

The Future for Constitutional Reform



Lessons from the process of leaving the EU

Sir Stephen Laws

Foreword by Rt Hon Lord Hague of Richmond



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Foreword

Rt Hon Lord Hague of Richmond

Former First Secretary of State, Leader of the House of Commons and Foreign Secretary

The protracted arguments about the United Kingdom's departure from the European Union have triggered renewed interest in a written constitution. This thoughtful and clear-sighted paper is a welcome warning about the dangers that would bring, while making a constructive case for some necessary change.

It is a common error to assume that a period of intense argument and division is a sign of a faulty process. With debates raging in the autumn of 2019 about the role of the Supreme Court, the nature of the Royal Prerogative, and the power of parliament to direct executive actions, it is not surprising that some people quickly concluded that our constitution must be unclear and in need of drastic overhaul. Yet these debates have been curtailed by democracy working as it is meant to: in 2020 we can observe that the British people resolved the issues at stake at the ballot box, in a peaceful and orderly process the legitimacy of which no one can doubt.

It is a central insight of this paper that controversy over issues should not be mistaken for failing constitutional arrangements. No nation is immune from periodic bitter divisions. The test of a constitution is whether it facilitates resolving those divisions with common acceptance of the outcome. British democracy has so far passed that test. It is weathering a serious storm.

That is not to say that complacency is warranted. In these pages a good case is made for reforming the ways in which parliament approaches treaty negotiations and scrutinises the mass of secondary legislation. Enthusiasts for repealing the Fixed Term Parliaments Act will find support, with the often-overlooked caveat that some of its provisions will nevertheless need to be replaced with new legislation. Continued reform of how our constitution works is necessary, but many commentators underestimate the dangers involved in trying to codify and entrench Britain's democratic habits in a written constitution.

That we have never in recent centuries had to start afresh, and construct a constitution from scratch, is a mark of our good fortune rather than a cause for regret. Is a constitution to lay out very specific rules, which might create unexpected problems later, or general rules, which open the way to regular judicial interpretation? Should it embody rights considered immutable across time, or every right or duty that is current today? Is it to be majoritarian in nature, or designed to balance different interests, with

dramatic change difficult to secure? It would be all too easy to wander into a labyrinth of deep and interminable questions.

The struggle to answer such questions could become the most divisive process of all. In particular, any constitution would need to set out the relationship between the component nations of the United Kingdom while that is still evolving and at risk of fracturing. The effort to do this might easily do more harm than good, crystallising differences that time and goodwill might yet diminish.

Amidst the various calls for constitutional conventions, citizens' assemblies and full-scale written constitutions, this paper offers a more feasible and considered approach, mindful of recent difficulties but not carried away by hasty reaction. It is well worth reading, and an important addition to informed deliberation.

Introduction

1. The Government should resist invitations to undertake a programme of comprehensive constitutional reform, but it should be willing to consider limited changes to address weaknesses in our constitutional arrangements exposed by the process of UK withdrawal from the EU. The proposal to ask a Commission to look at these matters is welcome.
2. So far as changes to remedy any weaknesses in our constitutional arrangements are concerned, the governing principle should be to avoid legislative solutions except where there is absolutely no alternative. The reasons for that are the same as those set out below in the arguments against proposals for a comprehensive “written” constitution. Nevertheless, some significant legislative interventions and adjustments are necessary.

No need for comprehensive constitutional reform

3. UK withdrawal from the EU has been the occasion for plenty of controversy about the UK’s constitutional arrangements. Constitutional issues are likely to continue to be high on the political agenda. However, it is possible to exaggerate the significance of the criticism of current arrangements that has been voiced.
4. UK withdrawal from the EU is a process in which there has been no consensus on the most desirable outcome. In that situation, it is very common for those opposed to the substance of a proposed outcome to use criticism of the process to recruit less committed individuals to their opposition to the substance. The level of controversy is not necessarily an indication of fundamental flaws in our constitutional arrangements. As Jeremy Waldron has pointed out, “Machiavelli warned us, almost five hundred years ago, not to be fooled into thinking that calmness and solemnity are the mark of a good polity, and noise and conflict a symptom of political pathology”¹.
5. Furthermore, constitutional reform needs to be based on an understanding that the primary function of all constitutional arrangements is to confer a legitimacy on political decisions that will enable them to be accepted by those who are otherwise unhappy with them. UK withdrawal from the EU has demonstrated that constitutional innovation (e.g. attempts at the subtle exploitation of moribund or previously unused processes) is unlikely to discharge that function; and it also risks provoking equally controversial retaliation in kind. Changing the procedural rules in the middle of the process is a bad idea and diminishes the legitimacy of the outcome.

