

towards a new constitutional settlement

The Smith Institute

The Smith Institute is an independent think tank that has been set up to look at issues which flow from the changing relationship between social values and economic imperatives.

If you would like to know more about the Smith Institute please write to:

The Director
The Smith Institute
3rd Floor
52 Grosvenor Gardens
London
SW1W 0AW

Telephone +44 (0)20 7823 4240
Fax +44 (0)20 7823 4823
Email info@smith-institute.org.uk
Website www.smith-institute.org.uk

Designed and produced by Owen & Owen

Edited by Chris Bryant MP



towards a new constitutional settlement

2007

THE SMITH INSTITUTE

towards a new constitutional settlement

Edited by Chris Bryant MP

Published by the Smith Institute
ISBN 1 905370 20 2

This report, like all Smith Institute monographs, represents the views
of the authors and not those of the Smith Institute.

© The Smith Institute 2007

Contents

Preface

By Wilf Stevenson, Director, Smith Institute 4

Introduction

Rt Hon Jack Straw MP, Leader of the House of Commons and Lord Privy Seal 5

Chapter 1: What are constitutions for? 13

Clare Ettinghausen, Director of the Hansard Society

Chapter 2: Constitutional authority in British democracy 20

Professor Stein Ringen, Professor of Sociology and Social Policy at the University of Oxford

Chapter 3: A reformed second chamber 30

Chris Bryant MP, Labour MP for the Rhondda

Chapter 4: Establishment and government 38

Rt Rev Dr Alastair Redfern, Bishop of Derby

Chapter 5: What role should there be for judicial review in our constitution? 44

Michael Smyth, Partner and Head of Public Policy Practice at Clifford Chance LLP

Chapter 6: Whitehall and the civil service 52

Helen Goodman MP, Member of the Public Accounts Committee

Chapter 7: The royal prerogative and democratic accountability 66

Rt Hon Lord Holme of Cheltenham CBE, Chairman of the Hansard Society and of the Lords Constitution Committee

Chapter 8: The Union and devolution – a fair relationship 74

Lord Sewel, Professor Emeritus, University of Aberdeen

Chapter 9: The EU and the UK's constitution 82

Gisela Stuart MP, UK Parliamentary Representative on the Convention for the Future of Europe

Chapter 10: The role of parliament in holding the executive to account	90
John Bercow MP, Conservative MP for Buckingham	
Chapter 11: The crucial role of party politics in a democracy	98
John Spellar MP, Labour MP for Warley	
Chapter 12: Parliament and political engagement	104
Peter Riddell, Assistant Editor and Chief Political Commentator of <i>The Times</i>	
Chapter 13: Insiders or outsiders? Political parties and the constitution	116
Fiona Mactaggart MP, Labour MP for Slough, and Dr Alan Whitehead MP, Member of the Constitutional Affairs Committee	
Chapter 14: The need for a written constitution	124
Graham Allen MP, Labour MP for Nottingham North	
Chapter 15: A bill of rights – what for?	130
Francesca Klug, Professorial Research Fellow at the Centre for the Study of Human Rights at the London School of Economics & Political Science	
Chapter 16: Towards a written constitution?	146
Professor Dawn Oliver, Professor of Constitutional Law at University College London	
Appendix: The constitution of the UK as of 1 January 2007	152
The outcome of a seminar course entitled “Enacting the British Constitution”, which was run in the autumn of 2006 at Oxford University by Professor Vernon Bogdanor, Professor of Government, and Professor Stefan Vogenauer, Professor of Comparative Law	

Preface

Wilf Stevenson, Director, Smith Institute

The Smith Institute is an independent think tank, which has been set up to undertake research and education in issues that flow from the changing relationship between social values and economic imperatives. In recent years the institute has centred its work on the policy implications arising from the interactions of equality, enterprise and equity.

Despite major constitutional and institutional reform since 1997 – devolution to Scotland and Wales, abolishing the sitting rights of the majority of hereditary peers, the introduction of a Freedom of Information Act and a Human Rights Act and new rules governing the transparency of political party funding – much remains to be done to ensure that government and parliament are relevant to the public and are more open, transparent and responsive to people's concerns. The challenge involves finding a way to reconnect individuals and communities to the state; to narrow the gap between the represented and their representatives; to bring power closer to the people; and to ensure that these democratic reforms are achieved in a manner that maintains high standards of law making, scrutiny and delivery.

This collection of essays by constitutional scholars, political scientists and politicians of all parties offers a wide-ranging and thought-provoking account of the issues that need to be addressed as we move towards a new constitutional settlement. The breadth of topics that our contributors were asked to write upon displays the complexity and nuance involved in this area, and highlights the wide range of angles from which a more formalised constitutional creed might be built. The collection also includes a fascinating attempt by a class of political science undergraduates to codify our constitution as it now stands. Their work brings together the various strands that are embedded in statute law, common law, the royal prerogatives, international treaties and agreements, authoritative works of political philosophy, institutional convention and culturally transmitted ways of working.

The Smith Institute thanks Chris Bryant MP for editing this collection. We are very grateful to the Joseph Rowntree Foundation, Clifford Chance, and to two members of the institute, for their support of this publication and the associated seminar series.

Introduction

Rt Hon Jack Straw MP, Leader of the House of Commons and Lord Privy Seal

This timely and important collection of essays, which sets out to examine how the UK's constitutional architecture might develop in the coming years, has been inspired by widespread concern at the apparently growing gulf that has opened up between citizens and the state, and is most visible in the disengagement of many people from the democratic process. This trend has prompted growing numbers of commentators to argue that only a major programme of constitutional reform designed to rebalance political power in Britain can address the problem.

That UK democracy is facing a number of difficult challenges is not in doubt. The focus provided here on practical constitutional changes that might help to meet them is therefore to be warmly welcomed. As Leader of the House of Commons, I have a special interest in the issues raised in this book and a particular concern about the need to increase and enhance public engagement in the formal democratic decision-making process. However, if our response to the challenges facing British democracy is to be successful, and future constitutional reforms effective, then it is important that we enter this debate with a clear understanding of the precise nature of political disengagement, and a realistic view of how it might be tackled. Hence, in this short foreword, I intend briefly to outline the nature, scale and root causes of political disengagement in Britain today, and the extent to which reform of our constitutional structures can lead to changes in the public's political interest and participation.

Political disengagement is scarcely a new phenomenon. As the recent Power inquiry noted, the problem is "well ingrained". Perhaps the best illustration of this comes in the form of a Gallup poll conducted in 1944, which asked the public what motivated their members of parliament. Despite the poll being undertaken in the context of a coalition government managing Britain's fight against fascism, the survey found that an overwhelming majority of the public thought MPs were "out for themselves" or for "their party", rather than acting in the best interests of the country. And this was by no means a one-off. Mass-Observation, which carried out social research throughout the period before and after the Second World War, regularly recorded negative public attitudes towards politics, politicians and political parties, and similar sentiments have been traced by historians back to the very emergence of political parties. So, negative attitudes towards political actors and institutions have deep roots.

Yet the significant point is that, for most of the period after universal suffrage was established in Britain, such misgivings did not prevent the overwhelming majority of the public from holding strong attachments to political parties and sharing a powerful sense of voting as a civic duty. This was most clearly visible during the 1950s, when turnout in general elections topped 80%, and over 90% of the votes cast were in favour of one or other of the two principal parties.

This was the era of class politics, when social divisions were sharper and the ideological divide between socialism and capitalism evident on a global scale. Since then, however, profound socioeconomic changes at home and abroad have served to unravel traditional political identities. They have created an atomised, less deferential, more consumerist society in which fewer people feel a strong affinity with one party or another and increasing numbers (especially of young people) view voting as a right more than a duty. As a consequence, turnout in UK general elections has dipped to unprecedented low levels: 59% in 2001 and 61% in 2005. Correspondingly, membership of political parties has halved over the last 25 years.

Worryingly, the decline in voting and party membership is most pronounced among the poor, those from ethnic minorities and the young. Turnout among 18- to 24-year-olds in the last general election was around 37%; more generally, studies have found those in younger age groups to be less politically active than other sections of society. Across all social groups, however, politics and political institutions are viewed with cynicism.

The combination of declining voter turnout and party membership has led some to argue that the public is less politically engaged today than was once the case. But it may be that political engagement has not so much declined as changed. Surveys show that people are just as interested in politics today as they ever were; but it seems their interest is being made manifest in new ways. So while party membership and electoral turnout have declined, membership of single-issue pressure groups has increased and direct action has grown in popularity.

In some respects this may be seen as a positive development, an indication of a more sophisticated and discerning public that are keener to have a direct say over policy decisions. But this change nonetheless presents some difficult challenges for representative democracy.

First, although pressure groups play an important role in any democracy, and the public

should of course be free to express their views by any legal means, the declining support given to political parties puts at risk an indispensable element of the democratic process that binds citizens to the state. Only political parties are sufficiently broad in terms of their aims, values and policy programmes to make the tough decisions and reach the painful compromises that are necessary in order that a diverse population characterised by competing claims and interests may successfully be governed – or rather successfully govern itself in a democracy. The apparent decline of political parties is not, therefore, a matter to be welcomed or indeed to be relaxed about. It is a threat to the future of democracy.

Second, it would be inaccurate to assume that the decline in electoral turnout and simultaneous increase in pressure group activity is simply a case of people giving up on one form of political action in favour of another. In truth, while some people may have abandoned traditional political vehicles to pursue more direct means of making their voice heard, most of those who attend demonstrations and sign petitions, or belong to pressure groups, also vote. I see this in my own Blackburn constituency; a recent survey of people who attended my advice surgeries over a three-month period revealed that they were much more likely to have voted in the 2005 general election than the population as a whole.

Hence the problem of political disengagement is not so much a problem of people turning away from "formal" politics and engaging in "informal" politics (if such distinctions can be drawn); it is more seriously a problem of many people simply opting out of democratic involvement altogether. And such people – as indicated above – are principally drawn from the ranks of the young, the poor and ethnic minorities. So while negative attitudes towards politicians and politics are nothing new, the problem of public disengagement from politics, and by definition the disconnection that many citizens feel from the state, is perhaps more serious today than ever before.

Hence the current clamour for constitutional reform aimed at addressing these problems. Yet it should be remembered that the problem of political disengagement outlined above has become more, and not less, entrenched since 1997 – despite a momentous period of constitutional change underpinned by the desire to strengthen connections with the public and open up new avenues for political participation.

Over the past decade, the government has pursued policies on devolution for Scotland, Wales and Northern Ireland, all implemented following public backing in referendums; the

Greater London Assembly has been established, with a directly elected mayor; regional development agencies have been set up across England to lead economic regeneration; the European Convention on Human Rights has been incorporated into English law; the Freedom of Information Act has been passed; there has been a major programme of modernisation of the House of Commons, aimed in particular at bridging the gulf between parliament and the public; and the House of Lords has been subject to the most significant reform since before the First World War, removing the majority of hereditary peers.

These reforms have transformed the constitutional landscape of Britain. Yet low election turnout, declining party membership and a continuing lack of confidence and trust in the democratic process persist. Some argue that this demonstrates the need for more radical reform, and it is increasingly common to hear people advocate further constitutional change designed to weaken executive power and to increase opportunities for direct citizen participation in government. There is certainly a need to investigate how reform of democratic structures could help to engage marginalised groups in the decision-making process. But, as is clear from looking at experience abroad, it would be unwise to assume that constitutional change would automatically produce a democratic renaissance.

The introduction of proportional representation in New Zealand, for example, failed to halt a slow decline in electoral turnout, while Norway's mammoth Study of Power and Democracy concluded that PR was among the causes of political disengagement in that country by failing to offer citizens the chance of making a clear change in government. Evidence from the USA, meanwhile, lends weight to social research at home that suggests that the introduction of measures associated with "direct democracy", such as local referendums, may serve merely to amplify the voices of those already adept at making themselves heard, rather than giving a platform for currently marginalised groups.

What all this, and the experiences of the last nine years of constitutional reform in the UK, demonstrates, is the inherent difficulty of changing public political behaviour through institutional reform. As the Power inquiry acknowledged, "the problem of disengagement arose not so much from changes in the political system but in changes in the citizens". Yet this is not to argue against further constitutional reform. As Marx pointed out, humans may be free to make their own history, but not in circumstances of their own choosing. Structure, as well as agency, must therefore form part of our analysis of the problem of political disengagement. Further changes to the political system may yet help to involve those who are currently disconnected from the formal decision-making process.

But such changes must be carefully considered. The reasons for variations in turnout in otherwise similar areas need to be assessed, likewise the explanation as to why individual MPs enjoy higher levels of public trust than MPs in general. Contact with constituents appears to be important, so changes to constitutional structures and political practices that facilitate greater interaction between electors and elected would seem to point the way forward to restoring public confidence in British democracy.

Such moves need not require the existing representative system to be dismantled. It remains the most effective means of balancing competing interests and protecting the rights of minorities against the demands of majorities or powerful vested interests. It is important, therefore, that we examine how future constitutional reform might help repair the link between citizens and the state by bolstering representative democracy. The authors of this monograph have made an important contribution to that process of analysis and investigation.

Chapter 1

What are constitutions for?

Clare Ettinghausen, Director of the Hansard Society

What are constitutions for?

From the smallest social club to the great nations, the rules, rights and responsibilities by which members and citizens are bound are contained in constitutions. Constitutions perform a variety of functions but primarily they confer legitimacy on the relationship between the governors and the governed. There is nothing implicit in the nature of a constitution to say that it must be democratic. Nor is there anything implicit in definitions of democracy that requires a constitution. The legitimacy may therefore be democratic or undemocratic but it is a set of rules and conventions by which the relationship between the state and the people is defined. Constitutions exist then to define a framework by which states operate. This essay looks at the context in which debates about constitutional reform take place, and the wider relationship this has with the public and parliament.

In the UK, a developed democracy, legitimacy is gained from centuries of acceptance of the relationship between the state and the people based on an uncodified set of laws and conventions. Arblaster notes that the people and the people's will legitimate a regime because at the heart of democracy is the idea of a legitimate power resting with the popular will of the people.¹ There have been calls for a codified (or written) constitution, with the popular Charter 88 campaign taking the lead on this in the late 1980s and 1990s. However, the Blair government introduced a whole raft of constitutional reforms, such as the Human Rights Act and devolution to Scotland, Wales and Northern Ireland, while completely bypassing the question of a formalised written constitution. It is only in more recent months that the issue has arisen again in relation to defining the relationship between nations in the UK, and/or rallying the public around a common set of "British" values.

More recently, the research to understand more about public disengagement by the Hansard Society, and reports from the Power inquiry and others, question whether the trust between the governed and those who govern has broken, and how this might be rebuilt.² There have then been calls to introduce a written constitution for the UK as a focal rallying and unifying process, by which a fractured relationship can be rebuilt. This, however, draws attention to wider questions of what constitutions are for, and that is about more than whether or not they are written in a single document, but about the wider relationships that a constitution encompasses.

1 Arblaster, *A Democracy* (Open University Press, Milton Keynes, 1987)

2 Hansard Society/Electoral Commission *Audit of Political Engagement 2006; Power to the People*, report of the Power inquiry (London, 2006)

Ajzenstat describes the traditional role of constitutions as providing four functions: defining the form of government; [in a federal system] determining the relationship between different levels of government; protecting individual and political rights; and providing mechanisms for amendment to the constitution.³ A constitution then formalises the way in which power is expressed in a democracy and limits to that power. Commonly, constitutions in their purest sense are used to define the relationship between the citizen and the state and, in liberal democracies, to set limits on government powers, outline the relationship between the executive, legislature and judiciary, and establish the boundaries of freedoms and rights between citizen and state. They mostly enshrine these in a bill of rights as part of the constitution.

In the UK, we have an uncodified constitution, meaning there is no single document setting these matters out. Instead, we have a series of historical documents, together with a number of unwritten conventions, various acts of parliament, and more recently blurred lines in relationships at home and overseas through the Human Rights Act, devolution, and our relationship with the European Union and the wider global community. Our constitution is largely written down, but not in a single document – framed on classroom walls and given to all new citizens as an assertion of their connection with the state and their rights. It is almost ironic, given that the Magna Carta, eight centuries ago, represented one of the earliest attempts to put constitutional arrangements in writing, that the UK is now in this position.

A statement of identity

An alternative way of looking at constitutions is as documents that assert the identity of the state, clearly outlining the relationship between citizen and state in a way that embodies the values of the country and the particular interpretation of democracy. Taking this perspective, "Constitutions contain more than the rules by which political institutions function. They also symbolise and express the core values of a political community."⁴

Constitutions can be used to build nations and galvanise a sense of shared identity, but this is not the automatic result of a process of constitutional reform, nor can it be. It is the process that encourages and entrenches these beliefs, rather than the introduction of a document in itself. The manner in which a state goes about constitutional reform sets

3 Ajzenstat, J "Constitution Making and the Myth of the People" in Cook, C (ed) *Constitutional Predicament: Canada after the Referendum of 1992* (Montreal and Kingston: McGill-Queen's University Press, 1994)

4 Pal, LA and Seidle, FL "Constitutional Politics 1990-1992: The Paradox of Participation" in Phillips, S (ed) *How Ottawa Spends, 1993-94* (Carleton University Press, Ottawa, 1993)

the tone for how any future constitution might be used and what sense it is meant to give the public. For example, are there public discussions, transparency in the process, opportunities for the public to feed in and be consulted, debates taking place in the media and around the country? Constitutions can be important nation-building exercises, but only if the process is designed accordingly.

The recent discussions on constitutional reform tend towards the idea that reform can be used for nation building, linked into a renewed idea of what Britishness might mean to the country in the 21st century. But this may be a passing fad, and a constitution drawn up to respond to concerns about "Britishness" may simply enshrine a moment in time and become outdated when faced with some different challenge. The successful constitution must represent some fundamental and transcendental values, which arguably no constitution is capable of. Even those accepted as successful bear the marks of their time: for example, the US right to "bear arms", which was historically grounded and now causes huge difficulties. In the current climate of identity crisis, vagueness about our nationhood might be the best option. Indeed, the rise of a call to national identity may well lead to stronger calls for separate nations or nation states within the UK, or at least to a move to a federal state.

When talking about constitutional change, there are calls for a new "narrative" or a new way of explaining the relationship between citizen and the state. This may be the backlash to the citizen-consumer rhetoric that has been dominant for the past two decades, but serious questions must be aired, such as: Is it possible now ever to shape a constitution that would command overwhelming support in a society of such diversity as the UK? How would the aspirations and beliefs of those who dissented be managed? It is notable that many successful constitutions are adopted after a revolution, liberation or founding, which the UK has not had, so is it even possible to garner public support for widespread constitutional reform?

The role of citizens

A large part of constitutional reform must relate to practical and symbolic issues regarding who is involved, which voices are heard or views represented, and how the practical and symbolic issues are handled. Therefore if the public are excluded from this process, then one must consider what practical and symbolic issues are raised; on the other hand, citizen participation can add legitimacy to an otherwise elite-led process.

Participation is part of the life-blood of the democratic process. The history of democratic government is a history of expanding the right to participate until it comes to embrace the whole community, and then of expanding the scope of participation so that it comes to embrace more areas of peoples' lives.⁵

One of the key questions raised on constitutional reform matters in the UK is whether this is something needed or wanted, by either the political classes or the general public. Indeed, it could be argued that the present system works in favour of the political classes and that there is not sufficient public interest (nor, indeed, pressure from civil society) to warrant a reform agenda becoming more widely popularised. In a recent survey, 43% of the public "agreed strongly" that Britain needs a written constitution, in this case, to provide clear legal rules within which government ministers and civil servants are forced to operate.⁶

It does not seem unreasonable to want a constitution to define (and limit) the power of the state, but there have been even more radical calls for public involvement in any constitutional change. For example, Michael Wills MP calls for a new constitutional settlement involving parliamentary reform, rebalancing power between the legislature and the executive, and restoring trust in the political class. Wills calls for this to be decided by a one-off constitutional convention to be formed after the next election and made up of members of the public.⁷

There are examples of public involvement in constitutional reform activities in the UK. For example, prior to devolution taking place in Scotland, years of discussion had taken place on a cross-party basis, via the 10-year constitution convention followed by a referendum.⁸ Since the Labour government was elected nearly 10 years ago, an unprecedented level of constitutional reform has taken place across the UK, in many ways changing the political landscape. However, this has left unanswered questions that are not only of a practical nature, such as the West Lothian question, but also on a more fundamental level about including and excluding the public in such reform measures. Indeed, questions such as this may end up being the undoing of the union that constitutional reform is intended to secure.

5 Bogdanor, V, discussion paper in the Second Strasbourg Conference on Parliamentary Democracy, September 1987

6 ICM Research State of the Nation 2006 (London, 2006)

7 Wills, MP *A New Agenda, Labour Et Democracy* (IPPR, June 2006)

8 More information on the membership and report of the Scottish constitutional convention can be found at: http://www.almac.co.uk/business_park/scc/

The constitutional reforms were introduced because of long-standing pre-1997 commitments (such as the Human Rights Act or Lords reform) or to address particular political problems (such as devolution in Scotland). Importantly, as Robert Hazell notes, reforms are generally seen as being introduced in a "... piecemeal fashion, with no overarching explanation or justification".⁹ More relevant, however, is that there was no change in the political culture to accompany these reforms.

There is a case study in the Scottish parliament that is useful here. The parliament was set up on the four principles of: sharing power; accountability; access and participation; and equal opportunities; with an intent to foster a sense of participative democracy on the new representative system. In a recent speech by George Reid, presiding officer of the Scottish parliament, he noted that the Scottish parliament had been introduced specifically with the idea of breaking down traditional barriers between the public and their elected representatives – in the way the parliament would work, the nature of the building, the legislative and scrutiny processes, and even using a proportional electoral system. However, despite the introduction of all these measures, it is clear at the end of the second parliament that there has not been a change in the political culture and the public do feel distant from the new setup.¹⁰

Perhaps one of the most persuasive views for opening up discussions about the future of our constitution is made in the simple view that it is not that the constitution does not work as a whole, but that it does not work for the public. Wills suggests:

*Our constitution functions. Compared with much of the world and our own history, it is healthily democratic. But it is increasingly failing to reflect the aspirations and hopes of voters.*¹¹

The role of parliament

A related and important matter is what role parliament should play in any constitutional reform debates. In a recent seminar hosted by the Commonwealth Parliamentary Association, it was noted that parliament can play an influential, and in some cases central role in constitutional reform.¹² The role of parliament in areas of constitutional

9 Hazell, R "The Continuing Dynamism of Constitutional Reform" in *Parliamentary Affairs*, advance access published online on 12 December 2006 at: <http://pa.oxfordjournals.org/papbyrecent.dtl>

10 Rt Hon George Reid MSP, Stevenson lecture on citizenship, University of Glasgow (23 November 2006)

11 Michael Wills "We Need the People" at <http://commentisfree.guardian.co.uk/index.html>, 20 June 2006

12 "The Role of Parliament in Constitutional Reform" in *The Parliamentarian* 2006, no 4, pp323-326

reform was subject to change and three drivers were identified: first, change in state from, for example, monarchy to republic, or changes to ensure equality of representation; second, where states or ethnic groups seek greater power leading to creation of new parliaments; last, where there is a need for appropriate power-sharing arrangements in countries where there are two or more ethnic or religious groups. In the UK we can be seen to have needed parliament to assist with the second driver (in the case of Scotland) and the third (in the case of Northern Ireland) but have not been in a situation in recent history where the first has come into play.

At the same seminar, it was noted that parliamentary bodies are not always at the forefront of initiating constitutional change. However, there are five positive features regarding the role that parliamentary bodies can play in constitutional reform that are relevant. They can ensure public participation and consultation, both by representing the views of the public and by ensuring that an open and accountable process is undertaken; they can guard against anti-democratic drafting processes; they can strengthen the rule of law in the political system; they can ensure that fundamental rights and freedoms are articulated in the process; they can provide clarity on the role of various branches of government and separation of powers.

However, there are also disadvantages of involving the parliament in constitutional reform, which include: facilitating the continuing dominance of one party or interest group; facilitating constitutional change through unconstitutional methods; using the process to impose regressive constraints on rights and freedoms; and using the reform process for the benefit of one person over and above the interests of millions of citizens.

There are then some nuances that must be considered in any future discussion of constitutional reform, which concern the role of the public and the role of parliament, which are interlinked. Parliament must act to represent the interests of the public against the executive and in this sense must be at the centre of any constitution, let alone any future constitutional reforms. At the same time, the public have not been given opportunities to participate in these sorts of discussion, aside from the Scottish constitutional convention, and without this public involvement the legitimacy of any future constitutional settlement would be called into question. Parliament as well as the public must then be involved in any future discussion about what a constitution is for.

However, even if there is no seismic shift in our constitutional arrangements, attention should still be given to the current system. Robert Hazell makes an impassioned plea to

focus on what we have now, rather than aspire to move formally to a written constitution:

Unwritten constitutions can be just as good as written ones, so long as they are nurtured and valued. What matters in a constitution is not so much the written text but the underlying values, and whether people are willing to stand up and defend them. Unwritten constitutions need to be regularly reviewed and updated (something it is easier to do than with a written constitution). They need guardians to protect and defend their underlying values.¹³

Constitutions are simply ways of defining rules and relationships. That is what they are for, whether for membership bodies, nation states or supranational bodies. If they are to embody more than this – to represent values and aspirations – then either a revolution is required, or a process of building through constitutional reform needs to occur. In a democracy the constitution must ultimately be for the people, and this is not something that can be taken for granted, at home or overseas.

¹³ Hazell, R, op cit

Chapter 2

Constitutional authority in British democracy

Professor Stein Ringen, Professor of Sociology and Social Policy
at the University of Oxford

Constitutional authority in British democracy

A country's constitution consists of various regulations and conventions that add up to a network of rules and more or less shared understandings of basic values and right procedures in the citizenry's joint life, governance and public policy. One view – the American theory – is that this can all be laid down in a single document. That, however, is impossible, and this theory therefore leads, in America, to the peculiarity of a Supreme Court that acts like a college of high priests that guards the holy text and pronounces, in a rather Delphian manner, on what it commands in this or that practical question. This makes the American political system – so says Robert A Dahl, the pre-eminent authority on democracy in American political science – near “undemocratic” on the argument that the highest de facto legislative power sits with a small committee of unelected officials.¹⁴

Another view – the British theory – holds a constitution to be a complex and evolving living organism that cannot be set in stone once and for all. There can be little doubt that this is a better answer to the question of what a constitution is than the American formalistic answer. In Britain the constitution and its meaning is predominantly (although not exclusively) the remit of the elected parliament, in the USA predominantly (although not exclusively) of the unelected Supreme Court. The benefit of British constitutional realism is a down-to-earth, flexible, muddling-through and pragmatic style of governance.

However, the recent experience is that constitutional flexibility has come to be paid for by an erosion of democratic accountability, trust and confidence. Near 30 years of strong prime ministerial rule has resulted in a centralisation of political power in the country to London, and in London from parliament to Downing Street. It is of course too strong to say that Britain has become an elected dictatorship, but let me refer to Robert Dahl again. In his most recent book he warns that “political inequality might reach levels at which the American political system dropped well below the threshold for democracy broadly accepted at the opening of the twenty-first century”.¹⁵ In Britain we might reasonably worry that the centralisation of political power might reach levels at which the British political system dropped below the threshold of what is now broadly accepted to be democratic.

There are reasons for that worry, reasons that in contemporary political parlance often go

14 See: Dahl, RA *How Democratic Is the American Constitution?* (Yale University Press, 2001)

15 Dahl, RA *On Political Equality* (Yale University Press, 2006), p94

under the name of "disenchantment". Voting participation is low and falling, in particular in local elections. Membership of political parties is in free fall. Confidence in the democratic institutions is low and falling, as documented in repeated British and comparative surveys. So low now is confidence in democracy that, in spite of local democracy having been all but killed off, there appears to be next to no demand or appetite among the population for this crucial building block in the democratic architecture to be restored.

Constitutional authority

It is hardly controversial to suggest that it would be beneficial to find ways to build some more constitutional authority into the British political system for the protection of basic democratic values and principles. The question is rather how to do it. There is much of value to preserve in the pragmatic tradition. The American model is clearly not to be envied or copied. It is not only rigid but also undemocratic that constitutional power is almost fully removed from the people's elected representatives, including the power to modify the constitution in response to new needs. In Britain it is not only practical but also democratic that this power sits predominantly with our elected representatives.

Constitutional authority should work its magic in two ways. First, in the citizenry. It should – and here I take my words from Aristotle in *The Politics* – educate citizens "in the spirit of their constitution" and attune them "by the force of habit and the influence of teaching to the right constitutional temper". We should want constitutional authority to guide and encourage citizens in the art of citizenship.

Second, in the system of governance. A political system is democratic if its citizens in a securely institutionalised manner hold the ultimate control over collective decisions. What makes a political system democratic is not simply that there are elections and that the elections are free and fair, but that there is a chain of command from citizens to decision makers to ensure that decision makers are forced to govern in a way that reasonably reflects a fair compromise of interests and preferences in the citizenry. We should want enough constitutional authority to keep that chain of command alive, intact and strong, including in the long periods between elections, and to prevent it from falling apart.

The quest for authority

The need for authority in this meaning is clearly recognised in British political life. The present government has been activist, to say the least, in citizenship awareness and training – through propaganda and information campaigns, through a range of initiatives and regulations for improved civic order, through the teaching of citizenship in schools

and so on. If anything, it has been too activist for British tastes and has been criticised for nanny-statism, micro-management of daily behaviour and manipulative spin.

It has also been activist in constitutional reform: the incorporation of the European Convention on Human Rights into British law, on-going changes in the House of Lords, devolution, public-sector reform and many other initiatives.

These efforts, although very considerable and far from being blatant failures, seem nevertheless to be rewarded with rather modest success. In the citizenry, there is nothing to suggest that the drift towards disenchantment with politics and democracy is being turned back. In constitutional reform it could be even worse. Devolution to Scotland, Wales – and London – is often held forth as the great success story, which in some ways it perhaps is. But these reforms have also produced a constitutional mess with tensions and dissatisfactions that contain the potential to threaten the Union or to reconfigure it into a confederation.

Democratic quality

In *What Democracy Is For* I rank 25 of the most respected democracies in the world according to their quality on a scale from 8 (high-quality) to 0 (low-quality). In that ranking, Britain finds itself on level 3. The best quality of democracy is found in some of the smaller countries with political cultures of egalitarianism, such as in Scandinavia (Norway and Sweden are on level 8 and Iceland on level 7). In Europe, Italy ranks the lowest, on level 0.

British democracy is a model for the world and should be expected to stand out as a good democracy. But it does not. My interpretation is that British democracy is strong in its foundations but weak in delivery; it is unable to realise its potential.¹⁶

Although it may seem surprising that British democracy compares poorly with some other established democracies in quality, it looks to me that this assessment is now broadly recognised, if tacitly. The great theme in British political discourse over the last three decades has been change, modernisation and reform. This message has been carried forth by two forceful personalities, Mrs Thatcher and Mr Blair, but is a message that contains much more than two leaders' personal ambitions. It is a message that responds to a

¹⁶ I explain this interpretation in more detail in a discussion paper for the Smith Institute, *How Good a Democracy is Britain?*

perception that the country, its political system and its constitution are opaque, old-fashioned and not up to the challenges of the modern world.

Does better democracy depend on better citizens?

