

Constitutional History: Chance or Grand Design?

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Two interpretations of constitutional history: product of chance or of design –
Written v. unwritten constitutions – Political and historical backdrop of constitu-
tional development – Evolution of interpretation of specific constitutional texts –
Chances of a global constitution

PRELIMINARY REMARKS

Two interpretations of history confront each other. Providential history sees the succession of events as a meaningful process leading to a superior goal and directed, in the older view, by the hand of divine Providence, or, as seen more recently, by the laws of history or some intelligent design resulting in unstoppable progress.

In legal history this march of the centuries can be moved on by external economic, political or cultural factors, or alternatively by the internal logical working out of the basic, everlasting principles of law and justice. Another interpretation views history as an incoherent and chaotic spectacle – ‘full of sound and fury’ – where human folly and chance play a leading role: people move from one expedient to the next, they make no plans or, if they do, they turn out in a quite different way from that intended, as events are dominated by fortuitous circumstances beyond human control.

The chance factor seems mainly to have preoccupied ageing historians.

Thus the famous mediaevalist Henri Pirenne lectured, after the First World War, on *Le hasard en histoire* in various universities in France and the United States. It can, however, safely be said that most historians ignore chance and prefer to present the sequence of events as a meaningful process. Indeed, they see as their

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mission in life to explain what happened (which is not difficult after the event), and blind chance is by definition not liable to rational explanation.

Constitutional historians tend to adhere to the Intelligent Design thesis. This is, for example, obvious when they study the origin of the American constitution, a text that was the fruit of a conscious decision and an intense effort by a group of lawmakers, who had a great vision of the future for their new and newly independent country. Their constitution and the Bill of Rights (the first ten Amendments) were created *ex nihilo* and presented to the people like Moses' Ten Commandments. Their design was as grand as it proved to be lasting.

This vision was, however, also held by the traditional historians of the British constitution, who – witness Bishop William Stubbs – saw it as the outcome of the majestic and irresistible development throughout the ages of primaevial Anglo-Saxon liberty, starting in the Teutonic forests and ending with the parliamentary and constitutional monarchy of Queen Victoria.¹ In hindsight the events of the past can easily present a teleological pattern.

Against this widespread view I have myself recently argued that, for example, the historic avatars of public law in the Low Countries were to a considerable degree dominated by sheer chance. To illustrate my point I quoted, *inter alia*, the reign of Philip II of Spain whose intolerant and autocratic rule led to the Revolt of the Netherlands and their historic and lasting separation into the Republic in the north and absolutist Habsburg rule in the south. That a king of Spain came to rule over the Low Countries was a consequence of the Spanish marriage of the Burgundian Duke Philip the Fair, a political union against France, which would not normally have led to Spanish involvement in the government of Flanders, Brabant and Holland. But here chance intervened in the shape of a most unexpected series of infant deaths in the Spanish royal family, with the consequence that Philip the Fair, son of Emperor Maximilian of Austria and Mary of Burgundy and husband of Joan, daughter of Ferdinand of Aragon and Isabella of Castile, became in 1506 king of the latter country. His son, Emperor Charles V and his grandson, King Philip II, consequently ruled over Spain and the Netherlands.²

'GRAND DESIGN' CONSTITUTIONS

I propose now to enter into my principal theme, which is that there are two main categories of fundamental laws, i.e., the products of one deliberate endeavour on

¹ W. Stubbs, *The constitutional history of England*, 3 Vols. (Oxford, Clarendon Press 1874-1878). The story goes to 1485. Stubbs was professor in the University of Oxford and bishop of the eponymous diocese.

² R.C. van Caenegem, 'Rechtsgeschiedenis en toeval', in 75 *The Legal History Review* (2007) p. 183-185.

the one hand and the results of an accumulation of disconnected events – or even accidents – on the other.

Let us have a look at some examples of the former type. They were the fruits of the purposeful and thoughtful discussions of a small group of lawmakers, who enjoyed the freedom to be creative because they worked in a revolutionary context after an ancient regime had been toppled. Consequently they were liberating documents, proclaiming new, fundamental freedoms.³ They were the result of a deliberate and creative ‘act of will’.⁴ Those modern constitutions have ideological roots in the Enlightenment, and their authors had read Locke, Hume, Montesquieu and other philosophers.

The most obvious example that comes to mind is the Constitution of the United States of 1787 followed by the Bill of Rights of 1791. After the revolting thirteen colonies had proclaimed their independence from Great Britain, the new country had to establish its form of government and the freedoms of its citizens. In intensive debates in a room in Philadelphia, which tourists still visit, the Convention, consisting of leaders of the American revolution, hammered out the Constitution in a few months. Some of those lawgivers are universally known – George Washington, Benjamin Franklin, Alexander Hamilton and James Madison – and they were well acquainted with the writings of the European philosophers of their time. The Founding Fathers introduced some startling innovations. They abolished the monarchy, the aristocracy and the established Church. They introduced a head of state elected by the people and a parliament with two houses, both elected.⁵ Not everything was pure invention, as the inspiration for the Ten Amendments came from the English Bill of Rights of 1689 and the federal structure was modelled on that of the Republic of the United Provinces.⁶

My next example is the French Constitution of 3 September 1791, which also originated at a time of revolution and created a new form of government. It established a constitutional and parliamentary monarchy after the British model, except that it had an elected one-chamber parliament (no House of Lords here!).