1. The Dignity of Legislation (1999), p 34

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6. A policy giving rise to irreconcilable differences between Parliamentary opinion and Government policy, under our system, was only ever going to be settled following a general election; and so it has proved. Attempts to find alternatives to that (in particular in the statutory mechanisms for a “meaningful vote”) were distracting, delaying and ultimately futile. It was perhaps the rigidity of the Article 50 process that created the temptation for what, in retrospect, can now be seen as the premature, attempt to resolve differences in the 2017 election, in anticipation, before they had become fully crystallised. Essentially, though, the UK system has worked as it is supposed to work.

The fallacy that a written constitution is needed

7. Those who argue that the process of UK withdrawal from the EU has demonstrated a need for a written constitution are wrong. For the reasons given above, they exaggerate the problem to which the production of a comprehensive statutory articulation of the constitution is supposed to be the answer. In addition, the proposed solution is both impracticable and undesirable.
8. UK withdrawal from the EU has proved just how problematic inflexible and detailed written rules can be when it comes to resolving political differences: whether it was in the rigidity of the Art 50 process and the form of “the backstop” or in the practical operation of the “meaningful vote” mechanism in s. 13 of the European Union (Withdrawal) Act 2018.
9. The latter barely lasted six months before MPs wanted to use the procedures of the House of Commons to change its effect. Legislating for Parliamentary procedure can in practice restrict, rather than enhance, the scope for Parliamentary influence over government. One of the consequences of enacting s. 13 was that the legitimacy of the subsequent novel and dubious tactics of the Speaker and some MPs was further diminished by the fact that they were incompatible with what Parliament had intended when it had set out a different process in primary legislation.
10. The use of legislation for a more comprehensive articulation of our constitutional arrangements, and to implement decisions about what it should contain, is impracticable without an assessment of whether the resulting arrangements and content would produce better outcomes. That requires some consensus on what “better” would be. That would always be very difficult to secure, but it will be impossible in the aftermath of UK withdrawal from the EU: when the principal question will be whether it would be better for that to have been easier to complete or easier to stop.

11. It is in the nature of statutory legal rules that, when ultimately construed by a court, they provide a clear winner and a clear loser. That (as Lord Sumption has pointed out in his second Reith lecture) is inimical to the compromises required for practical politics; and it also means that, when you frame such a rule, you will be expected to know who, in all reasonably foreseeable cases, you intend would be the winner, and who the loser.

The fallacy that involving the courts in resolving constitutional disputes is useful

12. A written constitution, and other statutory remedies, would necessarily involve greater involvement by the courts in political disputes. That is inherently undesirable, as well as potentially subversive of the respect in which the courts need to be held.
13. Others have written elsewhere² about “judicial power” and the undesirability of litigation being used for politics by other means. As mentioned already, the process of UK withdrawal from the EU has shown that politics tends to merge issues of substance with questions about process. The process adopted can often influence the most likely outcome on the substance, and that makes it reasonable - indeed unavoidable - for those who determine the process to be held accountable for both. It is inappropriate and unwise for judges to assume that sort of accountability, and it should not be forced upon them.
14. Another constitutional lesson from UK withdrawal from the EU has been the unhelpfulness of allowing litigation to be initiated for the purpose of framing or influencing debates in Parliament, or political debate in the country. Since 2016, there have been many cases of that sort that have consumed considerable amounts of the time and resources available to the justice system, but have got nowhere. The practical impact of those that did result in success for the litigants (notably, *Miller (No. 1)*³, *Wightman*⁴ and *Miller (No. 2)/Cherry*⁵ (“the prorogation case”)) has been insignificant, except to the extent of its effect on the content and temper of political debate. Producing such an effect, though, is not the function of litigation and has been thoroughly unhelpful so far as the temper of debate is concerned, and also (to the extent that it has endorsed forum-shopping around the United Kingdom) so far as the stability of the Union is concerned. If it became accepted as a legitimate function of the courts to regulate and even stage manage the conduct of national politics, that would pose a serious threat to the reputation of the judiciary and to the future of the rule of law.