A vibrant democracy needs citizens that invest in it confidence and involvement. The meaning of disenchantment is that this investment is lacking. The standard interpretation is that citizens are becoming uninterested and turning away from democratic values. That interpretation, however, is almost certainly wrong.

Citizens today are better informed than ever. If better informed citizens are more critical of democracy, it is not because they understand it less. They also hold to democratic values as strongly as ever. This we know from international value surveys. They are more critical of democracy in practice, but that comes from their experience with democracy at work, not from democratic values being abandoned. They are also as interested in social and political issues as ever. This we also know from international research. It is only that they are increasingly channelling their interest to other arenas than the traditional political ones. MORI surveys in Britain show that people are more interested in local than in national issues, but it is still, in a sad paradox, in local politics that they are the most disinclined to engage.

One way to think about improving and increasing citizens' involvement in politics and democracy is to encourage them more. That is the view that is behind government activism in citizenship awareness and training. This, however, has by and large been unproductive. The reason is simple: motivation is not the weak point. Citizens remain informed, interested and responsible. To pursue with motivational encouragement citizens who have made an informed judgment that politics is not worth investing energy in is likely to be counterproductive.

Another approach could be to offer citizens more and better opportunities for involvement. For example, in the follow-up to the Power inquiry, websites are being established to encourage popular debate and involvement in constitutional issues. This is also likely to be ineffective, if not necessarily counterproductive. It does not help democracy if citizens debate on the web *instead* of voting. Non-participation in local elections is not for want of an opportunity to vote.

A third way of thinking about the problem is this: if we want citizens to be more involved, they need to have better *reasons* to be involved. We need to take citizens seriously and to

shift the focus to political procedures and structures, to what we want citizens to be involved in. If citizens are informed and interested and hold to democratic values, the weak point must be not with them but with what we want them to invest confidence and involvement in. If we improve the way democratic politics works, we can trust citizens to get involved.

We should want more citizenship involvement in politics, but my recommendation here is that citizens be left alone. They are good enough. There is no regression on "values". There is no reason to pester them with motivations for involvement or to patronise them with opportunities for involvement. It is what they are asked to engage with that is faulty. Citizens trust democratic politics less not because they are less trusting but because democratic politics is less able to command the trust of critically aware citizens. The road to constitutional authority in the citizenry does not go through improving citizens but through improving democracy.

Does better democracy depend on more democracy?

A criticism of government activism in constitutional reform is that it is haphazard. There is a bit of devolution, a bit of human rights, a bit of modernisation in public services, a bit of reform in the House of Lords and so on. The Smith Institute and Hansard Society project on the British constitution has some of the same quality. The constitution is sliced up into various components – parliament, church, civil service, local government, political parties and so on – with an idea of looking for improvements in each component. An underlying assumption may be that if each component is made more democratic the end result will be a better democracy. But, as so often, more is not necessarily better.

Above I have suggested a measuring rod, which I have called *democratic quality*. Obviously we should want our democracies to be more democratic, but the building of a good democracy is hardly a matter of just piling on democraticness. A better democracy must be a smarter democracy. Constitutional reform needs to be applied where it will be productive. What it should be productive for, I suggest, is the quality of democracy.

I have defined democracy as a structure of power and I make that definition operational with the help of the concept of the *chain of command*. A good democracy is one in which decision making answers to the citizenry through a chain of command from citizens to decision makers. When the chain of command is weak, democracy suffers because space opens up for non-democracy to crowd in. For example, if interested citizens disengage with formal politics because they see it to be "useless", they will instead invest their

involvement in single-issue activism (which is what is happening). Decision making will then distort to responding more to activist minorities and less to the citizenry collectively. Or if citizens disengage with political parties, they leave a vacuum that moneyed interests can move into (which is also happening). The weakening of the chain of command hands disproportionate power to resourceful minorities, be their resources activism or money.

The weakness I have identified in the British political system is its inability to realise its democratic potential. I ascribe that weakness to a weak chain of command. The erosion of the chain of command, again, comes from a long period of centralisation of political power so that now, to put the matter very crudely, political decision making is exercised predominantly in Downing Street with inadequate scrutiny from below.

The paradox that more democracy is not always necessarily better democracy can be illustrated in the case of the House of Lords. The upper house in the British parliament is undemocratic: it is an unelected legislative chamber, something that by definition should not exist in a modern democracy. My personal view is that the upper house should be elected, but the issue presents me with a bit of a dilemma.

In the British political system, the Cabinet is the principle hub of decision making. Their decision making should be under democratic control through a chain of command. The first link in that chain is parliament. Parliament should scrutinise Cabinet decision making so that the Prime Minister and his or her colleagues know that their power of decision making is limited to what they can get acceptance for in parliament, whose members in turn answer to their voters. In formal terms, that is the British system. In fact, however, as a result of the slide towards centralised political power, parliamentary scrutiny is now weak.

The House of Commons, through its majority, acts as an extended branch of Cabinet decision making, rather than collectively as a critical overseer of Cabinet business. In this vacuum, the House of Lords has stepped in and taken on some of the scrutinising role that parliament should exercise but that the House of Commons has abdicated. The Cabinet should live in fear of parliament but at present has more to fear in the Lords than in the Commons. This has recently been visible in particular, but not only, in matters of civil liberty.

In this constellation, undemocratic as it is, we might do the thought experiment of abolishing the House of Lords on the argument that it is undemocratic. The result would

be, under present political conditions in Britain, strangely enough, a parliament that would be more democratic but a chain of command that would be yet more weakened. Britain might arguably be more democratic but there would be less democratic quality in British political life.

Constitutional reform

It is now possible to make some recommendations for British constitutional reform, guided by the logic of democratic quality.

The main links in the chain of command are parliament, the press, the political parties and local government. Those are the important building blocks in the democratic architecture to fill the space between citizens and decision makers. It is by building and protecting that structure that we can infuse British democracy with more quality, attune British citizens to Aristotle's right constitutional temper and block out distortions in decision making brought about by non-democratic minority influence.

In parliament, constitutional reform should aim first of all to restore the supreme authority of the House of Commons. The parliamentary system is established in the British constitution, but it is still possible within parliamentarianism to introduce some separation of power between parliament and Cabinet. That could be done by introducing more explicit and precise duties of reporting from Cabinet to parliament and by extending the working role of parliament in the preparation of budgets and laws. The conventional wisdom will have it to be primarily the House of Lords that should be reformed in the interest of democracy. My opinion, to repeat, is for a democratically elected upper house, but my analysis leads me to the view that the priority for parliamentary reform is the House of Commons.

The British press is outstanding and is the strong link in the chain of command. I have visited it elsewhere and it is enough here to repeat a previous conclusion. "Those of us who like to comment on public affairs usually like to ask what should be done and feel obliged to offer our earnest suggestions for action. As far as the British press is concerned it is gratifying to be able to recommend that nothing that is not already being done needs doing."¹⁷

17 Stein Ringen "Why the British Press is Brilliant" in *The British Journalism Review* 2003, no 3

For political parties to play their role in the chain of command, they need to be membership organisations that are under the control of and answer to their members. In this respect political parties in Britain (and elsewhere) are in decline. That comes from the drift into mega-expensive politics and the then unavoidable transgression (to use the term coined by the American economist Arthur Okun) of moneyed power into the domain of democratic politics. This is fuelled by donations to parties and campaigns from moneyed persons, businesses and organisations. To restore this link in the chain of command it is not enough to limit donations and make them more transparent. It is time to put a full stop to all private donations to political parties and campaigns – from individuals, from businesses, from unions, even from candidates' own pockets – and make political parties economically dependent on members. It would improve democracy if political budgets were cut and members given power in parties.

Finally, there is a need to reinvent local democracy. Devolution is well and good but does not reach local democracy and may contribute to further weakening it. What is needed is what a Smith Institute study calls *double devolution*, including to proper local units.¹⁸ Britain needs more and smaller local political entities – municipalities – with more decentralised responsibility and authority, and many more elected politicians to represent citizens' interests. There are possibly too many members of parliament but certainly too few elected politicians locally. That is a big order, a matter of reinvention. As it is now, Britain does not have truly local units to which to devolve democracy.

This little catalogue of reform is all but utopian. These matters are long since firmly on the political agenda. They are logical under the theory of democratic quality. They would add up to making Britain a better democracy and save the British political system from the danger of dropping "below the threshold of what is now broadly accepted to be democratic".

18 Mulgan, G and Bury, F (eds) *Double Devolution: The Renewal of Local Government* (Smith Institute, 2006)

Chapter 3

A reformed second chamber

Chris Bryant MP, Labour MP for the Rhondda

A reformed second chamber

It's hard work reforming the British constitution. Other countries can simply amend their national text or draft a new republic afresh. Many of Europe's nations enjoy the privilege of written constitutions that were written in the last 60 years. By contrast we, bound by a constitutional settlement that has been framed by successive parliamentary battles, by conventions, by traditions and by amendments accumulated in every generation since the Stuarts, have a complex hydra of a parliamentary democracy. We may not have a doctrine of checks and balances, as in the USA, but we certainly have an established order of limited power, enshrined in the complex relationship between the government and parliament and between the Lords and the Commons.

Reforming parliament is difficult for two other reasons.

First, there is no one text to amend so there is no clear means of effecting reform in one area without impacting on other aspects of the constitutional settlement. So any putative reform often collapses at the first hurdle of unintended consequences. Hence the cry from those who are opposed to a democratic second chamber that such democratic legitimacy would enfranchise the second chamber to overturn the Commons and thereby lead to worse government.

The irony of this anti-reform argument is not lost on most democrats. After all, it openly admits that an appointed second chamber is illegitimate – and it seems odd deliberately to enshrine illegitimacy in the parliamentary system. But the more significant point is that it is clear that if we are to proceed with a democratic second chamber we shall have to be far clearer about its powers and we shall have to break the cosy tradition of conventions that presently govern relations between the two houses of parliament.

The second source of difficulty in reforming the Lords is more logistical and political than theoretical or ideological.

It was most clearly shown by the Commons' votes on Lords reform in February 2003, when Robin Cook was Leader of the House. There was a clear feeling that both MPs and the public wanted reform, but one after another all the options for a reformed second chamber were rejected – with the 80% elected option falling by a mere three votes. Since at least four MPs reckoned they had accidentally voted the wrong way and two prominent Tory campaigners for a democratic chamber, Ken Clarke and William Hague,

both failed to turn up for the vote, many of the self-proclaimed "democrats" felt cheated.

Many commentators predicted an identical outcome in 2007. Yet by a decent majority of 37, the 80% option was carried and then the fully elected option was carried by a hefty 113 votes. It was a clear statement of intent, representing not just a majority of those voting but an absolute majority of the House of Commons, even without the Irish MPs who had previously voted for a fully elected second chamber. Some have tried to suggest that the large majority was simply due to "wreckers" trying to carry the least palatable option so that no further action would ever be taken. But the truth is that there were plenty of principled supporters of a democratic second chamber in all parties who only voted for the fully elected House – people like Andy Reed and Katy Clark.

Whatever the tactics, the result was clear – an unambiguous Commons declaration in favour of an elected second chamber.

With immense predictability, despite regularly proclaiming the primacy of the Commons, the Lords then went on to vote with an even greater majority for precisely the opposite of the Commons – a wholly appointed second chamber.

So, deadlock seems the order of the day, with each house glowering sanctimoniously at the other down Pugin's corridors of power.

The need for a clear definition of powers

But notwithstanding the inevitable reluctance of their lordships to vote for their own demise, perhaps there is a way of squaring the circle. For now that the Commons has effectively declared itself for a democratic second chamber, if the government is to stand any chance of getting any legislation on the statute book it will have to address the issue of the powers of such a democratically legitimate chamber and the processes whereby it would use those powers.

In short, without a clearer definition of the respective powers of the two chambers we will stand no chance of effecting real reform.

It is a matter that the recent joint committee on the conventions governing the Lords and Commons expressly noted, when they said: "If the Lords acquired an electoral mandate, then in our view their role as the revising chamber, and their relationship with the Commons, would inevitably be called into question, codified or not. Given the weight of

evidence on this point, should any firm proposals come forward to change the composition of the House of Lords, the conventions between the houses would have to be examined again."

The truth is that the powers of the present chamber are immense. It may not have a role in matters of finance, but in every other area of legislation it can amend legislation; it can insist on its amendments; it can refuse to give a second or third reading to a bill; it can carry a vote of no confidence in the government or in individual ministers; it can question and arraign ministers; it can initiate or follow through impeachment proceedings; it can delay legislation for at least a year; it can drag its heels and ensure the government loses its legislation; it can refuse to allow bills that have started mid-year to be carried over to the next session of parliament, thereby ensuring they are lost; it can take as long as it wants to consider legislation; it can equally object to legislation that has been the subject of free and whipped votes in the Commons; it can even refuse to carry legislation that is clearly adumbrated in the governing party's manifesto.

These are extraordinary and far-reaching powers. Two things alone legally limit the powers of the Lords: the exclusive right of the Commons to deal with matters fiscal and financial, to tax and to spend; and the Parliament Act of 1911 as amended in 1949.

Needless to say, this is what the Lords can do, not what it does. The powers of the Lords may be only minimally circumscribed in law, but the way it exercises those powers is bounded by both convention and by self-denial.

The primary convention is traditionally known as the Salisbury/Addison convention, most recently defined in the joint committee on conventions' report as the convention that: "In the House of Lords: a manifesto Bill is accorded a Second Reading; a manifesto Bill is not subject to 'wrecking amendments' which change the Government's manifesto intention as proposed in the Bill; and a manifesto Bill is passed and sent (or returned) to the House of Commons, so that they have the opportunity, in reasonable time, to consider the Bill or any amendments the Lords may wish to propose."

This may seem a perfectly adequate provision, especially when one considers that whenever the Lords chooses to hold out on legislation, the government with its Commons majority can simply wait a year and use the Parliament Acts to enforce its will. But a parliament that was constantly divided against itself, with one chamber deliberately enticing the other into invoking the Parliament Acts, would be far from ideal. Houses

divided rarely stand, and we need a strong parliament, not just a strong Commons or a strong government.

I don't happen to accept that any elections to the second chamber will ineluctably mean that there will be a constant battle for legitimacy and ultimate authority between two elected chambers. Nevertheless, if we are to avoid ambiguity it is important to ensure that the second chamber remains a secondary, revising chamber and the Commons remains the primary chamber.

There are practical measures that can help ensure this. So, for instance, if the members of the second chamber are elected by thirds every four years for an eight-year term, the composition of the chamber would never perfectly mirror the electorate and therefore elections would never grant a proper mandate in the same way that the Commons' all-out elections would do. Moreover, the fact that only the elections to the Commons would determine the government of the day could be strengthened by laying down in statute that the office of Prime Minister and the key offices of state (such as Foreign Secretary and Chancellor) could be held only by members of the Commons. A reformed Parliament Act could also stipulate that the government could not be toppled by the second chamber, or indeed that the second chamber could not arraign or impeach an individual minister nor table a vote of no confidence in the government.

What a definition should include

Even more significant, though, will be the need to draft a clearer definition of the powers of the second chamber as they are actually used rather than as they theoretically exist.

This should do the following:

- It should reinforce the existing provisions of the Parliament Acts and remove the ambiguity over whether the Parliament Act of 1911 could be used to amend itself in 1949.
- A new Parliament Act should establish a clearer and properly enforceable concept of a manifesto bill clearly adumbrated in the government party's manifesto and certified as such by the Speaker. Such bills should not go through the standard system of three readings in the second chamber. Instead, the second chamber should be invited to provide a "second chamber opinion" on the proposed legislation, if necessary with proposals for amendment, after committee and before report stage in the Commons. Following the third reading in the Commons, such a manifesto bill should automatically

pass for royal assent. Some have argued that the concept of a manifesto bill is hard to create in a world where many manifestos are vague and the public's attention is fickle. However, if there were such a concept, we can be sure that parties that wanted to carry controversial but important legislation would provide far greater manifesto clarity – and would thereby have earned the right to save passage for their bill.

- An elected second chamber should be required to consider business from the Commons in a timely fashion and all Commons business should be guaranteed a carry-over into a new session if it has passed to the second chamber more than 30 sitting days before the end of the session.
- It should lock in the primacy of the Commons by an additional measure. The second chamber should be entitled to insist on its view on any one bill on a simple majority on three occasions, but it would only be able to insist on its view again on a two-thirds majority or an absolute majority of all members, whichever is the higher. Where such a majority exists, the second chamber could block the bill subject only to the existing Parliament Acts provision.
- The second chamber should be allowed to express an opinion on any measure, whether in primary or secondary legislation, including an opinion that the Commons has not yet considered a particular measure adequately, together with its reasons. The Commons would then be required to hold a further debate and vote on the respective legislation before it had its way.
- Finally, the second chamber should be given a specific role in adjudicating on any controversies between the devolved and UK governments. This is at present exercised by the legal committee of the Privy Council, a less than suitable or accountable body.

One final point: Reform of the Lords must also lead to reform of the Commons, where our legislative processes are all too often simply not up to the business of parliamentary scrutiny that good legislation requires. This is less a question of the process of amendment in committee or at report stage. In fact the vast majority of Lords amendments are tabled by the government, not by the opposition. Far more troubling in the Commons is the often cosy co-operation between government and opposition front benches to suppress uncomfortable debates.

A classic instance is the Equality Act (Sexual Orientation) Regulations 2007, which introduced significant and complex new rights for people in receipt of goods and services. Much debated in the public, they were afforded only 90 minutes of parliamentary scrutiny in a committee in the Commons (and rather longer in the Lords). Some inveighed against the government, but it was actually the Commons that was to blame for allowing for only two

forms of legislation: primary legislation with three readings or statutory instruments with a 90-minute debate in committee or on the floor of the house. The time for a third category of bill that could be amended but would require a one-day debate is long overdue. Plenty of statutory instruments need little scrutiny, but some, where the underlying principles have already been agreed in primary legislation, need far more teasing out than 90 minutes can afford.

If the government is to succeed in parliamentary reform that gives us a better, more representative and accountable, and properly democratic second chamber, it must address these issues of the powers of the second chamber and lay them properly before the electorate in a general election so as to drive through reforms that may be popular with the country but controversial with their appointed lordships. The cross-party consensus in favour of an elected house is now established, but that can only be one tiny aspect of the whole package of reform that we need if we are to build a new constitutional settlement that will last for centuries rather than months.

Chapter 4

Establishment and government

Rt Rev Dr Alastair Redfern, Bishop of Derby

Establishment and government

This essay will argue that the royal prerogatives and the established Church are essential to the wholeness and well-being of our nation – not as identifiable systems with clear functions and boundaries, but as entities that are often notions in the mind, frequently ignored, always shrouded in ambiguity, and yet available to provide a vital perspective on the human enterprise of organising society creatively and justly. Since much research points to the paradox of increasing disengagement from parliamentary democracy at the same time as there is evidence of a strengthening concern for particular issues and the potential for web-based pressure groups, there needs to be a more profound explanation of these dynamics than simply a search for means of involving people more directly in the affairs of the state (Blunkett, 2001).

Our particular challenge may not lie in the area of reconnecting the individual to the state, but rather in the search to find ways of reconnecting the individual with society – within which the agenda and the activity of the state may always be a minority and specialist area. The key is to provide healthy and realistic points of connection and accountability between the state (including the political system) and society (including a large range of “community” identities from the very local to the national and supranational). The existence of royal prerogatives and an established Church provides limits to the responsibilities of parliament and politicians – not through a system of checks and balances that is clear in legal and formal terms, but through points of interaction that enable a different kind of perception and possibility.

A central issue in our post-modern context is that of difference and togetherness or connection. Freedom promotes diversity, creating an ever-increasing problem for parliamentary democracy to provide adequate commonness in term of standards and practices. Government tends to reflect our current cultural optimism about the possibility of enabling this necessary control and coherence. Whenever there is some kind of disaster (rail, social unrest, terror), “official” voices are keen to stress that we can learn from mistakes to ensure that such disasters will not happen again. In fact, they do. The key contribution of a Christian Church towards “establishing” society is to provide a framework that recognises the on-going reality of failure and sin, alongside the possibility of resurrection and new life. These realities form the deeper discourses of the human heart.

Such intuitions and insights need points of proclamation, and places where they can be tasted and tested when people feel the need. This is the rationale of the parish and

cathedral system, which embraces every member of society, as individuals, groups or occasionally as a nation, providing places to frame and “hold” the fears and hopes that form the inner currents of life – and which rarely connect to the political choices being offered by the system of parliamentary democracy. The temptation of Western liberal democracy to see religion as private and optional is misguided: society needs public places for the expression of faith and its various ingredients. This fact is recognised by other faith leaders, including the Muslim thinkers Madood and Badawi, along with Chief Rabbi Jonathan Sacks (Partington, 2006: 30-31, Sanneh, 2006: 13-14).

Similarly, the royal prerogatives indicate that the work of a parliamentary system is open not just to the support and nourishing of an ecclesial establishment, but is also subject to the oversight of a holy (whole-making) representative person who brings together this theological and pastoral framework (through her bishops and ministers, who swear an oath of allegiance) and the right to pose questions and comments about the wider and longer-term perspectives. The royal prerogatives, rooted in the ecclesial establishment, represent the political presence and opportunity of every member of society – past, present and future.

Crown and Church together

Together, the established Church and a monarch endowed with prerogatives to oversee and legitimate the necessarily more immediate and focused working of a parliamentary democracy maintain a broader perspective, which underlines the penultimacy of every current endeavour, and the need to measure practical politics accordingly. The theological notion of kingdom is important: a kingdom of heaven embracing kingdoms on earth. At the service of coronation in Westminster Abbey, as the monarch is about to be crowned, he or she turns to face the high altar in recognition of this greater reality. Further, this function of Crown and Church embraces every member of society, while recognising that fewer will actively participate in formal political processes.

Both Church and Crown still have an enormously high profile in contemporary British society (Davie, 1994: 189). The parish system embraces every person (if they wish to claim that membership), and the occasional offices tend to manage key moments in life and death, either directly or as a predominant model, while Anglican involvement is significant in education (a fifth of the school population attend Church of England schools) and through chaplaincies. Cathedrals and other churches have strong connections with the representation of civic life and its acknowledgement of a deeper accountability than merely to those who choose to vote. These spaces operated by the established

Church remain one of the few places that enable intergenerational activities and the opportunity to explore values and experience within a coherent and universal ("catholic") framework.

Moreover, in an age of diminishing commitment and loyalty to institutions and organisations, the Church of England is spectacularly bucking the trend by maintaining stable numbers of churchgoers in communities across the nation. Similarly, the Crown has an appeal that transcends social and ethnic groupings, as witnessed by jubilee events, royal weddings and funerals, and the work of the Prince's Trust with those in need (and often unconnected to the political process).

Hence the style of operation for Crown and Church is always rooted in the ambiguity of ritual and moments of occasional engagement. Within the economy of the church, there is a range in the scale and frequency of engagement with the gospel of Jesus Christ: from those whose lives are deeply rooted in daily prayer and self-conscious discipleship to those who reflect or engage occasionally. This is the same with regard to the "use" made by citizens of the holding context provided by Crown and Church: for many, if not most in our time, there will be occasions when the bigger perspective, the mystery of wrestling with fear, hope, freedom or limitation, can be accessed; from localised worship and events to national moments, often made available through the media.

The fact that Crown and Church can offer this constant availability and hold the possibility of deeper engagement with the mystery and ambiguity of human being frees the processes of parliamentary democracy to engage with the specific and the contingent, self-consciously or not in terms of the theological and pastoral framework – since the latter is in place through the prerogatives of Crown and Church. A parliamentary system that thought it could ignore or abandon this vital terrain of meaning and support, which relates only tangentially to the apparent and always being revised understanding of the needs of everyday practical life, would risk creating an open space ripe for the proselytising of far more radical operators of theology and nurture, generally imbued with a mission to dominate the practical and the political as well as the more mysteriously spiritual.

The Church of England, like our modern monarchy, has a long pedigree in operating the dynamic between giving people space and distance, and yet inviting and offering connection and cohesion. Although 72% of the population claimed to be Christian in the 2001 census, most people seem to need to access the areas of transcendence and ultimacy only occasionally. And that would be true of the dynamic between God's chosen

peoples and the rest of humankind throughout history.

The role of faith

As the efforts of government to provide a legal and cultural framework to hold together the ever-expanding freedoms claimed by individuals in our society have continued, so there has been a call for the building of "social" capital. Benchmarks, laws and bureaucracy need the active assent and involvement of citizens, learned through "association" in various modes. As this call has met with little response, a more desperate and less well-thought-out appeal has been made to the notion of "faith" capital: a belated recognition that commitment is an attribute of the heart, not simply an activity engendered by association. However, there seems to be no real notion of how this instinct might be cashed.

The lesson is to endorse the process in reverse order. Faith is the foundational energy of human hopefulness, love and endeavour. There will always be a deep need for places and persons that can be the focus of projection and prayer, providing a framework of meaning and promise rooted in the desire for love and eternity, whatever the apparent costs. The manifestation of such faith engenders social capital, and together these forces provide mature material for the negotiation and ordering that is the proper, on-going task of government.

Such a process will not be delivered by encouraging everyone to participate in the political processes of parliamentary democracy. Rather it will develop from synergy between the signs that effect faith (Crown and Church), the associations within which faith finds social expression (ecclesial and secular), and the mechanisms for consultation and participation to deliver the effective ordering and development of society, which we call parliamentary democracy.

Greek political philosophy was clear that in the *polis* there should be the *agora* – an open space for the market (the exchange of goods), social interaction, public deliberation and worship. All four elements are essential for human well-being – especially in terms of development, freedom, order and the restless search for meaning and spiritual security. The work of Habermas and others (Habermas, 1987) has highlighted the importance of public, participative space, but underestimated the role and contribution of public, visible, engaged worship. The Western tendency to seek solutions to our problems by calling for participation in conversation (Wheatley, 1999) underestimates the deeper need for focus that is not rooted in the elitism of the rational (the Achilles heel of modern democracy) but is accessed and explored through encounter with the points of transcendence, ambi-

guity and possibilities that connect hearts rather than proceeding by persuading minds.

Many contemporary secular thinkers own that the most basic area of vision, aspiration and struggle in human being cannot be clearly or definitively articulated, but needs representation and moments of focus (for instance Lacan, Foucault, Deleuze, Lévi-Strauss). Crown and Church provide this essential element, in an organic relationship with the forces of a sophisticated and developing parliamentary democracy – offering space and points of reference to hold individuals, groups and sometimes the whole of society.¹⁹ This element allows for reflection, the expression of deep intuitions, and engagement with those committed church members who en flesh these theological and pastoral resources.

In this way, Crown and Church offer a holding environment, a proper perspective on the penultimacy of the present, and a crucial element of responsible "government". Such "signs" or sacraments need to be conservative and stable, and tend to be effective because of the sheer breathtaking magnitude of their claims – therefore demanding "faith" as a prerequisite. They provide a spiritual, cultural context within which it is safe for political endeavour to be radical, innovative, immediate and realistic in worldly terms.

In theological language, the role of Crown and Church is thus to consecrate public life: to make it holy or whole, by providing engagement with a greater reality. Augustine saw that the Christian faith pointed towards a heavenly city, an aspiration but also a measure and a guide for earthly endeavour. Parliamentary democracy, like any other form of government, needs always to acknowledge that there is no ultimate allegiance in this world. Crown and Church enable this healthy critique of politics and ensure that the agenda of every human heart does not get marginalised by the always transient achievements of some human minds.

References

- Blunkett, D *Politics & Progress* (Demos, 2001)
Davie, G *Religion in Britain since 1945* (Blackwell, 1994)
Habermas, J *The Theory of Communicative Action* (Beacon Press, 1987)
Partington, A *Church & State* (Paternoster, 2006)
Sanneh, L in *Times Literary Supplement*, 13 October 2006
Wheatley, M *Leadership & the New Science* (Berrett-Koehler, 1999)

¹⁹ For its part, this God-given vocation should warn the Church of England against the danger of retreating into its own narrow life overseen by the General Synod. Church government needs to be through engagement with parliament more robustly and more routinely. There is a current danger of the Church of England abandoning this vocation to establishment – ironically, in the name of mission.

Chapter 5

What role should there be for judicial review in our constitution?

Michael Smyth, Partner and Head of Public Policy Practice at Clifford Chance LLP

What role should there be for judicial review in our constitution?

The phrase “balance of powers” may suggest constitutional stability, but it also connotes an underlying tension, equal and opposite, between those powers, making disputes among executive, legislature and judiciary regarding the exercise of their respective responsibilities understandable and indeed unremarkable. Nevertheless, in an environment in which Rt Hon Charles Clarke MP, during his period as Home Secretary, felt moved to say that such disputes could “seriously erode public confidence in the ability of the state to uphold the rule of law in practice”,²⁰ it is perhaps timely to reflect on the role that judicial review plays in our constitutional arrangements.

Every court case by definition involves a form of judicial review. In the present context it means the power of judges to determine the legality of the acts of public servants or bodies carrying out public functions and, if need be, to quash acts or decisions that are unlawful. On its face, that appears to allow the judiciary to trump ministerial authority.²¹ The reality is that lay clients wishing to challenge state action at law are invariably disappointed to learn that judicial review does not generally involve consideration of the substance of particular public-sector decisions.

This is fundamental, and the political class have in that regard not been conspicuous in acknowledging that the role of judges is at its core not to second-guess Whitehall, substituting their own views on the policy issues of the day for those who make and implement policy. It is, in American parlance, horn-book law that the role of the bench is to ascertain whether a decision has been reached in excess of powers or is perverse (in that no reasonable administrator in possession of all the facts could have made it) or has been reached by an unfair or improper process.

This is far from being a template for the untrammelled exercise of judicial discretion. It was ever thus, for the modern form of judicial review is a creature of parliamentary action (ie, statute). No surprise then that parliament has sought to keep it within bounds.²²

20 “The judiciary bears not the slightest responsibility for protecting the public, and sometimes seems utterly unaware of the implications of their decisions for our security” – evidence to the House of Lords constitution committee’s inquiry into the Constitutional Reform Act 2005, 17 January 2007 (www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/999/const170107.pdf)

21 As Lord Denning once famously remarked (speaking of the Attorney General), “Be you ever so high, the law is above you” (quoting Thomas Fuller): *Gouriet v UPW* [1977] 1QB 729

22 The jurisdiction was originally derived from the common law, but is now conferred and regulated by section 31 of the Supreme Court Act 1981 and parts 8 and 54 of the Civil Procedure Rules.

Restrictions on its availability were from the outset imposed, lest the courts' time be wasted by busybodies, or central or local government be forever hampered by uncertainty as to whether their decisions would be legally impeached far into the future. Claimants therefore need permission before proceeding to a full hearing, and they must act promptly if their claims are not to be dismissed.

Public bodies also benefit from other forms of protection, such as the requirement for complainants to exhaust alternative remedies before applying to court; the absence of automatic disclosure of documents and oral evidence; the lack of a general right to damages; and the discretionary nature of the remedies so that a decision, although successfully impeached, may still be allowed to stand. These limitations continue to have the effect that the government intended. Most applications for judicial review fail at the first hurdle. Most of the rest fail later.

