

A codified constitution for Britain?

Vernon Bogdanor

Is it time for Britain to have a codified constitution as so many other countries already do? Would it be so hard to bring disparate British legislation together into a single document? Vernon Bogdanor examines the arguments for and against a codified constitution for Britain.

Almost all codified constitutions are enacted to mark a new beginning.

The British constitution, it is often said, is unwritten, but this does not mean that the rules describing the powers of government and the rights of the citizen are passed down from generation to generation by word of mouth. Many, if not most, of these rules are, of course, written down in the form of either statutes or judicial decisions. The Parliament Acts of 1911 and 1949, for example, regulating the powers of the House of Lords, or the Constitutional Reform Act of 2005, regulating the role of the Lord Chancellor and of the judiciary and appointments to it, are important parts of the British constitution and are most certainly written down.

Enacting a codified constitution

The real difference between Britain and almost every other democracy is that in Britain the various constitutional rules have not been brought together in a single document. They are not codified, but scattered. Many would say that this is anachronistic, and that it is time the British fell into line by producing a codified constitution. The Liberal Democrats have long held this view; and Gordon Brown, both as chancellor of the exchequer and as prime minister, has called for a debate on the issue. There is growing support in political circles for the enactment of a codified constitution.

It would not be difficult in principle to draft a constitution, to bring together the relevant statutes and judicial decisions into a single document. In the autumn of 2006, I held a seminar with a colleague, Stefan Vogenauer, Professor of Comparative Law at Oxford, to do exactly that. We held weekly meetings at which small groups of students, both graduates and

undergraduates, prepared drafts of part of the constitution, e.g. the legislature, the judiciary, human rights. These were then discussed and amended by the seminar. The end result can be found in a book edited by Christopher Bryant MP, *Towards a New Constitutional Settlement*, published by the Smith Institute and in the *Political Quarterly* (2007).

The historic constitution

Before considering whether Britain ought to enact a constitution, it is worth asking why it is that we do not have one. The reasons lie deep in British history. They relate both to our evolution as a society and to the way in which our political system is structured. The reasons are both historical and conceptual.

Almost all codified constitutions are enacted to mark a new beginning. They are enacted when states attain their freedom, either from an external ruler or from an old regime. The constitution signifies a fresh start. That was the case, for example, with Italy in 1948 and Germany in 1949, when they drew up new constitutions following defeat in war and the destruction of the previous Fascist and National Socialist regimes; and with India, whose constitution was enacted in 1950 shortly after achieving independence from British rule. In Britain, however, there has been no such obvious break in our constitutional development since the seventeenth century.

Our constitution has remained uncoded precisely because we appear never to have had a genuine 'constitutional moment'. There has been no fundamental change in the nature of the English state since the time of Oliver Cromwell and the brief period of republican rule which lasted from 1649 to 1660. Cromwell did indeed draw up, in 1653, a codified constitution, an Agreement of the People, and this is perhaps the first codified constitution in modern European history. Yet, the republican interlude was followed by what was significantly called the Restoration — not another new beginning, but the return of a traditional institution, the monarchy. It is precisely because there has been no sharp break in our constitutional history since the seventeenth century that we have felt neither the desire nor the need to enact a constitution.

Dicey's view of the constitution

One of the most penetrating writers on the British constitution was the great Victorian scholar, A. V. Dicey (1835–1922), who was Vinerian Professor of Law at Oxford University from 1882 to 1909. Dicey argued that the British constitution was unique in being a 'historic' constitution. By this he meant not only that it was very old, but also that it was original and spontaneous, a product of historical development rather than deliberate design. This is a view that has been echoed by many other writers on British government. In *The Governance of England* [sic], 1904, the author, Sidney Low, wrote: 'Other constitutions have been built; that of England has been allowed to grow.' Our constitution, Low declared, was based not on codified rules but on tacit understandings, although, as he ruefully remarked, 'the understandings are not always understood'.

Parliamentary sovereignty

In addition to this historical reason why we do not have a codified constitution, there is also a conceptual reason — that the fundamental, perhaps the only principle behind our system of government has been the sovereignty of Parliament, the idea that Parliament can legislate as it chooses and that there can be no superior authority to Parliament. Dicey, who was the first to draw out the consequences of the doctrine of the sovereignty of Parliament, believed that the

Exam context

This article will help AS students to prepare more effectively for the new AS Government and Politics specifications. It focuses on the following aspects of the specifications:

Edexcel

Unit 2 The Constitution: the possible introduction of a 'written' constitution
AQA

Unit 2 The British constitution: constitutional change

OCR

Unit F852 The constitution: written and unwritten constitutions

for Britain?



TOP PHOTO
The Queen's Speech, November 2007.

roots of this idea lay 'deep in the history of the English people and in the peculiar development of the English [sic] Constitution' (Dicey 1959).

If Parliament is sovereign, there is no point in having a codified constitution, for part of the purpose of such a constitution is to limit the power of the legislature. Constitutions serve to demarcate provisions which are fundamental and are included in the constitution from provisions which are not fundamental and not part of the constitution. The fundamental laws can usually only be amended through some special procedure, over and above that of a simple majority vote in the legislature. In the USA, for

example, constitutional change requires the support of two thirds of Congress or three-quarters of the states.

In some constitutions, there are provisions which are regarded as so fundamental that they cannot be amended at all. The first 20 articles of the German constitution providing for the basic rights of the citizen and the federal form of government cannot be amended in any way whatever. Thus, in countries with enacted constitutions, it is normally not parliament, the legislature, which is supreme, but the constitution. Indeed, Article VI, Clause 2, of the US Constitution specifically provides that the constitution is 'the supreme Law of the Land'.

Fundamental law

In Britain, there has been no such thing as fundamental law, at least until recently. There is but a single process for all legislation, whether it deals with something fundamental, for example the powers or composition of the House of Lords, or with more parochial matters such as, for example, municipal drainage — and all voting is by simple majority.

In the nineteenth century, a distinguished French observer, the political theorist, Alexis de Tocqueville, remarked, in his book, *Democracy in America*, that, in Britain, 'the Parliament has an acknowledged right to modify the constitution; as, therefore, the constitution may undergo perpetual change, it does not in reality exist; the Parliament is at once a legislative and constituent assembly'. In Anthony Trollope's novel, *The Prime Minister*, the Duchess of Omnium declares that 'Anything is constitutional or anything is unconstitutional, just as you choose to look at it'. Trollope goes on to remark: 'It was clear that the Duchess had really studied the subject carefully.'

The British constitution could thus be summed up in just eight words: 'What the Queen in Parliament enacts is law.' It is because the sovereignty of Parliament has been seen as the central principle of the British constitution that it has always seemed pointless to draw up a codified constitution.

Challenges to parliamentary sovereignty

Since 1973, however, when we joined the European Community, as the European Union was then called, parliamentary sovereignty has come under challenge. The powers of Parliament are clearly limited by the European Union, by the devolution legislation and by the Human Rights Act. Lawyers argue about whether Parliament is still *legally* sovereign. But, even if Parliament remains sovereign in form, it is no longer sovereign in practice. To put the point another way, the legal sovereignty of Parliament no longer corresponds, as once it did, with the real exercise of unlimited political authority. That authority has now been dispersed, both 'upwards' to Europe, 'downwards' to the devolved bodies, and 'sideways' to the judges. In addition, the reforms of the Blair government have codified so much

The British constitution could be summed up in the words: 'What the Queen in Parliament enacts is law.'