PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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have, at various times, been considered elsewhere.[8] By contrast, the aim of this collection is to analyse the ways in which different aspects of the contemporary multi-layered constitution interrelate. While this exercise has a practical, map-drafting focus, certain broader conclusions about the *nature* of that constitution can be drawn from the analysis. In the remainder of this introduction, we will attempt to explain some of the features of the multi-layered model in further detail. We will then explain how the chapters in the collection illustrate the themes we have canvassed. It goes without saying that it would be impracticable, in a single introduction or set of essays, to capture every aspect of the present multi-layered model, or to evaluate all its consequences. We hope, in the present volume, simply to sketch out some of the broader themes.

THE MULTI-LAYERED CONSTITUTION: AN OVERVIEW

Many claims have been made about the post-1997 reforms to the United Kingdom constitution. It has been suggested, for example, that considered in the round, these reforms require us to see the contemporary constitution as less monolithic, less centralised and less political than it previously was.[9] More radically, others have claimed variously that the raft of constitutional legislation amounts to a new constitutional settlement,[10] that it deals 'hammer blows against our Benthamite and Diceyan traditions', or that it entails a shift from a 'political' to a 'law based' constitution.[11] Contestable though these latter claims might be, for the reasons indicated above, it is nonetheless clear that the emergence—over the past thirty years—of a multi-layered constitution is a matter of considerable significance, and it is the purpose of this section of the introduction to sketch out some of its features. In order to do so, a useful starting point is to outline—in order to provide a basis for comparison—the features of Professor AV Dicey's conception of the constitutional order. We are not saying that it follows inevitably from the emergence of a multi-layered constitution that all reference to Dicey's model should necessarily be abandoned. Rather, we present Dicey's analysis as a counter-example to the multi-layered model, something which will enable us to illustrate the differences between the two more clearly.

The primary components of Dicey's model were Parliamentary Sovereignty and

[8] There is a large literature on these topics. See, eg, N MacCormick, *Questioning Sovereignty: Law, State and Practical Reason* (Oxford, Clarendon Press, 1999); 'Symposium: Can Europe Have a Constitution?' (2001) 12 *KCLJ* 1–133; PP Craig, 'Constitutions, Constitutionalism and the European Union' (2001) 26 *EL Rev* 125; I. Pernice 'Multilevel constitutionalism in the European Union' (2002) 27 *EL Rev* 511; N Walker, 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism', ch 7 in T Campbell, KD Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford, Clarendon Press, 2001).

[9] C Munro, *Studies in Constitutional Law* 2nd edn (London, Butterworths., 1999), p 12.

[10] R Hazell and R Cornes (eds), *Constitutional Futures: A History of the Next Ten Years* (Oxford, OUP, 1999), p 1.

[11] J Jowell and D Oliver, *The Changing Constitution* 4th edn (Oxford, OUP, 2000), p v. D Oliver, *Constitutional Reform in the UK* (Oxford, OUP, 2003), p v.

the rule of law. Parliamentary Sovereignty, in Dicey's classic formulation, was the notion that 'Parliament has the right to make or unmake any law whatsoever, and further that no person or body has the right to override or set aside the legislation of Parliament'.[12] Dicey was not claiming here that there were no limits on Parliament. Rather, he was suggesting that such limits as existed were political, or—at most—took effect via judicial interpretation of legislation. For Dicey, the most obvious political limits on Parliamentary power were what he termed the 'internal' and 'external' constraints: a Parliament would not legislate to bring about certain outrageous consequences—even though it might have the power to do so—due to fear of an adverse political reaction by the electorate, and due to internal constraints of political morality. Dicey's notion of the rule of law might be said to play an analogous limiting function. Parliament would feel politically or morally compelled (even though it was not legally compelled) not to legislate in violation of the rule of law. Professor Paul Craig has thus suggested that a vision of unitary, self-correcting democracy lay behind Dicey's picture of the constitution: all were to be subject to the same law, with political rather than legal redress (hence 'self-correcting') being available for legislative excess.[13] Dicey's account was also noteworthy for his suggestion that the rule of law required 'equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts', so that there could be no

> idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can with us be nothing really corresponding to the 'administrative law' (*droit administratif*) or the 'administrative tribunals' (*tribunaux administratifs*) of France. The notion that lies at the bottom of the 'administrative law' known to continental systems is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England ... .[14]

Dicey was also keen to stress, as part of his definition of the rule of law, that the protection of individual rights in the United Kingdom was the task of the ordinary common law, and that no specific rights code was necessary.[15]

Many aspects of Dicey's account have now, it might be claimed, been superseded. The 'unitary' character of the British constitution has been called into question by the introduction of devolution and the transfer of powers to the European level. An intermediate level of national government now exists in Scotland, Wales and, in principle, in Northern Ireland, which is subordinate to Westminster.[16]

[12] AV Dicey, *An Introduction to the Study of the Law of the Constitution* 10th edn (London, MacMillan, 1959), pp 39–40.

[13] PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford, Clarendon Press, 2000), p 15 *ff*.

[14] AV Dicey, n 12 above, pp 202–3; see also pp 193–5.

[15] AV Dicey, n 12 above, p 197.