Remarkable then that judicial review should arguably have become the most dynamic area of activity in the legal profession. Before the 1980s few universities offered administrative law courses. Few law students now choose not to study it. Where there once were a mere handful of cases brought each year by those seeking a prerogative order,²³ the number of applications for judicial review over the last five years has routinely topped 5,000. Most striking of all, well over a third of the cases set down in the Court of Appeal in 2005/06 were public law cases (taking also into account asylum, immigration and social security appeals).²⁴ As the volume of commercial litigation in the High Court continues to decline in the wake of procedural reforms initiated by Lord Woolf in 1999, the cry may be heard: we are all public lawyers now!

No litigant relishes a courtroom defeat, least of all ministers criticised for acting unfairly or illegally. Judicial review thus inherently provides scope for causing irritation (and defensive or frustrated contumely) on the part of an executive increasingly apt to allude to its own democratic legitimacy²⁵ and decry excessive "judicial activism".

23 The old name for the principal remedies sought by way of judicial review

24 The actual figure was 38.8% of cases, up from 21.7% in 2002/03. See *Court of Appeal Annual Report 2005/06*, p30 (www.hmcourts-service.gov.uk/cms/1302.htm)

25 When the Attorney General took this line in the so-called *Belmarsh* case, Lord Bingham said: "The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision making as in some way undemocratic"; and that "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself": [2004] UKHL 56; [2005] 2 WLR 87 at [42]. One might add that in section 3 of the Human Rights Act, parliament has given courts the duty to modify the meaning and hence the effect of primary and secondary legislation where this is possible so as to render it compatible with rights under the European Convention on Human Rights.

The scope for such interventionism has undoubtedly increased and the fulcrum moved since the Human Rights Act came into force. Judges are in appropriate cases obliged to take Strasbourg jurisprudence into account (although they need not follow it), including the doctrine of proportionality, whereby the relationship between ends and means may be scrutinised. Lord Steyn described the new regime in the case of *R (Daly) v Secretary of State for the Home Department*:²⁶

First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations ... In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

Whereas therefore judges have traditionally eschewed merits review, when considering issues of proportionality they no longer look merely at the methods used to reach decisions but at whether, in all the circumstances, it was right to reach them. The effect is that judges considering the so-called qualified rights in the European Convention on Human Rights, such as the rights to freedom of expression, freedom of association, and respect for private and family life, now explicitly intrude into areas of social, political and economic policy. Unelected judges adjudicating on issues of pressing social need, or questions of democratic necessity? No wonder that the British left was traditionally unpersuaded by the arguments for European convention incorporation.

Bad enough, as parts of government might see it, that judges intrude into areas of social policy. Worse still when, by their actions, they are perceived as disrupting the Blair administration's anti-terror laws. Whilst the effect has been, in rhetorical terms, incendiary, the charge that our system of judicial review is overstated is not made out.

The principle of judicial deference

Judges know their place. They have traditionally recognised that there are some questions which politicians and elected law makers are better placed to answer than they are and

26 [2001] UKHL 26; [2001] 2 AC 532 per Lord Steyn at [27]

that it behoves them not to stray into making judgments in such matters. The shorthand term is “judicial deference” (not one necessarily used by every judge).

While different formulations have been attempted,²⁷ the four corners of the deference principle were perhaps most conveniently delineated by Lord Justice Laws in the case of *International Transport Roth GmbH v Secretary of State for the Home Department*:²⁸ His view is that:

1. Greater deference should be paid to an act of parliament than to a decision of the executive or subordinate measure.
2. There is more scope for deference where the European Convention on Human Rights itself requires a balance to be struck, and less where the human right in question is unqualified.²⁹
3. Greater deference will be due to the democratic powers where the subject matter is peculiarly within their “constitutional responsibility” and less so where it lies within the “constitutional responsibility” of the courts.
4. Greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or of the courts.³⁰

Judges are of course good at giving breath to grand statements of principle whose value in practice can be quite another matter. How adept would most judges be in deciding what subject matter falls within the constitutional responsibility of which organ of the state?³¹ Not to mention politicians, for that matter.

In the *Belmarsh* case the House of Lords held that detention of foreign terror suspects without trial under the Anti-Terrorism, Crime & Security Act 2001 was unlawful.³² The relevant issue for their lordships was whether there was a “public emergency threatening the life of the nation” within the meaning of Article 15 of the European Convention on

²⁷ See for example: Lord Hope *R v DPP ex parte Kebilene* (a pre-HRA case) [2000] 2 AC 326 at 381

²⁸ [2002] EWCA Civ 158 at [83] - [87]; [2003] QB 728

²⁹ An example of an unqualified right is the Article 3 right not to be subject to torture or inhuman or degrading treatment or punishment. Article 8, by contrast, provides the right to respect for private and family life, home and correspondence, but qualifies it by saying that a public authority can interfere with the exercise of that right in certain circumstances, including where necessary for reasons of national security.

³⁰ Points 3 and 4 are sometimes referred to as “relative institutional competence”.

³¹ Lord Justice Dyson in *Some Thoughts on Judicial Deference* [2006] JR 103 at para 7

³² *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 WLR 87

Human Rights which would permit derogation from Article 5 of the convention (the right to liberty and security).

Lord Bingham viewed this as a "pre-eminently political judgment", depending as it did on making "a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did". He went on:

*It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.*³³

Whether judicial deference is to be regarded as binding principle or as enduring discretionary constitutional custom, any supervisory role for the courts is bound in consequence to generate confrontations between executive and judiciary. It is not difficult to see why, as Home Secretary, Charles Clarke might not have testified to the existence of judicial deference. First, the detention of suspects without trial in Belmarsh was ruled unlawful by the House of Lords; then their lordships ruled that the Home Office's use of control orders under section 2 of the Prevention of Terrorism Act 2005 was also illegal,³⁴ as it amounted to a deprivation of the liberty under the European Convention on Human Rights.

Mr Clarke complained in particular that the Court of Appeal had refused an invitation to modify the terms of control orders in order to make them human rights compliant. In January of this year he raised concerns with the House of Lords constitution committee and suggested that the law lords should debate the issues of principle involved in these matters. His suggestion was, however, rejected by the judicial elite, principally on the ground that the law lords would be opining on the hypothetical, a notoriously counterintuitive concept in British legal practice. The argument has also been made that discussions with government behind closed doors would jeopardise the impartiality of the judges when it came to dealing with any subsequent cases.

The point is well made, but so is Mr Clarke's. It did not, for example, go unnoticed that, during the passage of the then Human Rights Bill, a number of serving law lords spoke in

³³ *Ibid*, at [29]

³⁴ *Secretary of State for the Home Department v JJ and others* [2006] EWCA Civ 1141; [2006] 3 WLR 866

parliament in favour of legislation on which they would be professionally obliged to adjudicate following enactment. There must in this context be scope for establishing an institutional dialogue whereby such pressing issues can be canvassed other than from the bench or the floor of parliament.

Judicial review is unquestionably a Good Thing. There is an ever increasing call for it. A means of restraining abuses of power, it is a tool for supporting not only vital individual rights, but also ensuring good administrative practices and decision making for the benefit of society at large.

Conferring on judges the power to strike down primary legislation is not obviously a feature of the politico-legal landscape for the foreseeable future. No judges appear to want our new Supreme Court to be the US Supreme Court with a British accent. The peculiar genius of our constitutional settlement in the context of judicial review has traditionally entailed moderation on the part of judges and the relative passivity of our parliamentary law makers. Imperfect the system may be, but it is manifestly not broken.

Chapter 6

Whitehall and the civil service

Helen Goodman MP, Member of the Public Accounts Committee

Whitehall and the civil service

Proceed by the procedure.

William Shakespeare, Coriolanus Act III, Sc I (1608)

Well, we went through all the right processes ... what more could we have done?

Former DTI civil servant on the forecast of Polish migrants, which was wrong by a factor of 30 (2006)

It is clear from these two remarks, made 400 years apart, that the mentality of the bureaucrat has been remarkably constant over a long period of time and that following certain mores takes priority over achieving results. This is not to say that we cannot improve the effectiveness of the British civil service; I believe we can, as long as we acknowledge some of the competing tensions in the role they have and seek to make them transparent and explicit. Large bureaucracies developed at the end of the 19th century, as government became larger and more complex, to ensure that cases were treated equitably. The downside is that they tend to be process-, not output-driven, and insensitive to individuals and to rapidly changing circumstances.

The good news

The British civil service has a number of important strengths. First of all, it is a professional body and largely free of corruption. This is in great part because of the 19th-century Northcote-Trevelyan reforms and the advent of the Public Accounts Committee, originally established to ensure that public money was spent on the purposes for which it was voted. High standards of probity, independence and competence have been maintained through an entry system of competitive examinations and promotion based on a transparent system that can broadly be described as meritocratic.

Second, it is staffed by people who are, in the main, hardworking, committed and, especially at senior level, highly intelligent. The skills it prizes and nourishes are largely intellectual – a capacity to analyse problems logically, to think clearly and dispassionately, to see both sides of an argument and to write well. These are all essential for developing good-quality policy. Political sensitivity, an understanding of political processes and an ability to negotiate in political environments (the EU, NATO etc) are also highly developed.

The weaknesses

It is a truth, almost universally acknowledged, that the main weaknesses lie with “delivery”

– the practical implementation of policy and public service management. Related to this are other problems.

At the middle-ranking levels in "delivery departments" there is increasing specialisation and professionalism, but this is not yet reflected in the senior civil service.

A lack of imagination and the limited life experience of officials drawn from a relatively narrow social base is a problem. For example, I recall one senior Treasury economist maintaining in 1996 that there was no youth unemployment.

There is an ivory tower mentality that sometimes verges on the Pythonesque – I attended a meeting once at which senior officials discussed, quite seriously, what was the probability in game theory that the current proportion of women permanent secretaries would occur. (Forty years after Dame Evelyn Sharp terrified Dick Crossman, there is still only one.)

Whitehall's problems include:

- A lack of specialist expertise, especially in human resources (which is usually just another posting for the administrative official) and finance.
- A culture of irresponsibility. The doctrine of ministerial responsibility frequently means that among officials there is no penalty for failure: for example, in 2004, when immigration minister Beverly Hughes resigned over whether there had been fraudulent visa claims, no official was disciplined as well. People are moved sideways out of trouble and seem to reappear and repeat mistakes. When the Russian economy collapsed in the mid 1990s, one official said: "Our advice was not wrong, but Russia was not ready for it."
- Weakness in thinking long-term, strategically or in the round. The Foreign & Commonwealth Office climate change ambassador John Ashton said in September 2006: "In no area have we begun to do joined-up government in practice." He says: "I think that turf-conscious, silo-based thinking still exists in Whitehall ... In a world of interdependence, we can't have this, as we will not deliver the outcomes we need because we are dealing with systemic problems, and you can only deal with these with systemic responses." Ashton, who took up his post last summer, also says that while the "Victorian" model of Whitehall has enormous strengths, it is not ideal for challenges like climate change. "At its best it does crisis management as well as anywhere in the world, and can do line policies pretty well, but it can't do shaping a complex future where every problem is interconnected." Obviously, this is an

exaggeration; for example, the Social Exclusion Unit made a difference. But this is a worrying perspective on an important policy area.

- An insensitivity to management realities and timescales. Since 1997, the NHS has undergone x reorganisations. Over the same period the Home Office has introduced y criminal justice bills. Throughout the public service more stability is requested.
- Ignorance and naivety about social problems – for example, the frequency of family breakdown dogs the Child Support Agency and tax credit administration.
- Poor oral and communication skills. People who are lucid and even acerbic in writing are often tongue-tied and inarticulate orally. Together with the culture of irresponsibility, this make for poor leadership.
- An inward and upward focus on peers and ministers rather than an outward focus on serving fellow citizens. This is in large part because good policy work and exposure to ministers in private office are the route to promotion.

Shortcomings in skills and accountability

The problems listed are symptoms of two more fundamental issues: skills and experience gaps and a lack of accountability.

We need to solve both: they are separate and should not be confused.

The most brilliant structural arrangements cannot hide professional incompetence, and a great group of people will be wasting their energies if they are not properly channelled.

The type of skills and experience needed varies from department to department. In the Treasury and the Foreign Office, the specialist skills required are largely policy oriented – economists and linguists, since these are not primarily delivery departments. The Treasury has in effect hived off its delivery responsibilities to others: the Bank of England, HM Revenue & Customs, the Financial Services Authority. The FCO does retain responsibility for visa administration (why this does not lie with the Home Office immigration department is not quite clear), but this is not the meat and drink of diplomats or foreign secretaries. Their management responsibilities are therefore only one notch up from housekeeping.

But in many other departments delivery is the essential business of the department. Policy is about delivery – if delivery fails, policy fails. Sometimes delivery is part of the department's function, sometimes it has been hived off to an agency, and sometimes it is via an institution or set of institutions with dual or separate governance and

accountability arrangements. The table sets out some examples: this list is not exhaustive but illustrative.

Table 1: Examples of different departmental delivery

Department	Internal/agency delivery	Separate delivery
Dept of Health	NHS – hospitals	GPs, foundation trusts
Dept for Education & Skills	Ofsted	Schools, universities
Dept for Constitutional Affairs	Courts systems	Judiciary
Dept for Work & Pensions	Benefits Agency/CSA	
Home Office	Prisons	Police
Ministry of Defence	Army, Navy, RAF	

For nearly 40 years, since the 1968 Fulton report, attempts have been made to broaden the experience of senior civil servants to make them competent managers and effective deliverers of large-scale systems.

This has been done through a variety of mechanisms:

- changing and extending recruitment, for example by more open competitions;
- increasing the level of secondments in and out (a slow process: in 16 years I was out for only four months and then was recalled because I was needed “urgently”);
- increasing in-service training and scope for acquiring professional qualifications (again, this rubs against the culture. I can remember being told twice not to do courses as it was an admission of ignorance!).

I believe strongly that these initiatives are vital simply to maintain the necessary knowledge and experience to operate effectively as a senior civil servant working on policy in the modern world.

But in terms of bridging the policy/delivery divide they have failed and they are doomed to fail, because the world is now just too complex. In effect we are asking people to be at the top of several professions simultaneously, and neither time nor aptitude allow this.

Over the past 10 years one permanent secretary who effectively achieved this was

Michael Bichard, who had a background in local government administration. Other officials who may be excellent intellectually and good at policy advice come unstuck when they have delivery responsibilities, as we saw recently in the Home Office.

We can run a system of government on the basis that we need a cadre of very able, intelligent individuals with a variety of different skills. We cannot run it on the basis of exceptionalism – achievable by only one person in 10 million.

At the Public Accounts Committee we take evidence from senior civil servants across the government, and I have been struck by the fact that when there is a technical but vital-for-delivery job, these have to be recruited from the specialist professionals. For example, two success stories:

- The DWP has had great difficulty in organising its information on benefit entitlements for the public, and now has recruited a logistics expert from the Canadian Army to sort it.
- The NHS wastes millions on inefficient food procurement; to tackle it they have found an expert from the finance sector.

A traditional civil servant can learn enough about these things to understand that they need help, but not enough to fulfil the role themselves. As one Treasury permanent secretary once said: "I didn't read Economics, but I know a man who has."

How decisions are taken

One problem that we have in Whitehall is that the voice of delivery, the needs of management are not heard sufficiently or properly *at the point at which decisions are taken*. The policy wallahs frequently behave as if they think they can design policy and then dump it on others to deliver. This is mad, or naive, or both.

So in these delivery departments two permanent secretaries are needed. A traditional Mrs Think-type policy-oriented person and a Mr Delivery. It may be felt that this is too unwieldy – but experience suggests not.

A few years ago at the Department of Health there was a sort of falling-out between the Secretary of State, the chief executive of the NHS and the departmental permanent secretary, which ended with the permanent secretary asking the Cabinet secretary to roll the two official jobs into one. (In passing, it is worth noting that a row is never a good

basis for a reorganisation.) But when the next set of ministers arrived, they found it impossible to run the system, because all the tensions between desire for reform and the practicalities of maintaining capacity during change were in effect internalised into one role and personality and the arguments which they needed to hear and understand to take sensible decisions were not exposed. So now the NHS chief executive and permanent secretary roles have been re-established.

This division between strategy and delivery responsibilities has worked well over a long period of time in the Ministry of Defence, where there is no role confusion between the permanent secretary and chiefs of the general staff, who are all involved in key decisions.

So we need similar arrangements as necessary across government to get the quality of management input needed. To make change or indeed any serious policy initiative happen, all three – Minister, Mrs Think and Mr Delivery – would have to be in broad agreement that it should be done and how.

Types of accountability in Whitehall

Accountability is essential to ensure that work is purposive.

Broadly, there are three types of accountability: hierarchical, market and democratic.

Charles Seaford has written:

In any organisation there are chains of hierarchical accountability, that is to say A is accountable to B, who is accountable to C, and in large organisations (such as government run services) A may be accountable to some remote boss D through an obligation to meet certain targets. The chain may just end in some individual with supreme authority, accountable to no one, but typically those at the top are subject to either market accountability (for example capitalist organisations, held to account, at least in theory, by a combination of consumer and capital markets) or democratic accountability (governments, some charities, trade unions etc).

Which of these operate in the civil service? Within departments and agencies, obviously there is a considerable degree of hierarchical accountability. But where does it end?

The main model is democratic, but the traditional doctrine of ministerial responsibility, whereby ministers are responsible to parliament for all mistakes and officials are free of

responsibility, has fallen into disrepute. This is largely because the chain between the minister and front-line staff is so weak. It is argued that it is simply unreasonable for Minister X to be responsible for the late payment of Mrs Smith's benefit. This criticism is a bit too crude – since it depends on *why* Mrs Smith's benefits were late.

Let us take a contemporary example.

The Rural Payments Agency failed to pay farmers their entitlements on time. Both the chief executive and the relevant minister were relieved of their posts and a number of civil servants whom it was found had been grossly derelict in the performance of their duties were sacked. Was this reasonable?

There is a case for saying that the English payments system, unlike the Scottish and Welsh, was unduly complex – that this was a policy design fault and ministers were responsible to that extent. The misbehaviour and underperformance of staff was obviously a civil service responsibility. Ministers do not line manage staff and can expect a proper level of competence from them.

But if they are not, do ministers have any levers over officials? Traditionally policy design might be thought well within ministers' bailiwick, but these are complex areas. Ministerial responsibility would seem to turn on whether they were warned of the problems and took account of any information given.

Whatever the actual rights and wrongs of the case, in the public mind ministers are responsible; they lose popularity from such problems even if they have been caused by officials' incompetence.

Possible reforms on accountability

In view of this, three structural changes are now discussed:

- a) separate out responsibility for ministers' policy from officials' delivery;
- b) strengthen ministers' controls over officials;
- c) set up some alternative system of civil service accountability.

Option (a) is possible in some circumstances – Bank of England independence is a case where it has worked well. But in many policy areas it is notoriously difficult. Michael Howard's famous Paxman interview about his relationship with Derek Lewis turned on

precisely this point. But it would be facilitated by the sort of organisational proposals discussed earlier, of having policy and delivery input when decisions are taken.

To work it also needs option (b). As well as clarity over roles and responsibilities, ministers need to be able to take action if officials are failing in their part of the equation. If ministers cannot or do not do this, then they are culpable. In any hierarchy, if the boss does not act when staff fall down, either through providing extra resources or training or in the final analysis discipline, that individual is responsible.

In the name of civil service neutrality we currently have a system where ministers have virtually no leverage over the top officials who are the first link in the chain of accountability. This is absurd. (No FTSE 100 company would run a corporate governance structure like this, as recent decisions at BP, painful though they may be, demonstrate). The Prime Minister appoints the Cabinet Secretary. Ministers approve their permanent secretaries and they choose their private secretaries. But they cannot remove senior officials, whom they may inherit or grow to distrust or in key areas of whose work they find failing.

This is to put an absurd block on effectiveness. It would not be necessary or desirable to go the whole way down the path of changing the whole staff, as they do in America, which is slow and time-consuming. But ministers do need a new power to remove under-performing officials. Currently, Whitehall does give people early retirement or severance, but it is only ministers who cannot influence this. Ironically, what looks like a weakening of democratic accountability (a nameless individual is sacked) is in fact a strengthening of it since it improves the incentives to meet the democratically expressed objectives.

In making this change, ministers would of course be subject to the normal conditions of employment law, but here to ensure that the power was not used trivially or viciously an extra check could be introduced, by requiring the Secretary of State to secure the agreement of the relevant select committee chair, who could in general be in a good position also to see problems emerging. Politicians from other parties would have a vested interest in making such a system work.

Option c), an alternative approach, is to establish an independent civil service board appointed by parliament, which defines its role and purpose, appoints the head of the civil service (this power would be taken from the Prime Minister) and a civil service executive which line manages permanent secretaries.

This approach would weaken democratic accountability even further. It would replace elected ministers with quangocrats – the sort of well-intentioned middle-class people who float in these circles and used to be called “the great and the good”, and are very nice to talk to over dinner – but who would be largely unknown to the public and insensitive to voter concerns.

It is a proposal that would further slow the pace of reform and change, albeit that it might be congenial to the current generation of senior officials. It adds two more chains in the link between voter and front-line staff, neither of which have legitimacy, either democratic or in terms of client representation.

The role assigned to the board and executive fundamentally confuses the issues of skills and accountability. If the head of the civil service wants to develop the skills of officials through changes to recruitment, training and career patterns, and to change behaviour by altering codes and procedures, he can do so by setting up a department under him to work on this and if necessary produce a Civil Service Act, but let this not be confused with the issue of accountability.

This proposal brings a real risk that elected politicians who in the British constitution already lack resources and levers are further undermined. Their role is not to act as glorified press officers or PR spokesmen, but to run the country – to do that they need a certain level of leverage over the machine.

Accountability in the wider public sector

In the public sector, accountability must ultimately be to the public – either in their role as users of services or in their role as citizens. All chains of accountability should flow to them.

In the private-sector model of accountability, things are relatively straightforward – companies have duties to their shareholders to make profits and to their clients to provide goods and services to fulfil legal contracts. Both groups have the power to take their money elsewhere if they are not satisfied. Within private organisations, hierarchies of command exist but all lead to these two key groups. Of course there are market failures where there is a monopoly or clients lack the knowledge to make decisions or there are important externalities like pollution. But by and large everyone understands the rules of the game and the roles they must fulfil.

In the public sector things are more complicated – partly because there are frequently multiple objectives and more stakeholders; partly because we now have so many and overlapping models of accountability, and partly because the public in their role as users and citizens often feel they have less leverage than in their role as private consumers. Sometimes the problem is simply one of size – the system is so big, the chain of command so long that the message just cannot get through.

So, accountability in the civil service is one problem, but there are wider issues that vary across the public service.

A little history

It is worth setting these issues in context. Up to the 1970s the traditional model was followed, but after 1979 and especially 1983 the Tories introduced radical changes, starting with an ambitious privatisation programme. The early sales of shipbuilding, cable and wireless, and other industries were fairly straightforward. But the advent of utility sales (telephone, water, energy suppliers and the like), areas previously seen as natural monopolies, meant that prices and service standards to consumers had to be overseen by newly established regulators.

At the same time, ministers sought both to distance themselves from and to introduce tighter controls over the public services too, with, for example, the establishment of the national curriculum in schools and the innovation of agencies for delivery.

In 1997 New Labour wanted to guarantee the public higher standards with five key pledges, later expanded to an array of targets and public service agreements. At the same time conscious of the need to free public servants and indeed of the impossibility of controlling everything, attempts have been made both to give new semi-independent status to (some) schools and hospitals and to copy the regulator model, for example Ofsted, Usung and Monitor for hospitals. Tony Blair has been particularly alert to people's desire for choice to be realised in some public services, setting up mechanisms designed to do this too. Unfortunately, this has left us with a rather confused patchwork of accountabilities, as the table shows.

Table 2: Forms of accountability in public services

Form of accountability	Schools	GPs	NHS hospital	Foundation hospital	Police	Prisons	State pensions & benefits	Universities	Legal aid	Judiciary
Parliament				✓						
Parliament via ministers	✓	✓	✓		✓	✓	✓	✓	✓	
Regulator	✓ Ofsted			✓ Monitor	PCC	✓				
Local government	✓				✓					
Other collective	Trusts			Trust members						
Professional body		✓	✓	✓				✓	✓	✓
Individual choice	✓	✓	✓	✓				✓	✓	

Finding solutions

These, then, are the problems. What are the solutions?

We need to re-establish some key principles.

1) Accountabilities for public services should lead to the public as citizens or clients, usually both. Which is dominant will depend on the nature of the service. This has two implications: first, we do not want accountabilities that end in bodies of the great and the good who are not themselves answerable to anyone and for whom there is no mechanism for removal (except in cases of madness or corruption). This is the key weakness of ideas such as a civil service executive and civil service board. It lengthens the hierarchy between public servant and citizen. These bodies might give good advice on professional standards but they should not be part of the accountability mechanism. Such arrangements apply equally of course to unelected peers and to bodies with quasi-legislative functions, such as the Human Fertilisation & Embryology Authority.

The second implication is that every public service must have at least one democratic accountability to us as citizens. We have an interest in the proper functioning of the whole public service, whether or not we personally come into contact with it. For example, it should do what it is set up to do and not stray into other territory; it should use public money efficiently and effectively; it should be transparent.

Interestingly, almost every public service also needs to be accountable to its users. Sometimes this will be a strong accountability – for example, university students have a choice over what they study and cannot be forced to do something else (unlike in the former Soviet Union when such a method was used to punish the children of dissidents!); sometimes it is more prosaic, such as whether you want your pension paid in cash or into a bank account; and sometimes it will be a weak accountability that does not give the "client" choices, but must respect their rights and dignity, as in the case of the prison service or the immigration department.

The more a service is seeking to meet individual needs, the more client-focused it must be. Where needs are largely similar, efficient administration is to be preferred (such as for passports or TV licences).

2) Democratic accountabilities should be to *relevant* communities, but this should not be used as an excuse for a postcode lottery in the quality of service. People are, reasonably

enough, hypersensitive to the impact on local communities, and are sometimes inconsistent: for example, wanting in general to house the homeless, but not to have developments in the field next door. This is why reform of the planning regime is quintessentially a discussion about level of democracy. Looking at the schematic diagram, the lack of local authority input into health, especially public health, is an obvious lacuna. In the medium term it is neither desirable nor sustainable to ignore local community interests and differences, but a proliferation of accountabilities at this level leads to confusion and hence weakness.

3) Public servants should put their duty to the public before their professional or sectional interests. This is a point that is well understood in Whitehall, but less so elsewhere. Chief constables feel free to criticise government policy (or even support it).

Sometimes there seems to be real confusion on the part of both policy makers and practitioners. To what extent can or should we rely on professionals to maintain standards of public service? Teachers, for example, are now subject to rigorous (perhaps excessive) inspection, while GPs still have great leeway. The problem is that we do not seem to have thought across departments in a consistent way, so the pattern varies hugely: sometimes we rely on independent professional bodies, sometimes on targets, sometimes on inspection and sometimes on incentivised contracts.

We need therefore to rethink and review accountabilities across the public services to ensure that there are mechanisms for protecting professional standards, client engagement in the services they receive, and appropriate democratic accountability on a consistent basis throughout the public services.

Chapter 7

The royal prerogative and democratic accountability

Rt Hon Lord Holme of Cheltenham CBE, Chairman of the Hansard Society and of the Lords Constitution Committee

The royal prerogative and democratic accountability

In its response to the public administration committee of the House of Commons in its 2004 report *Taming the Prerogative: Strengthening Ministerial Accountability*, the government conceded that the prerogative is "in many ways a historical anachronism".

This explanation, which seems to portray the residual prerogative powers of ministers, all flowing from the ancient prerogative powers of the Crown, as if they are odd islands remaining of a once mighty royal archipelago now sunk beneath the waves of parliamentary government, is comfortable to defenders of the status quo since it implies that time, and parliament, will eventually erode away these anachronistic outcrops.

That may be true to some extent as, over the centuries, since the constitutional settlement of the Bill of Rights of 1688 which transferred to ministers certain powers that were previously the exclusive preserve of the monarch, these powers have been gradually eroded by statute, such as the War Damage Act of 1965 and the Crown Proceedings Act of 1947. Moreover, the courts have held that new prerogatives may no longer be created – less of a landmark than it may seem, since a definitive list of the remaining powers has proved difficult to extract from government. In the words of the present Prime Minister, "it is not possible precisely to define them".

Whatever the mistiness in the margins, it is clear that residual prerogative powers, for the exercise of which there is no specific requirement on ministers for parliamentary legislation, or even parliamentary accountability, do include: diplomatic relations and treaty making; the governance of British overseas territories; the deployment of the armed services, whether overseas or in aid of the police within the UK; and the issue and revocation of passports.

Those are considerable powers indeed, central to the functioning of any state, ancient or modern. Other prerogative powers, including the Prime Minister's ability to appoint senior judges, actually vested until the Constitutional Reform Act of 2004 in the Lord Chancellor, and his right to recommend peerages to the Queen, have recently undergone, or are in the process of, removal.

Overseas troop deployment as a key ministerial prerogative

It seemed to the House of Lords select committee on the constitution, which I chair, that of these residual prerogative powers, by far the most significant was the deployment of

British armed forces overseas. The issue was topical because of the immense controversy over this country's involvement in the war in Iraq. Yet the significance went beyond controversial topicality to the important constitutional issue of parliamentary consent and popular accountability for waging war in a modern democracy. What should it take to make such a decision and commitment fully legitimate?

The constitution committee, therefore, undertook an 18-month inquiry, reporting in July 2006, into the use of the prerogative as the basis for the deployment of British troops in conflict zones. In the course of the inquiry both general issues relating to the prerogative, and specific issues relating to war making, were discussed.

It rapidly became clear that in choosing this specific prerogative we were probing the central nervous system of the nation state. The nations of Europe were formed in pre-democratic days by the leadership of monarchs ready to defend and expand their territorial limits by armed force, and the effectiveness of these monarchs was judged by their ability to muster the necessary forces in a timely way. Indeed, Britain's parliamentary democracy itself was forged in the struggles over "supply" to fund the monarch's military excursions. Paradoxically, the maintenance of a standing army, with related defence budgets and appropriations, let alone substantial contingencies and special reserves, mean that the 21st-century parliament is far less likely to be able to administer an effective check on executive action in this respect than would have been the case in the 17th century.

Nor do the courts offer any alternative check. Although judicial rulings from 1985 have broken down the total insulation of the exercise of prerogative powers from judicial review, the domestic courts have consistently held that the exercise of the umbrella power of deployment is beyond their supervision, not least because there are no legal standards by which to assess their exercise.

The subject proved sensitive in other respects that weighed with some of our witnesses. Given the indisputable responsibility of the government for the defence of the realm, with the Prime Minister in this respect assuming the responsibilities as well as the powers of his monarchical predecessors, a number of concerns emerged about the proposition that parliament should make the final decisions about war and peace. Would not the Prime Minister have access to more and better intelligence, on which to make decisions, than mere MPs? Might there not be genuine emergencies that required rapid executive decision making rather than measured deliberative debate? And, from military men, an

ill-concealed terror of politicians second-guessing their tactics and battle plans and interfering with the professionals.

This latter point we dealt with in terms, agreeing with Field Marshal Lord Bramall, himself an advocate of prior parliamentary approval, that "under no circumstances must parliamentary approval be allowed to go into the tactical field or ... the way you carry out the operation". We confirmed his strictures, saying: "We do not question the principle that the conduct of military operations should remain the exclusive responsibility of military commanders. At the same time, we should add that, clearly, the greater the clarity on the part of the government of their objectives in determining the mission objective, the more this assists military commanders in executing that responsibility."