³ The one exception is the Swedish constitution of 1772 (the earliest in Europe after the Instrument of Government of Cromwell), by which King Gustavus Adolphus established his absolute rule against the wishes of the Swedish parliament.

⁴ I borrow the expression from J. Tully, *Strange multiplicity. Constitutionalism in an age of diversity* (Cambridge, CUP 1995) p. 60, who writes: ‘A modern constitution is an act whereby a people frees itself from customs, and imposes a new form of association on itself by an act of will’.

⁵ For a detailed survey of the revolutionary and the traditional elements in the US constitution see R.C. van Caenegem, *An historical introduction to Western constitutional law* (Cambridge, CUP 1995) p. 166–170.

⁶ See the remarks in R.C. Van Caenegem, *Historical considerations on judicial review and federalism in the United States of America, with special reference to England and the Dutch Republic* (Brussels, KVAB 2003) (Koninklijke Vlaamse Academie van België voor Wetenschappen en Kunsten. *Academiae Analecta*, N.R., 13).

Another example of a fundamental law resulting from an ‘act of will’ in revolutionary circumstances is the August 1919 *Verfassung* of Weimar (where the law-givers met because Berlin was unsafe), following the abdication of the Emperor and the proclamation, on 9 November 1918, of the Republic. Germany became a democratic, constitutional and parliamentary state, with a federal structure. The constitution, the fruit of serious and protracted debate by an elected Constituent Assembly, introduced a presidential regime after the American model.⁷

CHANCE AND THE CONSTITUTION: THE BRITISH CASE

In marked contrast to our previous examples, the British constitution was not produced by one inspired effort, but resulted from piecemeal and often disconnected initiatives, customs or reactions to fortuitous external circumstances. That is why the United Kingdom has no single written constitution, as there was no moment when lawmakers, inspired by some political philosophy, sat down to draft a fundamental law for their country. It is also why the British constitution – unwritten but no less venerable – looks like an archaeological site, with several layers going back to several centuries, each belonging to a different historical period and its sediment. Only once, at the time of Oliver Cromwell, was a blueprint drafted outlining the organs of the state, and their respective roles, but this Instrument of Government of 1653 was a complete anomaly on the English scene.⁸

The primaeval text in the story of the Ancient Constitution is, of course, the Magna Carta of 1215. It was not produced by a meeting of scholars or members of Parliament, but was the outcome of a baronial revolt against an overwhelming, tyrannical king. It was triggered by the humiliating fact that King John, the feudal overlord of the English knights, had given away his – and their – kingdom to the Pope and received it back as a papal fief: the King of England a vassal of a cleric! Magna Carta says nothing about the organs of the state, but contains a rather disconnected set of articles which ban various arbitrary practices of the monarch, who granted the Charter only under duress, as he faced a superior rebellious force. Most of the articles deal with feudal issues, which were relevant only at that time and had no lasting effect. One article, however, stands out, because it enunciates a fundamental notion which became known in later centuries as the rule of law and the *Rechtsstaat*. This is Article 39 which says that no free man can be punished except on the strength of a lawful judgment by his peers or by the law of the land.⁹ This article was never forgotten in England, even though later lawyers chose

⁷ See the classic work of E.R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, III (Stuttgart, Kohlhammer 1990) p. 731 and ff.

⁸ See the classic study of E. Jenks, *Constitutional Experiments of the Commonwealth* (Cambridge, CUP 1890).

⁹ See the authoritative study of J.C. Holt, *Magna Carta*, 2nd edn. (Cambridge, CUP 1992).

to interpret it in an unhistoric way. Thus Sir Edward Coke, possibly the most learned common lawyer ever, had a problem with the express limitation of Article 39 to the *liber homo*. He must have known that in the 13th century a considerable proportion of the rural population on the feudal manors was unfree. He nevertheless maintained that Magna Carta applied to all Englishmen. Coke's view was, because of his immense prestige, generally accepted, although Bryce Lyon, an eminent mediaevalist pointed out that 'by no stretch of the imagination can the villein be considered a freeman' and he went on that 'few of the political and civil liberties so dear to us, and declared to be in Magna Carta, existed in 1215'. But then, Coke 'was not always attempting to find the truth in the sources . . . , he was using them in his fight with James I and Charles I.'¹⁰

Magna Carta turned up again in 1628 – and was again invoked against a Stuart king – when the Petition of Right expressly referred to it and used the famous phrase of 'due process of law'. The Petition forced the absolutist Charles I to concede a number of inviolable rights of his subjects and excluded all taxes other than those granted by Parliament. It was, however, no modern constitution, defining the organs of the state, but a brief document dealing with a few politically sensitive topics. It was no more than a truce between the Crown and the opposition, the fruit of a temporary constellation, and was soon discarded by the King, who proceeded to govern without Parliament.

