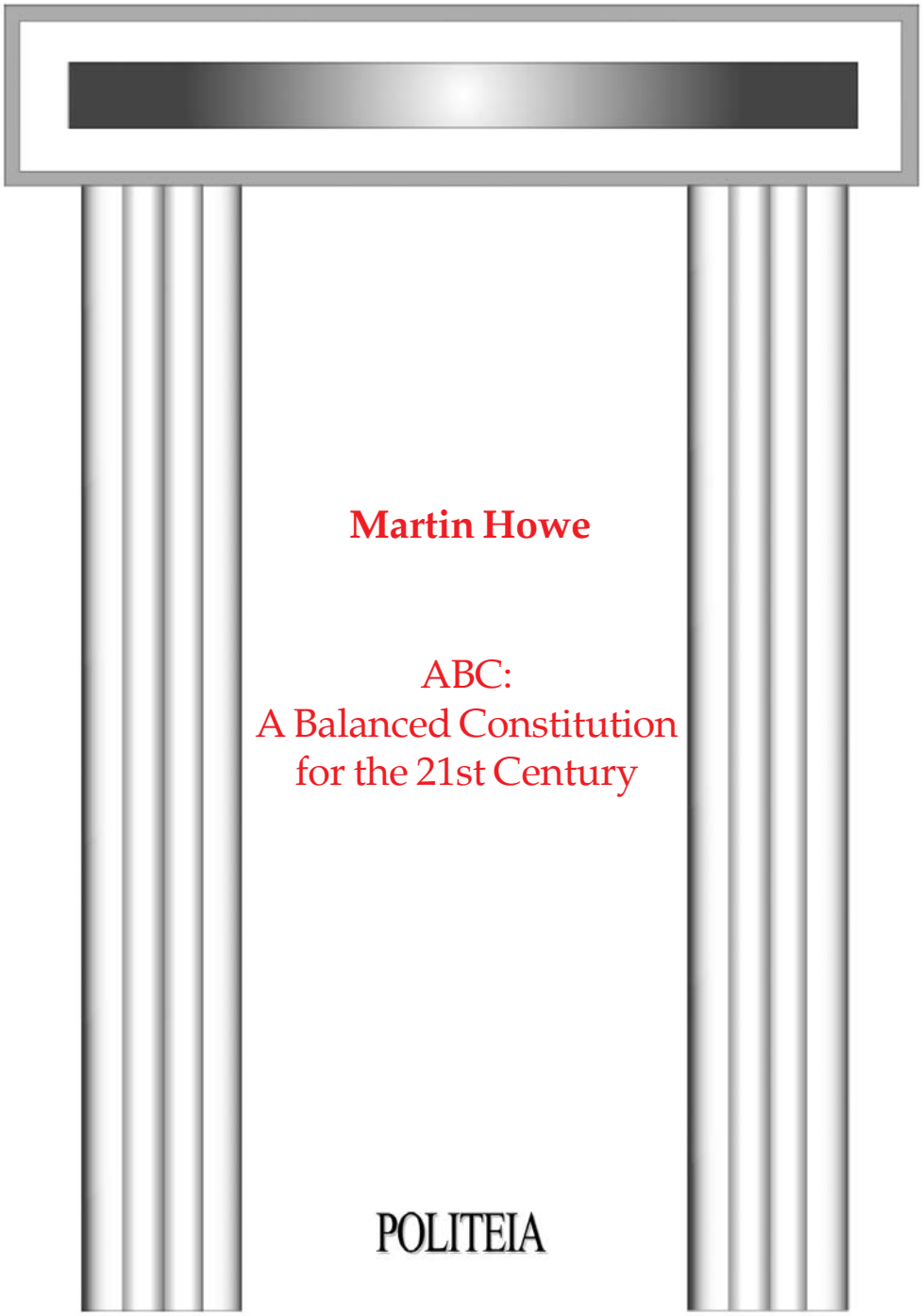

Martin Howe

ABC:
A Balanced Constitution for the 21st Century

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CONTENTS

I
Why is Constitutional Reform Needed?

Since it was elected in 1997, constitutional change has preoccupied the present Labour Government. Devolution, the House of Lords, the Human Rights Act and the highest courts have all been areas where the present Government has introduced constitutional changes. It has attempted to create an elected tier of regional government in England, although that attempt has stalled after its rejection by the voters of the North East region. One possible view is that there have been enough, or possibly too many, constitutional changes in the last few years. Why then should it be necessary or desirable to propose yet further constitutional changes?

The answer is that the constitutional changes made by New Labour have been selective and incomplete. They have left the constitution seriously out of balance. Devolution – particularly devolution in Scotland – has led to an absurd and unfair situation. MPs from Scotland sitting at Westminster cannot vote on a wide range of matters affecting their own constituents which now fall within the powers of the Scottish Parliament. These matters include the fields of education, health, most of criminal law and criminal and civil justice. But those Scottish MPs can vote on those very same matters as they affect citizens in England.

