due to the activities of institutions that lie outside the sphere of British politics. But that should not discourage anyone interested in these developments from acquiring and reading this important book.

Notes

[1]. House of Lords Act, 1999 chap. 34.

[2]. Government of Scotland Act, 1998 Chap. 46; Government of Wales Act, 1998 Chap. 38; Northern Ireland Act, 1998 Chap. 47.

[3]. A.W. Bradley and K.D. Ewing, "The United Kingdom and the European Community," in Bradley and Ewing, *Constitutional and Administrative Law*, 12th ed. (London and N.Y.: Longman, 1997), 131-59.

[4]. European Communities Act 1972, 1972 Chap. 68.

[5]. R. v. Secretary of State for Transport, ex parte Factortame, Ltd., [1990] 2 AC 85.

[6]. A.W. Bradley, "The Sovereignty of Parliament – Form or Substance?" in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, 4th ed. (Oxford: Clarendon Press, 2000), 23-57; Paul Craig, "Britain in the European Union," *ibid.*, 61-88.

[7]. Human Rights Act, 1998 Chap. 42.

[8]. (London and New York: Macmillan, 1885).

[9]. Recently some scholars have rediscovered the importance and implications of Dicey*s concept of the rule of law. *See*, for example, T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993), 2-3, 20; Janet Ajzenstat, "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights and Freedoms," *Canadian Journal of Political Science*, 30 (December 1997): 645-62.

[10]. (Hebden Bridge: Hebden Royd, 1990).

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