The next stage in the chain of events that came to constitute England's fundamental law was the Bill of Rights of 1689, the outcome of unforeseen political – and biological – events, which I should now like to present and where chance will be seen to have played a substantial role. The Bill was no elaborate and comprehensive fundamental law, worked out by a committee of jurists and politicians, but the result of give and take between Parliament and the King and Queen. Indeed, King William and Queen Mary agreed to the solemn proclamation of the inviolable liberties of their subjects. The Bill, moreover, outlawed the 'pretended power' of the Crown to suspend or dispense with laws without consent of Parliament. It also outlawed taxation for the use of the Crown without grant of Parliament. The unforeseen element behind this famous Bill was that the king in question, William III, was a Dutchman and stadtholder of Holland. The English were admittedly used to monarchs of foreign origin – Normans, Angevins or Welshmen (and soon would be ruled by Germans) – but his accession was a strange development, considering the endemic 17th-century commercial and military conflict between Holland and England. William was married to the Stuart Queen Mary and should normally, after Mary obtained the throne left vacant by her fugitive father, King James II, have been content with the title of prince consort. He demanded, how-

¹⁰ B.D. Lyon, 'The Lawyer and Magna Carta', 23 *Rocky Mountain Law Review* (1951) p. 12, 18.

ever, to be King of England, and his wish was granted by Parliament only when he and his wife paid the price of the proclamation of the liberties contained in the Bill of Rights.¹¹

How William came to England is an extraordinary story, where an unforeseen biological event – quite unconnected with constitutional developments – played a decisive role. Indeed, King James II, who was a Catholic and remarried to the Catholic Mary of Modena, was resented by the protestant English, but tolerated as long as that marriage had no offspring, because that would have meant the restoration of a Catholic dynasty in England. When, however, in June 1688 Mary of Modena produced a crown-prince, a small group of English aristocrats went to Holland to ask William, the husband of James' Protestant daughter Mary (by a previous marriage), to come over to England with an army and to topple the legitimate Stuart king. We have seen earlier how the chance deaths of Spanish children affected the fate of the Low Countries, and we see here how the chance motherhood of an English queen led to foreign occupation (William landed with his mainly Dutch army in the English West Country in November 1688) and, after James II had by the end of the year left for France, to the haggling that led to the Bill of Rights of the following year.

Shortly afterwards, the Act of Settlement of 1701 (which eventually led to the accession of the House of Hanover) provided another – important – piece to the puzzle of the Constitution, as it insured the independence – and the irremovability – of the judiciary: no longer could kings dismiss judges as James I had done with Sir Edward Coke.¹²

It was around the same time that another erosion of royal power took place. This time it was not by an Act of Parliament, but by the formation of a custom that became a customary law and a lasting part of the constitution. I refer to the fact that Queen Anne (1702-1714) was the last monarch to veto an Act of Parliament. Ever since that time the royal veto simply was 'not done' and in this unobtrusive way this became another element of the multifarious constitution (even today all Acts of Parliament need the royal assent, but this is never withheld).

Around that time another twist was given to the story of the constitution, involving another diminution of royal power: the king stopped presiding over cabinet meetings. Henceforth the government was wholly in the hands of politicians

¹¹ For a recent survey of these momentous developments, see U. Müssig, 'Constitutional conflicts in seventeenth-century England', 76 *The Legal History Review* (2008) p. 27-47 (with abundant references to the older literature).

¹² See R. Stevens, 'The Act of Settlement and the questionable history of judicial independence', *Oxford University Commonwealth Journal* (2001) p. 253-267. The author analyses the antecedents that led to the Act and notably the interference with the judges by Charles II and James II. He also presents in detail the political events that led to stadtholder William becoming king of England.

who discussed and decided among themselves, with the prime minister in the chair. They were, however, expected to implement the will of Parliament and particularly of the House of Commons, which voted the necessary budget laws and thus held the purse strings. This important and at that time most unusual innovation was not based on an Act of Parliament or the advice of some learned body, but came about because of the incongruous fact that George I, who became King of the United Kingdom in 1714, was Elector of Hanover, spoke no English and found it a waste of time to go to cabinet meetings (he spent most of his days in Hanover and was mainly interested in German politics).¹³ Thus the absence of the monarch, an external and even improbable factor with no basis in law, started a custom and became a customary law, which has been observed ever since.

The 18th-century British constitution consisted of an amalgam of vaguely connected texts, produced over several centuries, and of usages and customs often introduced by fortuitous circumstances. Using the epithet given by Professor Milsom to the common law, one could talk of 'the untidiness' of the constitution.¹⁴ One might even go a step further and call it a constitution 'of shreds and patches', always bearing in mind, however, that it happened to work and even became a model for much of the modern world.

Yet, as 'untidiness is not attractive',¹⁵ by the middle of the 18th century the time had come to attempt a scholarly streamlining and presentation of the amalgam and to uncover some coherent principles in it.

Two scholars undertook to bring light into the darkness, an English and a French lawyer. Sir William Blackstone, a barrister who had occupied since 1758 the Vinerian chair in Oxford, lectured on the laws of England, not to law students of the law faculty (for there was no such thing then), but to young gentlemen, the sons of the aristocracy and the gentry, who wanted to know the law of their land in plain language, without the abstruse technicalities for which the common law was notorious.