[16] In each case a new institutional framework has been established, with a range of competences. Also, the Greater London Authority Act 1999 restored a strategic level of London wide government with the introduction of a Greater London Authority consisting of a Mayor and Assembly for London. However, comprehensive devolution for England and its regions has thus far been a notable omission,

Although the devolution arrangements which exist are asymmetrical in nature—most obviously, in the present context, in relation to the presence or absence of legislative powers at the devolved level—it might nonetheless be said that they pose a challenge to the 'unitary' nature of the constitutional structure. For example, it was predicted that following devolution the supremacy of the Westminster Parliament would have a 'different and attenuated' meaning so that 'instead of enjoying a regular and continuous exercise of supremacy, [Westminster] will possess merely a nebulous right of supervision ...,'[17] the assumption behind this assertion being that post-devolution, Westminster would find it politically difficult to legislate against the wishes of the devolved bodies.[18] There was, indeed, an expectation that a convention would be established whereby the Westminster Parliament would not normally legislate over devolved matters in Scotland and that this would be an unusual occurrence which would take place with the agreement of the devolved legislature.[19] Furthermore, the law-making powers of the devolved bodies (whether consisting in the making of primary or subordinate legislation) are such that substantively different bodies of law might now be expected to emerge at different levels within the United Kingdom.

Looking to the European level, there has clearly also been a large-scale transfer of power to the EU law-making institutions. National laws must now be 'disapplied' by the courts for incompatibility with directly effective EU law, and national governments may be liable in damages for acting incompatibly with EU law.[20] Depending upon one's interpretation of the effect of EU membership on the concept of legal sovereignty, this development might be felt to affect both the unitary nature of the constitution and its self-correcting aspect.[21] For example, domestic courts must disregard the legislation of the Westminster Parliament—however much popular support there may be for such legislation—if it violates the rules of EU law.[22] The principle of 'subsidiarity' is intended to recognise the importance of ensuring that, where practicable, decision-making takes place at a local level. How successful this principle has been is, however, open to question.[23]

although proposals for regional government have recently been made (see the Cornes chapter in this volume).

[17] V Bogdanor, *Devolution in the United Kingdom* (Oxford, OUP, 1999), p 291.

[18] See now A Page and A Batey 'Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution' [2002] *PL* 501.

[19] This is referred to as the Sewell Convention. It acknowledges that three types of legislation require the consent of the Scottish Parliament to be proceeded with: Westminster legislation for devolved purposes; Westminster legislation altering legislative competence; and Westminster legislation altering executive competence.

[20] See, resepctively, *R. v Secretary of State for Transport, ex p. Factortame (No.2)*, n 6 above; *Brasserie du Pecheur v Germany* [1996] ECR I-1029.

[21] For rival accounts of the significance of *Factortame (2)*, see PP Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) 11 *YBEL* 221; Sir William Wade, 'Sovereignty: Revolution or Evolution?' (1996) 112 *LQR* 568; TRS Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 *LQR* 443.

[22] *R. v Secretary of State for Transport, ex p. Factortame (No.2)*, n 6 above.

[23] See, eg, C Barnard and S Deakin, 'European Community Social Policy: Progression or Regression?' (1999) 30 *IRJ* 55.

Dicey's notion that individual rights were the product of the common law can, to a certain extent at least, be seen as having been challenged by the enactment of the Human Rights Act 1998. The Human Rights Act 1998 establishes a direct relationship between domestic law in the United Kingdom and the rights set out in the European Convention on Human Rights. In theory, the Act preserves the sovereignty of Parliament since the courts cannot invalidate primary legislation,[24] and Parliament remains free to legislate in defiance of the Convention. However, the degree to which the Act enables courts to encroach upon Parliamentary intention when construing legislation is a matter for open debate, given that it requires courts to interpret domestic legislation in a way that is compatible with Convention rights.[25] The courts' power to judicially review the actions of public authorities for disproportionality, inspired by section 6 of the Act, also raises questions about the intensity and ambit of judicial review.[26] Another important aspect of the incorporation of the Convention is that the new devolved assemblies are also placed under a statutory duty to act in accordance with Convention rights, arguably requiring the courts to engage—in relation to the assemblies—in an activity akin to constitutional review.[27] Each of these functions is carried out by the courts in order to safeguard a guaranteed list of rights. However, it remains unclear how far the Human Rights Act is affecting the substantive outcomes in judicial review cases.[28] It is, for example, important to remember that the higher courts were concerned to stress their commitment to protecting litigants' common law fundamental rights in the decade before the enactment of the Human Rights Act.[29] Whether or not they did so effectively, they were already content to conceive of the common law in rights-based terms without legislative intervention, a stance which was sometimes associated with the rule of law.[30] At the same

[24] N Bamforth, 'Parliamentary Sovereignty and the Human Rights Act' [1998] *PL* 572; *R. v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115, 131E-132B (Lord Hoffmann); cf, however, *Thoburn v Sunderland City Council* [2002] EWHC Admin 195, [2002] 3 WLR 24, para [62] (Laws L.J.).

[25] C Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *LQR* 248, 254.