Thus, the votes of MPs from Scotland sustained the Government's Bill to introduce university tuition fees in England and Wales. But Scottish MPs, in common with all other MPs at Westminster, cannot vote on university tuition fees in Scottish universities because education in Scotland falls within the powers of the separately elected members of the Scottish Parliament. The Scottish Parliament has chosen not to introduce tuition fees in Scottish universities, so we see the spectacle of Scottish MPs at Westminster voting to impose a policy on England which will not be imposed on their own constituents.

This paradox was aired by Tam Dalyell, then MP for West Lothian, when he predicted the consequences of Scottish devolution, which became known as the "West Lothian Question": how could it be right that a Scottish MP at Westminster after devolution could vote upon matters such as education affecting English seats – but that same MP could not vote on such matters affecting his own constituency because they would have been devolved to a Scottish Parliament? He asked: "How could it be that the Member of Parliament for West Lothian could vote on matters affecting West Bromwich but not West Lothian? For how long could the MP representing Blackburn, West Lothian, vote on education affecting Blackburn, Lancashire but not on the very same matters in Blackburn, West Lothian? How long could the MP representing Linlithgow, in Scotland, vote on local government in Liverpool, but not in Linlithgow?

Twenty-two years have gone by, and the answer has there come, none."[1]

Reform of the House of Lords has proceeded only half way and has then stopped. The House has been partially "modernised" by removing most of the hereditary peers, but the resultant vacancies have been filled by a process of appointment which gives enormous powers of patronage to the government of the day. At the same time, the Government has threatened further to curtail the limited legislative powers of the House of Lords without coming up with a clear plan for its future role and functions as part of a bicameral legislative system.

The Human Rights Act 1998 has engendered serious problems in its operation which the present Government has struggled to overcome. Most importantly, the Act has distorted the Government's response to terrorism, making that response at one and the same time less effective and more illiberal than it need have been.[2] It has also altered the relationship between the executive and the judiciary. The judges, with varying degrees of willingness, have become more and more involved in taking decisions which have essentially political rather then legal content. In some important respects, they have seized greater powers than the Act intended to give them; for example, by holding that the Act's provision requiring them to "interpret" other legislation in accordance with European Convention rights entitles the courts notionally to write in new sentences and clauses. This is not a process of "interpretation" in any orthodox or recognised sense, but savours more of legislation by judges.

The increased political role given to the judges as a result of the Human Rights Act has led to an unfortunate reaction on the part of some politicians. In breach of well-recognised constitutional conventions, ministers in the present Government have subjected the judges to public criticism for failing to reach decisions under the Act which comply with the Government's wishes. This is intolerable and threatens the independence of the judiciary upon which freedom under law depends. Having invited the judges to step on to the political stage by passing the Human Rights Act, ministers cannot then seek to turn them into rubber stamps with the function of placing the words "Human Rights Compliant" on all the Government's policies.

The yet-to-be implemented legislation to create a Supreme Court for the United Kingdom was passed without any clear thought about these issues as part of a "back of an envelope" political gesture of abolishing the office of Lord Chancellor. Once the judiciary is given or assumes a significant political role then it becomes virtually inevitable that there must be some form of political accountability in the mechanism for their appointment. It is a difficult task to achieve a proper and appropriate level of political accountability without on the one hand making the judiciary subservient to the government of the day, or on the other hand entrusting excessive power to an appointments commission which becomes a self-perpetuating oligarchy.

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1 Tam Dalyell, *Devolution: the end of Britain*, in Keith Sutherland ed, *The rape of the constitution*, Academic, 2000, p. 259.

2 For a detailed description of these issues, see *Tackling Terrorism: The European Human Rights Convention and the Enemy Within* by Martin Howe, Politeia 2001, updated 2003.

Devolution, the House of Lords, the Human Rights Act and the highest courts are all areas where the present Government has introduced constitutional changes which either need to be rebalanced or are incomplete and need to be carried through to completion. But there are a number of other areas where, without making any formal constitutional changes, the present Government has altered previous constitutional practice in quite a profound way. Some of its actions have exposed serious weaknesses in our present constitution.

Many of our constitutional checks and balances rely on conventions rather than on more formal mechanisms. This is a defining feature of the British constitution compared with the constitutions of most other countries. Constitutional writers of the past have waxed lyrical about the superiority and flexibility of constitutional conventions. Sadly, some actions of the present Government demonstrate that relying on constitutional conventions to protect our liberties is something which belongs to a past age. A gentlemanly willingness to respect conventions is not part of a "modernised" world view.

The present Government has used its majority to ride roughshod over Parliament. On a scale not seen in previous Parliaments, it routinely uses guillotine motions to curtail debate on legislation. As a result, Bills are sent up to the House of Lords in some cases with the majority of their clauses having received no detailed consideration in the Commons. The procedures of the House of Commons offer no safeguards against a simple majority of the House under the control of government whips using procedural motions to pass whatever measures they like by whatever curtailed procedure they like.