The question of information, and the intelligence on which it is based, is a matter of legitimate concern, given the understandable fear of warning a potential adversary both of the details of deployment and the sources of intelligence. However, we concluded that both the House of Commons defence and foreign affairs select committees could and should keep a close watching brief on developments, as the "vanguard of the parliamentary process" and a responsible filter for sensitive information.

That leaves, as a substantial operational objection to prior parliamentary approval, the issue of the Prime Minister needing to react swiftly to an emergency. The nature of the interconnected global information system, and the way it has affected international relations, make such "surprises" relatively unlikely, although the Argentinian invasion of the Falkland Islands could be argued as something of an exception. However, even if they may be exceptional, emergencies and unwelcome surprises cannot be ruled out in the future.

A convention for parliamentary approval of deployment

It was this consideration, above all others, which led the committee to prefer the flexibility of a new convention, that the government should seek parliamentary approval if it is proposing the deployment of British forces outside the UK into actual or potential armed conflict, to a comprehensive statutory abolition of this prerogative power. Such a convention would continue to allow executive emergency action under prerogative powers, but with the important proviso that within seven days of its enactment, retrospective parliamentary approval should be sought.

Another consideration that weighed with the committee in recommending the convention

route was the view that it would be unacceptable for there to be a possibility, however remote, of, for example, subjecting forces of the Crown to criminal procedures for actions taken in good faith in protecting the national interest.

However, the compromise preference for convention should not obscure the unanimous clarity of a cross-party committee that the exercise of the royal prerogative as the authority for the government, in the person of the Prime Minister, to deploy armed forces is outdated and should not be allowed to continue as the basis for legitimate war making in our 21st-century democracy.

The reaction of the government, both in evidence given to the inquiry and in subsequent reaction to our report, was to defend the status quo, asserting the general principle of ministerial accountability to parliament and the unlikelihood of any government going to war in the face of widespread parliamentary opposition as adequate defences against the abuse of the prerogative.

This reaction is, to say the least, curious, for a government which gave parliament a vote on the Iraq war. It is the more so, given the wide measure of consensus across the political spectrum that the prior approval of parliament should be sought before deployment. This is the publicly held position of both Gordon Brown and David Cameron, together with Sir Menzies Campbell, Jack Straw and Kenneth Clarke. The fact that the Lord Chancellor's brief and negative reaction to the report also promised, contradictorily, to keep the matter "under review", suggests a recognition in Whitehall that the political weather may change imminently, and with it the defence of this anachronism.

A change would not be too painful, particularly given the compromise constitutional convention suggested by the committee. Indeed, some constitutionalists would maintain that the foundations for such convention have already been laid by the vote on the second Iraq war.

For those who believe that more open and rational decision making on big issues of public policy – and what could be more key than decisions of war and peace? – is that the recommended reform would put the onus on the government to place clearly before parliament the objectives of the deployment, together with its legal basis, its likely duration, and an estimate of its size. This clarity would be welcomed by the military, who, whatever their reservations about the danger of political micro-management of operations, hunger for clear definitions of the macro-task to be undertaken, and are

increasingly vocal when it is not forthcoming, as we have seen in the case of both Afghanistan and Iraq. The discipline of full accountability to parliament would help ensure clearer ends, and therefore a better match of means and ends.

Yet ultimately the issue is not one of efficiency or even legality but of legitimacy itself. How can we ensure in a democratic society that our armed forces are only put at risk in conflict on a legitimate basis with the approval and authority of an elected parliament, rather than under the cloak of mediaeval monarchical powers, which are uneasy survivors in this modern age?

A symptom of state power above the law

And it is the issue of legitimacy that raises the wider constitutional predicament of contemporary Britain. The British constitution's legitimacy rests essentially upon history rather than popular consent. The fact that history could be seen, not least by Whig historians, as a glorious progression from Magna Carta, to the Bill of Rights, to the Great Reform Bill and universal suffrage, first limiting and then eroding absolute monarchical power, cannot obscure that its continuing central feature is persistent top-down central power that has passed in a direct line from monarch to the modern state.

Britain has never had a "we the people" movement, in myth or reality, which could form the founding basis of a fully democratic bottom-up constitution, in which it would be clear that ultimate legitimate authority was vested in the people – one of the many interests of Scottish devolution, with its preceding Claim of Right and Constitutional Convention, is that there has been an attempt to create an alternative foundation.

The prerogative powers are in this sense not just an anachronistic survival from the constitutional "bad old days" of kings and queens and their divine rights, but a worrying symptom of state power, still largely unchallenged, which is both above the law and unaccountable to parliament, the representative of the people.

It is notable that AV Dicey, in his famous twin-pillar formulation of the British constitution, sets alongside the rule of law "sovereignty" – not "of parliament", as it is often misquoted – but "of the Crown in parliament".

"The state in parliament", as it might be more accurately rendered nowadays, for all its colourful royal cloak, well focuses the mind on the still-unresolved struggle between the people's representatives and the continuing power of the state. This is a constitutional

work in progress; and the perennial feebleness of parliament in asserting its legitimate power against the formidable reach of the modern state, buttressed by technology and information, cannot be a cause of optimism for democrats.

What is even more concerning is that Britain still has a constitutional culture of sovereignty and subjecthood rather than one of democracy and citizenship. If this is accepted, then the prerogative powers can be seen more clearly for what they are: not comfortable historical anachronism, a constitutional contribution to the heritage industry, but a sharp-toothed reminder of enduring state power, free from legal restraint and democratic discipline.

Chapter 8

The Union and devolution – a fair relationship

Lord Sewel, Professor Emeritus, University of Aberdeen

The Union and devolution – a fair relationship

Devolution to Scotland and Wales represented a unique legislative challenge to both government and parliament, as a highly centralised British state confronted the need to put in place institutions and a legislative framework that effectively devolved power to Edinburgh and Cardiff while at the same time maintaining the integrity of the Union. Although the precise details of devolution to the two countries differed, there was a common central claim that for the people of Scotland and Wales devolution delivered the best of both worlds. But devolution was not the product of some sort of coup by the Welsh and Scots. It is truly a British endorsed policy with a majority of English MPs voting in favour of the second reading of the Scotland Bill

Government would be improved and made more responsive if those areas of policy concerned with direct service delivery and where the state stood in an immediate relationship to the citizen were devolved. At the same time the continued existence of the Union meant that both Scotland and Wales benefited from membership of a large state which retained responsibility for defence, the management of the economy, foreign representation and major issues of equity, as in the areas of discrimination and economic and social security – all areas where there are benefits from being part of a large state possessing major economic and political resources.

Basic argument for devolution still strong

The fundamental argument for devolution remains as strong and as valid today as it did 10 years ago: a structure of government that provides local decision making that is locally accountable and that is reflective of local priorities, local circumstances and local values. The fundamental legislative architecture created by the Scotland Act of 1999 is equally sound. Given that devolution constituted a unique legislative challenge, it is unlikely that every last detail of the settlement was "got right" at the first attempt. Indeed, the ability of the settlement to develop organically has been one of its strengths.

Both major and minor adjustments have been made without seriously disturbing the underlying relationship between the two parliaments. One major amendment to the act retained the size of the Scottish parliament at its original number, 129. In addition a host of minor powers have been transferred to Scottish ministers where it has simply made common sense in terms of good and effective government.

Within Scotland the threat to the stability of the 1999 settlement has come both from

those who have always argued for separation and, more insidiously, from those who view devolution as a process rather than a settlement. With a process there is a likelihood of ending up at some unforeseen and unwelcome destination. Indeed, until recently there have been too few politicians in Scotland who have confidently argued that devolution has secured for Scotland the best of all possible worlds. By this failure of confidence there has been created the impression that somehow the settlement is incomplete and that something more and better lies beyond.

Externally the threat comes from two directions, an attack on Scotland's representation at Westminster and resentment at the resourcing of devolution. The former is articulated through a continuation of the West Lothian question, more recently reformulated as "English votes for English laws"; the latter through an attack on the Barnett formula, which has been used by successive governments since before devolution to allocate Scotland's share of UK public expenditure. These issues open up areas of debate that lie at the heart of the relationship between a sovereign Westminster parliament and a devolved Scottish parliament and are central to any assessment of the fairness of the devolution settlement. But ill-considered and ill-judged responses have the potential to undermine the integrity of the Union. It is a paradox of the present debate that those most avowedly in favour of the Union are those who put the Union most at risk.

At its heart the relationship between Scotland and England is part of the debate about Britishness. The political, social and cultural essence of Britishness lies in its celebration of diversity and distinctiveness, while at the same time asserting the centrality of values and interests held in common even when approached from different traditions. It is the combination of diversity and solidarity that provides the conceptual underpinning for devolution. What is essential is that, in resolving any tensions, those who value the Union should do so in ways that enable the different voices and interests within the Union to be heard and, even more importantly, that any adjustments are recognised as being fair to the constituent elements of the Union.

Such an approach is more likely to succeed in securing a long-term and broadly endorsed solution than an attempt to calculate and impose some finely calibrated, but narrow and ultimately specious financial and political equivalence on the members of the Union. It would be a Union too fragile to endure for long if it rested on nothing more than jealously calculated costs and benefits. A devolved Britain is more attractive, more likely to flourish and more likely to be capable of dealing with the challenge of social justice than the Britain of the ossified central state or the diminished and inward-looking nation

states that would be the products of separation.

Asymmetry of the present pattern

The original devolution agenda in 1997 was not limited to England and Wales but encompassed the English regions. The failure of the North East of England referendum means that for the foreseeable future devolution to the English regions is, at best, stalled. It is the asymmetry of the present pattern of devolution that brings English grievances into sharper focus. The West Lothian question would not have arisen with quite the same force if devolution had rolled out across England.

Although devolution has given the issue greater salience, its origins lie in the virtual disappearance of the Conservative Party from parliamentary representation in both Scotland and Wales and its emergence as an almost exclusively English party. It is nonsense to portray England as subject to the bullying of a gang of Scottish, Welsh and Northern Ireland MPs. Parliamentary arithmetic requires that any party aspiring to a majority in the House of Commons has to secure a strong level of representation in England.

The Conservative-led campaign against Scottish MPs voting on so-called English-only matters has more than the whiff of political opportunism about it. Throughout the period of the Stormont government established by the Government of Ireland Act, the Conservatives never raised any opposition to Northern Irish MPs voting on "English legislation". The likely explanation lies in the fact that throughout most of that period the Conservative Party was in formal alliance with the Ulster Unionists. More recently, the tortuous negotiations on a devolved assembly for Northern Ireland have been carried through without any proposal that Northern Ireland MPs should be disqualified from voting on devolved matters at Westminster.

The Conservative position is that the same anomaly is acceptable in the context of Northern Ireland but not in relation to Scotland. It is difficult to avoid the conclusion that the Conservative Party's position is based upon nothing more than party advantage. A spurious constitutional issue has been raised to the level of high principle in order to compensate the Conservative Party for its failure to secure anything but token parliamentary representation in Scotland.

The underlying concern is not the narrow issue of which MPs can vote for which laws, but whether the nature of Scottish representation in the parliament of the UK creates a

perceived level of grievance to threaten the Union itself. It is not clear that that is the case, but the debate has advanced to the stage where the various options can be identified and assessed. The most radical option, espoused by a quaint combination of English nationalists and some sections of the Liberal Democrat Party, is for a separate English parliament, essentially a federal solution. The flaw in such a proposition lies in the disparity in power among the constituent members of the proposed federation. The sheer size and dominance of England within a British federal state would make British federalism inherently unstable. A weak British federal state would not be capable of coexisting with a dominant England. Either England would press for full control over all policy areas or the minor parties to the federation would bridle against their subordinate position and seek separation.

"English votes for English laws", whereby MPs from areas where the devolved authorities exercised primary legislative powers were disqualified from voting in Westminster on devolved subjects, would not only destroy the existing relationship between the House of Commons and the executive, but would threaten the very Union it seeks to sustain. It raises the probability of a government able to secure a majority in the House of Commons being structurally unable to secure a majority for large elements of its "English" legislative programme. Ministers would be in the position of administering legislation that in all conscience they believed to be contrary to the public interest. Such a state of affairs would increase rather than diminish public cynicism in both politics and politicians.

The impossibility of delivering coherent government where different party-based majorities existed in the House of Commons for UK legislation and for "English" legislation would quickly lead to chaos and widespread confusion. English MPs would be seen as thwarting the government of the UK and MPs from devolved areas would be relegated to the status of second-class citizens. It is difficult to think of any arrangement that would be more guaranteed to produce an explosive cocktail of disaffection. Ultimately such an arrangement would fatally undermine the Union by in effect making a working majority in the House of Commons dependent on securing a majority of English seats.

Handling asymmetrical devolution fairly

An example of how representation from a devolved jurisdiction may be handled is provided by going back to the example of Northern Ireland. During the period from the establishment of the Stormont parliament to beyond its suspension, the province's representation at Westminster was adjusted downwards so that Northern Irish constituencies were significantly larger than in the rest of the UK. The province's

representation was subsequently returned to nearer parity by the Callaghan government during the period of direct rule. Although the below-parity adjustment lacks analytical clarity, it proved a pragmatic compromise. Decreased representation at Westminster was the price paid for having the benefit of devolved rule in Belfast.

Scotland's share of UK public expenditure has been a matter of contention since before devolution. Discussion is not eased by the fact that the history of the Barnett formula has been so convoluted that it has long since ceased to be readily understood. Its critics, however, are united in the claim that it assigns to Scotland a much more generous allocation than is justified, especially by comparison with the treatment of more disadvantaged English regions. The formula was devised as a short-term measure to prevent constant wrangling by the territorial secretaries of state for special treatment.

In essence, the formula, subsequently disowned by Barnett, took the relative allocation of public expenditure between the territorial departments at its inception as representing the relative expenditure needs of the territories, but introduced the condition that future increases in public expenditure would be allocated according to population ratios. As the base level of expenditure in Scotland was higher than the population ratio between England and Scotland the intended effect of the formula was to bring about a gradual convergence of English and Scottish expenditure. The fact that the convergence did not occur at anything like the speed envisaged was largely due to successive governments taking large elements of public expenditure increases, often to cover generous public-sector pay awards, out of the formula. This produced a more generous allocation than would have been the case if the formula had been applied. It was not so much that Barnett was faulty but that it was too often avoided.

It is misconceived to blame Barnett for inadequate levels of public expenditure in the more disadvantaged English regions. Public expenditure takes place in the regions but within England it is not allocated to the regions on any formulaic basis. Relative regional expenditure in England is an English problem and one that could have been best addressed within a strong model of English regional devolution.

That Barnett is largely misunderstood by both its supporters and its critics is not only not an adequate defence, it is its primary weakness. Barnett served the UK well prior to devolution and was important in enabling a smooth transition to be made to devolved government. It has now outlived its usefulness. Its lack of transparency is, at least in part, the reason for it being perceived as a cause of grievance between England and Scotland.

But, more powerfully, fairness demands that the relative expenditure levels of Scotland to the rest of the UK should be based on a new, objective study of relative expenditure needs. The Scottish parliament, with its power to vary the standard rate of income tax by 3p in the pound, has the means available to it to adjust expenditure either upwards or downwards if the needs assessment produced a figure that was not compatible with Scottish political values.

A very different approach would link Scottish public expenditure directly to the tax income raised in Scotland. Most simply this could be done by tax being collected as it is at present, but with Scotland getting the income raised in Scotland, after its contribution to the reserved functions had been paid. Although in concept simple, there are considerable technical difficulties in identifying tax income that would be appropriately Scottish, particularly in the area of company taxation.

However, technical difficulty is not the primary objection. Any idea that a territory's public expenditure should be dependent upon the tax raised in that territory flies in the face of one of the core values underpinning the Union. The Union is founded on solidarity, which means that the resources of the entire Union are available to support and sustain any part of the Union that experiences hardship and disadvantage. The more prosperous assist the less prosperous. A fragmented territorial approach would simply condemn disadvantaged areas to become more disadvantaged, while tax-rich areas would be in the selfishly advantageous position of retaining all their tax income.

In the late 1990s devolution saved the Union. The unresponsiveness of Conservative governments from 1979 to 1997 to growing demands for greater local Scottish control stretched the Union perilously close to breaking point. Any adjustments to the devolution settlement must be made in ways that do not either intentionally or unintentionally threaten the integrity of the Union. Those who were devolution's fiercest opponents are now in the forefront of advocating changes that, if ever implemented, would bring the Union under renewed stress.

Chapter 9

The EU and the UK's constitution

Gisela Stuart MP, UK Parliamentary Representative on the
Convention for the Future of Europe

The EU and the UK's constitution

What effect does EU membership have on our constitution? This seems at first to be a curious question.

We do not have a single document that we would describe as a constitution. What defines us is the concept of the rule of law and Crown in parliament. This is a parliamentary democracy. No one parliament binds its successor. Checks and balances ensure that neither the executive nor the legislative nor the judiciary have too much power. But ultimately the buck always stops with parliament. The people's representatives rule supreme; and ever so often they are kicked out by the people and replaced by another lot. Broadly speaking, the population at large is comfortable with this arrangement, because unlike almost all other European countries, we have not within living memory experienced the catastrophic failure of the nation state.

Of course, in practice it is not quite as simple. There are similar problems with the concept of national sovereignty; it is straightforward in theory, but in practice it is subject to compromises and limitations. We enter treaty obligations, make trade agreements or join international organisations. And a treaty was the starting point for our relationship with what has become the European Union. Since we joined the EEC in 1973 there have been profound changes in our constitutional relationship with that institution. With every change that has occurred, the EU's influence has deepened and widened. But the relationship was based on a treaty obligation. The UK parliament can at any point rescind that treaty. This is not the case once we are signed up to a EU constitution. Unilateral action is no longer possible. The UK parliament and government requires the consent of the other EU member states.

The European Union has a directly elected parliament, but there is no government as such. The MEPs are elected under national party labels, but few voters have any idea of what the political grouping stands for once they have been elected. There is a European Court of Justice but it is not subject to any of the safeguards we see either in our highest court or in constitutional courts in other countries. The court goes through phases of being more or less interventionist. With some of the judgments in the 1980s in the area of sex discrimination, the European Court of Justice pushed judicial law making to its boundaries. This is hardly surprising given that the court has a treaty obligation to participate in the "implementation of an ever closer union".

The European constitution is off the agenda for the moment, but there will be continued pressure for many of the political changes contained in the document to be implemented piecemeal. Eventually the EU will acquire a legal personality in its own right. For some this is essential to allow the EU to be a fully fledged partner in international organisations – for others it is a step too far on the road to the EU acquiring all the attributes of a nation state. There will be case-by-case extension of qualified majority voting. Some crisis will suddenly make the case for moving away from the national veto so important that countries will overcome their original principled opposition. And there will be someone fulfilling the role of a European foreign minister, whatever the official title will be.

Some regard the EU as the most effective supranational judicial body in the history of the world. EU law takes priority over national laws. Even the strongest governments and corporations must eventually yield to the rulings of European judges. For those who have lost faith in the nation state, this is a good thing. For others, who believe that the most enduring and appropriate level of identification is with the nation state, this causes serious problems.

(For this debate, let's put aside the Labour government's decision to incorporate the European Convention on Human Rights into UK law. Neither the convention, nor the court in Strasbourg, has anything to do with the European Union.)

A responsibility deficit at national level

More than half of our domestic legislation (and regulations) now has its origins at European level. Does this matter? The decisions are made by democratically elected MEPs and representatives from democratic governments. And much of the legislation coming from Brussels we probably would have passed in some shape or form at Westminster as well. It is just that now we do it collectively.

The problem is not a lack of democratic input or even that the legislation itself may or may not be unnecessary. It is that the process is drawn out and opaque, and it is almost impossible to pin down political responsibility. We do not have a democratic deficit, but we do have a responsibility deficit.

Let's illustrate the problem.

In October 2006 the Secretary of State for Trade and Industry appeared on the *Today* programme to talk about new legislation that will outlaw age discrimination. He was

asked if this made the government's minimum wage for young people unlawful, and said he did not know as it had not yet been tested by the courts.

As a piece of legislation, it is one that certainly every Labour MP would be proud of. Indeed, in the last 10 years there have been no less than 10 attempts to bring in such legislation, from amendments to existing bills, to 10-minute rule bills to private member's bills. They all failed.

But when the legislation did come, the problem was that the House of Commons as a whole had never debated it, and even the discussions in committee were cursory. In November 2000 the EU adopted the EU directive establishing a general framework for equal treatment in employment and occupation. This decision had been debated in July of that year by a European standing committee.

Six years later, on 30 March 2006, the debate in the Lords started at 4.22pm and ended 32 minutes later, at 4.54pm. The standing committee on delegated legislation in the Commons considered the matter for 40 minutes, from 4.30pm to 5.10pm. And even if either chamber had spent more time on it, they could not have made any changes or had a vote of any consequence.

This was a most cursory debate on a piece of legislation that is bound to impact on parts of our lives that we have not yet even begun to anticipate. And there were no ministerial statements giving guidance on the lawmakers' intentions. In the UK judges do turn to Hansard when seeking guidance on legislative intentions, but there is no European equivalent to this practice.

To any voter or business representative coming to my advice surgeries I would have had to say: "Some time ago a small number of MPs did look at this; the Commons and the Lords briefly talked about it – but by and large we played no part in this whatsoever." Of course, sometimes this suits politicians; they push through legislation at Brussels level to bypass domestic opposition. But in the long run, this is bad for democracy.

The absence of a single constitutional document makes the UK more open to EU legislation. Many a European Commission proposal has not seen the light of day because one country or another pleaded that "this would be contrary to our constitution". Politically particularly sensitive are cases where German courts suggest that the national government cannot give away rights that they consider belong to the federal Länder.

So far the European Court of Justice has always avoided a head-on clash and backed off. The UK has no mechanisms for ring-fencing national interests on constitutional grounds.

I now firmly believe that we have to anchor legislative processes and decision making in the national institutions. This is the level our voters can relate to and this is where the political direction can be changed at election time. They know "who is responsible for what" and they know how to get rid of those in charge.

The European constitution, which has been ratified by more than half of the EU countries, is often said to "increase the power of national parliaments". This is simply not the case. Being given more information does not mean that one has more power. For national parliaments to have power, they have to be able to arrive at a view different from that of their government. In the current structure this is almost impossible.

A written UK constitution is not part of the answer. A single judicial document increases the power of the judiciary and deprives the UK of the flexibility that has allowed us to change and adapt for centuries. (And, as I know from experience, successful constitution writing is not easy!)

Principles for a new EU treaty

Rather than argue about what can or cannot be salvaged from the rejected European constitution, the UK government should argue for a new treaty containing some basic principles that allow an enlarged and enlarging EU to be flexible. Here are just a few suggestions.

- We have a clearly defined process for powers to go from member states to the EU. A reverse process also has to be specified: a route for powers to flow from the EU back to member states. This has nothing to do with being a good or bad European. For example, few would argue against the case that the time has come to consider agriculture a national rather than a European policy area.
- A new constitutional settlement allowing the EU to create its own powers would be unacceptable. This would fundamentally undermine the rights of national parliaments and national governments.
- All legislative proposals from the commission should start with an explanation saying why they cannot be achieved at national level and therefore can only be resolved at EU level.
- The decision-making process in Brussels has to be shorter. Proposals can drag on for

decades, even though the time and the moment as passed. At best they are compromised to death. This is bad politics.

- After a European election the new commission and the new parliament should be able to start with a clean slate. Unfinished legislative proposals should fall. If they still have merit, the new commission can bring them back. But there must a "delete" mechanism, other than negotiation to death.
- The length of the decision-making process and the technique of agreeing now, but implementing in five or 10 years' time, when none of the original decision makers are around any more to be accountable, are but two of the worst aspects of EU law making. The working time directive is a case in point. It started life in the early 1990s. The UK government realised then that it could cause severe problems to the health service. Opt-outs were negotiated, and a gradual implementation was agreed in the late 1990s. It is only now that the full impact is felt. But no one who was part of the original political decision making is left in place to be judged on the merits of the decision. This flies in the face of political accountability.

Changes in Westminster

We also have to make significant changes at Westminster.

- We need a Europe Minister who is not based in the Foreign Office, and who pulls together all the domestic legislation originating from Brussels and answers questions in parliament. EU negotiations are drawn-out and involve compromises and trade-offs. We need a single minister who comes to the despatch box and pulls all these strands together and justifies the political decisions.
- Parliament has to involve itself in the early stages of negotiations. Scrutiny by a select committee and special standing committees – or, on occasion, votes on the floor of the house – is not effective. It is all too late, and ultimately the government can always rely on its majority. Much of EU law is implemented through statutory instruments. Our parliamentary procedures do not allow for amendments. Lengthier debates may sound good, but wouldn't make a blind bit of difference to the substance.
- Rather than stick to scrutiny after the decision is made, joint committees of MEPs and MPs should meet at Westminster and be able to put questions to ministers before they attend meetings in Brussels. Combined with question time for the Europe Minister, this would provide a system of coherent and effective accountability.

The EU as a supranational institution has had and continues to have profound effects on national constitutions. This causes concerns not just in the UK.

In January 2007 the former German President Roman Herzog noted that the German Department of Justice estimated that out of all the pieces of legislation passed in Germany between 1998 and 2004, 84% originated in Brussels. He pointed out that Germany's own constitution identified the parliament as the "central actor in the shaping of the political community". He concluded that "the question has to be raised of whether Germany can still unreservedly be called a parliamentary democracy".

Westminster too has to acknowledge that unless we dramatically change the way we deal with legislation that has its origin in Brussels we too may have to conclude that our claim to be a parliamentary democracy is no longer valid.

Chapter 10

The role of parliament in holding the executive to account

John Bercow MP, Conservative MP for Buckingham

The role of parliament in holding the executive to account

If the primacy of parliament in the nation's political life was ever a fact, it is no longer. In constitutional theory, parliament is the prime check and balance on government, scrutinising and amending its legislation, monitoring departmental actions and enabling MPs to articulate views and grievances on behalf of their electors. In political practice, although each of these activities takes place, the dice are loaded more than ever in favour of the executive branch.

Why? The short answer is: communications, context and compliance. Let us look at each.

First, in an age of 24-hour news, ministers can potentially be challenged or derailed at any time but, knowing the power of the media to shape the news agenda, they have recognised that as decision makers they are the lead suppliers of items for news coverage. Backed by departmental press offices, party machines and their own special advisers, a resourceful and energetic minister with support from No 10 has ample opportunity to secure media coverage for his or her policy.

The coverage may be good, bad or indifferent, depending on the policy and its presentation, but the debate is essentially a joust between the media and the minister. If the policy announcement is made initially to the media and there is no power to insist that parliament is instead the first to be informed, MPs become, at best, bit-part players in the process, struggling to catch up with what has been released and to probe the minister about it.

Second, the context in which parliament is operating is that of a society in which successive administrations of both colours have busied themselves on a wider range of issues than ever. Ministers pontificate about, and often seek to legislate on, a multiplicity of different subjects. This process has doubtless been intensified and accelerated by Britain's membership of the European Union, with a regular stream of directives, regulations and decisions flowing therefrom, but the trend is by no means a consequence exclusively or predominantly of our membership.

The modern state is simply bigger than its 19th-century counterpart. Concerns about health and safety, human rights, environmental standards, access to public services, means to challenge authority, entitlement to information, promotion of apparatchiks and the nature of public provision represent just a small selection of the drivers of government activity.

Moreover, there is little evidence of significant opposition to this trend. It is thought proper for politicians to be responsible for such matters. The difficulty is that in policy terms they are, but in parliamentary terms, all too often, they are not. The scale and complexity of ministerial activity have increased but the time and resources to scrutinise it have not. In short, government is doing more, for better or worse, well or badly, but MPs are not doing correspondingly more to monitor, question or evaluate executive endeavour. Viewed crudely as a tug of war, several recruits have been added to the ministerial team but few, if any, to the parliamentary.

Thirdly, there is a dominant culture of compliance in the House of Commons. The government of the day chooses the majority of MPs who will sit on the select committees that scrutinise its work. Similarly, it chooses the bulk of MPs who will sit on the standing committees that consider its legislation and how long they will be given for the task. Finally, it decides most of the business of the two chambers and the timetables for it.

Of course, the opposition can complain and demand changes, which are sometimes granted. Individual MPs who persistently press for a statement or a debate can succeed in securing it. Even when they do not, there are good opportunities to raise issues, not only in end-of-day adjournment debates but in those debates that MPs can obtain in Westminster Hall. Nevertheless, for the most part, the government dictates the parliamentary calendar.

Moreover, there appears to be widespread acceptance of, or resignation to, the dominance of government over opposition and of front bench over back. This is unsurprising. Many MPs, understandably, would like the chance to be ministers or shadow ministers and do not wish to rock the boat and damage their chances of preferment. Yet the result of passive acceptance of the status quo is that as ministers steer the ship of state, individual MPs are in danger of being treated as mere passengers.

Vast tomes have been written on the subject of how to improve our parliamentary democracy. There is a plethora of ideas for improving the work of the House of Commons alone. None is a panacea for the ills described above, but a combination of reforms to increase scrutiny, extend ministers' accountability and inject greater topicality into our deliberations could make a meaningful difference. This essay identifies four areas for urgent attention.

Select committees

The introduction of the select committee system in 1979, championed by Norman St John-Stevias and opposed by Michael Foot and Enoch Powell, has been one of the best and most progressive reforms the House of Commons has made. The committees have the lead role in the scrutiny of the executive – of the quality of its policies, of the effectiveness of its administration, and of its expenditure of taxpayers' money. By focusing in detail on an issue, calling expert witnesses, visiting sites or institutions as appropriate and weighing up the evidence, they are well placed to produce authoritative reports that can make uncomfortable but necessary reading for the government of the day and force it to defend, review or change policy as a result.

Yet there is one glaring weakness in our select committees, and that is the manner of their composition. MPs are nominated by their whips – Labour members by government whips and Conservative or Liberal Democrat members by opposition whips. It is simply wrong that the composition of committees whose purpose is to scrutinise the executive should be determined by representatives of that executive. The inappropriateness of such front-bench control is particularly acute when the government is choosing committee members, because it is the government that holds the levers of power and its apparatchiks should, therefore, be precluded from deciding who is best qualified to assess how well it is using those levers.

Needless to say, this is not a party political point. Many of us remember the brutal but clumsy attempt by government whips in the last parliament to remove Donald Anderson and Gwyneth Dunwoody as chairs of the foreign affairs and transport committees for their cardinal sin of robust and uncompromising criticism of the government. Yet, in a sense, Labour whips were simply repeating the approach taken by their Conservative predecessors in the early 1990s, who moved to sack Nicholas Winterton as chair of the health select committee for displaying a similar independence of mind. Moreover, it can be argued that it is also wrong for opposition whips to determine which of their MPs should sit on select committees.

Many colleagues recognise that the present method of composition is indefensible, but the alternatives canvassed have been less than satisfactory. The liaison committee report *Shifting the Balance* in March 2000 proposed that a trinity of very senior and distinguished parliamentarians should make up a panel to which aspirant members of select committees could appeal. That might be marginally better than leaving the matter to the whips, but it would still represent a system of patronage, and members anxious to

sit on a committee might feel the need to ingratiate themselves with the panel. Subsequently, in February 2002, the modernisation committee recommended that a committee of nine members should act as a filter for applications for select committee membership. Once again, this would be a form of patronage.