[26] See further P Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117 *LQR* 589; M Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 *CLJ* 301; R Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' [2001] *EHRLR* 504; N Blake, 'Importing Proportionality: Clarification or Confusion' [2002] *EHRLR* 19.

[27] See, for example, the revised role of the Judicial Committee of the Privy Council in relation to the devolution legislation: see further the Hadfield chapter in this volume; P Craig and M Walters, 'The Courts, Devolution and Judicial Review' [1999] *PL* 274.

[28] Useful bi-monthly surveys of the case law can be found in the 2001 and 2002 volumes of the *EHRLR*. The impact of Convention rights via section 3 of the Act might be felt, to date, to have been more obvious than that under section 6: see *Mendoza v Ghaidan* [2002] EWCA Civ 1533, [2002] 4 All ER 1162; N Bamforth, 'Interpretation and the Human Rights Act 1998: A Constitutional Basis for Anti-Discrimination Protection?' (2003) 119 *LQR* 215.

[29] See, eg, *R. v Secretary of State for the Home Department, ex p. Leech* [1994] QB 198, 209–212; *R. v Secretary of State for Social Security, ex p. Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385; *R. v Lord Chancellor, ex p. Witham* [1998] QB 575; *R. v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539; *R. v Secretary of State for the Home Department, ex p. Simms*, n 24 above; M Hunt, *Using Human Rights Law in English Courts* (Oxford, Hart, 1997), chs 5 and 6.

[30] For reflection on the rule of law in the context of legislative intention (albeit without specific association with fundamental rights), see *R. v Secretary of State for the Home Department, ex p. Pierson*

time, it was clear, before the Human Rights Act came into force, that courts were developing new principles relating to legitimate expectations and arguably—despite the official prohibition on their doing so, proportionality—and that, in doing so, they were influenced by the supra-national layers of European jurisprudence represented by the ECHR and by EU law.[31]

From a contemporary perspective, it is abundantly clear that a distinctive notion of administrative law has emerged in the United Kingdom, in direct response to the growth of government power in the twentieth century. It seems clear that, at the time of writing, Dicey was in fact mistaken in his view of the nature of French law and of the absence of any type of administrative law in England.[32] As Lord Diplock noted in *R v IRC, ex parte National Federation for the Self Employed*, '[T]he progress towards a comprehensive system of administrative law ... I regard as having been the greatest achievement of the English courts in my judicial lifetime'.[33] We now have an Administrative Court branch of the High Court, which administers judicial review against public authorities, with distinctive grounds of review and distinctive remedies. Many questions surround the appropriate ambit of the judicial review jurisdiction (and it should be noted that private law remedies may still be pursued against public authorities without reference to the Administrative Court), but it should be clear that this major limb of Dicey's definition of the rule of law is not truly representative of the contemporary constitution. This development does not challenge the 'self-correcting' nature of Dicey's vision—the courts do not challenge legislation of the Westminster Parliament head on—but the emergence of judicial review has plainly cast the courts, in the contemporary constitution, as an important counter-weight to executive power.[34]

However, the extent to which there has been a shift in power away from the executive and towards the courts is itself open to question. In part at least, this is because there have been legislative measures which have granted increased powers to ministers and officials[35] and others that have reduced judicial discretion.[36] But

[1998] AC 539, 591 (Lord Steyn). References to the rule of law have continued since the Human Rights Act came into force: see *R. v Spear* [2002] UKHL 31, [2002] ACD 97, para [4] (Lord Bingham).

[31] See G Anthony, *UK Public Law and European Law* (Oxford, Hart, 2002), chs 2 and 3; R Thomas, *Legitimate Expectation and Proportionality in Administrative Law* (Oxford, Hart, 2000). Specifically on proportionality, see G De Búrca, 'Proportionality and *Wednesbury* Unreasonableness: the Influence of European Legal Concepts on UK Law', ch 4 in M Andenas (ed), *English Public Law and the Common Law of Europe* (London, Key Haven, 1998); P Craig, 'Unreasonableness and Proportionality in UK Law', in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart, 1999).

[32] I Jennings, *The Law and the Constitution* (London, University of London Press, 5th edn., 1959) and 'In Praise of Dicey 1885–1935' (1935) 13 *Public Administration* 333.

[33] [1982] AC 617, 641. See also *R. v Secretary of State for the Home Department, ex p. Fire Brigades Union*, n 5 above, 567D-568B (Lord Mustill); Lord Woolf, 'Droit Public-English Style' [1995] *PL* 57, 58–9.

[34] For a controversial and particularly strong definition of the role of the courts, see the views of Sir John Laws in *Thoburn v Sunderland City Council*, n 24 above, and—speaking extra-judicially—in 'Law and Democracy' [1995] *PL* 72.

[35] The Immigration and Asylum Act 1999 and the Terrorism Act 2000 confer added powers in the sphere of immigration and state security; the Criminal Justice and Police Act 2001 extends greater powers to the police.