Even guillotined scrutiny of Bills is better than the lack of effective scrutiny given to statutory instruments. More and more important laws are now being introduced in the form of statutory instruments. Statutory instruments are regulations, orders or rules which have the force of law. They are made by a Minister, or sometimes by some other committee or body, in accordance with powers granted by an Act of Parliament. Many Acts confer powers to make statutory instruments for purposes specified in the Act. The powers to make statutory instruments are often very widely defined, and in some cases statutory instruments can even be used to repeal or amend Acts of Parliament: so-called "Henry VIII" powers.[3]

In 2001, no less than 4,148 statutory instruments were passed by central government, higher than in any previous year and covering a record 10,830 pages. These figures exclude an additional 494 statutory instruments passed by the Scottish Executive which would before devolution have been included in the central government total.[4] Increasingly, "framework" Bills leave most of their actual content to be filled in by SIs.

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[3] The most important and widely drawn "Henry VIII" power is that contained in section 2(2) of the European Communities Act 1972, which permits ministers and a range of other bodies to make regulations making "any such provision (of any such extent) as may be made by Act of Parliament." Regulations under this section can and regularly do repeal or amend Acts of Parliament, and may be made for the purpose of implementing EC obligations or "for the purpose of dealing with matters arising out of or related to any such obligation."

[4] Figures from House of Commons Library Note SN/SG/2911, 7 December 2004.

When implementing EC directives, the Government has increasingly employed the SI procedure instead of the full Parliamentary procedure of Bills.

Outside Parliament, some actions of the present Government have revealed the weaknesses of the traditional convention-based approach when it comes to the government machine. The apparent politicisation of the Civil Service coupled with the enhanced powers wielded by special advisers acutely raises the issue of whether public servants funded by the taxpayer should be servants of the state or servants of the party in power. And apart from some limited provisions relating to an immediate election or referendum campaign period, there are virtually no formal safeguards against the government of the day using taxpayers' funds to pay for political propaganda under the guise of public information campaigns or "consultancy" contracts.

In all these areas, the old conventions are not strong enough to stand up against a government determined to ignore or subvert them. Conventions need to be replaced by formal restraints on the actions of government backed up by effective mechanisms for enforcement.

The other constitutional trend promoted by the present Government has been ever increasing centralisation. It is fair to say that this not a new trend and had taken place under previous Governments as well. The upshot is that local democracy has been emasculated and power has been centralised. It is impossible for ministers in practice to exercise the vast range of detailed powers vested in central government. It is even more impossible for Parliament to hold ministers to account. Therefore in practice many of these centralised powers are wielded by civil servants or by appointed bodies who are subject to little or no democratic accountability whether in Parliament or at local level.

A graphic illustration of this point is the absurd spectacle of a body called the Standards Board for England trying the Mayor of London for allegedly offensive remarks he may have made to a journalist – proceedings which may result in his suspension or removal from office. Whether or not offensive remarks should disqualify a local politician from office should be a matter for his or her electors and not for anyone else. Disqualification from office should be limited to clearly defined breaches of the law such as corruption or electoral fraud, proved in court. We have reached a remarkable state of affairs when an organ of the central government has the power to override the decisions of local electors because a local politician in its opinion fails to show sufficient "respect" to somebody.

The trend of centralising power away from local electors into the hands of an unrepresentative metropolitan élite seems to have an unstoppable momentum. The police are already overcentralised and in practice are virtually unaccountable to any form of local democratic control. Although police authorities are partly (indirectly) elected, their membership or even existence is unknown to most of the public. A voter who wants to cast a vote in order to influence police policy has no means of doing so. In practice, police authorities are virtually puppets who provide token local accountability when all important powers are exercised by the Home Office which can,

for example, suspend or dismiss Chief Constables over the heads of their own police authorities.

And yet our already overcentralised police service is now to be amalgamated into giant regional forces purportedly on the theory that mergers improve efficiency: a theory already disproved by every previous reorganisation of local government and public services. The effect of the Government's proposals will be to snuff out any last vestiges of democratic accountability in our law enforcement establishment.

II
The Themes of Constitutional Reform

Constitutional reform should be based on a set of consistent themes. Those themes should be accountability, democracy, decentralisation of powers and the strengthening of the freedoms of individual citizens. Those themes have underlain the historical development of our constitution since the Civil War and before, even if they have been lost sight of from time to time.

Not only should the themes of constitutional reform be consistent, but the reforms need to fit together in a coherent way so as to produce the desired end results. Constitutional changes are notorious for suffering from the law of unintended consequences. This means that any proposals for constitutional reform need to be developed as an inter-related set. The answers to the problems discussed above can be made to fit together, as will be explained.

The starting-point is to address the imbalance of power created by devolution. In theory, this could be done by converting the United Kingdom into a fully federal system in which each part of the UK has the same devolved powers as the Scottish Parliament. This would be an unusual federal structure since England would be so much larger than the other three units. To overcome this problem, England would then have to be cut up into regional blocs, with each bloc having the same range of powers as the Scottish Parliament. However, England has been governed as a unified nation with a single legislature for 1000 years and there is no demand for it to be cut into pieces or to have different laws in different regions.

Such a solution would be neither wanted nor necessary. The people of England by and large are content to have their laws made by Parliament at Westminster. They have no desire for the establishment of a regional tier of government, as illustrated by the referendum result on the Government's proposal to create an elected regional assembly in the North East.