Blackstone's lectures were such a revelation that they resulted in the four volumes of his famous *Commentaries on the laws of England* (1765-68), written in an elegant style which is still a pleasure to read for all lovers of English prose. The First Book dealt with public law and presented the basic principles of the British constitution, i.e., the supremacy of Parliament, the inviolable rights of the indi-

¹³ George I (Hanover 1660 – Osnabrück 1727) became Elector of Hanover in 1698 and king of Great Britain in 1714. He was the son of the Elector Ernest Augustus and Sophia of the Palatinate, a granddaughter of King James I of England. Upon his mother's death in 1714 George succeeded her on the British throne, which his mother had obtained on the strength of the Act of Settlement of 1701.

¹⁴ S.F.C. Milsom, *A natural history of the common law* (New York, Columbia UP 2003) p. 20 (based on the Carpentier lectures at the law school of Columbia University in 1995).

¹⁵ *Ibid.*

vidual, the rule of law as administered by an independent judiciary, Cabinet government supported by Parliament and the country, which elected its representatives in the House of Commons, and no taxation without representation. Blackstone's coherent account went through numerous editions, not least because he was full of praise for the law of his land.¹⁶

Around the same time Montesquieu was also full of admiration for the fundamental laws of Britain which, after a two-year stay in that country, he presented as a model in his famous *De l'esprit des lois* of 1748. Here the President of the Parlement of Bordeaux expounded his theory of the *séparation des pouvoirs* which he had conceived in England. Montesquieu believed that the judiciary, the government and the legislature ought to be three separate and mutually independent powers in the land, an ideal that stood in sharp contrast to the situation in his own country, where the king was head of government, supreme lawgiver and supreme judge. Montesquieu's account of the British constitution was perspicacious, elegant and widely read. He did, however, – wittingly or unwittingly – describe the British separation of powers in overly absolute terms, for there was and is a good degree of overlap. I have myself witnessed this when, in 1985, I was privileged to be present at a debate on criminal procedure in the House of Lords. The late Lord Hailsham sat on the Woolsack and was the embodiment of this overlap. He was, as Lord Chancellor, the head of the judiciary; he also presided over the House of Lords, one of the two chambers of Parliament and was thus a legislator; and he moreover was a Cabinet Minister and an influential member of the executive. At one moment I saw him leaving his Woolsack and, taking on his role as party-bound Cabinet Minister, standing at the bar in the middle of the chamber in order to reply to a question posed by a member of the opposition.¹⁷

All these theorising efforts culminated in the following century with the classic and authoritative *Introduction to the study of the law of the constitution* (1885), by Albert Venn Dicey who, like Blackstone, was a barrister and an occupant of the Vinerian chair in Oxford.¹⁸

The British constitution is still largely unwritten and largely based on custom, which is the reason that Constitutional Law is more correctly described as 'The Law and Custom of the Constitution', because it contains more customs than law.¹⁹

¹⁶ For a recent appraisal see S.F.C. Milsom, *The Nature of Blackstone's Achievement* (London, Selden Society 1981) (Selden Society Lecture).

¹⁷ See Stevens, *supra* n. 12, p. 261, shows how the aforementioned Act of Settlement marked 'an inarticulate effort to have a kind of separation of powers', because it constituted an 'effort to keep the executive out of the legislature and to offer a measure of protection to the judiciary'. Nevertheless, as he points out, 'the English decided that they preferred a balance of power rather than a separation of powers'.

¹⁸ The work went through numerous editions. I mention here the 10th edition (1961) by the Cambridge professor and Master of Caius College, the late E.C.S. Wade.

¹⁹ I quote here C.K. Allen, *Law in the Making* (Oxford, OUP 1964) p. 76-77.

I have, if a personal anecdote is allowed, heard at Oxford in 1989 a lecture by the leading liberal on the US Supreme Court, Justice W.J. Brennan, entitled *Why Britain needs a written constitution*. It was a truly cogent address and of the highest intellectual quality, but the English audience was not impressed, as they ultimately prefer the law to be controlled by an elected Parliament rather than an unelected Bench.

ABORTED CONSTITUTIONS

Beside written and unwritten fundamental laws we can distinguish some other categories, to which I will now turn, starting with some examples of aborted constitutions, where plans were made and even elaborate texts drafted, but to no avail, as they were never proclaimed and applied. My first case comes from the Austro-Hungarian Empire, which struggled with its multitude of nationalities. In 1867, as is well-known, the *Ausgleich* or compromise was enacted and a 'dual monarchy' established, with Franz Joseph as Emperor of Austria and King of Hungary. After the Hungarians had been satisfied, the Czech national aspirations became even more outspoken so that the idea was launched of a separate Czech kingdom, after the Hungarian model and harking back to the ancient Bohemian Crown. Franz Joseph had made it known that he was willing to be crowned in Prague. It was in 1871 that Count Hohenwart's government talked to the Czech aristocracy about the recognition of the Kingdom of Bohemia, which meant the creation of a 'trialist' monarchy. Franz Joseph also encouraged the proclamation of a new constitution which would give the Czech and the German languages equal status. This sensible endeavour sadly came to nothing and the new constitution never saw the light of day, nor was Franz Joseph ever crowned in Prague. Political obstruction from various quarters was to blame. The Hungarians objected because they feared a rival kingdom in the monarchy, the Germans in Bohemia feared they would be secondary citizens in the new Czech kingdom and, more unexpectedly, Bismarck objected because he suspected the Czechs of French and Russian sympathies.²⁰