2. Richard Ekins, *Protecting the Constitution: How and why Parliament should limit judicial power* (Policy Exchange, 2019); Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books, 2019); Richard Ekins and Graham Gee, “Putting Judicial Power in its Place” (2017) 36 UQLJ 375; Richard Ekins (ed.), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018).

3. [2017] UKSC 5.

4. [2018] CSIH 62.

5. [2019] UKSC 41.

The fallacy of an over-mighty executive

15. The Government should be willing to challenge the narrative that the process of UK withdrawal from the EU has demonstrated an undesirable dominance of the executive in the UK's constitutional arrangements.
16. If anything has become clear from the process, it is the extent of Parliament's real influence over government decision-making, and the dependence of government on the support of parliamentary opinion.
17. On the other hand, it has also clearly been demonstrated that there is a constitutional imperative for a collaborative relationship between government and Parliament and Parliament itself cannot turn itself into an effective initiator of policy or legislation. It has become obvious that the functions Parliament is best capable of carrying out effectively are, instead, those of scrutiny and calling to account.
18. This was clear, amongst other things, from the failure of the "indicative votes" process and the related complaints (which should have surprised no one) that Parliament was able to say only what it did not want.
19. Parliament is, necessarily, a reactive institution. Attempts by the House of Commons to take over policymaking and the functions of the executive from government (which, as described by their proponents, invited comparison with arrangements under the Commonwealth of 1649) proved largely unsuccessful except for prolonging uncertainty and dissension. Where they appeared to succeed against the previous Prime Minister, as in the bill for the European Union (Withdrawal) Act 2019, the result was an Act that imposed obligations on the Government which (at the insistence of the House of Lords) were confined to requiring the government to do only what it had already agreed to do.
20. It was the European Union (Withdrawal) (No. 2) Act, known (until it received royal assent on 9 September) as "the Benn Bill" which went further, ultimately succeeding in requiring the Prime Minister to secure an extension to the Article 50 process. But this only aggravated a constitutional problem it had itself created. By providing the House of Commons with a less drastic alternative to withdrawing confidence in the Government, it prolonged the corrosive delay and uncertainty caused by the policy deadlock in Parliament, and damagingly hindered progress towards what had always been, and events have now proved to be, the only

practicable escape from that situation, namely, a general election.

21. It is particularly unfortunate that the *Miller (No. 2)* judgment of the Supreme Court appeared to endorse an erroneous view of Parliamentary sovereignty that seemed to confer a misplaced legitimacy on the process of subjecting the Government to legislative direction, while maintaining it in office and denying it an appeal to the electorate..

Changing SO 14

22. **It is a highly undesirable precedent for government to be forced or otherwise induced to make a change of direction by legislation used, not to make general rules, but to give specific directions on the exercise of executive functions.** The proper constitutional course, when the House of Commons and government cannot agree on fundamental elements of how the country should be governed is for the House to withdraw its confidence in the government. Otherwise, a significant risk of damaging the fundamental balance of the constitution is created.
23. The European Union (Withdrawal) (No. 2) Act 2019 has also demonstrated the particular need for government to be involved in the preparation of legislation that binds it (which is normally secured by its legislative initiative) and to acquiesce in its requirements and implementation. The inevitable alternative spectacle of Government seeking to find an interpretation of legislation imposed on it by which it can avoid, delay or defeat its effect upsets the whole balance of the constitution.
24. The Government should reassert the right of the government to exercise the functions of government, including the initiative in policymaking and legislation, so long as it retains the confidence of the House of Commons - but of course no longer. The aberration the 2019 Act represents needs to be recognised as what it was, and steps should be taken to secure that it is not an aberration that is repeated or drawn into precedent in future.
25. Government should resist pressure to allow changes to SO 14 to make something like the Letwin/Cooper demarche and the Benn Bill any easier in future.
26. On the other hand, it may wish to consider whether there is scope to allow backbenchers more influence over the management of business in the House of Commons - but only so far as that can be confined to the business of scrutinising government policy initiatives and legislative proposals, and to calling it to account

for their implementation. It is not a threat to good governance to improve the quality of challenge provided by Parliament. But it is not in the best interests of the country for politics to descend into a contest for the use of the same levers of power between Parliament and the ministers to whom Parliament has entrusted the responsibility of operating those levers.