A simpler solution is at hand which requires far less disturbance to our existing constitution. This solution has been called "English votes for English laws". That is an oversimplified title.[5] The principle is that MPs from a part of the United Kingdom which has a parliament or assembly exercising devolved powers should not vote on those matters affecting other parts of the United Kingdom. This resolves the West Lothian

[5] This phrase was used for example by Lord Mackay of Clashfern as the title of his September 2005 paper published by the Society of Conservative Lawyers. He explained that with the coming of devolution: "There are now different units of legislative power and I take Scotland as the main example although similar considerations apply to some extent to England in relation to Wales and Northern Ireland."

question by ensuring that Scottish MPs do not vote on devolved matters in relation to Scotland, England, Wales or Northern Ireland. The same principle would apply to Welsh MPs although the scope of the devolved powers of the Welsh Assembly is much narrower than those of the Scottish Parliament. As regards Northern Ireland, it would be equitable for the same principle to apply assuming that the Northern Ireland Assembly overcomes its present problems and is no longer suspended.

This reform is based on the simple principle of reciprocity. Where the exercise of legislative power over a particular subject in some parts of the United Kingdom is pooled at Westminster, it is right that MPs from all those parts of the UK should participate in legislation on that subject at Westminster; but MPs from a part of the UK which is not part of the "pool" relating to that subject should not take part in the legislative process.

Although the principle is clear and relatively simple, its implementation is more complex than at first it appears. A plan for its implementation necessarily involves interaction with the powers of the House of Lords, and would need to dovetail with other reforms to Parliamentary procedures designed to strengthen the scrutiny of legislation. And the way in which Parliament works – in both Chambers – cannot be separated from any question of reforming the composition of the House of Lords.

The relationship between Parliament, the executive and the courts needs to be addressed. If Parliament puts its house in order and more effectively scrutinises primary and secondary legislation, there should be less need for the courts to feel that they have to protect individuals from injustices created by badly drafted laws crammed through a compliant Parliament by an over-mighty executive. At the same time, there will be a stronger case for asking the judiciary to leave questions of political value judgement for decision by elected representatives. This raises the question of whether the present structure of the Human Rights Act is the best way of reconciling the protection of individual liberties and judicial independence with democratic accountability.

The arrangement and distribution of powers *within* the United Kingdom cannot be addressed without looking at the elephant in the room: that elephant is the legislative and judicial powers of the European Union. Under our present system, the transfer of powers from the United Kingdom up to the EU institutions has been accompanied by an internal transfer of powers from Parliament to the executive.

Ministers act as primary legislators when they sit in the Council of Ministers passing directives and EC regulations, and again are the legislators when directives are transposed into national law using secondary legislation under the European Communities Act 1972. That Act needs to be reformed to rebalance power between Parliament and the executive as well as to reassert the fundamental sovereignty of Parliament.

III
Reforming Parliament

'English votes for English laws'

As has already been pointed out, this phrase is an over-simplification. The principle is simple and easy to justify. Since, for example, the Scottish people now have the right to decide independently the matters falling within the powers of the Scottish Parliament, only MPs from the parts of the United Kingdom which still exercise those powers in common should be entitled to vote on them at Westminster. But that principle gives rise to a number of important issues when it comes to the practicalities of implementing it.

First, a clear and robust mechanism would be needed to ensure that Bills went forward by the correct procedure, and would be considered by the appropriate sub-group of the House of Commons. It would be necessary to ensure for example that the English, or English and Welsh, sub-group of the House of Commons did not pass a Bill which exceeded the powers of that sub-group. In the case of the Scottish Parliament, the mechanism is provided by the judges in the Privy Council. The Scotland Act 1998 says that "An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament."[6] The courts may therefore strike down an Act or part of an Act of the Scottish Parliament which exceeds its powers.

However, it would be a constitutional innovation to subject Parliament at Westminster to external control or review by the courts.[7] It would place too much of a burden of resolving potentially complex legal issues on one person alone to rely solely on the Speaker's certificate as to the correct procedure to be followed by a Bill, as is done under the Parliament Act 1911.[8]

This suggests that an appropriate body needs to be established inside Parliament to perform this important task. In form a joint committee of both Houses, the Parliamentary Procedure Committee could consist of the Speaker, the Lord Chancellor, senior parliamentarians from government and opposition parties and some Law Lords: or Supreme Court Judges reintroduced into Parliament if they have by then been exiled from the House of Lords. Its composition would reflect the fact that it would have both a legal and a political role.

6 Scotland Act 1998, s. 29(1). Schedule 5 to the Act lists the "reserved matters" which are outside its legislative competence.

7 Article 29 of the Bill of Rights states: "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."

8 Under that Act, the questions which the Speaker has to certify are fairly straightforward and unlikely to be the subject of much doubt, such as whether or not a Bill is the same, except in respect of dates, as a Bill sent up to the House of Lords during the previous session.

The task of this Committee would be to rule on any disputed issues as to whether or not a particular Bill should be considered by the full House of Commons or by a particular sub-group from which certain MPs are excluded. For example, if a Bill were introduced relating to England, the Committee might have to consider whether or not a similar Bill relating to Scotland would fall within the legislative competence of the Scottish Parliament. This could potentially be a complex question of interpretation of the Scotland Act 1998 and the list of "reserved matters" in Schedule 5 to that Act. If the Bill in question were not a "reserved matter", then MPs from Scotland would be excluded from voting on it.