My next example is the constitution which Marshal Philippe Pétain, *Chef de l'Etat français*, failed to produce. After the defeat in the summer of 1940, the discredited *IIIe République* gave full powers to the hero of Verdun to give France a new constitution. At Vichy on 10 July 1940 the combined assembly of the senators and deputies dissolved the existing regime and gave Marshal Pétain a mandate to draft a new constitution which was to uphold the traditional values of *travail, famille et patrie*. On 11 July 1940, Pétain issued three *Actes constitutionnels*, by which, *inter alia*, the legislative chambers were 'adjourned until further notice'. The

²⁰ See M. Rosso, 'L'Autriche-Hongrie entre nationalismes et « Mitteleuropa »', *Revue historique de droit français et étranger* 2007, p. 548.

planned fundamental law never materialised, although Pétain put some work into it and a few fragments (which I have not seen) were actually drafted.²¹

My third example of a constitution that failed to get on to the statute book is a text that was planned, discussed and drafted in Rome, the *Lex Ecclesiae Fundamentalis* of the Second Vatican Council. This fascinating document, whose *textus emendatus* was printed, and in 1971 sent, together with the *textus prior* of 1970, to all the bishops of the Catholic Church, has not received all the attention it deserves. That so few legal historians mention it²² must be because scholars tend to write ‘victors’ history’. They are not interested in past failures, but in the successes that formed the stepping stones to their own time. That, by the way, is why the modernisation of English law under Oliver Cromwell receives so little attention, as his endeavours were swept away by the Restoration.²³

In my view, the flops of the past are as much part of our heritage as its direct hits, and the attempt to give the Catholic Church a constitution was a remarkable and even extraordinary new move in its twenty centuries of history. The initiative came from Pope John XXIII, but it was under Pope Paul VI that a commission, led by Cardinal Felici, was installed in 1967 and published in 1971 the aforementioned *textus emendatus*. The project was part of the *aggiornamento*, the catching up of the Church with modern times and, since fundamental laws and declarations of human rights are typical for our era, the idea of the Fathers of the Council was understandable.

It followed that the *Lex* was modelled on the great constitutions of the modern states, containing an analysis of the organs of ecclesiastical government and, most noteworthy, a chapter *De Christi fidelibus et iuribus eorum* (which brings to mind Articles 4 to 24 of the Belgian Constitution of 1831, entitled *Des Belges et de leurs droits*).

It is, of course, intriguing as to why this project was never enacted, shaming all the work that had been put into it and the great expectations it aroused. I have talked about this with two old friends, eminent canonists who had been involved in the elaboration of the texts, Professor Willy Onclin and Professor Stephan Kuttner, who gave several explanations for the failure, some legal and some theological.

²¹ See E. Berl, *La Fin de la IIIe République* (Paris, Gallimard 1968) (Trente Journées qui ont fait la France, 29).

²² I was surprised to find no reference to it in the encyclopaedic and monumental *Storia del diritto in Europa. dal medioevo all'età contemporanea* (Milan, 2007) by my old friend Antonio Padoa Schioppa.

²³ Talking of the rule of Oliver Cromwell when very interesting attempts at modernisation – and even the codification – of the common law were made, all an eminent legal historian typically wrote about them was that ‘it is hardly necessary to say that most of these premature advances ceased at the Restoration’ (T.F.T. Plucknett, *A Concise History of the Common Law*, 5th edn. (London, Butterworth 1956) p. 54.

The problem for the canonists was that there is nothing in their tradition to build on: ecclesiastical law had always been concerned with the duties of the faithful rather than their rights. Canon law knew no limits to the papal *plenitudo potestatis* so it was no wonder that the very idea of a constitution limiting the rights of the government had been condemned by Cardinal Consalvi who, in 1820, rejected the very principle of a constitutional government as an objectionable heresy. He feared that if it was granted in the Papal State, people would, eventually, even try to impose it on the Church. Consequently the terminology of the *Lex* was largely borrowed from the secular states, which disturbed the traditional canonists.

There were also theological question marks. Scholars such as Karl Rahner and Ives Congar warned against the danger of *juridisme* and saw no need for a new constitution, as the Gospel was the true fundamental law of the Church.²⁴

If, to round off this chapter, I am allowed a personal anecdote, I heard in 2008 on the BBC an interview with a leading figure of the Kingdom of Saudi Arabia, who maintained that his country had no need for a constitution, as it already had a fundamental law in the Koran.