The most obvious alternative to any of these approaches is for the House of Commons to take the composition of select committees into its own hands – to determine that composition by election. There are various possibilities for how to do so. One is to allow a complete free-for-all in which all MPs have the right to vote for all the members of all select committees, with no reserved rights for opposition or other minority parties. Such a system could settle down and function effectively, though there is a risk that members might vote in a partisan way and membership would therefore be skewed.

A second and preferable method would be to allow all MPs to vote for all members of all of the select committees, but to protect the respective strengths of the parties in the house in terms both of the numbers of members from each party who could sit on the committees and of the numbers of such members given the chance to chair them. A third possibility would be to provide for Conservative members to vote only for the Conservative members of the committee, Labour members to vote only for the Labour members of the committee, and so on.

Whichever of these models is adopted, each committee should be free to elect its own chair. This would be in contrast with present arrangements whereby the committee formally possesses the right to do so, but in practice is expected simply to rubber stamp the appointment of the person who has been agreed through the usual channels.

Constituted democratically, select committees should then be empowered politically. As the Parliament First group suggested in 2003, government replies to select committee reports should conform to minimum standards and include an undertaking to address each of the committee's recommendations. The committees should work to ensure that their reports have an impact on the policy or conduct of the relevant department. They could best do so by undertaking follow-up reports to monitor departmental progress.

Critically, select committees should enjoy more formal powers to demand the appearance of ministers, appropriate EU Commissioners and officials, together with the release of papers and other information that are germane to the inquiry. Finally, more regular debates on published reports should take place in the main chamber of the house, with a

government minister from the relevant department present to hear and respond to the debate.

Critics of such an approach sometimes suggest that election would not achieve the necessary balance between geography, gender, youth, knowledge and experience, and it must be admitted that election would not be a perfect system. Neither is the status quo. The issue is which has more strengths and fewer weaknesses. My view is that election by secret ballot would be the most democratic and equitable way to proceed, and it would demonstrate transparency and independence of government. Ultimately, as MPs, we have to ask ourselves whether we consider the status quo to be satisfactory. If not, we have to will the means of change. If we are to be respected by government, the media and our constituents, we have to show some respect for ourselves.

Standing committees

The principle that composition of committees should be determined by people independent of government and opposition front benches should apply also to standing committees. At present the committee of selection decides which MPs will sit on a particular bill committee, but its decision is heavily influenced by the recommendations made by the so-called "usual channels", in other words the respective whips' offices. This is wrong. On a committee scrutinising its legislation, the government should certainly be entitled to a majority of a size that reflects either its strength in the House of Commons as a whole or the level of support that the measure enjoyed at second reading. However, decisions on who should serve on the committee should have regard to members' interest or expertise in the subject and to the balance of debate that took place at second reading.

It is profoundly unattractive when government whips take a punitive or admonitory approach, either denying a place on the committee to a prominent rebel who is well versed in the subject or putting a prolific rebel on a committee in which he or she has no interest as revenge for that individual's dissent against the government on an unrelated issue. Such an approach was often taken by the Conservative government in the 1980s, and it has been replicated by new Labour. Three recent examples illustrate this trend of executive defensiveness. There were 71 Labour rebels on the Higher Education Bill at second reading but only two were put on the standing committee to scrutinise the bill; over 20 Labour rebels opposed the second reading of the Identity Cards Bill and none of them was put on the standing committee; and 52 Labour MPs voted against the Education & Inspections Bill at second reading, but none of them was appointed to the standing committee.

A business committee

Programming of legislation was a controversial innovation by new Labour. Even now, some traditionalist MPs regard the idea of formal timetabling in advance of debates on bills as inherently objectionable. However, there is probably now a general acceptance that it makes sense to subject ourselves to some basic self-discipline, for otherwise there is scope for debate to increase almost infinitely if colleagues know that there is no formal limit and if irreconcilable opponents to a bill wish to delay indefinitely its passage. Moreover, at a time of pervasive cynicism about politics and politicians, it arguably looks self-indulgent, inefficient or both if we cannot conduct our arguments within a reasonable timescale and without sitting into the early hours of the morning on a regular basis.

The problem is not with programming per se, but rather with the fact that the government decides how much time should be allocated to each bill or debate. It would be far preferable if the House of Commons were to insist upon the control of its own affairs.

The Commons should therefore establish a business committee, which would be responsible for managing the parliamentary timetable. It would be composed of senior backbenchers from the major parties and be expected to decide how much time should be allocated to each bill and debate. It would also be charged with ensuring that the house determined its own standing orders and could resist unwanted executive encroachment.

Reform of the Commons

The chamber was once the cockpit of parliamentary life but it is sometimes threatened with relegation to the status of cargo hold. This is the consequence of the growth of Westminster Hall debates – in itself a largely benign development – and the growing tendency of ministers to court the media in announcing policy and either to ignore the chamber altogether or to consider it as an inconvenient afterthought.

The House of Commons could take a number of steps to revitalise the work of the chamber, thereby increasing participation and bolstering visible scrutiny of ministers. Once again, the Parliament First group identified some constructive reforms, but its calls have been only partially heeded. We need to see greater use of “urgent questions”: Provision for topical debates when a critical mass of MPs demands them would be widely welcomed, and one yardstick could be the number of signatories to an early day motion. Time limits on backbench speeches should overwhelmingly become the norm to maximise the numbers of colleagues who can contribute.

In addition, the Speaker, as the historic guardian of the rights of backbenchers, has frequently expressed his displeasure when ministers have neglected to inform the House of Commons first of their plans, preferring instead the opportunity of a prime-time television or radio interview. If such activities were to constitute a breach of the ministerial code of conduct in the most extreme cases or, at the very least, to result in an immediate summons to address the house, a marked improvement in ministers' respect for parliament would rapidly take place.

This essay began by outlining in stark terms the cumulative impact of 24-hour media, the size of the modern state and the strength of the ruling party machine on the capacity of parliament effectively to scrutinise the executive. To highlight this phenomenon is not to argue that nothing has been done to increase opportunities for MPs to raise issues of concern. The introduction of regular debates in Westminster Hall has given a welcome forum for MPs to consider subjects for which time could not be found in the main chamber but which merit the attention of the Commons and the response of the minister. Similarly, the government has pioneered pre-legislative scrutiny and the Leader of the House has shown some appetite for extending it. In short, some good work is being done with the support of MPs of all parties.

Nevertheless, there is an in-built and formidable impetus to increase legislation and other government activity. In this situation, the House of Commons needs single-mindedly to focus on its responsibility to improve its own productivity in an age of hyperactive government. As members of parliament, we often need to run very fast in order to stand still. Unless government curbs its insatiable legislative appetite – and there is little sign of a long-term commitment to that end – parliament has to work more efficiently, more creatively and more independently to hold the executive to account.

My party is committed to this cause, with Ken Clarke's democracy task force looking in detail at how the next Conservative government would strengthen the legitimacy and effectiveness of our democratic institutions. Doubtless the Liberal Democrats will also reach a judgment on this vital set of questions. It is obviously the duty of the present government to offer its own assessment of what our long-term national interest requires and to seek to act accordingly.

Chapter 11

The crucial role of party politics in a democracy

John Spellar MP, Labour MP for Warley

The crucial role of party politics in a democracy

Over the summer a number of people seem to have had a grievance with Chris Bryant, but no one has a more legitimate complaint than myself after I agreed to write this article. Because then I had to read the adolescent drivel that is the pretentious so-called "Power inquiry", which wouldn't rate a pass grade in a GCSE.

Furthermore, when I looked at the list of the main authors they seemed to have one common distinguishing characteristic: that few, if any, of them have troubled the electorate very often at the ballot box. Yet they seem to proclaim themselves as experts on our democratic processes. Maybe it is no wonder they appear to be getting more credence in the House of Lords than in the House of Commons. Maybe that is why they are so surprised at opinion polls' criticism of politics and politicians, as though this is a new and historically unique phenomenon.

One writer pronounced: "The machinery no longer moved. The fuel has evaporated. Trust – trust between governors and governed; trust between representatives and represented; trust for that matter, between ordinary citizen and ordinary citizen had disappeared and was disappearing. The solutions on offer from the old parties had failed and was doomed to failure. A new approach was needed and it can only be provided by a new force."

That paragraph could easily have been the introduction to the Power inquiry, yet it was actually penned in 1983 by David Marquand to justify the ill-judged and short-lived creation of the SDP. We should recognise that it has always, probably throughout history, been fashionable to lament the state of current politics and possibly compare it with a better previous age.

However, many of those who pronounced that view seem remarkably unwilling to engage with or trouble the electorate at the ballot box themselves, and the members of the Power commission seem no different in that respect. It seems to be very much as Hotspur in *Henry IV Part 1* quotes Percy as saying, "but for these vile guns he would himself have been a soldier", and as was said of that Edwardian grandee George Nathaniel Curzon, that he "wanted the palm without the dust".

But in spite of any concerns of taste rather than content that might be expressed regarding political life, the struggles between parties and within them is a crucial, desirable and necessary part of a working democracy.

Many of the proposed solutions to so-called deficiencies of political parties are basically anti-democratic. Calls to take issues "out of politics" really mean to prevent the electorate being able to hold their rulers to account and to change policies by changing their votes and thereby changing their rulers. You can see this regularly in the columns of the broadsheets, where they fulminate against the Labour government supposedly capitulating to red-top populism. They seem outraged that the government should have a concern for the views of the readers of papers with a 3 million-plus circulation rather than those of a paper with a 10th of that number.

From my long experience of the wars in the Labour Party, it is all very reminiscent of the debates when we were pushing for OMOV (one member one vote) and the far left argument against was that ordinary party members would be overly influenced by the tabloids. No doubt they would need to hear the arguments at general committees from the local thought police. Is it little wonder that their elitist disdain for the reality of politics was shared by another great democrat, the Portuguese dictator Salazar? Quoted in Bernard Crick's excellent book *In Defence of Politics*, he said that:

... he detested politics from the bottom of his heart; all those noisy and incoherent promises, the impossible demands, the hotchpotch of unfounded ideas and impractical plans ... Opportunism that cares neither for truth nor justice, the inglorious chase after unmerited fame, the unleashing of uncontrollable passions, the exploitation of the lowest instincts, the distortion of facts ... All that feverish and sterile fuss.

How party politics helps

So why is politics and – in any community beyond a small village – party politics so essential to the functioning of democracy? Essentially because interests and ideas are varied, needs and aspirations are limitless, and resources are limited. Yet decisions have to be made and acted upon, and governments to make those decisions have to be elected and be capable of being replaced by an election.

The electorate cannot be in permanent session or even continually interested and engaged – indeed, as Tony Crosland pointed out in *Socialists in a Dangerous World*, it would probably be a sign of social breakdown if they were so engaged. The country has to be run and a balance struck between tax and expenditure and between different fields of that expenditure. The voters have to be able to make a broad judgment on the prospects and record of a party in order to decide whether they have deserved responsibility. The justification for a government to make decisions is not so much its mandate from the last

election, but its prospects for the next one. To make that judgment, voters have to know how their local representative will fit into the creation of that administration. However superficially attractive the prospect of completely independent local representatives may appear, the reality is the sort of incoherent chaos that manifests itself in some local council Lib Dem groups.

One of the great errors of those who seek a more mathematically accurate representation of shades of opinion in the legislature is that this does not necessarily make it easier or even possible to construct a government that can take actions and be held accountable for those decisions and that, most importantly, can be changed at the ballot box. This is the crucial corrective mechanism. If the actions of the government are felt to be putting the party's prospects at the next election at risk, then it is their own future that comes into question – as Margaret Thatcher found out very forcibly after the poll tax debacle.

A further threat to democratic government comes from many self-important NGOs. There are regular attempts by campaign groups to weaken and undermine democratic parliamentary accountability. Proposals to move control to external bodies run by and effectively self-appointed by the great and the good are presented as independent and objective.

The distillation of this is the Electoral Commission, where membership, or even employment, is conditional on an absence of involvement in party political activity. In other words, lack of knowledge of the subject is a prerequisite for involvement in the commission's work!

All this is sold to the public as a high-minded attempt to avoid political interference – in other words, to pose the public versus the politicians. In reality, the public and the politicians are on the same side. The obvious logic of the so-called independence of the administrators is that they are not susceptible to public opinion and the public cannot, therefore, change the policies by changing the government. It is clear that much of the current public frustration with the public policy process is driven by the difficulty in getting things done and getting things changed. When MPs try to explain the obstruction of judges, civil servants, local government officers or quangos, the public understandably say, "But you are the government: change it," and our excuses won't wash.

Ironically, it is not an excess but a deficiency of party political involvement that is the root cause of many difficulties and public disillusion. While much of David Blunkett's diaries is self-indulgent and self-serving, his difficulties with the Home Office bureaucracy and its

unwillingness to identify problems or take action, as well as rank obstructionism, ring only too true for any of us who as either ministers or members of parliament have had to deal with that department. Our frustration is reflected in the feelings of our constituents and the wider electorate at the consequences of civil service incompetence.

This is also the air of many of those who constantly stress the supposed difference between "parliament" and "the executive", although, as I remarked to Tory Lords Leader Lord Strathclyde when he was giving evidence to a parliamentary hearing, "the executive" is a term normally most used by those who don't expect to be in government in the near future!

However, in the British system, parliament and government are inexplicitly intertwined. "Cohabitation", Mitterrand style, is not possible under our system. The source of the government's legitimacy is its majority in the House of Commons and its ability to maintain that majority, and that is a political process.

Political parties, as an incidental but crucial part of their operation, act as a training ground for the next generation of political leaders. It is by working, debating, organising, canvassing, winning and losing in the internal debates and by engaging with the electorate that younger party members learn the skills that they will present later to the wider public, and also learn the reactions and concerns of the broader electorate.

It is through this party structure that the route to serving in public life is open to all. The alternative is to leave the field to those personally rich enough to advance their causes and their careers. It is the party system that is the great leveller, unlike the situation with open public primaries in many parts of the USA. There, wealthy individuals are able to swamp their opponents inside or outside the party through the sheer weight of money. Much of the time of legislators is spent on raising money, not necessarily with a view to spending it on an election but to intimidate other candidates into not running at all.

In summary, party politics is sometimes trivial, often messy and frustrating, but is an essential part of government and the bedrock of a functioning democracy. Party politics really does give power to the people.

Chapter 12

Parliament and political engagement

Peter Riddell, Assistant Editor and Chief Political Commentator
of *The Times*

Parliament and political engagement

Parliament – MPs and peers – has never been more active and assertive, yet never have politicians as a group and parliament as an institution been held in lower public esteem. This paradox explains the muddled character of much of the debate about parliament and constitutional reform. None of this is to suggest that everything is fine at Westminster. It obviously is not. There is much that could, and should, change, both in how both chambers organise their own business and in their relations with the outside world. Indeed, the perception that parliament is weak is, however exaggerated, part of the problem that needs to be addressed.

But, first, some puncturing of fashionable myths, held by both the *Daily Telegraph/Daily Mail* right and the Channel Four/Charter 88 left. Both groups believe that parliament has been substantially weakened in the past two decades, and especially since 1997, by the combination of an over-mighty and arrogant executive and a supine legislature. That view was typified by the deeply flawed and often ill-informed report of the Power inquiry of March 2006 (*Power to the People: The Report of Power, an Independent Inquiry into Britain's Democracy*), which has been subject to coruscating analysis from several political scientists.

The report of the Power inquiry, chaired by Baroness (Helena) Kennedy, concluded that:

The executive in Britain is now more powerful in relation to parliament than it has probably been since the time of Walpole. The whips have enforced party discipline more forcefully and fully than they did in the past.

This is plain wrong. The report virtually ignores the changes in the procedures of the Commons of the past decade-and-a-half, notably those introduced during Robin Cook's 21 months as Leader of the Commons (as discussed below). A similar error has been made by Roy (now Lord) Hattersley when, in 2005, he described Labour backbenchers as "the most supine MPs in British history".

From the right, journalists such as Simon Heffer, first in the *Daily Mail* and then in *The Daily Telegraph*, have talked of the Commons adopting a "posture of slavishness and ineffectuality". He has also complained about how the Blair government has emasculated the House of Lords by the removal of most of the hereditary peers and by the creation of many new Labour ones. Again, this is factually wrong. The weakness of parliament is also

often cited by many of the older establishment, retired senior civil servants and the like. A typical example was the book by Sir Christopher Foster, a perennial government adviser during the 1970s and 1980s, entitled *British Government in Crisis*, which highlighted a decline in parliamentary accountability.

Underlying these complaints, from whatever source, is usually a strong dislike of Tony Blair and his style of government, and, in particular, of his handling of the Iraq war. The implicit belief is that if only the process of decision making had been different, and parliament had been more fully involved, then Britain might not have been joined in the US-led war in March 2003.

But serious though the mistakes made by the Blair government were, both in the run-up to the war and especially afterwards, they were essentially about the Prime Minister's conviction, dating back to 1997-98, that Saddam possessed weapons of mass destruction, and about his determination not to be split from the policy of the US administration. Parliament itself was regularly informed, albeit inadequately, as we now know, and the Commons had two votes on the government's policy, the final, crucial one just before the fighting started. So it is misleading to look at parliament just through the prism of the Iraq war.

Recent improvements in parliamentary process

Many of the critics ignore the way that parliament has changed in recent years. Admittedly, Tony Blair himself has little interest in parliament as such, has a poor voting record and has spent little time around Westminster. But his lack of personal interest should not obscure the many changes: the strengthening of the scrutiny role of departmental select committees, which have been given core tasks and are required to publish annual reports on their activities; extra payments for their chairmen; the creation of a specialist Scrutiny Unit; the twice-a-year questioning of the Prime Minister by the chairmen of all the select committees on the liaison committee; a slow, and to date insufficient, improvement in the examination of legislation by publishing more bills in draft form; and various attempts to make the workings of parliament less remote from voters.

But more important than formal changes has been a shift in the behaviour of MPs. They are now much more active than, say, 30 or 50 years ago. Indeed, the expansion of their constituency casework, facilitated by emails, has led to complaints that MPs are now spending too much of their time as local welfare officers. At Westminster, the number of

questions asked is a record, in itself a mixed measure since some of that is generated by their expanded staffs. Moreover, the notion that MPs are merely passive pawns under the control of party whips is nonsense.

Ever since the 1970s, backbenchers from the governing party have become more independent-minded, both in expressing their views and in their votes, as shown by the pathbreaking work of Professor Philip Norton, and, nowadays, Philip Cowley and Mark Stuart (notably on their invaluable website, revolts.co.uk, and in Cowley's 2005 book, *The Rebels – How Blair Mislaid His Majority*). Cowley and Stuart have recorded the increasing rebelliousness of Labour MPs since 1997, and especially 2001.

The Iraq votes of February and March 2003, when record numbers of MPs voted against the party whip, were obviously crucial. But they have been only part of the story. Labour MPs have been voting against the party line more often and in larger numbers. Whereas the Eden/Macmillan government went through a whole session – the tumultuous Suez year of 1956/57 – without a single Conservative MP voting against the whip, the Blair government, with a virtually identical nominal Commons majority, not only suffered rebellions in more than a quarter of whipped votes, but also was defeated four times in the first year after the election. Moreover, ministers now take account of parliamentary, and especially Labour backbench, opinion and modify policy and bills in order to avoid defeats.

The same point is true of the Lords. Claims that the government was creating a tame house of Tony's cronies as a result of its record number of new peer creations and the removal of all but 92 of the predominantly Conservative hereditary peers have proved to be wide of the mark. For a start, the new Labour creations have only raised the party to a rough parity with the number of remaining Conservative peers, and this is well under a third of the house's total membership. Labour cannot therefore win votes on its own. The government can easily be outvoted when the Conservatives and Liberal Democrats vote together.

Indeed, the effect of the removal of most of the hereditary peers has been to embolden the Lords, particularly on civil libertarian and constitutional issues. So the government has faced more than twice as many defeats since 1999 as before then. But it is not just the increased frequency of defeats. As important is that two-fifths of these defeats stick and are not reversed. Meg Russell of the Constitution Unit, a leading academic expert on the Lords, entitled a recent paper (written with Maria Sciarra) *A More Representative and Assertive Chamber*.

The overall picture is of a more vigorous and lively parliament than is commonly assumed. Writing in a recent collection of essays produced by the Study of Parliament Group (*The Future of Parliament – Issues for a New Century*, edited by Philip Giddings), Michael Ryle, a reflective former Commons clerk, concluded:

Simple factual comparison with the 1950s and early 1960s shows that parliament – particularly the House of Commons – plays a more active, independent and influential role in Britain today than at any time for many years. Important reforms are still needed, but the major advances in the past 50 years should not be derided.

From his long experience, Ryle argued that:

Governments can no longer ignore parliamentary opinion. MPs must be heeded or the media will put government in the dock for being out of touch with the public. The ability to damage or to improve ministerial reputations also increases MPs' influence.

Falling electoral engagement

Yet the low standing of parliament cannot be ignored. The substantial evidence of disengagement and disillusion with the mainstream party battle was highlighted by both the Power inquiry and, the previous year, by the Hansard Society Commission chaired by Lord Putnam (*Members Only? Parliament in the Public Eye*), on which I served. This trend is signalled by the fall in voter turnout at the 2001 general election (only partly reversed in 2005), by the longer-term decline in membership, and by lower levels of trust in politicians, parties and the main national institutions such as parliament.

The disagreement is about what these trends mean. A running theme of the Power report was that voters have not rejected politics as such, as shown by their support for single-issue pressure groups and the like, but they have turned against the conventional party battle, with what is described as "a contempt for formal politics in Britain". The report noted that people still volunteer, donate money and take a keen interest in their local community. Consequently, amid a wide range of proposals, the Power report urged an expansion of direct democracy alongside sweeping changes to the current parliamentary system.

This case is overstated. First, the low level of turnout in the last two general elections may, in part, reflect the widespread, and justified, view that the results were a foregone conclusion. So this trend may, at least in part, be reversed if voters believe that the

contest is likely to be much closer and that more is at stake. Second, "the message of disappointment, frustration and anger with our elected leaders and the institutions of politics" noted by Power may be as much to do with the unusual situation in 2001, and especially 2005, of widespread public hostility both to an unpopular government, fuelled by discontent over the Iraq war, and to a then unattractive main opposition party. The disillusion may be more about the performance of government than process.

Third, the increase in the numbers and membership of voluntary organisations is a deceptive indicator, since often engagement is limited to paying an annual subscription or contributing donations rather than joining in more time-consuming activities, such as organising or attending meetings. (There is nonetheless evidence that the minority of people who join local community and voluntary organisations are often hostile to becoming members of their local political party or standing for the council.)

Above all, the Power report reflects a deep mistrust of party politics. It is certainly true that many voters dislike party infighting, notably as portrayed in the weekly televised jousts at Prime Minister's question time. But, as Sir Hayden Phillips has argued in his review of funding, the health of parties remains central to the coherence and effectiveness of any representative system. Parties ensure that competing views and interests can be reconciled, as well as being a recruiting agency for those elected to be representatives.

A weak party system is likely to mean poor government. This applies whether you have a first-past-the-post electoral system, as used for the electing the House of Commons, or a form of proportional representation, as used in the elections for the Scottish parliament and the Welsh national assembly. Various tools of direct democracy such as citizens' juries and deliberative bodies can assist representatives, but they cannot replace them since such groups are, by definition, unrepresentative of the electorate as a whole. It is all very well invoking the people, but which people?

Reinvigorating the representative system

Consequently, the main priority should be to reinvigorate the representative system. This is partly a matter of improving communications, so that the activities of parliament are better understood. But it is much more than that. One of the reasons for the disillusionment with mainstream political institutions is that they are no longer seen as central and predominant. As I argued in my 1998 book, *Parliament under Pressure*, the centrality of Westminster, and particularly of the House of Commons, has been challenged by the growing importance of competing sources of influence and power, such as the media,

European institutions, the judiciary, regulators and, since 1997, by other elected bodies, in Scotland, Wales, London and, intermittently, Northern Ireland. Parliament had failed to take account of these developments, despite the reforms and increased activity noted above.

I have always rejected the conventional declinist thesis, since parliament still matters. But the challenges are more complicated, and the changes introduced since 1997, while welcome, are insufficient. Matthew Flinders of Sheffield University noted, in *The Future of Parliament* essays mentioned above, that parliament remains "the central locus of legitimate state power in Britain". However, he says:

The danger for parliament is that the roles of alternative scrutiny mechanisms such as judicial review, regional assemblies and parliaments, the European Commission, public inquiries, tribunals and inspectorates and the media, will further evolve and this may harden the public's misguided perception that parliament is a peripheral actor within the political system.

What needs to be done? First, parliament – both houses – need to improve how they perform their core roles of examining legislation and scrutiny. The September 2006 report of the modernisation select committee on *The Legislative Process* outlined some ways in which the largely meaningless standing committee procedures could be improved, notably by making pre-legislative scrutiny the norm rather than the exception – being so far mainly used for non-controversial bills. The report recommended making more information available about bills, detailed clauses and amendments, notably via legislation gateways on the internet and by encouraging general committees (as standing committees will be called) to take evidence on the details of bills.

There is also growing pressure for post-legislative scrutiny to assessing the effectiveness of laws after they have been passed and to look at any unintended consequences. Such post-legislative scrutiny has been urged by a variety of parliamentary committees and by the Law Commission in an authoritative report in October 2006. These are not arcane matters, since improvements in the quality of legislation would have a direct and favourable impact on the lives of everyone.

Scrutiny of the executive can also be improved. The changes so far have been limited. Ministers have resisted attempts by committees to look at major appointments, as discussed below, and at the activities of quangos and other non-departmental public

bodies. The current conventions on the provision of "persons, papers and records" are inadequate. The doctrine of ministerial accountability to parliament has been used to head off demands by committees to question specific civil servants and advisers.

However, as important as procedural reforms are attitudes. Are MPs willing to take scrutiny seriously, or will all ambitious and talented new MPs be determined to get on to the frontbench as soon as possible? The key to effective scrutiny is the determination of MPs to press the executive. Of course, there are limits. Unlike the US congress, which is constitutionally separate from the executive, government and legislature are fused in Britain. But even within the constraints of the party battle, select committees could be bolder, as some are.

Above all, the Commons needs to come to terms with the new challenges outlined above. Since the main devolution legislation was passed in 1999, the Commons has often behaved as if not much has changed, apart from the limits on the questions that Scottish and Welsh ministers can answer. Scottish and Welsh select committees have continued to exist, when it would make far more sense for the Commons to have a broader devolution committee to monitor the operations of our emerging quasi-federal constitution. On relations with the European Union, an elaborate mechanism of scrutiny exists, but in the Commons, though not the Lords, few MPs have shown much interest, apart from those passionately committed on either side.

Parliament exercises only irregular oversight over the vast network of regulators. The Hansard Society commission chaired by Lord Newton of Braintree on parliamentary scrutiny in 2001, of which I was joint deputy chairman, proposed in *The Challenge for Parliament: Making Government Accountable* making the Commons and Lords the apex of a system of scrutiny. So the growing number of independent regulators would ultimately report to parliament, and be subject to scrutiny.

The Treasury committee of the Commons holds regular hearings with the monetary policy committee of the Bank of England and produces post-appointment reports on new members of the monetary policy committee, though it has no powers to halt their appointment. The idea of giving the Treasury committee, and the Commons, "advise and consent" powers like the US congress, with pre-appointment confirmation hearings, has been floated and would give parliament an important role in scrutinising executive patronage. However, attempts by the education and skills and home affairs select committees to have a role in senior appointments such as the Chief Inspector of Schools

and the head of the Independent Police Complaints Commission have been rejected by the government. And few, at present, could want this power to be extended as far as in the USA. The Law Lords have made plain their opposition to any British version of senate approval for members of the Supreme Court.

There needs to be a further shift towards making the prerogative powers of ministers (as opposed to the remaining personal prerogatives of the sovereign) accountable to, and subject to scrutiny by, parliament. This covers not just nominations to important public appointments but also treaties and, in particular, war-making powers. Following the controversy over the Iraq war, and the Commons votes in March 2003, the constitution committee of the Lords produced a report in July 2006 recommending a new concordat whereby the executive would have to seek parliamentary approval for a major commitment of British forces to military action. Similar proposals – in some cases linked to the requirement to provide legal advice – have been endorsed by Gordon Brown, David Cameron and Sir Menzies Campbell.

Underlying these changes is the growing debate about relations between parliament and the judiciary. While the constitutional reform legislation of the late 1990s was careful to maintain the supremacy of parliamentary sovereignty, the *de facto* influence of the judiciary has been growing. This is partly as a result of judicial review but also, in particular, follows the passage of the Human Rights Act, which gave judges the power not to strike down or annul legislation, as in the USA, but to issue declarations of incompatibility that could, and have, put strong pressure on the government to amend laws. This happened most notably over the 2001 counter-terrorism legislation.

This is a very sensitive area: is there, for instance, a class of constitutional enactments that should be given special treatment and protection? This issue arose over the legality of using the 1949 Parliament Act to push through the law banning hunting with dogs. More broadly, any formalisation of relations between the Commons and Lords, as well as between parliament and the judiciary, raises the question of a written constitution – which would be subject to challenge in the courts. The fact that the question has been raised indirectly by Gordon Brown and more explicitly by Lord Goldsmith, the Attorney General, shows that this has become a live debate.

Changing parliament's relations with the electorate

These issues are crucial to the relevance of parliament, and how it is seen. If the Commons is seen as being more effective in scrutinising the executive, then its public standing may

improve. But as both the Power and Putnam reports correctly argued, parliament, and that means primarily the Commons, has to change its relations with the electorate. Of course, these relations have many aspects: between an individual MP and his or her constituents; between MPs as members of parties and voters; between the executive and the public; and between parliament as an institution and the outside world.

This is a two-way process. The Putnam report contained a long list of suggestions about how to improve understanding of what parliament does: from public education, especially for younger people; to the creation of a visitor's centre to make the Palace of Westminster more open and welcoming; to improvements in the parliamentary website. Underpinning the report was the belief that parliament needs a coherent communications strategy.

The report tied in with a changing mood in parliament itself. Before the Putnam commission reported, the modernisation committee had produced recommendations on *Connecting Parliament with the Public*. There has been much activity in both houses, both administratively in various committees, but also more tangibly via the construction of a visitor reception building and an upgrading of the parliamentary website in autumn 2006. As the report of the House of Commons commission noted in its 2006 report, there were over 32 million page requests for information from the main website in 2005/06, 18% more than in the previous year. In addition, there were 88 million page requests to the parliamentary publications website. This means that far, far more people are now gaining direct access to what parliament does than in the days when debates and publications were available only in printed form.

Such direct access has become more important than coverage via the mainstream media. There has been much criticism of the decline in reporting of the activities of parliament in the press and on radio and television, and the change in tone towards a more strident, partisan and personality driven style. The Putnam report did not discuss this issue sufficiently. But, while the mainstream media have obvious faults, there is no prospect of a return to the lengthy gallery coverage of debates in some newspapers that existed up to the mid-to-late 1980s. Indeed, such coverage has been made redundant by the existence of the internet, which provides direct access to the activities of parliament. However, much can, and should, be done to improve the way that the media covers politics in general.