[36] Eg, Powers of Criminal Courts (Sentencing) Act 2000, ch 3.

also, in the wake of the attacks on the United States on 11 September 2001, statutes have been enacted which might be said directly or indirectly to qualify or undermine Convention rights, demonstrating Parliament's continuing competence to legislate in defiance of the European Convention.[37] For example, the Crime and Security Act 2001 gives the Home Secretary a draconian set of powers directed at immigrants, asylum seekers and alleged terrorists which are perhaps unprecedented in peacetime.[38] Such examples make it difficult to maintain that recent constitutional reforms have simply given rise to a fundamental re-balancing in favour of the courts.

A further crucial aspect of Dicey's account which has been put under severe stress is the notion that there was no distinction between public and private law. Indeed, a more contingent and related question which has arisen in recent years concerns the shape of the state.[38a] Since 1979, the United Kingdom has witnessed privatisation, regulation, deregulation, new public management, the creation of next steps agencies, contracting in the public sector, compulsory competitive tendering in local government, public private partnerships, the citizen's charter, health service reorganisation (to name but a few of the most prevalent initiatives). The tangled interactions between public and private bodies involved in these mechanisms have been further complicated by the operation of divergent patterns of contacting out and regulation at different constitutional layers. There are increasingly dense networks of accountability within which power is exercised, with state institutions being tied into relationships with the business sector and voluntary and consumer groups in many different ways.[38b] These modified approaches clearly have important implications for the shape of our institutions, given that the creation of so much complexity calls into question the predominant role of the state and in particular its capacity to intervene effectively by legislative means. Having said that, the post-1997 period has also witnessed an apparent reiteration of the divisions between public and private institutions at national level due to the obligations imposed specifically upon public authorities by the Human Rights Act 1998[39] and the Freedom of Information Act 2000,[40] and a continuation of the distinction between such institutions in the EC case law concerning the direct effect of directives.[41]

The developments outlined in this section of the introduction suggest that it is no longer realistic (if, indeed, it ever was) to analyse our constitution in terms of a

[37] See also the Nationality, Immigration and Asylum Act 2002.

[38] Section 23 allows indefinite detention without trial of a suspected terrorist who is a not a British citizen. See A Tomkins, 'Legislating against terror: the Anti-terrorism, Crime and Security Act 2001' [2002] *PL* 205.

[38a] See M Loughlin, 'The State, The Crown and The Law', in M Sunkin and S Payne (eds), *The Nature of the Crown* (Oxford, OUP, 1999), at p 76.

[38b] See eg, C Scott, 'Accountability in the Regulatory State' (2000) 37 *JLS* 38.

[39] A point made strongly by Morritt V-C in *Aston Cantlow and Wilcote with Billesley Parocial Church Council v Wallbank* [2001] EWCA Civ 713, [2001] 3 All ER 393, para [33].

[40] See the Palmer chapter in this volume.

[41] PP Craig, 'Directives: Direct Effect, Indirect Effect and the Construction of National Legislation' (1997) 22 *EL Rev* 519.

unitary, self-correcting model. The essays in this collection—which are introduced in the next section—seek to build upon this conclusion by highlighting some of the important features of the contemporary, multi-layered constitution, together with the role of public law within it.

THE MULTI-LAYERED CONSTITUTION: THE FEATURES, AS OUTLINED IN THE ESSAYS

It should be stressed that the remit of this collection does not extend to an exploration of the foundations of the contemporary constitution—something which would involve a book in itself. Instead, the various chapters analyse some of the key political and legal features of today's multi-layered constitutional landscape. Broadly speaking, the chapters address—from a variety of standpoints—three key questions. First, what are the similarities, inconsistencies and overlaps between the different layers? Secondly, to what extent should public bodies be regulated—at each layer of the constitution—by legal as opposed to political means? And thirdly, how does the recent reshaping of the structure of the state—using processes such as deregulation, contracting-out and the like—inter-relate with the existence of different constitutional layers? Analytically speaking, the first two questions would be important in *any* multi-layered constitutional arrangement, simply by virtue of the existence of the different layers. The third question is important for the localised and contingent reason that the so-called 'modernisation' of government has been a key feature of recent United Kingdom political history, making some discussion of it crucial if we are to understand the workings of the contemporary constitution.

If we are properly to understand the notion of a multi-layered constitution, however, it is sensible to begin by analysing to some extent the nature of constitutions more generally. This is the purpose of Professor Martin Loughlin's chapter, 'Constitutional law: the third order of the political'. Loughlin suggests that just as 'constitutional' concerns have become important for politicians in recent years, a sceptical strain has emerged among lawyers, whereby constitutional law is seen as 'just politics'. Loughlin, by contrast, seeks to differentiate the legal from the political, thereby explaining the role of law within a constitution.[42] Unusually, he does this by starting with an inquiry into the nature of politics, the results of which are then used to identify what is special about law. Loughlin divides politics into three 'orders'. The first is concerned with the conceptual nature of the political, which relates to disagreement. It is only through the establishment of a state that a group of people within a given territory can become a unity which encompasses the political. By acquiring a monopoly of coercive power, the state is able to keep conflict and disagreement within a framework of order. At the second order level of the political, politics thus emerges within a viable system of government, and is

[42] See, at greater length, Loughlin's *Sword and Scales: an Examination of the Relationship Between Law and Politics* (Oxford, Hart, 2000).

concerned with the resolution or containment of disagreement within the parameters set by the system concerned. The cultivation of a belief in the law-governed nature of the state is a powerful aspect of state-building. Constitutional law must be treated as the third order of the political, and Loughlin's analysis of the third order provides the basis for his distinction between law and politics. He suggests that while conflict is an important criterion of politics, a sense of even-handedness is a vital component of state-building, necessitating the cultivation of a belief in the law-governed nature of the state. Constitutional law therefore establishes a framework through which the sovereign authority of the state can be recognised. Loughlin maintains that, while it is possible to see constitutional law as a relatively discrete set of positive rules, the meaning, function and application of those rules is governed by political practice, in which the law is embedded and from which it derives its identity.