My last example in this series concerns the proposal for a written constitution for the United Kingdom drafted in 1991 by a London think-tank called the Institute for Public Policy Research. The text of 136 pages consists of 129 articles. Its basic idea is that authority must be sought not in (unwritten) common law principles but in the written provisions of the Constitution, which incorporates a Bill of Rights. It provides for the replacement of the House of Lords by an elected Second Chamber and for legislative power to be shared between Parliament and elected Assemblies for Scotland, Wales and Northern Ireland and twelve English regions. The Parliament should, however, retain an exclusive right over those matters normally retained for the central government in federal (note the use of this term) constitutions. The project also provides for a Supreme Court, with appellate jurisdiction over the interpretation and effect of the Constitution, contraventions of the Bill of Rights, the interpretation of Acts of Parliament and various matters within the jurisdiction of other courts.²⁵ This 1991 draft never became the United Kingdom's fundamental law, nor has the country obtained a written constitution. Nevertheless, the text deserves our attention, as some of its proposals have become law and others may be on their way in the ongoing profound changes in the shape of the British state (*see, inter alia*, the Constitutional Reform Act, 2005). But this is a subject of which the eminent members of the Devolution Club know much more than I do, so I will say no more about it.²⁶

²⁴ See *Legge e Vangelo. Discussione su una legge fondamentale per la chiesa* (Brescia, 1972); W.J. Ladue, 'A written constitution for the Church?', 32 *The Jurist* (Washington, 1972), p. 1-13.

²⁵ *The Constitution of the United Kingdom* (London, 1991) (Institute for Public Policy Research).

²⁶ I noted with great interest that the Italian Cultural Institute and the Devolution Club-Italy organised on 10 April 2008 a dialogue on *The Supreme Court of the United Kingdom: towards a*

EPHEMERAL CONSTITUTIONS

I now leave the discussion of the ‘might-have-been’ (however interesting it is, as I often told my students, to note what did not happen) and proceed to the presentation of fundamental laws that were duly enacted but very short-lived.

One that immediately comes to mind is the *Verfassung* of the 1848 *Nationalversammlung* in Frankfurt-am-Main. This fruit of the revolutions that then swept through Europe was a landmark in German history. Its aim was twofold, German unification and a liberal monarchy. The Frankfurt Parliament, which met on 18 May 1848, was elected by the people of the various states and produced two fundamental laws embodying the liberal and national aspirations of the time. In December 1848, it proclaimed the *Grundrechte des deutschen Volkes* and, in March 1849, the *Reichsverfassung*, which turned Germany (including Austria) into a federal and constitutional monarchy. Both the Constitution and the Bill of Rights were short-lived, as the Frankfurt Parliament had more ideas – and professors – than power (hence the famous quip ‘Hunderdzwanzig Professoren, Vaterland du bist verloren!’). In 1849 the King of Prussia put *manu militari* an end to this memorable experiment and soon Frankfurt was but a glorious memory. Both in Prussia and in Austria the old monarchies reasserted themselves.²⁷

Ever since 1789, France has gone through a variety of regimes at breakneck speed and produced a succession of constitutions – royal, imperial and republican – some of which were very short-lived indeed. Maybe the most dramatic episode in this story was the *IIe République*, the fruit of the February revolution of 1848, the flight of the king, the proclamation of the republic and the election of a Constituent Assembly. The Constitution of 1848 lasted only till the *coup d'état* of December 1851, the dissolution of the National Assembly and the proclamation of Napoleon III as emperor. There is no need for an enumeration of the other regimes, but I hope the reader will allow me an anecdote here. When, in 1954, I worked in the *Archives Nationales* in Paris, I had a discussion with a French intellectual about the numerous constitutions of his country. He asked me under which constitution Belgium lived at that time and when I told him that the Fundamental Law of 1831 was still in force, he stared at me in disbelief: the same constitution after more than 120 years! He was as astonished by Belgium as I was by the rapid changes of regime in his country. So when I asked him what caused this *mobilisme*, he explained that the French were so clever that as soon as they had a new consti-

British ‘Constitutional’ Adjudication? with Prof. Anthony W. Bradley and Prof. Peter Leyland as speakers.

²⁷ F. Eyck, *The Frankfurt Parliament* (London, St. Martin’s 1968). For a general and fundamental survey see M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland III: Staats- und Verwaltungswissenschaft in Republik und Diktatur 1914-1945* (Munich, Beck 1999).

tution they already thought of a better one (this was under the Fourth Republic, the Fifth was just four years away).

SHAM CONSTITUTIONS

My next (and last – and rather dismal) category consists of fundamental laws that were as liberal as any democrat could wish, but were in fact political propaganda and far removed from real life. One could therefore call them sham or phantom constitutions. Two examples, which are ideological manifestos rather than texts of law, should be sufficient to illustrate this category.

The French Constitution of the Year I (1793), under the regime of the *Convention Nationale* (created after Robespierre's *coup d'état* of 10 August 1792), was very democratic and guaranteed, *inter alia*, the *liberté indéfinie de la presse*, but it was at once made clear that this freedom did not extend to royalist opponents of the young republic, so that several journalists were exposed as *empoisonneurs de l'opinion publique* and executed.

Similarly, the *Stalinskaia* of December 1936, another paragon of democracy, guaranteed the freedom of the press, but in fact it appeared while the terror of the great purges was raging and freedom was nonexistent in the Soviet Union.