The biggest change that parliament could make is not just improving the way it informs

the public but allowing voters to have their say on what is happening. It is no longer good enough to say MPs are elected every four or five years and that is that. Of course, MPs do consult their constituents regularly, and far more regularly and conscientiously than in the past. But there has so far been little provision for formal consultation by select committees and committees considering legislation.

There have been some online consultations on specific issues such as domestic violence and as part of occasional select committee inquiries, but these could be made the norm. Committees could set up public participation on their websites. Of course, this would invite, even encourage, individuals and groups with specific interests and axes to grind. But a well-moderated online discussion can easily balance out such contributions, which would anyway only be consultative – a guide to representatives and committees and no more. But such consultations not only provide an alternative range of views to the usual groups questioned by committees, but they may also give voters the sense that their opinions can be heard directly.

The largely formal petition procedures of the Commons should be overhauled. At present an MP just presents a petition on behalf of his or her constituents at the end of the day's sitting, and that is largely the end of the story. But the Scottish parliament has a system whereby public petitions are considered by a petitions committee to sift out the vexatious, cranky and trivial, referring the remainder to specialist committees. These range from specific individual complaints to more general grievances. Some petitions have produced executive actions to remedy such complaints and a few have even led to legislative changes. This process does not replace decision making by representatives, who still have the final say on what happens.

The Power report went further in arguing that citizens should be given the right to initiate legislative processes, public inquiries and hearings into public bodies and their senior management. But there are dangers in moving too far towards plebiscitary democracy. The evidence from certain US states that give voters this direct power in referendums is that the result can often be a block on new initiatives – thus preventing the necessary balancing of diverse interests that a representative system seeks to achieve. Nonetheless, a petitions process along the lines of the Scottish system could enhance public engagement. This idea has been urged by a variety of outside bodies and now has the support of leading politicians of all parties.

There is no easy answer to public disillusion with, and disengagement from, mainstream

parliamentary politics. Much of the answer lies in the performance of politicians as opposed to changes in process. But there is scope to strengthen the powers of parliament in scrutinising the actions of the executive and legislation, as well as improving communications with the public in both directions.

Chapter 13

Insiders or outsiders? Political parties and the constitution

Fiona Mactaggart MP, Labour MP for Slough, and Dr Alan Whitehead MP, Member of the Constitutional Affairs Committee

Insiders or outsiders? Political parties and the constitution

The answer to the question “What is the role of political parties in our constitution?” is: not much. UK political parties stand almost wholly apart from constitutional regulation, and most people would agree that it is right that this is so. The idea that the state defines and limits political parties jars in a democratic society of free association, but the democratic state plainly does have an interest in the operation and health of political parties: from the point of view of the legitimacy of its institutions it is important that elections are conducted fairly, with parties being able to compete for office fairly, putting forward independently chosen candidates and offering policy options that they have determined. Parties guarantee the integrity of the democratic process by being independent of the state, and enabling power to be transferred peacefully and reliably on the basis of the mandate arising from a local or national election.

Outside the immediate period of elections, parties also play a vital role in guaranteeing the political process – by putting forward ideas and policies, by endorsing and supporting competing candidates for elections, by developing leaders and by providing important elements of political education for the population.

Parties are the sales force for democracy. By talking to people about their views, discussing how things can be changed, finding out what a larger number of people want, showing how the party can take those ideas forward, all help to get people involved in changing their local environment and local council and then government. If we care about that democracy, parties should be protected rather than denigrated.

Parties are unique in synthesising policies, worked out in debate and in discussion inside and outside the party, into programmes of action. No other organisation can do this. The many very active one-issue groups, like Make Poverty History, can work on their single issue but when they try to do more, they may find that their members think very differently about all other issues and they fall apart. Parties have a wider area of consensus or shared beliefs, so that there may be heated internal debate about the way of implementing a policy but a basic agreement on the way in which it wants to change society.

A party also needs to take its members with it – it cannot move too far in one direction without losing momentum or losing members, and it needs to remain accountable to the majority of its members and those who have voted for it. The shared history and shared ideals of a party and its rules and discipline means that the party members keep their

elected representatives accountable to them and to the party's ideas. It also means that in government a party can deliver on its promises, its manifesto.

Parties give disparate groups of people access to governance, through joining or influencing local parties or being part of local groups that influence parties. They help ordinary people to be the driver for change and can play an important role in training citizens to influence events and policies. Effective political parties listen to people's concerns, hopes and ambitions and develop policies to reflect them. This can pick up issues that are not surfacing in media or other arenas of public discourse. Parties are engines for engaging with the public: it is no one else's main job and it is a vital one.

The UK state has dipped its toe into the regulation of parties for the purposes of elections, but otherwise the enormous role that parties play in the democratic life of the state remains both unacknowledged and unregulated. If it happens, it happens by chance. Even the conduct of elections has been only relatively recently regulated to any extent: party labels were only attached to candidates on ballot papers in the 1970 general election and only in 2000 did the Political Parties Elections & Referendums Act (PPERA) for the first time set out spending and fundraising limits for parties in election periods, and introduced the registration of parties for these purposes through the medium of the Electoral Commission. In 1975 Harold Wilson's government introduced some limited state funding to political parties, or at least their parliamentary manifestations, through the introduction of "short money" intended to provide resources for opposition parties to conduct research and organisation: a state sponsorship of the boxing ring rather than of the boxers themselves.

Other than that, the local and organisational life of political parties remains outside any constitutional framework, yet is assumed to be attached to the regulated electoral arrangements. Parties provide the candidates, for local, national and devolved elections, raise much of the finance to fight elections, and in between maintain a local presence of membership, providing local and national debate, political education, and the ordering of the competing political choices that a democracy must manage effectively. Should we therefore just leave it at that? Will the *laissez faire* approach of the state to its vital but unrecognised political parties serve for democracy in the 21st century?

There is a paradox at the heart of the British political party system. On the one hand they appear to be raising and spending record sums of money on elections and on national campaigns, but at their base, membership has never been lower, local activity has never

been feebler, and the proportion of funding that national parties obtain from the contributions of their members has never been smaller. This withering away of the base of parties has been a relatively rapid and recent phenomenon. As recently as 40 years ago, almost 100% of the British population were party members and the wider aspects of that membership permeated into British culture. Examples include a string of Labour clubs associated with the party, or even the supposed most effective dating agency of the 1950s – the Young Conservatives.

Now membership of all political parties barely tops half a million – less than 1% of the population, and within that shrunken base only a small proportion remain active in party work. Indeed, a recent study of party activity in a number of large towns (Facey and Robinson, 2004) showed that the entire apparatus of selecting local candidates, supplying councillors, holding meetings, discussing local political issues, distributing leaflets and fighting elections was undertaken by a few dozen activists scattered among the parties. Activism and membership at these levels requires great single-mindedness of an individual to join and be active when he or she is clearly now engaging in such an apparently marginal and eccentric activity.

The rise of "anti-politics"

This feeling of marginalisation cannot help being exacerbated by the rise in more recent years of what can best be described as "anti-politics" – a view, supported by much media comment, that politics is a dirty and dishonourable business, that one is making a positive statement by not voting in elections, and that British society really would be better off without parties in general. Politics is seen, through this prism, increasingly not as taking part in political life through parties but as taking action through lobbying, demonstrations, signing "pledges" and so on, to influence "them" in political parties, the membership and leaders of which can be presented as mysteriously and somehow illegitimately in their positions, and certainly not connected in any way with the general public.

This is potentially a totalitarian position, in that eventually, if political parties simply collapse from the bottom upwards, the way is open to "the great and good" to occupy positions of influence and decision making appointed by and accountable simply to each other, rather than the public at large. Indeed, such a trend is already under way, ironically with the substantial connivance of existing political parties, bent on demonstrating that areas of public life are "trustworthy" – that is, free from the suspicion that their activity has been tainted by "politics".

Thus, from the mid 1980s onwards, whole swathes of people working in local government were simply denied, by law, the right to participate in parties or stand for election: more recently, appointment to any form of public body or quango has been largely scrubbed clean of those with any political affiliations now or in the past: indeed, on the forms on which one can apply for nomination to public bodies the question on political affiliations is next to the question on criminal convictions. The same applies now at local level, where on government bidding documents and through schemes such as regeneration programmes, participation in decision making is strongly encouraged, so long as the participants are clearly not "party political". The "good" process of participation in the state has largely been sanitised from the "bad" process of politics and elections.

In truth there is, it seems, an increasing "common sense" that local political participation should be limited to action to place demands on "the politicians" but not to be one of them, and if a greater degree of participative involvement is required, to be appointed as "representative" of your community or interests, but not under any circumstances to aspire actually to be a representative through party and election. But without a party and electoral framework these participants may become frustrated and isolated. Creatures who can remain accountable and in touch with popular concerns on their own, without allies, are rare, and many of the political skills that enable people to be effective representatives are taught only in political parties. Meanwhile the remaining, sanitised and marginalised political activists kick themselves for the mark of Cain they have placed upon themselves by being a party member.

So, a century or so after the rise of local democratic forms of governance began to replace the self-appointing gentry and magistocracy, a new "great and good" rides in to take their place. With the body of the political parties gone or collapsing, nothing is left but the head offering eventually a simulacrum of choice through the parade of two (or perhaps more) versions of elites for an otherwise uninvolved public to place a mark against. We may ask whether we are headed towards a US style of established "elite" political parties with money but without real membership, competing mainly electronically for the periodic favours of the public.

That is perhaps an extreme vision of political dystopia, but one that does have echoes in the degraded circumstances our parties find themselves in. Our political system, and the integrity of the constitutional arrangements that go with it, needs political parties, and needs them to be a healthy, functioning part of the body politic. A reason for failing to "constitutionalise" political parties could be fear that it could either make them pawns of

the state as in soviet-era eastern Europe, or immovable pieces of constitutional furniture, regardless of the level of real life in them, like the Republicans and Democrats in the USA. It is clear that the state needs to invest in the health of political parties, but not in such a way that the cat is killed by the kindness shown to it. State recognition of the honourability of the political process needs to be buttressed by reversing the depopulation of participative positions by those with "political" backgrounds, and at the very least reversing the shameful legislative banning of large numbers of public-sector workers from holding political office or even joining political parties.

State funding of parties needs to concentrate on the local, on the educative and cultural role parties play and the way they can bring forward and nurture leaders of local communities. It should also operate so that the emergence of new or modified parties to inhabit the political terrain is enabled by the rules. It is also clear, or should be, that if the state takes measures to regulate the life of political parties by choking off forms of fundraising that replace local dues and money-raising efforts, then the party political system will not revive as a result of being clean, but will become more enfeebled still.

State funding is also a conundrum, in that the more "anti-politics" as an assumed norm of political life takes hold, the less likely it is that anyone will successfully gain agreement for a large handout to the same bunch of rascals who are allegedly the cause of all the trouble in the first place. It is also true, though, that many of those professing "anti-politics" would most like to see a revival of local involvement and participation in the political process. Ironically, the best way to ensure that parties cannot revive as meaningful locally based pillars of democracy and indeed only function in the way demonised by "anti-politics" would be to deny parties that local support. In reality, with "short money", and with indirect funding of the political process through election freepost and party political broadcasts, the state is already some way down the route of funding assistance, albeit without ever explicitly acknowledging it.

It should go further, with an extension of funding for the use of local parties. This should be loosely regulated, not closely defined as to purpose, and set in the context of overall national caps on expenditure. In this way the state can feed the roots of its own political health. Levels set by votes cast in elections, or by a check-off system at the point of voting, as suggested by the Power commission, are perhaps the most suitable methods of providing both meaningful and flexible funding.

Whatever the precise method, the process needs to be started soon, for the sake of the

health of democratic choice and accountability. We have described how, without parties, the state can be captured by unaccountable elites. A choice of nothing or nothing is not a choice at all. The best way to ensure that the values of democratic choice and accountability underpin our constitution is to promote, succour and support the role of political parties within it.

Chapter 14

The need for a written constitution

Graham Allen MP, Labour MP for Nottingham North

The need for a written constitution

A government without a constitution is a government without a right.

Thomas Paine in *The Rights of Man*

Gordon Brown's reference to a written constitution at the 2006 Labour Party conference gave hope that for the first time the British political system would finally be created on a legitimate and understandable basis. It is the last unfinished business of British democracy – the British people prising the political rulebook from the closed grasp of the executive.

New political leadership in Britain will always be the opportunity for fresh thinking, a chance to look again at the fundamental concepts parked by the old leadership.

A written constitution would also introduce a new dynamic into British politics; merely describing what at present exists would not be enough. No self-respecting founders would dare produce a snapshot of our over-centralised system.

Imagine enshrining article 1: "The chief executive of our nation may not be elected by the people, nor even endorsed by a new parliament, but should be summoned by the unelected sovereign." Or article 2: "Laws will be subject to veto or delay by an unelected second chamber." Or article 3: "Local government will be the creature of statute changeable on the whim of central government," let alone article 4: "The British people shall not be citizens with rights and responsibilities, but subjects of a hereditary monarch." Yet this is what we have now, by courtesy of our over-lauded "unwritten constitution". The simple effort of writing down the rules we live by now must (after a brief period of disbelieving ridicule) invite analysis and generate a serious momentum for reform.

The very act of committing a constitution to paper would pose the question that lies behind all our key debates on UK democracy: Do we want to continue our centralised unitary system or evolve a pluralist democracy with many equally legitimate institutions? It would inevitably precipitate the most radical package of democratic reform ever presented to the British people by a major political party.

Moreover, by putting our political settlement beyond easy repeal it would *change our political system for good*. It would be the end to short-term tinkering and tampering by the executive. It would do for democracy what putting the Bank of England in charge of interest rates has done for the economy. A written constitution would mark the end of

"winner takes all" politics and establish agreement that political action in the future must be checked, negotiated and accountable – as it should be in a modern democracy. An open, accountable system would be the catalyst for change – institutionalised, mediated and careful change, no doubt, but change nevertheless.

The historic task of the next Labour Prime Minister will be to create a UK democracy that will no longer be embodied and entombed in an over-powerful government, but one where different institutions, each properly and legitimately established, can help to rebalance the executive power that has been so sorely abused in recent decades.

Replacing command politics with the synthesis of all our talent will not only facilitate better democracy; it will also be a more effective way of governing ourselves in the modern world. The 1980s proved that executive power, seen at its most extreme and unhindered, has failed, even when led by its most obsessive and dynamic driver, Margaret Thatcher. A written constitution is a different path; it is about enabling the abilities of all our institutions and people, at all levels and locations, not about controlling them from the centre.

A written constitution is just the beginning

A new written settlement, creating clearly defined institutions and rights, where everyone can know the rules, is just the beginning. The interrelationship and evolution of those new features will be of great significance. There will undoubtedly be a serious debate and even conflict among the different institutions: a reformed House of Commons will discomfit the executive; an elected second chamber will want to spread its wings; regional and national assemblies will need to negotiate their space at both the federal and the local level; individuals using the bill of rights will expose the government to much greater accountability and influence the future development of the judiciary; European decisions will have to be debated in greater detail; and constitutionally independent local government will be assertive and rejuvenated. Above all, individuals will not only feel greater ownership of the political system and be more demanding of it, but also be less tolerant of the abuse of power and better equipped to put the situation right.

Winning the general election to decide the national government will always be vitally important. However, in a pluralist democracy, with other equally legitimate institutions available as outlets for political action, losing a general election will never again be the end of meaningful politics. A written constitution will *thereby end the subcontracting of political action from a whole nation to a small elite in the executive.*

However, a written constitution could evolve and need not spring fully fledged into being. The reforms mentioned above do not in themselves demand a formal written constitution as a prerequisite to set out every aspect of government power and citizens' rights. They are nonetheless essential pieces of the jigsaw to be completed. Each part will require legislation that is carefully formulated and consistent with the others. When the legislative programme necessary for the democratic agenda is completed, logic and momentum might then demand that a written constitution extracting the fundamental principles briefly and elegantly be compiled, which would be an easy task if the electorate wished it.

Equally, democratic reform could continue hand in hand with the formulation of a written constitution. Such a step might take place at the active request of British citizens, using the means given to them. There are lots of ways to progress this. For example, to help promote a wide public understanding of all these changes, an independent All-Party Commission for Democracy (similar in stature to the CRE) could be created. It could be at arm's length from the government and promote education in democracy and citizenship at school and within the community, train and equip the next generations of councillors and political activists, fund research, monitor and advise on electoral processes, spread best practice at home and abroad, tidy up the technical details of electoral law, and regulate the funding of political parties and administer their state aid.

A written settlement for our democracy will be a different world for the media, too. Initially, the clash and reconciliation of independent political institutions will doubtless be painted as "splits" and "crises" by those used to being spoon-fed "the line" by No 10. However, the media will learn to look beyond simplistic winners and losers, and grow to understand diversity and legitimate debate. Those who look beyond the daily No 10 press briefing will revel in it.

Critics will doubtless say that this is too rosy a picture of pluralist democracy. Advocates of this new settlement must be clear that pluralism itself does not provide answers; what it does is create an accessible, open set of democratic structures, the *framework* in which real policy battles and choices can take place. Pluralist democracy – with all its debate, conflict, agreement and progress – will be represented by the centralists as a system "out of control", for it will indeed be out of their control. We should celebrate such novel characteristics in British politics while remaining sceptical of those who would turn pluralism into a panacea.

Creating a true democracy

For the immediate future, and certainly for the duration of the first term of a new Labour Prime Minister, our task will be to bring to life the various elements of a new constitutional settlement for Britain that will create a true democracy for the 21st century. The obstacles are many, but the most deadly are our own conservatism and timidity, for even those with little or nothing to lose will fear change unless it is put forward confidently and coherently. Even in the legislature – abused by government on a daily basis – there are still some who cling to the mythology of parliamentary sovereignty, unable or unwilling to see that it was long ago replaced by governmental supremacy.

To drive through all the change that is necessary against the enormous forces of stagnation and complacency in each of the institutions affected (including the political parties) will require both an understanding of the conflict between pluralism and centralism, and an enormous fund of political will, particularly – given the centralised nature of the current system – from the leader of the ruling party.

Unlike many constitutions, which have been the statements of political victors fortifying their own power, ours will need to be part of the programme of change. The process of making our written constitution will be massively educational. It can only be the product of a nationwide debate which in itself would re-energise and revive politics in the UK. Unlike all previous constitutions, this one – in the age of television and computers – could have a million founding fathers and mothers rather than be the property of a handful of the great and the good.

Imagine the rules of our politics and government not being discovered by “judicial archaeology”, as John Smith described it, but being in the pocket of every child at school, on every family kitchen table or bookcase – understood and proudly owned by those it affects. If we already have a constitution, as some claim, then what is wrong with writing it down so that all those who are affected and governed by it can read it? The way we are governed should not be secretive or made up as government goes along. It should be an open book for all.

Of course, as with any framework or rulebook, a written constitution will be fought over and interpreted. Usually that interpretation will be by the elected political institutions placed there for just that purpose. Believers in today’s unitary system want certainty and unequivocal answers and are appalled at the prospect of a written constitution denying them the total victory they desire. The written constitution is the boxing ring, not the

political fight itself. It should be the guarantor of a fair contest, not the deliverer of a pre-determined result where the executive always wins.

Of course there must be a backstop of judicial interpretation – one not based, as now, upon unseen and unwritten rules and conventions, but played out in public on a basis formulated and endorsed by the people. Such a responsibility will itself be a catalyst for the new role of the judiciary.

There are many ways in which an incoming Prime Minister could set this process in motion, though this is not the place to go into detail (for that, see my Written Constitution Bill presented to parliament in February 2007). However, the most obvious is in a bill that would create a commission which would report to parliament within a year with a draft of a constitution that parliament and people would then debate in the most extended pre-legislative consultation in our history. It would define the powers of each political institution, the separation of powers between the executive and legislative branches, and how the constitution itself would be approved and amended by referendum.

Let the debate begin on how we create a written constitution. First we must attempt to codify that which currently exists, starkly revealing to all the current inadequacies; then, if the people wish, we must reform those institutional structures. Let the natives of the last country in the Empire be free to agree on and implement how they can realise their dream to finally govern themselves.

Chapter 15

A bill of rights – what for?

Francesca Klug, Professorial Research Fellow at the Centre for the Study of Human Rights at the London School of Economics & Political Science

A bill of rights – what for?

The bill of rights debate is back on the political agenda, but not as we have known it before. For the first time there is all-party agreement on some kind of bill of rights for the UK. David Cameron has committed the Tory Party to "work towards" a "British bill of rights"³⁵ The government has belatedly begun to defend the "benefits which the Human Rights Act has given ordinary people"³⁶ and the Liberal Democrats supported the incorporation of the European Convention on Human Rights (ECHR) into UK law decades before Labour did.

The only argument now is, what kind of bill of rights? In other words, should the Human Rights Act (HRA) be defended as Britain's bill of rights by any other name, based on "a single clear catalogue of ... rights and freedoms" shared across Europe, as the Lord Chancellor has described it?³⁷ Or should a "home-grown" bill of rights replace the HRA, as David Cameron has suggested? Alternatively could a British bill of rights build on the ECHR, as the Labour Party once advocated before it took power³⁸ and it is rumoured Gordon Brown may now be considering?³⁹ These are no longer purely constitutional questions, of interest only to an informed elite. They feed into a national preoccupation with the appropriate balance between liberty and security that has come to dominate the era in which we now live.

Back story

Not since Tom Paine wrote *Rights of Man* in 1791 has so much national attention focused on fundamental rights and how to protect them. Published amidst mounting panic by the British government that the French Revolution would prove contagious, Paine's bestseller called on the state to secure fundamental social rights as well as refrain from abusing individual liberties.

In his day, Paine electrified political debate in Britain. Within two years about a quarter of a million copies of *Rights of Man* were sold in a population of 10 million.

Over the next 150 years the radical rights movement that Paine represented was buffeted from all sides. By the beginning of the 20th century he was eclipsed as a leading thinker

35 "British Bill of Rights", speech to Centre for Policy Studies, 26 June 2006

36 *Review of the Implementation of the Human Rights Act* (Department for Constitutional Affairs, July 2006), p7

37 *Ibid*, Lord Falconer, p6

38 *A New Agenda for Democracy: Labour's Proposals for Constitutional Reform* (National Executive Committee, 1993)

39 See, for example: Andrew Grice "Tory Leader is Stealing Brown's Best Tunes" in *The Independent*, 30 September 2006

of the labour movement by social democrats and Marxists⁴⁰ who championed public ownership over constitutional reform and collective bargaining over individual rights.

Interest in bills of rights remained largely dormant until 1968, when the Wilson government introduced the Commonwealth Immigrants Act. Passed in only three days amidst a tabloid frenzy, the act prevented British Asians expelled from East Africa from entering the UK. This was a Labour government using its parliamentary majority to ride roughshod over the rights of a minority. The expelled East African Asians were eventually vindicated by the European Court of Human Rights in Strasbourg. But the ECHR was not enforceable in the domestic courts. Without a bill of rights or written constitution to turn to, British democracy offered these citizens virtually no protection.⁴¹

The bulk of the Tory and Labour parties remained unpersuaded about the benefits of constitutional reform.⁴² Conservative opinion tended to dismiss bills of rights as lethal for the doctrine of parliamentary sovereignty,⁴³ resisting virtually any restraints on the will of the legislature. The idea that certain values are so fundamental to democracy that they should receive special protection was deemed almost alien to Britain's political traditions.⁴⁴

Opposition to bills of rights within the Labour Party was more political than constitutional. The spectre of public school-educated judges overturning laws passed by a democratically elected, centre-left government hung over the debate.⁴⁵ Support for a UK bill of rights remained largely the preserve of lawyers and liberals (with a lower and upper case L).

A growing perception amongst opinion formers and some leading politicians that the British political system amounted to an "elective dictatorship"⁴⁶ kept the bill of rights

40 Marx famously mocked Paine's "so-called rights of man" in *On the Jewish Question* (1843)

41 The government, by way of concession, created a special voucher scheme to allow entry to an annual quota of British Asians from East Africa, as refugees rather than as British subjects exercising their right of residence.

42 Exceptions included Roy Jenkins, Shirley Williams, Sir Keith Joseph, Sir Michael Havers, Leon Brittain and Lord Hailsham.

43 The doctrine of "parliamentary sovereignty" hailed from the first British Bill of Rights in 1689, which is less a bill of rights for "the people" and more a set of protections for peers and MPs. The essential component of the doctrine is that one parliament should not bind its successor.

44 Bills of rights are sometimes known as "higher laws" in that all other laws, whenever passed, are supposed to confirm with their broad principles or be reinterpreted or repealed.

45 The first Labour Party document to propose the incorporation of the ECHR into UK law, *A Charter of Human Rights*, was published in 1976. The national executive committee would not allow the paper to be presented as official policy but only as an issue for debate.

46 It was Lord Hailsham, former Conservative Lord Chancellor, who gave this phrase currency in a stinging critique of the British constitution in the Dibley lecture, 1976. He pledged support for a written constitution and bill of rights based on the ECHR.

debate on the boil. Hidden within Margaret Thatcher's 1979 election manifesto was the promise of all-party discussions on a bill of rights. Once in power this commitment was airbrushed away. But it was 18 years of Conservative rule that was to turn the tide in the Labour Party in favour of constitutional reform.

The reputation of the legislature as a check on the executive sank to (what was then) an all-time low. Parliamentary sovereignty was exposed as government sovereignty in all but name. From the poll tax to the Spycatcher ban, the Conservatives enacted any measures they wished, on a minority of the popular vote. Judges gained a reputation for providing virtually the only effective challenge to executive measures as they developed their own powers of judicial review, much to the frustration of the Tory government.⁴⁷

When the late Labour leader John Smith committed the Labour Party to a British bill of rights in February 1993, it was as part of a package of proposals to "restore democracy to our people". Echoing the sentiments of the former Conservative Lord Chancellor Lord Hailsham 18 years earlier, he bemoaned that "what we have in this country at the moment is not real democracy; it is elective dictatorship".⁴⁸

Smith concluded that "the quickest and simplest way" of introducing "a substantial package of human rights" would be to pass a Human Rights Act "incorporating into British law the European Convention on Human Rights",⁴⁹ completing the process that began in 1951 with the ratification of the ECHR.⁵⁰ The 1993 Labour Party conference adopted an national executive committee statement, introduced by home affairs spokesperson Tony Blair, supporting an all-party commission to "draft our own bill of rights", following the incorporation of the ECHR into UK law.⁵¹

After John Smith's untimely death, Labour's commitment to constitutional reform was recognised as one of his strongest legacies. Tony Blair pledged to introduce a bill of rights as part of a package of "democratic renewal" in his 1994 campaign literature for party

47 Judicial review of executive acts and decisions grew significantly from 491 cases in 1980 to 2,439 in 1992.

The eminent *Guardian* journalist Hugo Young wrote in April 1992, "For Thatcherite Whitehall, the judges were a curse."

48 "A New Way Forward," speech by John Smith, leader of the Labour Party, Bournemouth, 7 February 1993

49 *A Citizen's Democracy*, Charter 88 (March 1993). The Institute for Public Policy Research published *A British Bill of Rights* in 1990, drafted by Anthony Lester QC and others based on the ECHR and the UN's International Covenant on Civil & Political Rights.

50 It was the Atlee government that ratified the ECHR in 1951 and the Wilson government in 1966 that granted individuals the right to directly petition the European Court of Human Rights in Strasbourg.

51 *A New Agenda for Democracy: Labour's Proposals for Constitutional Reform* (National Executive Committee, 1993)

leader. The new shadow Home Secretary, Jack Straw, committed a future Labour government to a "two-stage process". The incorporation of the ECHR into UK law would be followed by "the establishment of our own British bill of rights".⁵² The 1997 manifesto reflected the first part of this commitment and the Human Rights Act was introduced the following year.

The Human Rights Act: what went right, what went wrong?

The cracks in the new government's approach to constitutional reform soon became apparent. John Smith's manifesto for a "citizen's democracy", which he had "wanted to make the hallmark of the next Labour government",⁵³ gave way to a set of significant but piecemeal reforms, their relationship to invigorating democracy increasingly opaque.

Nevertheless, if the world had not shifted on its axis after 11 September 2001, the Human Rights Act may well have bedded down to become an accepted part of the legal and constitutional landscape of the UK. Many of the early predictions about clogged-up courts and a new litigious culture did not materialise, at least not as a consequence of the HRA. Research by the Lord Chancellor's department⁵⁴ indicated that very few cases were wholly reliant on the act.⁵⁵ Then, as now, the HRA was mainly cited as a defence in criminal trials or as an additional argument in judicial reviews or civil cases.

The shocking events of 9/11 – less than a year after the HRA came into force – provided a jolt to the political system. The Prime Minister and the new Home Secretary, David Blunkett, rapidly came to see the act as an obstacle in the so-called "war on terror".⁵⁶ In particular, they became frustrated that judges would not deport foreign suspects to countries where there was a real risk they might be tortured, including those accused of involvement in international terrorism.⁵⁷ This was blamed on the HRA, although the government was bound to comply with this European Court of Human Rights

52 Speech to Community Links, November 1995

53 Smith, E "Introduction" in *A Citizen's Democracy* (March 1993)

54 Now the Department for Constitutional Affairs (DCA)

55 See Raine, J and Walker, C *The Impact on the Courts & the Administration of Justice of the Human Rights Act 1998* (October 2002), which found relatively limited impact of the HRA on the courts in terms of challenges and additional workload, although it had invoked a number of significant policy and practice changes and was felt to be engendering a stronger human rights culture within the courts.

56 A phrase coined by the American President, George Bush, in the wake of 9/11.

57 Contrary to some media reports, the ECHR does not prohibit all deportations to particular countries but requires the courts to protect individuals where there is evidence that they personally face torture if they are returned.

interpretation of ECHR article 3, prohibiting torture, before Labour came to power.⁵⁸ Regardless of the HRA, this mandate would still have applied.⁵⁹

Many other controversial policies, from the introduction of antisocial behaviour orders to the retention of DNA, were found to be *compatible* with the HRA. The assumption that the act would usher in a new era of rampant libertarianism – based on a “black letter” (or liturgical) reading of the ECHR – was not substantiated.⁶⁰ The courts put down an early marker that, “inherent in the whole of the Convention”, is “a search for balance between the rights of the individual and the wider rights of the society ... neither enjoying an absolute right to prevail over the other”.⁶¹

More recently the Lord Chief Justice, Lord Phillips, described the HRA as “an important and successful part of the legal structure”.⁶² This followed the (largely) clean bill of health given to the act in July 2006 by both the Home Office and the Department for Constitutional Affairs (DCA) in reviews initiated by the Prime Minister and overseen by the Home Secretary and the Lord Chancellor respectively. The Home Office concluded that the HRA represents a “powerful framework” to deliver “a commonsense balance between the rights of individuals and the rights of victims and communities to be protected against harm”.⁶³

58 *Chahal v UK* (1996) 23 EHRR 413, which built on the case law in *Soering v UK* (1989) 11 EHRR 439. In times of national emergency, states can usually “derogate” from most provisions of the ECHR but this excludes the prohibition on torture. This is why the government cannot legislate to require the courts to take national security considerations into account when adjudicating on deportations to countries where the courts judge there is a real risk that an individual deportee may be tortured or subject to the death penalty. The government is trying to persuade the European Court of Human Rights to change this interpretation of article 3 by intervening in a Dutch case, *Ramzy v Netherlands*. It is also seeking “memoranda of understanding” with certain states that they will not torture named suspects if they are deported.