Secondly, the status of Acts passed under the English (or English/Welsh/Northern Ireland) procedure would need to be addressed. Would they be classed as full Acts of Parliament for the purposes of the doctrine of supremacy of Parliament, or would they be a special form of subordinate legislation analogous to Acts of the Scottish Parliament? If their legality is appropriately reviewed inside Parliament by a body along the lines suggested above, then it would be logical to class such Acts fully as Acts of Parliament which are not subject to review in the courts.

Thirdly, would the House of Lords play the same part in English (or English/Welsh/Northern Irish) Bills as in ordinary UK Bills, and if so should the Parliament Act powers of override by the Commons operate in the same way? Since the Scottish Parliament is unicameral it would be possible to adopt the same solution for English Acts but that would lose the benefit of the House of Lords acting as a revising chamber. Since the emphasis of these reforms should be to strengthen not weaken Parliamentary scrutiny, the role of the Lords should be retained and there seems little reason to make the balance of powers between Lords and Commons different in the case of English Bills from that applying to UK Bills. However, if an elected membership is introduced into the House of Lords, it would be logical to treat members elected to the Lords from the different parts of the UK in the same way as elected Members in the Commons.

Fourthly, when and in what circumstances could the UK Parliament as a whole choose to override these provisions and legislate internally within England or England and Wales? The Westminster Parliament normally requires the consent of the Scottish Parliament if it legislates in Scotland on a matter within the powers of the Scottish Parliament. However it could ultimately override the Scottish Parliament by passing an Act within the scope of the devolved powers, if necessary amending the Scotland Act 1998 in the process. If a similar ultimate power of override did not exist in relation to English laws, then the fundamental unity of the United Kingdom would be threatened. However, there needs to be some protection against a simple majority in the House of Commons elected for the UK as a whole overriding the rights of English or Welsh or Northern Irish members as and when it suits them.

One possibility is to exclude such Bills from the Parliament Acts so that the assent of the House of Lords would be required; a more radical option might be to require a referendum before such a Bill can be presented for Royal Assent.

Fifthly, the important question of the scrutiny of statutory instruments needs to be addressed. At present, the Scottish Parliament approves many SIs relating to Scotland and the Welsh Assembly some SIs relating to Wales. The Northern Ireland Assembly would approve most SIs relating to Northern Ireland if it were not suspended. It would seem logical that statutory instruments relating to a particular part or parts of the United Kingdom should be treated in the same way as Bills i.e. they should be scrutinised and approved by the appropriate sub-group of the House of Commons if they are SIs which would fall within the powers of the devolved bodies.

It can be seen that the machinery needed to establish "English votes for English laws" would require what in effect would be a new Parliament Act regulating both the internal procedures of the House of Commons and the respective powers of the two Houses. If so, it seems sensible that this new Parliament Act should repeal and replace the existing Parliament Acts 1911 and 1949 which at present regulate the respective powers of Lords and Commons, and should re-enact the provisions of those Acts either with or without changes. And the architecture of this new Parliament Act could also be used to encompass the other reforms to Parliament and the legislative process discussed below.

House of Lords reform

There is a basic philosophical question to be answered. Should the second House be a revising chamber subordinate to the Commons, or should it have a political (i.e. electoral) mandate? If it has a political mandate, how should this differ from that of the House of Commons and which House should prevail if there is a conflict between them?

The powers and functions of the House of Lords, and accordingly its composition, need to be considered in the context of the legislative process as a whole. At present it has the power to delay most Bills for about a year to eighteen months. The exceptions are money Bills which the Lords can only delay by one month; and Bills to extend the duration of Parliament beyond five years, which the Lords can veto.

This settlement is more the consequence of historical accident than careful thought. It would be possible to expand the category of Bills over which the Lords retain a power of veto: Lord Mackay of Clashfern has suggested that all constitutional Bills should be in this category.[9] Without necessarily going that far, it would sensible to provide that amendments to the new Parliament Act itself should fall into this category, together with other central constitutional provisions. This would provide a safeguard against a transient majority in the Commons overturning fundamental constitutional provisions, but any power of veto placed in the Lords could be made capable of being overridden by a referendum.

At the other end of the scale, the powers of the Lords to review money Bills could usefully be expanded. Complex and ill-digested tax legislation, for example, could

[9] Society of Conservative Lawyers paper already cited.

usefully be subjected to revision in the Lords. The historical reasons for the exclusion of the Lords from consideration of money Bills, going back to the Lloyd George budget crisis or even the Petition of Right in the 17th Century, are no longer valid so long as the Lords does not acquire the power to deny "supply" to the government of the day. It should be recalled that in 1975 Gough Whitlam's Labor Government in Australia was brought down because the Australian Senate had the power to deny supply, even though the government had a majority in the Commons. The power to vote "supply", i.e. to approve the expenditure of taxpayers' money on the activities of government, is inextricably linked to the power to sustain or remove a government and is the historical route by which the Commons acquired its effective power of veto over the appointment of the King's ministers.