This framework provides the basis for Loughlin's critique of much contemporary thinking about constitutions and constitutional law—a critique which is relevant when assessing the arguments developed in later essays. Loughlin suggests that the United Kingdom's traditionally 'political constitution'[43] was an expression of the laws, institutions and practices which made up the processes of governing. Laws regulated many of the key rules of political conduct and ensured a measure of even-handedness, but ultimately only a portion of the rules regulating the political regime were embodied in positive law. By contrast, the more recent tendency has been to treat the legal rules of the constitution as providing the foundation for all political engagement (rather than as the current and perhaps temporary product of such engagement). Loughlin suggests that the emerging modern culture of constitutional legalism misunderstands and downplays the crucial, conflict-centred role of the political, and places too much faith in the rules of positive law as the providers of 'correct' answers to contested questions. Observance of the law is necessary for the maintenance of power, but constitutional legalism obscures the primacy of the political in the operation of any constitution.

Loughlin's analysis is undoubtedly thought-provoking. For present purposes, his essay raises three vitally important questions. First, given that the United Kingdom has traditionally been seen as possessing a 'political constitution', how far have we—in recent years—seen a shift to the type of legalistic model that Loughlin decries, whether in terms of the arrangements that we in fact possess or in our interpretation of them? Is it inevitable that a multi-layered constitution is legalistic in the sense identified by Loughlin? Related to this is the second question, which is whether it is in fact correct to maintain that constitutional legalism misunderstands the role of the political. Murray Hunt's essay, later in the volume, would maintain—for example—that while courts have attempted to accommodate the political when conducting human rights-based judicial review, they have done so in a way which is inelegant and excessively broad, according *too much* deference to

[43] This term was used by Professor JAG Griffith as the title to his 1978 Chorley Lecture, 'The Political Constitution' (1979) 42 *MLR* 1. It should be noted that Loughlin's definition of politics is analogous to that used by Griffith (below at pp 12, 19–20; see also Loughlin's *Sword and Scales*, n 42 above, pp 6–9).

political bodies. The scope for disagreement about such matters in a multi-layered constitution is immense, and it is clear that different viewpoints will depend upon competing normative perspectives. The third—and perhaps broadest—question is whether it is meaningful to analyse a constitution using any particular analytical framework, if constitutions are of the provisional character identified by Loughlin. The argument underpinning this collection of essays is that the traditional, unitary model of the United Kingdom constitution has now been replaced by a multi-layered model. Loughlin's analysis—if correct—forces us to ask ourselves how temporary such an arrangement may be, and whether it is in fact useful to deploy a multi-layered analysis as a basis for understanding the constitution.

The subsequent two essays—by Adam Tomkins and Carol Harlow—complement one another, given that they concentrate on political aspects of our present-day constitutional arrangements. In his essay 'What is Parliament For?', Tomkins analyses the contemporary role of the Westminster Parliament—in particular the House of Commons—in an era characterised by the constitutional layering inherent in devolution within the United Kingdom and the transfer of powers to European institutions. As a supporter of the 'political constitution' model, Tomkins asks how we can repair the 'political constitution' by improving the performance of Parliament.[44] He argues that it is a mistake to conceive of Parliament, as Dicey did, principally as a legislative body. Rather, the key task of Parliament is and always has been to hold government to account (of which scrutiny of draft legislation is but one aspect). Parliament at the start of the twenty-first century plays a largely instrumental role as a legislator: it retains the theoretical right not to enact into law the measures placed before it by the government of the day, but this right is very rarely exercised. Tomkins thus suggests that the primary purpose of Parliament is not to make law, but is instead to scrutinise the government's legislative proposals—something which is a part of its broader scrutiny function. Tomkins argues that it would be sensible officially to recognise the primary role of Parliament as being that of scrutineer, and calls for a radical strengthening of Parliament's powers of scrutiny. Parliament should be placed at the top of a pyramid of accountability, allowing it systematically to draw upon the investigations of outside regulators and commissions. Tomkins's prescription thus involves a re-casting of the methods available at Westminster level for promoting political accountability, one aim being to adjust the notion of a political constitution so as to fit in with a multi-layered constitutional structure. The normative debate concerning the desirability of the political constitution model is of course long-standing,[45] and it would be natural for supporters of the competing positions in this debate to differ in their conclusions concerning the merits of Tomkins's aim. A further question—whatever one's normative perspective—will be how far Tomkins's proposals can succeed as a basis for guaranteeing a meaningful constitutional role for the Westminster Parliament.