59 When the government introduced legislation to indefinitely detain, without charge, the foreign suspects it could not deport, the House of Lords declared this to be a disproportionate breach of the HRA in that there was no evidence that the threat to national security was from non-British nationals alone: a prescient observation, as it turned out (*A v Secretary of State for the Home Department* [2004] UKHL 56).

In response, the government introduced “control orders” to severely inhibit the movement of British and foreign suspects alike and has subsequently detained many of the original suspects again, this time with a view to deporting them.

60 An early example was *Brown v Procurator Fiscal and Advocate General for Scotland* [2001] 2 WLR 817, which found that the submission in trials of self-incriminating evidence by car owners was compatible with the HRA provided that the trial as a whole was fair. This is currently being appealed at the European Court of Human Rights.

61 Lord Bingham, *Leeds City Council v Price and others* [2006] UKHL 10 at para 32. See also *Sporrang and Lonroth v Sweden* (1982) 5 EHRR 35; *Soering v UK* 1989. The exception to this search for “balance” are the rights to be free from torture and slavery, which are neither qualified nor limited under the ECHR.

62 Interview in *The Observer*, 8 October 2006

63 *Rebalancing the Criminal Justice System* (July 2006), p4

The DCA report claimed the HRA "has had a significant, but beneficial, effect upon the development of policy".⁶⁴ Although further training and guidance are necessary, the HRA "framework" promotes "greater personalisation and therefore better services".⁶⁵

Certainly many individuals and groups can testify to tangible benefits from the HRA in their everyday lives.⁶⁶ Widely respected organisations such as the Disability Rights Commission and Help the Aged have embraced the HRA and campaigned for an extension of its scope.⁶⁷ They cite the benefit of human rights values such as dignity and respect to thousands of people for whom anti-discrimination legislation on its own provides insufficient protection.⁶⁸

Speaking at the London School of Economics & Political Science after the publication of the review in September 2006, the Lord Chancellor urged: "Now is the time to stand up for human rights", for "in a whole range of unsung areas the act has improved the lot of those who deserve help".⁶⁹

Yet considerable damage had already been done to the perception of the act. The more disenchanted the government became with the HRA after 9/11, the more the act was presented as a technical measure to "bring rights home"⁷⁰ and avoid queues at the European Court of Human Rights. It was as if the government hoped that the more it played down the act's significance, the less effect it would have.

64 *Review of the Implementation of the Human Rights Act* (Department for Constitutional Affairs, July 2006), p19

65 *Ibid*, p21

66 Examples include the following: Two disabled women challenged a local authority policy prohibiting care staff from manual lifting. As a result the council amended its Safety Code of Practice on Manual Handling to include consideration of the dignity and rights of those being lifted (*R (A and B) v East Sussex County Council* [2003] EWHC 167 (Admin)). Following the murder of a prisoner by his racist cellmate and a successful challenge under the HRA for a public inquiry, the Prison Service introduced changes to its policy and procedures relating to cell-sharing risks (*R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51). Discrimination against post-operative transsexuals in obtaining marriage certificates was challenged and a declaration was made that s.11(c) of the Matrimonial Causes Act 1973 was incompatible with the ECHR (*Bellinger v Bellinger* [2003] UKHL 21). The Gender Recognition Act 2004 was introduced and entitled a transsexual person to be treated in their acquired gender for all purposes, including marriage.

67 To cover private and voluntary care and nursing provision

68 An illustration of the difference between anti-discrimination and human rights law was provided by the case of Nadia Eweida in November 2006. She was prohibited from wearing a small crucifix by her employer, British Airways, who maintained that no discrimination between faiths had occurred. This did not satisfy Ms Eweida, who was effectively seeking to exercise her human right to manifest her religion. The fact that others in a comparable situation would be treated similarly was no consolation to her.

69 Speech to the Human Rights Lawyers Association, London School of Economics & Political Science, 26 September 2006

70 This phrase originated from the discussion paper published by Labour before they came to power – Straw, J and Boateng, P *Bringing Rights Home: Labour's Plan to Incorporate the European Convention on Human Rights into UK Law* (Labour Party, December 1996) – but was complemented by broader aspirations for the HRA prior to September 2001.

The tabloid onslaught against the HRA⁷¹ has been relentless, fuelled by a combination of Euroscepticism⁷² and apocryphal stories which ministers showed little or no desire to rebut until recently.⁷³ After the 2005 London bombings in particular, the Prime Minister sometimes sounded like a cheerleader for this negative spin, threatening to “amend the Human Rights Act in respect of the interpretation of the ECHR”.⁷⁴

Much of this is reminiscent of the media frenzy that accompanied the introduction of race and sex discrimination legislation in the 1970s. In simple terms, stories about “politically correct” legislation that benefit the “undeserving” at the expense of the “average British citizen” sell copy. The absence of a statutory champion, like the Commission for Racial Equality or the Equal Opportunities Commission, and the lack of consistent political leadership on the purpose and benefits of the HRA have taken their toll. Time will tell whether the new Commission for Equality & Human Rights (CEHR), the first British statutory body charged with promoting the values in the HRA, will succeed in rehabilitating it.⁷⁵

Can the Human Rights Act stand in lieu of a bill of rights?

Soon after Labour came to power it became clear that, outside the context of Northern Ireland, ministers had lost any appetite they might have once had for building on the HRA with a “second-stage” bill of rights.⁷⁶

Yet largely because the bill of rights debate provided the original impetus for the HRA, it was designed to be far more than an incorporated treaty. As the “second-stage” commitment receded, so there was a push to draft the HRA in lieu of a bill of rights. The Home Secretary, Jack Straw, conceded this when it came into force in October 2000,

71 Not all tabloids; the *Daily Mirror* has been largely supportive of the HRA.

72 This largely comprises the wilful misconception that the ECHR is a creature of the EU rather than the post-war Council of Europe, comprising 46 states across the whole of Europe, all of which have ratified the convention and incorporated it into their domestic law.

73 The July 2006 DCA review (*Review of the Implementation of the Human Rights Act*) distinguishes between urban myths, rumours and partial reporting which leaves the impression that a claim that fails at its first hurdle is successful – such as Dennis Nielsen’s bid to receive pornography in his prison cell, which was dismissed at the permission stage, meaning it wasn’t even heard by a full hearing.

74 Prime Minister’s statement on anti-terror measures, press conference, 5 August 2005

75 The Commission for Equality & Human Rights, due to operate from October 2007, will have a duty to clarify and promote the values in the HRA to both officials and the wider public. It is also mandated to champion the importance of human rights in general, like human rights commissions throughout the world. There will also be a separate Human Rights Commission for Scotland.

76 The 1998 Good Friday Agreement mandated the Northern Ireland Human Rights Commission to consult on supplementary rights, which “together with the European Convention on Human Rights” would “constitute a Bill of Rights for Northern Ireland”. Nearly 10 years on, it is still being consulted upon in conjunction with the all-party Bill of Rights Forum.

describing the HRA as “the first bill of rights this country has seen for three centuries.”⁷⁷

In legal and constitutional terms most of the salient features of bills of rights are present in the HRA. First, like most post-war bills of rights, its pedigree is the 1948 Universal Declaration of Human Rights (UDHR) and its broad, ethical values aimed at establishing fair and tolerant societies.⁷⁸ Characteristically, most of the rights incorporated in the HRA can be legitimately, and proportionately, limited to protect other rights or interests, including what would be recognised as the common good.⁷⁹ The HRA has to be interpreted purposefully, rather than literally. In this sense it is a different species from the technical, “black letter” law characteristic of most British statutes. This is one of the reasons why the tabloids so often get it wrong when they invent stories based on a *literal* interpretation of its provisions.

Second, the HRA provides individuals with a set of fairly simple, written rights which they can use to hold public authorities to account, inside or outside the courtroom. Remedies are available, at the discretion of the courts, where unjustified breaches occur.

Third, British courts can develop their own interpretation of the broad values in the HRA, provided this does not “weaken” the protection afforded by the ECHR.⁸⁰ Contrary to misleading statements by the leader of the Conservative Party,⁸¹ judges are required to “take account of” European Court case law, but are not bound by it. Amendments tabled by the Tories, but rejected by the government, during the passage of the HRA were aimed at tying the domestic courts to Strasbourg jurisprudence. As Conservative MP Edward Leigh observed, without such a mandate “we are in danger of not simply incorporating

77 Speech to the Institute for Public Policy Research, 13 January 2000

78 The 1948 Universal Declaration of Human Rights was a direct response to the horrors of the Holocaust and World War Two. The ECHR gives legal expression to most of the civil and political rights in the UDHR, as its preamble makes clear, but excludes nearly all of its economic, social and cultural rights.

79 ECHR article 5, for example, allows for the deprivation of liberty where there is “reasonable suspicion” that an individual has committed a crime or where it is necessary to prevent one, provided this is promptly followed by release or charge and trial.

80 HRA section 2. Recently, however, the courts have started to interpret this section as if it required the courts to stay within the confines of the case law of the Strasbourg court. See *R (Ullah) v Secretary of State for the Home Department* [2004] UKHL 26 and *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327. This was not the original intention behind the act, one of whose stated aims was to influence Strasbourg jurisprudence via the interpretations that might be put on it by British courts, a development that has started to occur in practice.

81 In his speech declaring his intention to support a British bill of rights, David Cameron wrote that the HRA “makes things worse in that it obliges British courts to base their judgments on the European Convention on Human Rights and [its] case law ... giving them no scope to develop their own principles” (“British Bill of Rights”, speech to Centre for Policy Studies, 26 June 2006).

the Convention in our law but going much further. What we are creating is an entirely new bill of rights.”⁸²

Most importantly, the HRA, like all bills of rights, is effectively a higher law to which virtually all other law and policy must conform where possible. The “possible” relates to the prohibition on striking down statutes; parliament still has the final say.⁸³ Instead, judges can declare acts of parliament incompatible with the HRA, but whether, and if so how, to respond is a decision for parliament, or more realistically government.⁸⁴

This so-called dialogue model was a direct response to criticisms of bills of rights within the Labour Party.⁸⁵ The point was to give parliament a primary role as the custodian of fundamental human rights. Jack Straw emphasised from the outset that higher courts “could make a declaration [of incompatibility] that, subsequently, ministers propose and parliament accepts, should *not* be accepted.”⁸⁶ The example he gave was abortion law, but he might have added fox-hunting bans, gun control and election expenditure limits;⁸⁷ issues that many people would agree are more appropriately decided by elected MPs, working within a human rights framework, rather than by judges.⁸⁸

82 313 HC 398 (3 June 1998)

83 Liberty’s draft bill of rights, *A People’s Charter*, published in 1991, proposed such an approach. This was developed further in unpublished papers on the HRA that I drafted for the Home Secretary in 1997 at the Human Rights Incorporation Project, King’s College Law School, London.

84 At the time of writing, there have been 21 declarations of incompatibility by the higher courts since the HRA came into force in 2000, of which 15 are still standing and six have been overturned on appeal. However, if a court or tribunal finds that a provision in an act of the Scottish parliament is incompatible with European Convention rights, it will be able to strike it down as *ultra vires*. The Australian Capital Territory and the state of Victoria have both recently passed Human Rights Acts explicitly based on the UK model.

85 Describing the intention behind the HRA, Jack Straw said, “Parliament and the judiciary must engage in a serious *dialogue* about the operation and development of the rights in the bill ... this dialogue is the only way in which we can ensure the legislation is a living development that assists our citizens.” (314 HC 1141 4 June 1998) See also Klug, F “The Long Road to Human Rights Compliance” in *Northern Ireland Legal Quarterly, Special Issue: Human Rights & Equality* vol 57, no 1 (Spring 2006). The former Lord Chancellor, Lord Irvine, described the HRA as a “new and dynamic co-operative endeavour ... between the executive, the judiciary and parliament ... in which each works in its *respective constitutional sphere*” – lecture at Durham Human Rights Centre, November 2002.

86 317 HC 1301 (21 October 1998). My emphasis. Lord Hope confirmed this in the case of *R v Shayler* [2002] UKHL 11 at para 53 when he said decisions as to “*whether* [offending legislation] should be amended ... must be left to parliament”. My emphasis

87 Constitutionally speaking, there was no obligation on the government to comply with the Belmarsh indefinite detention ruling either (see above, note 57), although realistically the European Court of Human Rights was likely to take a similar approach to the domestic courts on this issue.

88 It cannot be assumed that the European Court of Human Rights will always take the same view as the domestic courts that an act of parliament breaches European Convention rights. Where there is no “human rights consensus”, the Strasbourg court is likely to affirm the right of national authorities – parliaments as well as courts – to use their own discretion to determine where the balance of rights should lie. This is known as the “doctrine of a margin of appreciation” to national authorities and can even be applied to national security issues where there is no Europe-wide consensus.

Should the Human Rights Act be replaced by a British bill of rights?

Bills of rights are not just legal and constitutional documents, however. They do not only protect the rights of individuals but can have a symbolic role in highlighting the fundamental principles of a democracy and signifying what a country stands for, even when their legal protection falls short of their high ideals. In a modern context, bills of rights can act as a baseline of common values in a diverse society.

Assessed against these criteria, the HRA has clearly failed to pass muster. The reality is that it has never been sufficiently owned by British people as truly theirs. The absence of prior consultation,⁸⁹ and the adoption of a European human rights treaty wholesale, has reduced the likelihood of the HRA ever reaching the iconic status of the American or South African bills of rights.⁹⁰

This was David Cameron's point when he argued for "a modern British bill of rights ... to define the core values which give us our identity as a free nation".⁹¹ The Conservatives have pledged to scrap the HRA whilst remaining signed up to the ECHR, as Cameron confirmed at his first Party conference as leader.⁹²

Commentators of various political persuasions instantly questioned the "constitutional literacy" of this package.⁹³ Probably the strongest critique came from Ken Clarke, chair of the Conservative Party's democracy task force, who dismissed the proposals as "xenophobic" and "legal nonsense".⁹⁴

Is this fair? Legally and constitutionally, the Conservative package seems *confused*, at the very least. Were a British bill of rights to be weaker or more qualified than the ECHR, the UK government would fall foul of the Strasbourg court with increasing regularity.⁹⁵

89 In contrast to the years of local, as well as national, public consultation that preceded bills of rights in Canada, New Zealand and South Africa in the 1980s and 1990s, and more recently in the Australian Capital Territory and state of Victoria, there was no prior consultation in the UK beyond the publication of *Bringing Rights Home* (see above, note 70).

90 Or even the Canadian Charter of Rights & Freedoms, which is also partly based on an international treaty, the UN's International Covenant on Civil & Political Rights, which draws heavily on the Universal Declaration of Human Rights, as does the ECHR.

91 "British Bill of Rights", speech to Centre for Policy Studies, 26 June 2006

92 Speech at the Conservative Party conference, September 2006

93 See, for example: Mary Ann Sieghart in *The Times*, 30 June 2006; Vernon Bogdanor in *The Guardian*, 1 July 2006

94 Quoted in *The Guardian*, 29 July 2006

95 This would be a reversal of recent years. The number of violations involving the British government has fallen since the effect of the HRA started to bite. See July 2006 DCA *Review of the Implementation of the Human Rights Act*, p4. The number of cases where at least one violation of the ECHR was found has fallen from 30 in 2002, when pre-HRA cases were still being heard, to 15 in 2005.

If, to avoid this, the bill of rights were broadly similar to the ECHR, the domestic courts would strive to iron out any differences by interpreting it to comply with the convention whenever they can, as happens elsewhere in Europe.

Cameron's main pitch was that a home-grown bill would encourage the European Court of Human Rights to back off and interfere less with "British parliamentary sovereignty". This is simply wrong. The suggestion that a less broad, more "specific" bill would "protect" the UK from Strasbourg jurisprudence on fundamental rights is a misreading of the court's "margin of appreciation" doctrine.⁹⁶ The whole point of the ECHR was to provide a floor of basic rights across Europe. Evidence from countries such as France or Germany clearly demonstrates this point.⁹⁷ A domestic bill will provide no get-out clause from the absolute prohibition on torture.⁹⁸ Yet Cameron has subsequently declared this goal to be the main purpose of repealing the HRA.⁹⁹

As for the charge of xenophobia, the pledge to replace the HRA with "a clear articulation of *citizen's rights* that *British people* can use in British courts" has to be taken seriously.¹⁰⁰ This could just be a sound bite, but the reference to Britishness appears to extend beyond the *kind* of rights that are enshrined,¹⁰¹ to the people who can lay claim to them.

The underlying philosophy of human rights is, of course, that all human beings are entitled to fundamental rights simply because they are human. British citizens who live and travel abroad protest if they are not treated according to internationally recognised standards. Whilst voting rights and many welfare benefits are usually dependent on citizenship or residence, nearly all the fundamental rights in democratic bills of rights apply to everyone within the jurisdiction of a state. The Bush government built the

96 Cameron seems to have confused the Strasbourg's court "doctrine of a margin of appreciation", which applies when there is no European consensus on what minimum standards consist of, with the concept of subsidiarity, an EU term for retaining national "independence", not applicable to notions of fundamental, universal human rights. See note 88

97 In Germany, for example, the ECHR has the rank of a statute over which the constitution is supreme. However, the European Court of Human Rights does not generally apply the margin of appreciation any differently to Germany than to any other state.

98 As we have seen, there are many areas where the European Court of Human Rights accepts that domestic courts are best placed to use their "own discretion", provided this does not weaken the baseline protection provided by the ECHR; but torture is not one of them. Alongside slavery it is one of the only rights to receive absolute and unqualified protection under the convention. See note 58

99 Cameron wrote in the *Sunday Times* on 12 November 2006, "It is time to replace the HRA with a British bill of rights that will enable ministers to act within the law to protect our society. If M15 tells the government that a foreign national is ... a danger to national security, then the home secretary should be free to balance the rights of the suspect with the rights of society ...and proceed with the deportation if necessary."

100 "British Bill of Rights", speech to Centre for Policy Studies, 26 June 2006. My emphasis

101 Like jury trial or restrictions on the introduction of identity cards, rights with a traditional British pedigree

Guantanamo Bay detention centre for foreign nationals to bypass the natural justice protections of the American constitution. The Conservative package hints at a bill of rights that would exclude non-citizens from some of its provisions from the outset.

Once subjected to deeper scrutiny, these proposals may well unravel as unworkable and illogical. But if they make it into the Tory manifesto un-amended, and a Conservative government takes power, a likely scenario would be swift repeal of the HRA whilst consultation on a bill of rights becomes mired in dispute and delay. Obtaining consensus on a bill of rights, particularly given the conflicting goals of some of the likely participants, is not a simple task.¹⁰²

What is to be done?

The immediate effect of the Tory proposals on the Labour administration was to galvanise senior ministers, including the Prime Minister, into belatedly defending the HRA and claiming that an additional bill of rights would be "a recipe for confusion, not clarity"¹⁰³

This is disingenuous. All 46 members of the Council of Europe have incorporated the ECHR into their law, through one means or another.¹⁰⁴ At least 21 of these have their own bill of rights or written constitutions, enshrining fundamental freedoms. Confusion is avoided by the national courts interpreting their domestic bills to conform broadly with the Strasbourg case law, which has only very occasionally proved difficult or controversial.¹⁰⁵ The argument that a domestic bill of rights, alongside the HRA, is necessarily confusing does not stand up to scrutiny. The claim that introducing a bill of rights necessitates the repeal of the HRA is nonsense.

So what are the choices for a future Prime Minister committed to democratic renewal and constitutional reform?

One option is to reinvigorate the DCA's belated efforts, led by the Lord Chancellor, Charlie Falconer, and the Human Rights Minister, Cathy Ashton, to defend and promote the HRA

102 Shadow Constitutional Affairs Minister, Henry Billingham, hinted at the fragility of the Tories' commitment when he said in a recent parliamentary debate that "the only answer is to repeal the Human Rights Act and *consider* introducing a new, modern bill of rights ..." 457 HC 80 (19 February 2007). My emphasis

103 Lord Chancellor, Lord Falconer, *Radio 4*, 26 June 2006

104 In states with a monist tradition, the rights in the ECHR can be applied by domestic courts on ratification. In states with a dualist approach to international law, like the UK, the substantive rights must be incorporated by statute to become applicable in domestic law.

105 See the German *Gorgulu* case, decision of the Federal Constitutional Court, 2 BvR 1481/04.

as "common sense"¹⁰⁶ and relevant for everyone.¹⁰⁷ A rebuttal strategy has finally been developed to respond to the more outlandish claims about the act. An increasing number of public-sector bodies are finding the HRA useful in leveraging up standards in their sectors.¹⁰⁸

Despite the relentless tabloid bashing inflicted on the HRA, a YouGov survey commissioned by the Disability Rights Commission in June 2006 found that 62% of respondents thought it was good to have an act of parliament to protect everyone's rights, although ignorance of what is in the HRA was profound.¹⁰⁹

Opinion polls indicate that bills of rights are popular in principle. Support for a bill of rights, at nearly 80%, has remained fairly consistent over the last 15 years according to the ICM State of the Nation polls.¹¹⁰ What these findings also suggest is that even if the HRA can fairly be described as a bill of rights, most people in the UK are ignorant of the fact.

At one level it is extraordinary that the government is in danger of being upstaged by the opposition on the introduction of a bill of rights, when the former has already effectively introduced one. If the government has received virtually no credit for doing so, it largely has itself to blame. Far from consistently promoting the HRA as Britain's bill of rights, enshrining values such as free speech and a fair trial that have a long British pedigree, the act has sometimes been presented like an elaborate European directive! Yet without the HRA it is highly unlikely there would now be all-party support for some kind of catalogue of written rights.¹¹¹

The Conservative support for a bill of rights opens up a second option: the opportunity to consult on additional rights that might *supplement* – but *not replace* – the HRA to create a distinctively British bill of rights.¹¹² If the UK is to remain within the ECHR, as every

106 Lord Chancellor "Human Rights and Common Sense", Harry Street lecture, Manchester University, 9 February 2007

107 Lord Chancellor "Human Rights are Majority Rights", Lord Morris memorial lecture, Bangor University, 23 March 2007

108 The British Institute of Human Rights works with a range of public bodies to apply the standards in the HRA in everyday life.

109 70% of respondents could not name three of their rights.

110 In 1991 79% thought their rights would be better protected if written in a single document. By 2006 77% agreed strongly or slightly that Britain needs a bill of rights to protect the liberty of individuals, with only 6% disagreeing. However, some of the rights attracting strongest support in 2006 are not included in the HRA, such as the right to a fair trial by jury and free hospital treatment.

111 All three major parties support either the introduction of a bill of rights or the incorporation of the ECHR.

112 "British" as in the pedigree of some of the rights it upholds, not as in the people who are entitled to its protection. A British bill of rights could either consolidate the rights in the HRA or, as effectively happens in much of Europe, run alongside it.

mainstream political party intends, no other approach to a bill of rights makes sense. This, as we have seen, is what Labour had originally envisaged, and is an on-going process in Northern Ireland.¹¹³ An inclusive and deliberative process could, ironically, rehabilitate the HRA more successfully than any campaign, by clarifying the rights it *already* enshrines and its purpose and relevance to everyone in the UK.

The Tories have suggested that a British bill of rights should include issues like data protection, which is inadequately protected by the HRA, or jury trial, which is absent from it.¹¹⁴ Their list is not large because the HRA includes all the minimum, standard rights present in bills of rights the world over. Other potential candidates for consultation could include a stronger equality clause;¹¹⁵ a more extensive right to education; a right to healthcare free at the point of need;¹¹⁶ provisions from the Children's Convention;¹¹⁷ and carers' and independent living rights from the new UN Convention on the Rights of Persons with Disabilities.¹¹⁸

Some commentators propose introducing a bill of rights and responsibilities. The 2006 Victoria Charter of Human Rights & Responsibilities¹¹⁹ asserts in a preamble that "human rights come with responsibilities and must be exercised in a way that respects the human rights of others." This was drafted, in response to community consultation, to underline the implied or explicit vision of all post-war human rights treaties, including the ECHR.¹²⁰ Rights can, and sometimes should, be limited when necessary to protect the rights of others or the wider community.¹²¹ But very few bills of rights contain *legally enforceable*

113 See notes 38 and 76

114 See in particular: Dominic Grieve "Liberty and Community in Britain", speech to the Conservative Liberty Forum, 2 October 2006

115 Article 14 is limited to outlawing discrimination in relation to the civil and political rights enshrined in the ECHR and does not explicitly include categories like age, disability and sexual orientation, although the interpretation of article 14 has increasingly included these groups.

116 Rights to education and health could reflect state obligations that already exist – for example, providing healthcare at the point of need – but which are "unprotected" from easy repeal. Polls suggest that such social and economic rights are the most popular candidates for a bill of rights. Following the path of the South African argument, to guard against excessive individualism overriding the public interest, the state could be duty bound only to "progressively realise" economic and social rights that are not already enshrined in law. This reflects the provisions of the International Covenant on Economic Social & Cultural Rights, which the UK has been bound by since 1976.

117 The 1990 UN Convention on the Rights of the Child includes recognition of the "rights and duties of parents".

118 See: www.un.org/disabilities/convention/

119 Note 89

120 Article 10 of the ECHR, for example, refers to the "duties and responsibilities" that correspond with the right to free expression, which can be limited, to the extent that it is necessary, to protect national security, public safety, the prevention of disorder or crime and the reputation and rights of others.

121 Article 29 of the Universal Declaration of Human Rights states: "Everyone has duties to the community in which alone the free and full development of his personality is possible."

duties aimed at individuals.¹²² These are contained in a host of other statutes.

As significant as the rights upheld by any bill of rights is the body selected to be the final arbiter of its broad values.¹²³ The current "dialogue model" adopted by the HRA, in which parliament has the final say, is not one that any government is likely to alter significantly to give stronger powers to the courts, least of all one concerned to reduce judicial "interference" with its anti-terrorism policy.¹²⁴

The strongest case for consulting on a British bill of rights in this period of on-going debate on our national identity is that we have no equivalent to the American or South African bills of rights to turn to at times of national tension. Yet there has arguably never been a time in modern history where a foundational document is more necessary; a charter that reinforces the right to choose to be different, as well as the bottom line values of fairness, equality and tolerance that are definitive of modern British democracy.¹²⁵ A bill of rights can provide a unifying force in a diverse society, as the Conservative Party has suggested, but it will not do this if it ignores the contribution of many countries, and most religions and cultures, to the human rights values recognised throughout the world today.¹²⁶

The process of adopting a bill of rights can be as important as the rights themselves. If the objectives are clear and the process is inclusive, this is an opportunity to return to the unfinished project begun by John Smith. A project he referred to as a "new deal" between "the people and the state". A deal that "gives people new powers and a stronger voice in the affairs of the nation"; one that "restores a sense of cohesion and vitality to our national life".¹²⁷

With thanks to Helen Wildbore for her meticulous research assistance.

122 Exceptions include the constitution of the former Soviet Union and some African bills of rights.

123 Cameron proposes to semi-entrench a bill of rights by amending the Parliament Act so that the House of Commons could not amend or repeal it without the support of the second chamber. This seems an innovative idea.

124 See note 99. America, Canada, Germany and South Africa all have "legislative strike down" powers, by contrast.

125 In a speech on "multiculturalism and integration" for the Runnymede Trust on 8 December 2006 the Prime Minister, Tony Blair, spoke of the need to "conform" to "our common values", which he defined as the rule of law, democratic decision making, and freedom from violence and discrimination.

126 The Universal Declaration of Human Rights reflects the insights and values of all major religions and cultures, and many of these are reflected in the ECHR, in spite of its European designation. South African MP Professor Kader Asmal, in a speech on the South African constitution at Chatham House on 10 November 2006, warned that a "shared vision of national identity" could, if based on a "mythical past" rather than the future, bring with it "the alienation of many immigrants and communities" whose experience belies the "imagining" of a Britain "that has always held dear the values of liberty, tolerance and social justice".

127 Smith, *J A Citizen's Democracy*, p5, note 14

Chapter 16

Towards a written constitution?

Professor Dawn Oliver, Professor of Constitutional Law at
University College London

Towards a written constitution?

In this paper I shall explore:

- how, if at all, the UK could achieve a written constitution;
- whether a "big bang" or incremental approach would be preferable;
- what if any case there is for a referendum as part of the process; and
- what other consultative or legitimating institutions might be needed, for instance a constitutional assembly.

First, my view is that it is extremely unlikely that the UK will acquire a written constitution in the foreseeable future. This is because the current arrangements in fact suit all the influential political actors. The system is highly tribal, and although the tribes involved dislike one another, the two main ones, the Labour Party and the Conservatives, actually enjoy the tribal system, with its promise of unbridled power and patronage in the future even if for the time being they are not in power.

So unless it appears to both of the main tribes that it would be advantageous, probably for some external reason such as to hold Europe at bay, there will not be sufficient consensus to enable a new written constitution to be enacted, unless perhaps it were to do no more than write down the existing system, without entrenching it.

New Zealand has written down its system recently, so this would be a possibility, but a question is: what is the point of writing it down? The obvious one would be to make it clearer what the system was and to educate the public about it by making available a relatively short and clear document setting it out. A problem with that approach, however, is that there is considerable ambiguity about what the rules of the UK's constitution currently are, and there would be disagreement about which ones should be written down and which should be left to tradition or convention. There would be a risk of an enormously long document emerging that would not serve the educative role of a constitution, if that were one of the justifications for the exercise.

It would also be impossible to avoid commentators pressing for the opportunity to be taken to reform the constitution while we are about it, rather than just write it down. The project would undoubtedly attract a lot of attention to matters of relatively peripheral importance such as the establishment of the Church of England, and the monarchy.

When I say "relatively peripheral" I do of course accept that these are both important aspects of our constitutional arrangements, and rather controversial in some quarters. But they are not nearly as important for the day-to-day operation of the system of government, or as controversial as, for instance, the electoral system to the House of Commons, whether the Human Rights Act should be reformed, or the composition of the House of Lords.

As soon as a project was launched to write down the existing system, various organised groups would certainly object on the basis that certain issues needed to be reformed. My own sense is that energy would be disproportionately expended on aspects of the system that are not doing much or any harm, such as the position of the Church of England and the monarchy, rather than more important aspects which are not, in my view, working or are working against the spirit – or what should be the spirit – of the constitution.

Seeking a consensus

A major problem, then, would be in seeking some kind of consensus about the spirit of the constitution – the meanings and relative weight of, for instance, responsible government, effective government, representative government, democratic government, rights-based democracy, citizenship, subsidiarity within the UK, and so on.

So consensus would be difficult to achieve. But why does consensus matter at all? I consider consensus to be important when writing down or reforming the UK constitution, both because there is a kind of tradition in the UK that constitutional reform should not be put in place for party political advantage, for else its legitimacy will be in question, and partly because a highly controversial, imposed reform would be unstable.

The process by which devolution to Scotland was put in place, with the Scottish Constitutional Convention achieving broad agreement on the terms of devolution and the British government largely adopting those proposals, was ideal. But it could not be replicated at UK level. There is no sufficient movement for a written constitution across the UK to make this possible. (Consensus was not complete in Scotland, because the Conservative Party and the Scottish Nationalists were not party to it. But it was sufficient to enable the measure to be implemented.)

Thus for the UK to achieve a written constitution, it would be essential to have in place a trusted and neutral institution with a mandate to explore the issues and come up with formulations that would be acceptable to most of those involved in the process of

government as well as to citizens and civil society.

