

# A codified constitution for the (?Rest of the) United Kingdom

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# Outline of remarks

- Does theory of UK constitution exist?
  - More among lawyers than pol. scientists
  - A Scottish blind spot
- Some implications of taking 1707 seriously
  - *MacCormick v. Lord Advocate* 1953 SC 396
- If Scotland leaves, can rUK remain uncodified?
- If Scotland stays, is federalism coming?

# Does the theory of the British Constitution exist?

- Marxist realism: *The constitution is what happens* (J.A.G. Griffith)
- The case of A.V. Dicey
- The MacCormick case
  - Cooper LP, speaking *obiter*
  - Legally irrelevant
  - Powerful point of political theory

# England's greatest constitutional theorist...

*...Dicey's iconic reverence for the arrangements he chose to see and describe. Leaving aside his xenophobic and counterfactual insistence that Britain, unlike France, had no body of administrative law, Dicey's doctrine of parliamentary supremacy stood firm until Home Rule came up: then he changed his mind and argued that there were some things that even Parliament couldn't do. (S. Sedley, 2009)*

# Scotland's senior judge...

*The Treaty [of Union 1707] and associated legislation ... contain some clauses which expressly reserve powers of subsequent modification; and other clauses which either contain no such power, or emphatically exclude subsequent alteration by declaration that the provision shall be fundamental and unalterable in all times coming ... I have never been able to understand how it is possible to reconcile with elementary canons of [statutory] construction, the adoption by the English constitutional theorists of the same attitude to these markedly different types of provision.*

# If the constitution is what happens, what is happening?

- Demands for popular sovereignty
  - To fill gap left by intellectual collapse of Diceyanism
  - It might be nice if we elected our legislature
    - Bishops??!!
    - Col. Rainborough's challenge
  - A Scottish angle
- Demands for rights entrenchment
  - ECHR and HRA 1998
  - Effect on judges' behaviour

# Thomas Rainborough at Putney, October 1647

*The poorest he that is in England hath a life to live as the greatest he, and therefore truly, sir, I think it is clear to every man that is to live under a government ought first by his own consent to put himself under that*

- Only rediscovered in 1890s
- Recently retweeted by History of Parliament

# But popular sovereignty and rights protection may be incompatible...

- Political pushback against ECHR regime
- Driven by (well-founded) fear of UKIP
- Rights are inherently counter-majoritarian
- Should the UK have an entrenched Bill of Rights?
  - Yes – IM
  - No – J Waldron



# If Scotland leaves, can rUK remain uncodified?

- The source of Dicey's contradiction ('unrepealable' clauses of Acts of Union) repealed
- But both 'popular sovereigntists' and 'rights protectors' will continue to argue:
  - ps want an elected legislature
  - rp want rUK to stay in the ECHR
  - Many (not all) senior UK judges are rights-protecting

# If Scotland stays, is federalism coming?

- Scotland Act 2012 or undefined “devo max”
  - Significant devolution of tax powers
  - Marginal tax to align with marginal spending
  - Scottish Parliament will have to grow up
  - Therefore more legitimate (already more trusted in Scotland)
  - UK federalism may emerge gradually, as in Canada

# For further reading

- V. Bogdanor, *The New British Constitution* Hart 2009
- I. McLean, *What's wrong with the British Constitution* 2/e OUP 2012
- J. Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal* 115, 2006