The composition of the Lords needs to be addressed. The House of Lords has been an "interim" House since 1911, when it was intended that the Parliament Act 1911 would be followed shortly by another Act replacing the Lords with an elected Second Chamber. The Preamble to the Parliament Act stated: "And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of a hereditary basis, but such substitution cannot immediately be brought into operation."

If the present "semi-reformed" House is indeed replaced with a wholly or mainly elected House, then the dynamics of its relationship with the Commons will be dramatically altered. If it is under the effective political control of the same party which controls the Commons, there is a risk that it will act as a shadow of the Commons and its revising function will be compromised. On the other hand, if it is under the effective control of the opposition party or parties, there is a danger of repeated conflicts with the Commons and its role in dealing with Bills may amount to political opposition rather than constructive revision.

A wholly elected House would lack the wide range of expertise of the present House, which is made possible by the large number of effectively part-time members who are distinguished in their own fields. Is it possible to retain the advantages of a House with specialist membership while at the same time strengthening its democratic mandate? A possible solution to consider could be to confer the legislative power of the House of Lords to conduct Second and Third Readings of Bills on a Legislation Committee of the House whose members form the effective full-time core of the House. This core could include a progressively expanding elected element. This would mean that the wide specialist expertise within the wider House would still be available for contribution to debates, for membership of select committees and for detailed scrutiny of Bills and SIs.

Reform of Parliamentary procedures including scrutiny of statutory instruments

The present Government has repressed the proper scrutiny of legislation by using House of Commons procedures to curtail proper debate particularly by imposing

guillotines by majority vote. Legislation loses democratic legitimacy if is not properly scrutinised by Parliament. As has already been pointed out by Lord Strathclyde,[10] it is not acceptable that the time allotted for debate should be fixed unilaterally by the government: it should be fixed either by the Speaker of the Commons or the Chairman if the debate is in Committee, or by a cross party committee on which the government does not have a majority, with a duty to ensure that adequate time is provided for the scrutiny of Bills.

If the Commons as a whole chooses to override the Speaker or Chairman of such a cross-party committee, a sanction could be imposed: the Lords could be given a veto over the Bill under the Parliament Act instead of just a right to delay it.

Much could be done to improve scrutiny of the large volume of important legislation which now comes in the form of statutory instruments. At present, draft SIs are reviewed by Committees of each House and a limited number are referred for debate on the floor. In some cases, SIs need to be approved by an affirmative vote of each House before they become law (the "affirmative resolution" procedure). More commonly, SIs come into effect unless there is a vote of either House against them (the "negative resolution" procedure). In the case of SIs relating to money and taxation matters, the House of Commons alone has the power to approve or disapprove, whether by the affirmative or the negative resolution procedure.

The key weakness is that while each House can vote down an SI as a whole, there is no power to amend it. Rejecting the whole instrument is a drastic remedy if the objection is to parts of it. This problem is compounded by the fact that debates on SIs in the Commons are normally allotted brief times at unpopular hours. The key reform is to make draft SIs amendable in Parliament. The fact that they cannot be amended in Parliament is one of the reasons which at present makes them so attractive to the Whitehall machine. This reform should do much to discourage excessive use of the SI procedure at the same time as improving the scrutiny of those measures which are put forward as SIs.

The specialist expertise in many areas possessed by members of the House of Lords could usefully be harnessed to this task. Effective scrutiny of SIs would also require adequate resources to be made available for support staff for members of both Houses engaged in this task. The task at present is unrewarding because there is so little opportunity in practice to have an input into the legislation, but it could be made much more worthwhile.

One possibility could be to establish joint specialist committees of both Houses to scrutinise SIs so as to get both democratic political input and specialist expertise into the process. Procedures would be needed to resolve disagreements between the Houses on the form of SIs.

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[10] *Working in Harness: parliamentary government and the role of the Lords*, Politeia Address, 2005.

A new Parliament Act

All the above reforms of the workings of Parliament could be encompassed within a new Parliament Act. This would be logical because the reforms interrelate: the powers of the House of Lords cannot be considered in isolation from the procedures for English laws or from improved scrutiny of primary legislation and SIs. The Parliamentary Procedure Committee would be the central point within Parliament regulating the correct procedures for the passage of legislation.

IV
The Constitution in the European Framework*

Huge volumes of important legislation now originate in Brussels rather than in our own Parliament. In some cases EU laws are made by regulation in which case they have direct effect under our law without the intervention of Parliament. In the majority of cases, new EU laws are made in the form of directives which need to be "transposed" into national law before they become effective. Directives require a particular result to be achieved, but often leave important choices to national parliaments in the manner of implementation when they are transposed into national law. To give but one example, the Packaging Waste Directive imposes general obligations to control the amount of packaging on goods, but our Whitehall machine managed to implement it with detailed regulations which require even fairly small businesses who simply sell goods in packaging to file detailed returns on the amounts of packaging they are selling with their goods.