CONSTITUTIONS ARE BORN AND GROW UP

As soon as the Constituent Assembly has done its work, its brainchild stands on its own feet and grows up: long after its creators have all gone, it leads a life of its own. It has to be applied and interpreted in new circumstances by judges who face unknown problems. Having escaped from the lawmaker, the constitution falls into the hands of inscrutable judges, who find some unexpected possibilities to interfere with public life. Surely, the Founding Fathers never imagined in their wildest dreams – or worst nightmares – that their precious Bill of Rights would one day serve to legalise abortion (*Roe v. Wade*, 1973), which to them was an unspeakable and sinful abomination. Nor could they imagine that the same Bill would be quoted – almost successfully – in order to declare the death penalty unconstitutional, when it is clear that the 18th-century lawmaker found capital punishment entirely acceptable and made that quite clear in the Fifth Amendment.²⁸ This situation is not peculiar to America. Indeed, it is a general observation that, as a distinguished legal historian aptly put it, 'even if the legislator thought through exactly what he wanted to achieve . . . , he could not foresee the circumstances or control the ways

²⁸ See van Caenegem, *supra* n. 6, p. 13-20.

in which his provision would actually be brought to bear, and the eventual consequences often had little relation to what had been envisaged.²⁹

What the US Supreme Court has done or attempted to do with the Constitution in recent decades is well-known. But the impact of the judges on their fundamental law had started long before then. I would like to select two examples, both concerning the famous First Amendment (1791), which says: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’ My examples deal with two different elements, both of crucial importance for American democracy, i.e., the role of religion and freedom of speech and the relations between the States and the Union (an endemic problem in federal states).

Let us see what happened to the Free Speech clause in the First Amendment. A recent book by a former Law Professor at Harvard and Columbia points out that the judiciary was far from consistent in upholding freedom of speech. He reminds his readers of the jail sentence imposed by a Massachusetts court in 1823 for an essay denying the existence of God. He reminds them also of the pronouncement of a State-court judge in 1824 that ‘Christianity is and always has been a part of the common law of Pennsylvania.’ And in 1919 the Supreme Court unanimously upheld a prison sentence for the author of a leaflet denouncing conscription (in the First World War) as slavery. In fact, it was not until 1931 that the Supreme Court began enforcing the constitutional guarantee of freedom of speech, when it struck down a Californian law that had forbidden the display of a red flag: at last speech was safe in the hands of the judiciary.³⁰

The First Amendment also gave rise to debates about the relations between the Union and the States. They concerned the clause that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ For a long time this meant that congress, a federal organ *par excellence*, could not interfere in the states’ religious establishments. Thus the Marshall Court (1801–35) stated explicitly that the Bill of Rights did not apply to the States (consequently, in the second and third decades of the 19th century, Connecticut and Massachusetts were still using tax revenues to maintain their established Congregational churches). But in 1925, in *Gitlow v. People of the State of New York*, the Supreme Court declared, without any citation of precedent: ‘We may and do assume that freedom of speech and of the press, which are protected by the First

²⁹ See Milsom, *supra* n. 14, p. 71 (discussing the Statute of Uses of 1536).

³⁰ A. Lewis, *Freedom for the thought that we hate: a biography of the First Amendment* (New York, Basic Books 2008). The book was the subject of a detailed review by Jeremy Waldron in *New York Review of Books*, 29 May 2008, p. 40–44.

Amendment from abridgement by Congress, are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment [1868] from impairment by the States.’ Somewhat later, another rather remarkable judgment was passed on this constitutional rule. In accordance with a law passed in 1941 by the New Jersey legislature, the township of Ewing authorised the reimbursement of money spent on the transport on regular buses of children to Catholic parochial schools, but one citizen objected and the lawsuit reached the federal Supreme Court. Justice Hugo Black, who wrote the majority opinion, said that the First Amendment meant the separation of Church and State and could in no way be breached. This was straightforward enough, but the strange thing is that the Court then unexpectedly went on to uphold Ewing’s programme, because no aid to the schools in question was involved, but just a measure to protect the students. The reader will remember that I have spoken of ‘inscrutable judges’.³¹

LONG-LIVED CONSTITUTIONS

Some fundamental laws live forever. The longest-living are, of course, the unwritten ones, like that of Great Britain. There is here no single text that can be annulled and replaced, but a tissue of Charters, Acts, customs, traditions and ingrained attitudes which cannot at a stroke of the pen be abolished. Parliament can repeal any ‘fundamental’ text (as in the 19th century it repealed most of the articles of Magna Carta). It recently abolished the age-old and venerable office of Lord Chancellor and created instead a continental-style Ministry of Justice. Parliament could even abolish the monarchy – but the royal assent would still be required! So, in a way, the most elusive and unreal constitution is the least vulnerable.

What a contrast with France, where one debate and one vote led, in July 1940, to the demise of the Third Republic. And what a contrast with what happened to the Weimar Republic. Two months after Adolf Hitler became Chancellor, the Reichstag, in March 1933, passed the Enabling Act (*Ermächtigungsgesetz*), which handed over legislative powers from parliament to the government. This was done with the necessary two-thirds majority required by Article 76 of the Constitution. But when in August of the following year President Hindenburg died, the fundamental law was forgotten and no new president elected. The new ruler had not even bothered to abolish the Constitution of Weimar: it had, as old soldiers do, ‘not died, but just faded away’.