[44] For Tomkins's normative views, see his 'In Defence of the Political Constitution' (2002) 22 *OJLS* 157, 169–175.

[45] See eg, C Harlow and R Rawlings *Law and Administration*, n 1 above; M Loughlin *Public Law and Political Theory* (Oxford, Clarendon Press, 1992).

Arguments about scrutiny—this time at European Union level—are pushed further in Professor Carol Harlow's chapter, 'European Governance and Accountability', which critically evaluates what she categorises as the accountability problems which have arisen in the development of a multi-layered constitutional structure. Harlow argues that there has been a transfer of power vertically upwards from national institutions to EU institutions, arguably weakening national political mechanisms for maintaining the accountability of executive bodies (in particular, accountability through national legislatures), as well as a transfer of power within the EU layer from political decision-makers to the European Court of Justice. This argument provides a powerful illustration of some of the developments associated earlier in this introduction with the notion of a multi-layered constitution: legislative and executive power now resides, in practice, at national *and* EU levels, and a significant regime of legal accountability has developed through the courts. At a deeper level, Harlow's chapter also illustrates the definitional difficulties inherent in notions of accountability. Politically, the term can be interpreted in many different ways, each of which has diverse constitutional implications: compare, for example, the idea that elected bodies are held accountable by submitting themselves periodically to the electorate's verdict; the notion that executive decision-makers are held accountable by having to explain their decisions to a legislature; the requirement that officials resign in prescribed circumstances as a mechanism for ensuring accountability; and the view that accountability is fostered by subjecting institutions to periodic auditing by regulators. Legally, the term is associated with controls imposed by the courts, begging the question which controls are appropriate. Harlow suggests that the weight and meaning ascribed to various notions of accountability in the United Kingdom is somewhat unique when considered against a broader European backdrop, something which may help to explain why these notions have generally failed to take hold at a European level. Harlow reiterates her faith in political (in preference to legal) accountability, and uses this as a basis for criticising current proposals—such as the European Commission's White Paper on Governance—for reform of the policy-making processes at EU level. As with Tomkins's arguments, one's view of Harlow's criticisms and conclusions must ultimately depend, at normative level, on one's position concerning the comparative pros and cons of political as opposed to legal accountability.

The subsequent two chapters—by Richard Cornes and Professor Brigid Hadfield—explore some of the important constitutional questions raised by devolution from the Westminster Parliament to Scotland, Wales and (sporadically) Northern Ireland: that is, by the explicit creation of new constitutional layers. Whilst each author is formally concerned with a particular aspect of the post-1997 devolution programme—Cornes with the position of the English regions post-devolution, Hadfield with the role of the judiciary in post-devolution Northern Ireland—both make significant general points about the role of devolution within a multi-layered constitution, and about what is required in order for the process of asymmetrical devolution to work. For example, Professor Hadfield points out that

the degree to which each layer in a multi-layered constitution is both discrete and settled will be crucial to the working of the overall structure, and both essays provide useful analyses of the efficacy of the devolved aspects of the United Kingdom's constitution.

In his essay 'Devolution and England—what is on offer?', Richard Cornes engages in a critical analysis of recent proposals for English regional government.[46] Cornes suggests that although such proposals would constitute a further advance for multi-layered governance in the United Kingdom, they do not in fact amount to devolution in any real sense. Based on an analysis of the devolution regimes in Scotland, Wales and Northern Ireland, Cornes argues that the essence of devolution is the transfer of power from Westminster to governing institutions responsible for distinct geographical areas within the United Kingdom, with devolved decision-makers being primarily answerable to their local electorates. Thus defined, genuine devolution of power must be to an area with which the local population identifies, and to locally elected bodies with a legislative/executive division. Furthermore, it is desirable for devolved institutions to be open to judicial review only on the grounds set out in the statute in which power is devolved, rather than on every available common law ground of review. Priority should be given to devolved institutions being held to account by the local electorate, something which would also leave only a residual guardian role for the United Kingdom government and Westminster Parliament. Measured against these criteria, the nature and functions of the proposed English regional bodies, together with the ambit of continuing central government control, would make it inappropriate to describe them as genuinely devolved institutions.

Cornes's analysis serves to remind us that there is no uniquely correct way to allocate power within a multi-layered constitution. For example, as part of his argument, Cornes distinguishes between devolution and other methods for allocating power on a layered basis. According to Cornes, the requirement of local election differentiates devolution from decentralisation, in which central government power is merely delegated to appointed officials or bodies. The United Kingdom's programme of devolution can, he argues, also be distinguished from federalism—under which *each* governing authority enjoys a constitutionally entrenched scope of authority—given that the Westminster Parliament technically retains legal sovereignty, even if it cannot in practice freely exercise its legislative power over devolved areas. In practice, political considerations are likely to determine which devolution arrangement is adopted. Important general lessons can also be learned from Cornes's conclusion, which is that the nature of the union between England, Scotland, Wales and Northern Ireland must be reformulated so that each constituent nation becomes an individual, but co-operating, member state within the European Union. This is a contentious suggestion, but it is important analytically for two reasons. The first relates to Cornes's argument that his proposal provides the only practical basis for managing the relations between the constituent nations. He contends that the asymmetrical devolution regime which has emerged since

[46] Made in the White Paper *Your Region, Your Choice: Revitalising the English Regions*, Cm.5511.