In practice the executive rather than Parliament interfaces with the EU in legislating in the Council of Ministers, and the executive rather than Parliament then makes regulations to transpose the directives into national laws. Parliament's involvement in this process can be strengthened at both ends. First, it can be made a legal obligation for ministers to obtain parliamentary approval before exercising the UK's vote in the Council of Ministers.[11] This is done in some other member states such as Denmark and Sweden. Secondly, the reformed procedure for SIs outlined above would allow Parliament to become effectively involved in the important issues which often arise on "transposition" of directives into national law. The prevalent tendency for EU directives to be "gold plated" by the Whitehall machine would be subject to some form of restraint.

But more fundamental steps need to be taken. Because the UK lacks a formal written constitution, it is uniquely vulnerable to excessive claims of jurisdiction and powers which may be made by the EU institutions including the European Court of Justice. By contrast, in Germany for example, the Constitutional Court has ruled in the *Brunner* case that the provisions of the EU Treaties are subordinate to the German Constitution and that it, i.e. the German Court, has the ultimate right to rule if the EU institutions exceed their powers under the Treaties or seek to implement a measure within Germany which conflicts with the German Constitution.

The constitutional mechanism by which EC law is given effect internally within the UK (the European Communities Act 1972) requires reassessment. There are a number of

* A separate pamphlet on the implications of the referendums on the EU Constitution will be published by Politeia.

11 At present, the valiant efforts of the European Scrutiny Committees are undermined by the lack of a legal obligation on ministers to obtain Parliamentary approval before casting a vote in the Council of Ministers.

possible reforms which could be considered: (1) a declaratory measure re-affirming Parliament's ultimate supremacy; (2) protecting central provisions of the UK's constitution from being overridden by EC law; (3) a requirement for Parliament to vote on payments to the EC budget which at present are paid out of the Consolidated Fund as a "direct charge" without a vote; (4) flexible mechanisms by which Parliament can ensure that its will prevails in respect of EC law, analogous to its power to prevail over the Human Rights Act.

EC law is made by the organs of the European Union in Brussels, and interpreted by the Court of Justice of the European Communities at Luxembourg. But standing beside these European Union institutions is the European Court of Human Rights at Strasbourg, which also affects our laws through the interpretations which it gives to the European Human Rights Convention, to which we belong through our membership of the Council of Europe. The Convention was drafted in the 1950s with British involvement and sets out a number of rights and freedoms which are expressed in very general terms. Almost nobody would disagree, as a matter of broad principle, with those generally expressed rights. These include the right to liberty, the right to a fair trial, a right to respect for private and family life, and the right to freedom of expression and of religion.

The problem comes when the scope of those rights is interpreted, or when they conflict with each other. If the right of the media to freedom of expression conflicts with the right of an individual to keep something private, which right should prevail and where should the line be drawn? If the right of an intended deportee to be protected from inhuman or degrading treatment if returned to his country of origin conflicts with the security of the state in which he seeks asylum and the safety of its citizens, where should the balance lie? These are essentially political rather than legal questions and our past constitutional practice has been to entrust decisions of this kind to our elected legislators in Parliament.

But by virtue of the European Convention and its machinery, we have farmed out these intrinsically political decisions to a court in Strasbourg which is not accountable, even indirectly or over the long term, to the electors of the United Kingdom. In this respect, we differ from, for example, the United States, where the Supreme Court takes decisions with a political content but where there is an ultimate political link to the electorate through the power of Presidents to nominate Supreme Court Justices. This means that the Court will over the long term come to reflect the political climate of the era.[12]

Most other Commonwealth countries now have their own Bills of Rights. Although similar in broad terms and all protecting a core of rights which would universally be

[12] See William H Rehnquist, "The Supreme Court", 2001, Vantage Books, p. 134: the Court's string of decisions against the New Deal were ultimately overcome and its attitude to social and economic issues changed through President Roosevelt's nomination over the period of his presidency of a Chief Justice and 8 Associate Justices of the Supreme Court.

recognised, this gives each country the ultimate right to decide on the detailed shaping and application of these rights in accordance with its own culture and historical traditions. Why have we in the United Kingdom given up this fundamental right of a nation state, without any serious debate? If there is a place for a framework of fundamental rights and freedoms which constrains the executive and in practice at least to some degree constrains Parliament, are we not capable of fashioning such a framework ourselves, which will more closely reflect our own historical and constitutional traditions and the rights and freedoms recognised by the common law? This country has probably the longest unbroken historical tradition of democracy, the limitation of the powers of the State by law, and the protection of the liberties of the citizen, of any country in the world. Can we not protect our liberties better than through the European Human Rights Convention and its multinational court?

V

The Role of the Courts, the Executive and Parliament

The role of the courts

Traditionally the courts of the United Kingdom have been subservient to Parliament. We have never had a system like that in the United States where the Supreme Court has the power to strike down Acts of Congress if they, in its opinion, breach the Constitution. British judges traditionally interpret and apply the will of Parliament and do not question it. The more limited role of the courts in the United Kingdom has meant that the political opinions of judges have not been so significant as in the case of US judges and political factors have, at least after the early part of the 20th century, not played a major part in their appointment.