27. The Government should not allow itself to be deterred from using the procedures of Parliament to protect its right to govern, subject only to the withdrawal of confidence by the House of Commons. This may involve, for example, the use of the rules of financial procedure to assert and confirm the proper dominance of the Government in financial matters. It should also reassert the principle that decisions, once enacted in primary legislation, should only be capable of being changed by or under primary legislation initiated or acquiesced in by the Government, subject of course to the influence that Parliament always has over government: as a result of its dependence on Parliament to remain in office and to carry on business.
28. UK withdrawal from the EU is not a unique instance of a case where the fiercest opposition to a proposition for change crystallises at the time of its imminent commencement, rather than in relation to its enactment. It is, in fact, a very common phenomenon. The frequency with which it manifests itself is a major reason why it is so important for government to insist on the principle that opposition at the subsequent stage is too late.

Asserting the importance of the confidence principle

29. Asserting the right of the government to govern so long as it retains the confidence of the House of Commons involves some consideration of the claim that the confidence principle has proved inadequate for enabling Parliament to exercise sufficient influence over government policy-making in the context of UK withdrawal from the EU.
30. This assertion is partly explicable by the fact that the rigidity of the Art 50 timetable and its interaction with the purdah convention has resulted in some quite long periods when the withdrawal of confidence would have produced a practical effect quite different from the wishes of those who might have wanted to vote for it. On the other hand, there are strong principled objections to letting the House of Commons “have it both ways”, by maintaining the government in office but restricting its capacity to govern.
31. Coherent and effective government in a case where an election

has produced a “hung Parliament” would be impracticable if this principle were not firmly reasserted.

32. Three specific issues arise in that connection

A. The Fixed-term Parliaments Act 2011

33. The 2011 Act did produce some real practical advantages. The presumption that a Parliament will run its course and the limited amount of extra leverage the Act provides to the junior partner in a coalition both incentivise the formation of a stable government and reduce the incentive for a government (whether or not a coalition) to conduct business for significant parts of its life with the dominant objective of manoeuvring towards the most favourable election date.

34. On the other hand, the mechanism adopted to secure those advantages created the theoretical capacity of the House of Commons to produce a government that remains in office without the means of governing. Previously the PM alone had the sole power and responsibility to end such a deadlock by asking for a dissolution. The 2011 Act does not make it impossible for a PM to act in such a case to secure an election but, now that the power and responsibility are shared with the Cabinet and MPs, there is a much greater risk that a deadlock the PM cannot break will arise, particularly following the creation of precedents for resorting to the alternative of legislative direction.

35. Recent events have demonstrated that this is more than just a theoretical risk, even though the necessary election did in the end take place. For this reason, the Act cannot possibly be retained in its current form, and the need to replace it is reinforced by the fact that the prorogation case has cast doubt on whether the original intention of Parliament (that the provisions of the 2011 Act should not be justiciable) would any longer be respected by the courts.

36. The Conservative manifesto said, at page 48, “We will get rid of the Fixed-term Parliaments Act - it has led to paralysis at a time when the country needed decisive action”.

37. In practice, a promise to “get rid” of the 2011 Act is only shorthand for something more detailed. The broad intention is to restore the position to what it was before 2011. However, just repealing the Act does not have that effect. It will not revive the previous law (ss. 15 and 16 of the Interpretation Act 1978). Any new Bill to reverse the 2011 Act will have to say what will replace it.