1997 does not resolve the anomalous status of England, and that the proposals for regional government will not strike the right balance either. Whether or not this is correct, Cornes draws our attention to the key point that there is ample room for debate about the suitability of a given legal regime to the political and social circumstances in which it must operate: something which may lead us to conclude that a particular method of distributing power on a layered basis either is or is not workable in practice. Secondly, Cornes's conclusion highlights the possibility that an inappropriate legal regime may generate tension or inconsistency between different constitutional layers. Quite apart from the possibility that devolution creates a division between the Westminster Parliament's political and legal capacity to act, the fact that the United Kingdom forms part of the European Union clearly has implications—as Cornes recognises—for how best to allocate power between Westminster and the devolved layers of the UK's constitutional structure. Unless, for example, all four constituent nations of the United Kingdom remain members of the EU—with an overarching EU layer in their constitution(s)—Cornes's substantive conclusion could not in practice work.

In her chapter 'Does the devolved Northern Ireland need an independent judicial arbiter?', Professor Hadfield also suggests that there is a key distinction to be drawn between devolution and federalism. By contrast with Cornes, however, the distinction—for Hadfield—rests upon the presence or absence of a written constitution as much as the presence or absence of a hierarchy of legislative bodies. Hadfield suggests that in a federal system, power is allocated by an overarching written constitution, which can be amended only by using a specific formula involving both central and provincial authorities. Furthermore, central and provincial bodies within a federal structure must each possess areas of exclusive legislative competence—something which is not the case under devolution, in which the 'national' level remains constitutionally paramount. In an evocation of our earlier discussion of the debate between advocates of legal and political controls, Hadfield also implies that one key to understanding a multi-layered constitution—whether constructed on a federal or a devolved basis—is by identifying the custodians, whether legal or political, of the integrity of each layer. Hadfield suggests—in a fashion which, in its emphasis, differs from Cornes's analysis—that responsibility for the evolution of devolution should lie primarily with the elected devolved institutions, *subject to* the presence of other mechanisms for accountability within the multi-layered constitutional system.

However, the appropriate balance between political and legal controls appears—for Hadfield—to be a somewhat contingent matter. In assessing the role of legal controls within the devolved structure that (at present, intermittently) applies in Northern Ireland, Hadfield points out that—in the various devolution experiments which were attempted in Northern Ireland prior to the Northern Ireland Act 1998—the judiciary was given roles, in policing the relevant settlements, of varying widths. Hadfield therefore makes the important suggestion that, while political accountability may often prove to be more effective than legal accountability, this depends upon the *general* efficacy of the judiciary as a mechanism for

ensuring constitutional accountability. The implication seems to be that the more effective the judiciary is in general terms, the wider the role it might plausibly be given in policing a devolution settlement. Hadfield thus suggests that any assessment of the 1998 Act must take account of the fact that, at 'national' level, the judiciary has become much more assertive and self-confident in exercising its judicial review jurisdiction than was the case during previous periods of devolution in Northern Ireland. Hadfield concludes that rigorous judicial scrutiny of the respective powers of the devolved institutions *and* central government is vital if the constitutional settlement contained in the 1998 Act is to be properly policed; and that, by contrast with earlier devolution experiments, it is not appropriate to rely overwhelmingly on political mechanisms.

The next four chapters focus, in very different ways, on the sideways diffusion of what might once have been viewed—broadly-speaking—as purely state power. Processes such as deregulation, contracting-out and privatisation have become widespread at all constitutional levels in the last twenty years, as has the (at least partial) reconceptualisation along consumerist lines of the relationship between providers and recipients of public services. These changes raise difficult questions about how (and whether) we should now distinguish between public and private bodies and functions, and how we can best ensure that such functions are exercised accountably.

Professor John Morison's chapter, 'Modernising Government and the e-government revolution', uses Michel Foucault's governmentality approach to the deployment of power in society to analyse the constitutional implications of the contemporary 'modernisation of government' process, in particular the development of e-government. The governmentality approach seeks to shift our focus away from traditional subjects of constitutional scholarship such as the executive and the legislature. Governmental action cannot attain its ends all by itself: instead, it requires the active co-operation of non-state actors (whether individuals or collective bodies) and engagement with existing networks of power in society. By focusing solely on the notion of a sovereign body imposing its will, we lose sight of the fact that the practical *operation* of government is shaped, informed and assisted by civil society. Furthermore, law is only one instrument of governance: one must also think of codes, agreements, understandings, and so on. Foucault argued, using the governmentality approach, that the state diffused its power and developed links with a whole range of power centres in civil society during the nineteenth and twentieth centuries, allowing it to survive social change by moving away from earlier forms of government based on command and territorial control. Morison analyses recent constitutional changes from a similar standpoint, by arguing that globalisation and European integration—together with processes such as privatisation and contracting-out—have generated a multiplicity of sites of power, arranged in a network of mutual influence instead of hierarchical layers. The creation of quasi-governmental agencies and the frequent performance of characteristically 'public' functions by private bodies require us to think of power in terms of a complicated series of networks.