How could this be achieved in the UK? First, the example of the Labour government after its election in 1997 should be followed. The project should be in the winning party's manifesto. Then, after the party has won the election, a referendum should be held, as referendums were in Scotland, Wales and (though the case is different) Northern Ireland before devolution legislation was introduced. That would indicate what support there was for the project, and this might make it easier to have the necessary legislation put in place.

The government would have *institutional* legitimacy for its policy because it had won an election on the constitutional project. The development of a constitution would have *substantive* legitimacy if it had won sufficient support in a referendum. But, to secure confidence that the project was not being manipulated in the interests of the incumbent government party, an independent body – perhaps a constituent assembly, perhaps a royal commission – should be established to consult appropriately and draw up the document.

Once a document emerged from such a process, the question would be how the draft constitution was to be brought into force and effect. Here much would depend on whether the constitution was to be entrenched, or to have only the status of ordinary law, perhaps with provision for "declarations of incompatibility" such as may be made under the Human Rights Act and fast-track remedial orders if subsequent acts of parliament were incompatible with the constitution.

If the constitution were not to be entrenched but were protected in this way, as the Human Rights Act is, then it could be passed as ordinary legislation, though there are issues as to whether the parliamentary process should include that the committee stage should be taken on the floor of the House of Commons, and as to whether the Parliament Acts could be invoked so that a new constitution could or should take effect without the consent of the House of Lords. Whether a draft unentrenched constitution would be passed would depend on the party balance in each chamber, which would in turn depend on whether the second chamber were to any extent elected, and so on, and on what electoral systems those elected in each house got there.

If a written constitution were to be entrenched, then it is unlikely that the entrenchment provisions (for instance, requiring two-thirds majorities for amendment of the constitution, or providing that subsequent constitutionally incompatible legislation was to be invalid) could be effective if the constitution were passed by a simple majority in each house of

parliament. Would the courts refuse to give effect to a later act of parliament that amended the constitution without complying with the entrenching provisions? Would they give effect to a later act that was inconsistent with some part of the constitution though it did not purport to amend it? Much would depend on how the attitude of the courts developed towards "constitutional fundamentals" as they saw them.

Would parliament have to dissolve itself?

The position might also depend on whether the transition to the new constitution involved the present parliament "committing suicide": if the position of the courts is that a recent act of parliament repeals (whether expressly or impliedly) any previous act of parliament, and if the parliament under the new constitution is the same one as we have now, then it would not be possible to entrench the constitution, or not strongly. It would be necessary to replace the present parliament with a new, limited one, and that could probably not be done by an ordinary act of parliament. It would require a new constitution supported by a referendum, or resolutions of the current two houses of parliament endorsing it, and then the two houses of parliament irrevocably dissolving themselves or being dissolved by the monarch.

If, on the other hand, the position of the courts at the time of the adoption of a new constitution were that the parliament under the new constitution is restricted as to its power to amend the constitution, or to pass legislation contrary to it and expect the courts to give effect to that later act, then the constitution could be successfully entrenched.

Another issue would be how the new parliament could be prevented in advance from amending the constitution or passing "unconstitutional" bills. In other countries there is independent pre-legislative scrutiny of draft bills, for instance by the Legislation Advisory Committee in New Zealand or the French Conseil d'Etat and its sister institutions in many European countries. Should the UK emulate these?

Or should there be a court or council of some kind with the power to prevent promulgation of unconstitutional measures that have been passed by the parliament, as the French Conseil Constitutionnel does?

Or would there need to be a body with the power to strike down or "disapply" provisions in legislation that are unconstitutional, as in Germany, the United States, and Australia, for instance?

Big bang versus incremental change

So there are many problems with a big bang approach to introducing a written constitution for the UK. What about a gradual incremental one? Lord Scarman suggested such an approach in *English Law: The New Dimension* in 1976.

One possibility, then, adopting an incremental approach, would be to continue the process of change that has been taking place since 1997, and deal with outstanding issues, such as the electoral system, composition of the House of Lords, a home-grown bill of rights, devolution, a Civil Service Act and so on, bit by bit. A problem here is that while the reforms introduced after the 1997 election were for the most part not motivated by party political manipulation – unless, as in Scotland, that also gave effect to Scottish opinion at the time – it is unlikely that an incumbent government would introduce or tolerate legislation that is against its own interests, such as electoral reform or certain kinds of House of Lords reform.

So the best hope for a move towards a written constitution would be for a newly elected government to come to power on a groundswell of public support for further reform of a non-partisan nature. I can imagine that happening in relation to, for instance, unregulated patronage in the system for appointments to the House of Lords, or party funding or sleaze. But not in relation to, for instance, the removal of bishops from the House of Lords, or reform or abolition of the monarchy, since I find it hard to imagine the political parties and public opinion moving together into “groundswell” mode on these matters.

An energised new government committed to further constitutional reform, possibly a constitution, entrenched or unentrenched, is most likely to come about, if at all, after a long spell in opposition. But electoral reform is a no-no as far as an incremental approach is concerned, because by definition a party introducing such a reform has won an election on the present electoral system and it would be voting itself into opposition, coalition or oblivion if it put through legislation to alter that system.

Appendix

The constitution of the UK as of 1 January 2007

The constitution of the UK as of 1 January 2007

The following is the outcome of a seminar course entitled "Enacting the British Constitution" which was run in the autumn of 2006 at Oxford University.

The purpose of the seminar was to draw up the British constitution roughly as it is now, and not as we might think it ought to be. This was done primarily by the students who attended. Each week a group of two or three students produced a draft of the constitution, which was discussed by the others in the seminar. Where there was contention, the decision was put to a vote of the students themselves.

Seminar tutors

Professor Vernon Bogdanor, Professor of Government at Oxford University

Professor Stefan Vogenauer, Professor of Comparative Law at Oxford University

Seminar participants

Andrew Baldwin, Laura Bradley, Becci Burton, Eleanor Doherty, Sarah Sophie Flemig, Tarunabh Khaitan, Christopher Knight, Tom Lubbock, Oliver Newman, Anna Oldmeadow, Paschalis Paschalidis, Mathias Schallnus, Ruby Thompson, Charlotte Yan

The constitution of the UK

Part 1: The UK and its nationals

Article 1 – The UK comprises England, Scotland, Wales and Northern Ireland. Northern Ireland shall in no circumstances cease to be a part of the UK without the consent of a majority of registered voters in Northern Ireland voting in a poll.

Article 2 – Nationality of the UK

The following are nationals of the UK:

- a. British citizens, except for British citizens from the Channel Islands and the Isle of Man;
- b. British subjects with the right of abode in the UK;
- c. British overseas territories citizens.

Article 3 – British citizenship

- a. British citizenship is acquired by birth, adoption, descent, registration or naturalisation, or is conferred by statute.
- b. A minister may by order deprive a person of British citizenship acquired as a result of registration or naturalisation on the ground that it was obtained by fraud, false representation or concealment of any material fact. But no such person may be deprived of British citizenship unless a minister is satisfied that it is not conducive to the public good that that person should continue to be a British citizen.

Part 2: The head of state

Article 4 – The sovereign

- (1) The head of state is the sovereign who is the descendant of Sophia Electress of Hanover next in line to the throne, as provided by the Act of Settlement 1700, extended to Scotland in 1707 and Northern Ireland in 1801 by Acts of Union.
- (2) The sovereign is the head of the executive and the fount of justice.
- (3) The sovereign is commander-in-chief of the armed forces.
- (4) The sovereign presides at meetings of the Privy Council whose members are

appointed by the sovereign on advice. Only British citizens and citizens of the Republic of Ireland may be members of the Privy Council. Members of the Privy Council are appointed for life but a privy councillor may be removed on advice or at his or her request. Privy councillors are required to take an oath as laid down by statute. The Privy Council exercises advisory functions and functions entrusted to it by statute. Three privy councillors constitute a quorum. The full Privy Council is summoned only for a coronation. Ministers are responsible to parliament for decisions taken by the Privy Council.

- (5) The sovereign is in communion with, and supreme governor of, the Church of England, by law established.
- (6) Any alteration in the succession to the throne requires the consent of the parliaments of the Commonwealth realms as well as the parliament of the UK.
- (7) The sovereign acts on the advice of ministers, except when appointing a Prime Minister, considering a request to dissolve parliament, making a public statement in virtue of the office of head of the Commonwealth or conferring honours, awards, decorations and distinctions that are within the personal gift of the sovereign. The sovereign assents to legislation, unless advised to the contrary by ministers.
- (8) The acts of the sovereign as head of state are not reviewable by the courts. The sovereign is immune from suit and legal process in any civil cause in respect of acts and omissions in the sovereign's private capacity. The sovereign is immune from criminal proceedings in respect of acts and omissions in the sovereign's private or official capacity.
- (9) An annual sum shall be voted by parliament for expenditure incurred by the sovereign, the royal household and by other members of the royal family.
- (10) All persons in the service of the Crown are required to swear or affirm allegiance to the sovereign and his or her heirs according to law.
- (11) The sovereign has the right to be informed upon all matters of state.
- (12) Statutory provision is made for the appointment of a regent in case of the minority or incapacity of the sovereign.

Part 3: The legislative power

Article 5 – Parliament

- (1) Legislative power in the UK is vested in parliament.
- (2) Parliament consists of the sovereign, the House of Lords and the House of Commons.

Article 6 – The House of Commons

- (1) Members of the House of Commons are directly elected in free, equal and secret elections by universal suffrage. Constituencies are regularly reviewed by boundary commissions, chaired by the Speaker of the House of Commons. The revision of constituency boundaries requires parliamentary approval before it can be given statutory effect.
- (2) All Commonwealth citizens and citizens of the Republic of Ireland over the qualifying age, not detained in a penal institution, nor found guilty of a corrupt or illegal practice, who are registered in a parliamentary constituency on the qualifying date shall have the right to vote. Peers entitled to sit in the House of Lords shall not be entitled to vote.
- (3) Details of the electoral process are set out in an act of parliament.
- (4) The following are disqualified from membership of the House of Commons:
 - a) aliens;
 - b) those under the qualifying age;
 - c) bankrupts;
 - d) persons convicted of treason;
 - e) persons currently detained in a penal institution for more than one year;
 - f) persons convicted of illegal election practices;
 - g) holders of various judicial offices;
 - h) civil servants;
 - i) members of the regular armed forces of the crown;
 - j) members of any police force maintained by a police authority;
 - k) ambassadors and High Commissioners;
 - l) election and boundary commissioners and electoral registration officers;

- m) members of a foreign legislature outside the Commonwealth or the Republic of Ireland;
- n) holders of various other public offices, as defined by statute, and
- o) members of the House of Lords.

(5) An electoral commission of the UK is appointed by the sovereign on the advice of the Prime Minister, with the agreement of the Speaker, and following consultations with the leaders of all parties represented in the House of Commons. The commission is responsible for the supervision of elections and referendums, the registration of political parties, and the determination of those who are permitted to participate in a referendum or make donations to political parties.

(6) Political parties wishing to nominate candidates for elections are required to register with the electoral commission and to maintain accounts in accordance with regulations laid down by the commission.

(7) The chief officer of the House of Commons is the Speaker, who is elected by the House of Commons at the beginning of each new parliament or on the death or retirement of the previous office-holder. The Speaker does not belong to any political party and votes only in the case of a tie when the Speaker votes for further discussion where that is possible. The Speaker represents and presides over the house, enforces the rules which govern its conduct, and protects the rights and privileges of the house. The Speaker has full authority to enforce the rules of the house, and powers to regulate the conduct of debate. In cases of grave and continuous disorder, the Speaker may adjourn or suspend the sitting. The Speaker may order a member of parliament who breaks the rules of the house to leave the chamber, initiate a short suspension or put the matter to a vote.

(8) Members of parliament are remunerated from public funds, and may claim various allowances as determined by the House of Commons.

(9) Members of parliament are required to observe the code of conduct. They are required to register pecuniary interests and various other benefits in a register of interests. The register is supervised by an independent parliamentary commissioner for standards.

(10) Parties which sit in the House of Commons but do not support the government constitute the opposition. The leader of the opposition is the leader of the largest

of these parties. The leader of the opposition in the House of Commons and the leader in the opposition in the House of Lords, the chief opposition whip in the House of Commons, the chief opposition whip in the House of Lords, together with not more than two assistant whips in the House of Commons, are remunerated from public funds.

Article 7 – Meeting and dissolution of parliament

- (1) The sovereign summons parliament to meet after each general election, and its duration is from that first meeting until parliament is dissolved. If not dissolved earlier, a parliament ceases to exist five years from the day on which, by writ of summons, it was first appointed to meet, unless extended by acts of parliament.
- (2) The Prime Minister may at any time ask the sovereign for a dissolution of parliament. Such a request will be granted unless the sovereign believes that an alternative Prime Minister, able to secure the support of the House of Commons, can be found.
- (3) A Prime Minister defeated in a vote of confidence in the House of Commons either resigns or requests a dissolution.

Article 8 – The House of Lords

- (1) The House of Lords comprises the following categories:
 - (a) Life peers under the Life Peerages Act, 1958. Life peers in this category are appointed by the sovereign on the advice of the Prime Minister. An independent appointments committee recommends non-party life peerages to the Prime Minister. The Prime Minister may also recommend the appointment of non-party peers. Party peerages are recommended to the Prime Minister by party leaders, and vetted by the appointments commission to ensure propriety.
 - (b) Ninety-two hereditary peers, as provided by the House of Lords Act 1999.
 - (c) The lords spiritual, who comprise the archbishops of Canterbury and York and the bishops of London, Durham and Winchester, together with 21 other diocesan bishops by seniority of appointment. The lords spiritual remain members solely during the tenure of their sees.

- (d) Until 2009, life peers under the Appellate Jurisdiction Act 1876, as amended. Life peers in this category are appointed by the sovereign, on the advice of the Prime Minister, following a recommendation by a selection committee. But, from 2009, peers in this category shall be disqualified from sitting and voting in the House of Lords as long as they remain justices of the Supreme Court.
- (3) The chief officer of the House of Lords is the Lord Speaker, who is elected by the members of the House of Lords every five years or on the death, retirement or resignation of the previous Lord Speaker. The Lord Speaker does not belong to any political party, and votes only in the case of a tie when the Lord Speaker votes for further discussion where that is possible. No Lord Speaker serves for more than two five-year terms. The Lord Speaker presides over the house, offers advice on procedure outside the chamber, acts as an ambassador for the work of the Lords at home and abroad, and participates in certain ceremonial duties, including the state opening of parliament. The Lord Speaker has no power to act in the house nor to discipline members without the consent of the house.
- (4) Members of the House of Lords are required to observe the principles in the code of conduct. They are required to register various pecuniary interests and other benefits in a register of interests.

Article 9 – Powers of the two houses

- (1) The House of Commons alone may propose alterations in financial charges on public funds, taxes or other charges.
- (2) A public bill, certified by the Speaker of the House of Commons as a money bill, that has been passed by the House of Commons, but has not been passed by the House of Lords without amendment within one month of the House of Lords having received it, is, nevertheless, unless the House of Commons directs otherwise, presented to the sovereign for royal assent.
- (3) Any other public bill which originates and has been passed by the House of Commons in two successive sessions and which, having been sent to the House of Lords at least one month before the end of the session, has been rejected by the House of Lords in each of these sessions, is, on its rejection for the second time by the House of Lords, unless the House of Commons directs otherwise, nevertheless

presented to the sovereign for royal assent; provided that at least one year has elapsed between the second reading of the bill in the House of Commons in the first session and its passing the Commons in the second session.

- (4) The provisions of paragraph (3) of this article do not apply to a bill to extend the maximum duration of parliament beyond five years, for which the consent of both houses is needed, nor to any amendment to this constitution under article 59 (1).

Article 10 – Privileges of parliament

- (1) The freedom of speech, and debates or proceedings in parliament are not impeached or questioned outside parliament.
- (2) The House of Commons has the power to expel a member whom it deems to be unfit to continue in that capacity, and also to adjudicate upon cases of disqualification of members not covered by an act of parliament.
- (3) Each house has the right to control its own proceedings and to regulate its internal affairs and whatever takes place within its walls.
- (4) Each house has the power to punish for breach of its privilege or for contempt.

Article 11 – Legislative measures of the European Union

Legislative measures of the European Union that are directly effective have legal effect in the UK.

Part 4: The executive power

Article 12 – The executive

- (1) The executive power of the UK is vested in the sovereign, but all executive acts are performed by ministers in the sovereign's name. Ministers are required to observe the principles of administrative law which apply to the interpretation of executive acts.
- (2) The executive power includes authority to appoint and remove officers of the armed forces, to declare war, to command the armed forces, to recognise foreign jurisdictions, to exchange envoys, to sign and ratify treaties, to make appointments not otherwise

provided for, to grant charters, to grant honours and to grant mercy.

- (3) All executive powers are exercised subject to the legislation, if any, governing the circumstance and mode of such exercise.
- (4) Declarations of war and deployment of armed forces to engage in armed conflict require the consent of the House of Commons, except in circumstances that do not admit of delay.
- (5) Subject to schedule 2 of the European Communities Act 1972, obligations of the UK arising under EU law may be implemented by order in council or by statutory instrument.

Article 13 – Appointment and removal of ministers

- (1) The government consists of a Prime Minister, a Cabinet and other ministers. The maximum number of holders of ministerial office entitled to sit and vote in the House of Commons at any one time is 95.
- (2) The sovereign appoints as Prime Minister the person who appears best able to form a government enjoying the confidence of the House of Commons.
- (3) All ministers besides the Prime Minister are appointed and removed, and have their individual responsibilities determined, by the sovereign upon the Prime Minister's advice.
- (4) All ministers must be, or within three months of their appointment become, members of the House of Lords or House of Commons.
- (5) The Prime Minister and all ministers of the Treasury must be or become members of the House of Commons.

Article 14 – The Cabinet

- (1) The Prime Minister, the heads of the executive departments and such other ministers as the Prime Minister determines, comprise a Cabinet, which is summoned and chaired by the Prime Minister.

(2) The Cabinet is collectively responsible for its decisions.

Article 15 – The ministerial code

(1) The ethical standards required of ministers are laid out in a code formulated and published by the Prime Minister.

(2) The Prime Minister is responsible for enforcing the ministerial code, and is also bound by it.

Article 16 – Relations between the government and parliament

(1) Ministers are always entitled to be heard in the house of parliament of which they are members. A minister who has resigned or been removed is entitled to make an address to the house of which he or she is a member.

(2) The government must present receipts of revenue and estimates of expenditure to the House of Commons at least once in every year.

(3) Every minister who is a member of the House of Commons is personally accountable to the house for all matters within his or her portfolio. Ministers may not deceive or knowingly mislead parliament or the public.

Article 17 – The civil service

(1) A civil servant is a servant of the Crown employed in a civil capacity who is paid wholly and directly from monies voted by parliament.

(2) Civil servants are recruited on the basis of merit and promoted on the basis of ability. They are politically impartial at all times.

(3) There shall be a civil service commission, appointed by the Crown under royal prerogative, and independent of ministers, to ensure that selection to the civil service is based on the principle of fair and open competition, and to hear appeals under the civil service code.

(4) The civil service supports ministers individually and collectively in formulating policy

and in administering public services for which the government is responsible. Civil servants give honest and impartial advice to ministers and make all information relevant to a decision available to ministers. They may not deceive or knowingly mislead ministers, parliament or the public. They must conduct themselves in such a way as to deserve and retain the confidence of ministers and to be able to establish the same relationship with those whom they may be required to serve in some future administration.

(5) The ethical standards required of civil servants are provided for in a civil service code.

(6) Ministers uphold the political impartiality of the civil service. They may not ask civil servants to act in any way that would conflict with the civil service code.

Article 18 – The police

There shall be a police authority for every area of the UK. Police authorities in England and Wales shall comprise magistrates, local authority representatives and independent members, except that the police authority for the City of London shall be the police committee of the Corporation of London. In Scotland police authorities shall comprise members of local authorities. In Northern Ireland the police authority is the Northern Ireland Policing Board. It is the duty of every police authority to secure the maintenance of an efficient and effective police force for its area. Every police authority must appoint, with the approval of the responsible minister, a chief constable, except that, in London, the head of the police force is the Metropolitan Commissioner, who is appointed by the sovereign on advice.

Article 19 – The armed forces

The armed forces of the UK comprise the Royal Navy, the Army and the Royal Air Force. Officers in the armed forces are commissioned by the Crown, and may be dismissed at the pleasure of the Crown, but they may not resign their commission without leave. There shall be no standing army in time of peace without the consent of parliament.

Article 20 – The security and secret intelligence services

The security and secret intelligence services are required to protect national security from, in particular, espionage, sabotage and terrorism. Their powers are laid down by statute and

they are accountable to responsible ministers.

Article 21 – Public inquiries

An act of parliament provides for the establishment and conduct of public inquiries into matters of public concern.

Article 22 – Emergency powers

The sovereign may, on advice, proclaim that a state of emergency exists, in time of war, or when there is a threat to the life of the nation. The occasion of such a proclamation must be communicated to parliament. During the existence of a state of emergency, the Crown has power, by order in council, to make regulations for securing the essentials of life to the community. But such regulations may not impose any form of compulsory military service nor industrial conscription.

Part 5: Devolution and local government

Article 23 – Devolution

- (1) There shall be a Scottish parliament, a Northern Ireland assembly and a national assembly for Wales. Their powers are laid down by statute.
- (2) The establishment of a directly elected, territorially based body enjoying legislative or executive powers devolved from parliament requires a referendum.

Article 24 – Local government

- (1) There shall be directly elected local authorities covering every area of the UK, and appropriate to the character and needs of each.
- (2) Local authorities have powers to promote the economic, social and environmental well-being of the areas that they represent.
- (3) Local authorities may raise taxes as provided for by an act of parliament or by the devolved bodies.

(4) The boundaries of a local government area may be revised by the electoral commission.

(5) The executive of a local authority is either a cabinet or a directly elected mayor.

Before the office of directly elected mayor is instituted in a local government, a referendum is held in that local government area to ascertain the view of its electorate. In any local authority area, 5% of the registered electorate in that area can require, by petition, that such a referendum to be held.

Article 25 – Proviso

Nothing in this part affects article 5(1).

Part 6: The judicial power

Article 26 – The judicial power

The judicial power is exercised, until 2009, by the appellate committee of the House of Lords and the judicial committee of the Privy Council; and, after 2009, by the Supreme Court and the courts of England and Wales, Scotland and Northern Ireland, the decisions of which are executed in the name of the sovereign, and by tribunals.

Article 27 – Extraordinary courts

The establishment of extraordinary courts requires an act of parliament.

Article 28 – Head of the judiciary

The Lord Chief Justice is head of the judiciary in England and Wales; the Lord President of the Court of Session is head of the judiciary in Scotland; the Lord Chief Justice of Northern Ireland is head of the judiciary in Northern Ireland.

Article 29 – Independence of the judiciary

(1) The judiciary is independent of the other branches of government.

(2) Ministers are required to uphold the independence of the judiciary. The Lord Chancellor is responsible for defending the independence of the judiciary. This includes the duty to ensure the support necessary to enable them to exercise their functions.

Article 30 – Publicity of sittings

The sittings of all courts are public, except in circumstances provided for by act of parliament, and judgments are pronounced at a public sitting.

Article 31 – Supreme Court

(1) The Supreme Court of the UK is the ultimate court of appeal in Great Britain and Northern Ireland, except for Scottish criminal cases.

(2) Subject to statutory restrictions, an appeal lies to the Supreme Court:

(a) in civil and criminal cases, from the Court of Appeal in England and Wales, by leave of that court or of the Supreme Court;

(b) in civil cases, from the Court of Session in Scotland, leave to appeal not normally being required;

(c) in civil and criminal cases, from the Court of Appeal in Northern Ireland, by leave of that court or of the Supreme Court;

(d) in civil and criminal cases, direct from a decision of the High Court in England and Wales or the High Court in Northern Ireland, by leave of the Supreme Court;

(e) from the Court Martial Appeal Court, by leave of that court or of the Supreme Court;

(f) on issues concerning devolution under the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998.

Article 32 – Judicial review

(1) So far as it is possible to do so, legislation and all other rules of law are read and given effect in a way that is compatible with this constitution. The courts do not give effect to any rule that is incompatible with article 59 of this constitution.

(2) If a court is satisfied that a provision of a statute is incompatible with a right enumerated in part 7 of this constitution it may make a declaration of incompatibility.

A minister may then by order make such amendments to the statute as are considered necessary to remove the incompatibility.

- (3) So far as it is possible to do so, legislation and all other rules of law are read and given effect in a way that is compatible with the law of the EU. The courts do not give effect to any rule of law that is incompatible with directly effective EU law.
- (4) Subordinate legislation and administrative action are subject to judicial review.

Article 33 – Appointment and selection of judges

- (1) Judges are appointed by the sovereign on advice.
- (2) There shall be a judicial appointments committee. No person with a legal qualification may be appointed as chair of this committee. The committee shall have a majority of lay members.
- (3) Judges are selected solely on merit, regard being had to the need to encourage diversity in the range of persons available for selection for appointments.
- (4) Judges of the Supreme Court are selected by a selection committee convened by the Lord Chancellor. The Lord Chancellor notifies to the Prime Minister the name of the person selected. The Prime Minister advises the sovereign to appoint this person.
- (5) The Lord President of the Court of Session and the Lord Justice Clerk are nominated by the First Minister of Scotland. The Prime Minister advises the sovereign to appoint this person.
- (6) Other judges are selected by the Judicial Appointments Commission for England & Wales, the Judicial Appointments Board for Scotland, or the Northern Ireland Judicial Appointments Commission. The Lord Chancellor or, in the case of Scotland, the First Minister of Scotland, recommends the persons selected for appointment.
- (7) The Lord Chancellor or, in the case of Scotland, the First Minister of Scotland, may not reject a selection made under paragraphs (4) or (6) of this article unless there is evidence that the person selected is not suitable for the office or is not the best candidate on merit. Reasons must be given for rejection.

Article 34 – Tenure of office

- (1) Judges hold their office during good behaviour, until they reach the age of retirement provided by statute or resign or become incapable of performing their duties.
- (2) Judges of the Supreme Court, the Appeal Court and the High Court may be removed by the sovereign only on an address by both houses of parliament. Judges in the inferior courts may be removed only after compliance with statutory procedures for their removal.

Article 35 – Salaries and pensions

- (1) All judges are entitled to a salary which is to be determined by the Lord Chancellor in agreement with the Treasury and which is to be a charge on the Consolidated Fund of the UK.
- (2) A holder of high judicial office is entitled on retirement from that office to a pension for the rest of his or her life at the annual rate provided by statute.

Part 7: Human rights

Article 36 – Right to life

- (1) Everyone's right to life shall be protected by law.
- (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force that is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 37 – Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 38 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 39 – Prohibition of slavery and forced labour

- (1) No one shall be held in slavery or servitude.
- (2) No one shall be required to perform forced or compulsory labour.
- (3) For the purpose of this article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of article 5 of this convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service that forms part of normal civic obligations.

Article 40 – Right to liberty and security

- (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;

- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- (2) Everyone who is arrested shall be informed promptly, in a language that he understands, of the reasons for his arrest and of any charge against him.
- (3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 41 – Right to a fair trial

- (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- (3) Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language that he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 42 – No punishment without law

- (1) No one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

- (2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 43 – Right to respect for private and family life

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 44 – Freedom of thought, conscience and religion

- (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
- (3) If a court's or tribunal's determination of any question arising under this part of the constitution might affect the exercise by a religious organisation (itself or its members collectively) of the right to freedom of thought, conscience and religion, the court or tribunal must have particular regard to the importance of that right.

Article 45 – Freedom of expression

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent requiring

the licensing of broadcasting, television or cinema enterprises.

- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 46 – Freedom of assembly and association

- (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

Article 47 – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 48 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this constitution shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 49 – Restrictions on political activity of aliens

Nothing in articles 45, 46 and 48 shall be regarded as preventing the imposition of restrictions on the political activity of aliens.

Article 50 – Prohibition of abuse of rights

Nothing in this part of the constitution may be interpreted as implying for the state, a group or a person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in this constitution.

Article 51 – Limitation on use of restrictions on rights

The restrictions permitted under this constitution to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Article 52 – Protection of property

- (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- (2) The preceding provisions shall not, however, in any way impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 53 – Right to education

No person shall be denied the right to education. In the exercise of any functions that it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 54 – Right to free elections

Free elections are held at reasonable intervals by secret ballot, under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 55 – Freedom of information

There shall be a right of access to information held by public authorities subject to exceptions determined by statute.

Article 56 – Right to healthcare and subsistence

No person shall be denied the right to a minimum standard of healthcare and subsistence as set out in statutory provisions to be enacted from time to time.

Article 57 – Interpretation of human rights provisions

(1) A court or tribunal determining a question which has arisen in connection with one of the rights and freedoms enumerated in articles 36-49 of this constitution must take into account:

- (a) any judgment, decision, declaration or advisory opinion of the European Court of Human Rights;
- (b) any opinion of the European Commission of Human Rights given in a report adopted under article 31 of the European Convention on Human Rights;
- (c) any decision of the European Commission of Human Rights in connection with article 26 or 27(2) of the European Convention on Human Rights; or
- (d) any decision of the committee of ministers taken under article 46 of the European Convention on Human Rights;

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

- (2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this article is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.
- (3) In this article "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this article:
- (a) by the Lord Chancellor or a Secretary of State, in relation to any proceedings outside Scotland;
 - (b) by the Secretary of State for Scotland, in relation to proceedings in Scotland; or
 - (c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland:
 - (i) which deals with transferred matters; and
 - (ii) for which no rules made under paragraph (a) of this article are in force.

Article 58 – Derogation

In time of war or other public emergency threatening the life of the nation, the government may derogate from the above rights providing that such derogation is not inconsistent with the obligations of international law. There can, however, be no derogation of the rights in articles 36, 38 – except in respect of deaths resulting from lawful acts of war – 39 and 42.

Part 8: Amendment and commencement

Article 59 – Amendment

- (1) This constitution may be amended by legislation passed by the Crown in parliament, with the assent of the sovereign, the House of Lords and the House of Commons.
- (2) Any amendment must be brought expressly through a constitutional amendment bill. A Constitutional Amendment Act purporting to amend or repeal the provisions in article 23(2) of this constitution must be approved in a referendum before coming into effect.

Article 60 – Commencement

This constitution comes into force at the end of the period of 12 months beginning with the day on which it is passed. *Oxford, March 2007*

Andrew Baldwin (St Antony's)
Laura Bradley (Exeter)
Becci Burton (St Hilda's)
Eleanor Doherty (Oriental)
Sarah Sophie Flemig (Brasenose)
Tarunabh Khaitan (Exeter)
Christopher Knight (St John's)
Tom Lubbock (Brasenose)
Oliver Newman (Brasenose)
Anna Oldmeadow (University)
Paschalis Paschalidis (Harris Manchester)
Mathias Schallnus (Brasenose)
Ruby Thompson (Brasenose)
Charlotte Yan (St Hilda's)

Professor Vernon Bogdanor (Brasenose)
Professor Stefan Vogenauer (Brasenose)

Professor Vernon Bogdanor and Professor Stefan Vogenauer are grateful for the assistance of, amongst others, Professor Anthony Bradley, Sir Edward and Lady Caldwell, Emma Douglas of Justice, Lord Goodhart, David Pannick, QC and Wilf Stevenson. But they are not to be assumed to be in agreement with the provisions of this constitution.