The Human Rights Act 1998 has been a major factor in changing the relationship between Parliament, the executive and the courts. The Act has required the courts (whether willingly or unwillingly[13]) to an unprecedented extent to decide many questions which are essentially political rather than legal in nature. This is because many questions which arise under the European Convention involve deciding upon the balance to be struck between conflicting interests, an exercise which is more familiar to elected legislators than to judges.

We are at a cross roads. In the United States, it has long been recognised that the judges of the higher courts have a political role and that is acknowledged when they are appointed. The late US Chief Justice Rehnquist argued that the President's power to nominate justices to the Supreme Court was necessary to ensure that the court, over time, would reflect the political climate. Can we have a judiciary which takes decisions with political content unless we are willing to go down the road of appointing judges on a political basis? Unless a mechanism exists similar to that in the United States, there is a risk of the judges of the higher courts becoming an unaccountable self-perpetuating oligarchy whose political views become more and more out of touch with those of people and Parliament.

At present, there is a tendency to deny that this dilemma exists by claiming that decisions under the Human Rights Act are legal and not political and therefore the political views of the judges who take these decisions do not matter. This denial will become more

[13] Lord Lloyd of Berwick, a retired Law Lord, in his 2005 lecture to the Denning Society on "The Judiciary and the Executive" has pointed out that by passing the Human Rights Act, Parliament has compelled the courts to confront these difficult questions. For the executive then to complain about the decisions the courts reach is unfair.

and more unsustainable as time goes on. There are two alternatives: we will either have to recognise that political factors should play a legitimate part in the appointment of the judiciary of the higher courts and devise a system which overtly and fairly takes account of those factors, or we must decrease the involvement of the judiciary in taking decisions which have political content, principally by revising the Human Rights Act.

These are deep questions which need to be confronted. Should the Human Rights Act and the Convention be kept basically as they stand; or can the Act be reformed to take the ordinary courts out of the essentially political role of interpreting and applying the Convention? Another option to consider is to develop our own domestic Bill of Rights based on common law concepts as many Commonwealth countries have done; this could either be a supplement to, or a replacement for, the existing Convention and Act. The touchstone should be effectiveness in safeguarding and enhancing individual liberty. This should be seen as complementary to the improvement of democratic accountability and scrutiny of legislation.

The over-centralised executive

An over-powerful, over-centralised government needs to be reformed in two ways. The first is by restricting the abuse of central government itself. The second is by strengthening local democratic accountability on matters which are important to people's lives.

The behaviour of the present Government demonstrates that it is no longer possible to rely on constitutional conventions to guarantee the impartiality of the civil service and the government machine. The impartial and politically neutral status of the civil service needs entrenching in statute law in a new Civil Service Act. This should include safeguards against the abuse of special adviser status, the use of government-paid press officers for party political purposes instead of government business, the use of taxpayer money for political advertising or "information" services, and the use of taxpayer money for politically motivated "consultancy" services.

Strengthening local democracy is also vitally important. This requires a real and radical transfer of powers from central government to local level; and the powers involved need to be important not peripheral. One key area is law and order functions where local communities need to be given a much greater ability to decide on a policing and penal policy which reflects their own priorities instead of those thought important by Whitehall. It is vitally important to improve the democratic accountability of local police forces.[14] At present they are accountable in practice only to the Home Office, if indeed they are accountable to anyone at all.

[14] See Politeia, *Policing Matters: Recruitment, Training and Motivation. The Report of the Politeia Police Commission* (2005).

And local democratic accountability can, and should be, extended further to other aspects of law and order. Local prosecution policies should also be set by directly elected bodies and they could be given the power to appoint the county Crown prosecutors for their areas. More radically, locally elected bodies could be given the right to vary national sentencing guidelines having regard to local concerns about crime, and be given responsibility for the appointment of the magistracy and local judiciary.

VI
Conclusion

There is a long lead time in developing proposals for constitutional change because of their complexity and the risk of unintended consequences if they are not properly thought through. The present Government's problems over its "back of envelope" policy of abolishing the post of Lord Chancellor should be warning enough.

The unwritten constitution of the United Kingdom, like topsy, has just grown. The last few years have unbalanced it and shown up the weaknesses of relying on gentlemanly respect for "conventions" in a climate where such relics of the past are regarded with contempt rather than respect. The vulnerability of our constitution to partisan manipulation is also painfully apparent.

The events of the last few years make it clear that it is now time for a new constitutional settlement. The lynchpin of that new settlement is a new Parliament Act, defining the powers of Members of Parliament from the different parts of the United Kingdom, the powers of the House of Lords, and introducing for the first time an effective system of parliamentary control over legislation by statutory instrument. But that constitutional settlement should also cover the composition of the House of Lords; the relationship between Parliament, the executive and the judiciary; the protection of the liberties of citizens; the proper regulation of the civil service; the relationship between Parliament and European Union law; and the effective restoration of local democracy and accountability.

It is vital that the country now prepares to embark on these lasting improvements to our constitution, which go beyond simply reversing the damage which the present Government has done. Even a brief study of the problem such as this one shows the scale of the task of formulating a coherent set of well worked out plans for changing our constitution for the better. That task needs to be started on now.

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