If Morison's advocacy of governmentality is accepted, then public lawyers will need to widen their focus radically. Whatever one's view of this possibility, Morison offers some important observations concerning the re-conceptualisation of government resulting from the 'modernisation' programme. The essential focus of this programme is on developing a consumer orientation for service-delivery, improving public sector performance and taking advantage of new information technology. This involves the notion of government as an enabler, facilitator and regulator rather than as a direct provider of services: something which turns on negotiation, monitoring and the development of networks and partnerships. E-government—which harnesses computer technology as a mechanism for delivering government services and consulting citizens—is a key part of the programme, although it is still at an early stage of development in the United Kingdom.[47] Morison suggests that—if developed radically so as to make *all* government services, at whatever level, available on-line through the same electronic 'gateway'—the project could relegate the distinctiveness of different government departments, as well as the many different layers which characterise the present constitution. The project would require us to redefine the space occupied by government, since a new forum would have opened up in which government, citizens, and other bodies could interact. Therefore, while it appears to dilute our need to think of the state in distinctive terms, e-government may—if fully developed—serve also to blur the distinctions between constitutional layers.

In his chapter 'UK Utility Regulation in an Age of Governance', Peter Leyland evaluates the consequences of the re-conceptualisation and 'modernisation' of government for a specific area of activity which now appears to embrace aspects of both the public and the private, namely the regulation of utility supply. In the wake of privatisation, contracting-out and the introduction of 'New Public Management', the gas, electricity and water industries have become increasingly fragmented, as have the forms of regulation that apply to them. Responsibility for regulating related aspects of the same industry are sometimes distributed to different bodies. This process of fragmentation has been accentuated still further since 1997 by the creation of differing regulatory regimes in different parts of the United Kingdom following devolution. The post-1997 period has also seen the development of informal 'soft law' regulatory techniques for service delivery by the utility sector, further underlining the switch from centralised bureaucratic mechanisms of service delivery to much more fragmented devices. Leyland argues that another consequence of the reconfiguration of the utility sector has been the attenuation of political accountability to the Westminster Parliament through ministers (an argument previously explored by Tomkins). In consequence, utility regulation provides a powerful illustration of the variable mechanisms by which power is exercised and regulated at the national and devolved constitutional layers, and of the difficult question of how best to ensure the accountability of bodies charged with the delivery of services formerly provided directly by state bodies. In developing these arguments, Leyland is sympathetic to the notion (articulated by

[47] See also 'E-government: no thanks, we prefer shopping', *The Economist*, 4 January 2003, p 23.

Colin Scott) that regulation should be seen not so much as a function of government but as a form of governance, characterised by the interdependence of state and non-state organisations, interactions within networks, negotiations between actors, and sometimes by a degree of autonomy from the state.[48] In contrast to Morison's conclusions concerning the development of e-government, Leyland therefore emphasises the on-going importance of the differences between the regulatory regimes operating in different constitutional layers. As we shall see when considering Professor Peter Cane's chapter, different views to Leyland's may also be taken concerning the distinction between state and non-state actors.

Questions concerning the division between public and private power are also raised by the concept of a right to freedom of information. As Stephanie Palmer argues in her chapter, 'Freedom of Information: a New Constitutional Landscape?', freedom of information is an important measure available for the control of power in the contemporary constitution, and is viewed in many jurisdictions as a constitutional right. Traditionally, the democratic objectives underpinning freedom of information have, however, not been seen as relevant to private sector bodies: for information can, from a private sector standpoint, be viewed as private property rather than as a public good. Given the arguable blurring of public and private in the last twenty years, the democratic objectives of freedom of information legislation can therefore be undermined—where public services are contracted out to private bodies—if access to information is denied in such circumstances because the arrangement in play is uncritically accepted as private. It is with this concern in mind, together with an appreciation of the way in which they illustrate the multi-layered theme, that Palmer analyses the similarities and differences between the Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002. While the Acts apply to a broader range of bodies than is typical in many other jurisdictions—thereby alleviating some of the concerns relating to contracting-out—Palmer argues that the exclusion from disclosure of commercially sensitive information contained within the legislation may well be problematical in the light of such concerns. Furthermore, the bodies which are defined as public authorities for freedom of information purposes are not identical to those which count as public authorities under the Human Rights Act 1998—something which may cause confusion both administratively and in terms of future litigation. It therefore remains unclear how far the Acts will enhance either the political or legal accountability of the bodies to which they apply.

The questions raised by Leyland and Palmer concerning the public law-private law divide are analysed in greater depth in Professor Peter Cane's chapter 'Accountability and the Public/Private Distinction'. Cane characterises the current debate as paradoxical. On the one hand, the public law-private law distinction seems to be alive and well in every layer of the constitution: it is embedded in domestic judicial review, in the Human Rights Act 1998 and Freedom of Information Act 2000, and

[48] C Scott, 'The Governance of the European Union: The Potential for Multi-level Control' (2002) 8 *ELJ* 59; 'Private Regulation of the Public Sector: a Neglected Facet of Contemporary Governance' (2002) 29 *JLS* 56.