The American Constitution, by contrast, is, although written, remarkably long-lived. It is still going strong – with Amendments – after more than two centuries.

³¹ See on all this S. Mansfield, *Ten tortured words. How the Founding Fathers tried to protect religion in America and what’s happened since* (New York, Thomas Nelson 2008). See also the detailed review by Jordan S. Wood in *New York Review of Books*, 1 May 2008, p. 52-56.

This striking longevity becomes understandable when one realises that the American Constitution is not just a legal text, but more like a religious revelation. The First Amendment bans established churches, but the adoration surrounding the fundamental law amounts to an established civil religion, a substitute for a state church. The law turned into religion is the bedrock that binds all Americans together. The constitution is a 'holy book' and as such the object of deep veneration: the original text is exhibited in the National Archives in Washington on an altar and venerated by the public, like saints' relics in a medieval shrine.³² P. Maier has called the great texts of the Founding Fathers 'the American Scripture',³³ while S. Wood has spoken of profane political beliefs turned into a hallowed religious-like creed, and of secular and temporal documents being turned into sacred scriptures.³⁴

IS A GLOBAL CONSTITUTION A PIPE DREAM?

As I have been talking a lot about the past, a few words about the future may be a good way to conclude. The idea that our 'global village' may be moving towards legal globalisation, leaving behind the old national boundaries, has recently occupied jurists in several countries. Among them are two eminent Italian scholars. In 2003 Sabino Cassese, Professor of Administrative Law at La Sapienza and judge at the *Corte Costituzionale*, published a book in Rome entitled *Lo spazio giuridico globale*. He showed how the markets had become worldwide, as had technology and finance. Global markets and multinational companies cannot operate without being regulated by global political and legal institutions. Cassese analyses the role of the European Union, as a model of supranational endeavour. In 2007 Antonio Padoa Schioppa, who teaches legal history at Milan, published in Bologna his comprehensive and impressive *Storia del diritto in Europa*, whose very last chapter is entitled *Verso un diritto globale?* Here the United Nations, the legal structure of the world economy and the protection of human rights are analysed.

As these jurists were at work in southern Europe, others were grappling with the same problem in the extreme north, for it was in Stockholm that, in 1999, a volume of articles was published under the title *Globalizations and Modernities*.³⁵ It was the result of an initiative of the Swedish Council for Planning and Coordination of Research, within whose framework a Committee on 'Global Processes'

³² See in Ch. 4 'The holy books of the law', the pages on 'The American Constitution and original intent', in R.C. van Caenegem, *European law in the past and the future. Unity and diversity over two millennia*, (Cambridge, CUP 2002) p. 56-60.

³³ P. Maier, *American scripture. Making the Declaration of Independence* (New York, Vintage 1997).

³⁴ Reviewing Maier's book in the *New York Review of Books*, 14 Aug. 1997, p. 37.

³⁵ G. Therborn (ed.), *Globalizations and modernities. Experiences and perspectives of Europe and Latin America* (Stockholm, Forskningsrådsnämnden 1999).

went to work, organising a series of conferences. Among the contributions in this volume that are particularly relevant to my topic I mention studies on the role of the professions in global development, religious globalisation, global legal cultures, urban culture in an age of globalisation and the global future of the European welfare state.

The previous three books came from Europe, my fourth was written by an Australian jurist, David B. Goldman, a practising lawyer and an Honorary Affiliate of the Julius Stone Institute of Jurisprudence in the University of Sydney. His *Globalisation and the Western Legal Tradition* (Cambridge University Press, 2007) is the fruit of extensive research and deep reflection. The author shows how the Western legal traditions offered a dynamic model for a supranational order. This prepared the way for the comprehensive harmony which is the aim of the European Union and of the United Nations. Like Cassese, the author attaches great importance to international commercial law.

Having maintained these four works on globalisation, I can now return to my proper subject, constitutional law. What are the chances of a global constitution? Some years ago, I wrote an article asking whether the unification of European law was a pipedream.³⁶ My present question is whether a constitution encompassing the world is a pipe dream. As a realistic lawyer I see, of course, immense difficulties. The world is rent by violent conflict and, as constitutions used to be embedded in the national culture, so the future world constitution would have to be nourished by a world culture. This is at present lacking: to quote one example, some cultures cannot conceive of a fundamental law that is not based on religion, whilst others, more secular, object to references to God. Nevertheless, as a historian, I see grounds for optimism, for history shows that men and women in the past have overcome immense obstacles and belied the pessimists who ridiculed their utopias. I have myself seen the rise and expansion of a united, prosperous and peaceful Europe. After the Second World War, which I lived through as a schoolboy, Europe was in ruins, the victim of seemingly endless and fratricidal wars, when the nations were at each other's throats. To climb out of that hell of hatred and destruction in order to found a haven of peace seemed truly utopian. And yet the pipe dream has come true.

There is another, final, consideration here: a global fundamental law does not have to start from scratch: certain endeavours are already in place. The Charter of the United Nations exists and is a first version of a global constitution; and the Universal Declaration of Human Rights is a first version of a global Bill of Rights: the future has already started.



³⁶ R.C. van Caenegem, 'The unification of European law: a pipedream?', 14 *European Review* (2006) p. 33-48.