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38. The Bill could expressly provide that the law in future is to be the same as it was before the 2011 Act, “as if that Act had never been passed”. But there are two reasons why that may not be the best thing to do.
 39. The first is that the 2011 Act included provisions clarifying and re-enacting the law relating to the dissolution of a Parliament at the end of its 5-year term, and to the timetable for dissolutions and elections. It would be difficult to justify restoring the previous complex and, in some respects, obscure, law on those matters.
 40. The second, more important reason, is that, as a result of the prorogation case, an important feature of the previous law on dissolving Parliament (the non-justiciability of political decisions about a dissolution) could no longer safely be relied on, unless expressly addressed. Just as that case has cast doubt on the future non-justiciability of the provisions of the 2011 Act, so it has also cast a similar doubt on whether restoring the pre-2011 law (under which prorogation was an invariable feature of every dissolution) would restore the non-justiciability of dissolution itself.
 41. The prevention of paralysis in the nation’s affairs requires the responsibility for avoiding paralysis - and for remedying it if it occurs - to rest with PM alone (subject to the views of the Sovereign as the ultimate arbiter of fair play in the UK constitution). The House of Commons as a body has proved that it is incapable of discharging that role responsibly, because it could not, collectively, be held accountable for any failure to perform it.
 42. It is essential that the role of the Sovereign, as well as the accountability of the PM to the electorate for triggering an election, is restored. Furthermore, it is essential that it is restored without either the PM or the Sovereign being vulnerable to political litigation, to which, as we have seen, other politicians would have a strong incentive to resort: as providing a low risk opportunity to try to inflict political damage on their political opponents.
 43. A Bill to reverse the effect of the 2011 Act would need both to make clear that the PM is to have ultimate responsibility (subject to the Sovereign’s role) to decide on the dissolution of Parliament and the holding of a general election, and to ensure that it is outside the jurisdiction of the courts “to impeach or call into question” the PM’s discharge of that responsibility..
 44. It is also important that the exclusion of the court’s jurisdiction should not be capable of being circumvented by indirect intervention by the courts in different, but related matters. It will

need to extend, for example, to prorogation, to the appointment, resignation and dismissal of the PM and other Ministers and to government formation more generally. It should also be made clear that the exclusion should not be capable of being circumvented by framing any challenge as a challenge to advice or other preliminary steps.

45. Moreover, it is also essential, quite apart from the reversal of the 2011 Act, more generally to reverse the shift the prorogation case represents of the role of “guardian of the constitution” from the Sovereign to the Supreme Court. This is true so far as dissolution, prorogation and the appointment, resignation and dismissal of Ministers are concerned. It is vitally important to restore the situation in which politicians seek political solutions to political problems by seeking to keep the Sovereign out of politics, rather than succumbing to the temptation to resort to the courts for an easier rule-based answer: an approach that avoids the litigants having to accept political responsibility and accountability for the answers given by the courts.
46. The necessity of undoing the reasoning in the prorogation case in order to implement the manifesto commitment on the 2011 Act, and for these other reasons, creates both a legislative and a political opportunity to deal with other aspects of the growing tendency of the courts to allow litigation to be used as a vehicle for “politics by other means” and to make some legislative adjustments designed to put a check on that. That opportunity should not be missed. It would be risky to leave the inference to be drawn that the only overreach for which Parliament has provided an adjustment is the one represented by the prorogation case.

B. The mechanisms for selecting party leaders

47. The systems for the selection of the leaders of the main parties make it impracticable for a government that has lost the confidence of the House of Commons rapidly to regain it by a swift change of leader in the governing party, or to build a more stable coalition around a new leader. These mechanisms have long been seen as a potential risk in the event of a sudden vacancy caused e.g. by death or illness. The two-month summer hiatus in the leadership of the Conservative party was particularly unfortunate when time for decision-making on UK withdrawal from the EU was so short.
48. It would of course be for the parties to decide what to do about this; but a system that allows the Crown to avoid being left with only a caretaker to advise it, and which better secures that the Parliamentary leader of the governing party commands

the confidence of the Commons, would be desirable from a constitutional point of view.

C. Negotiating government formation in the absence of an overall majority

49. The Government should look at the procedures for such negotiations. In 2010, the civil service was willing to provide assistance and did provide incidental help, but only with the permission of the then PM. That would be more difficult in a case where a government lost the confidence of the Commons in the course of a Parliament; and it would obviously be desirable to avoid direct involvement by or on behalf of the Crown. In some other countries the Speaker of the House performs the role of convening negotiations and acting as an “honest broker”. The retiring Speaker clearly disqualified himself from such a role.
50. To some extent confidence in the system has been restored by the appointment of his successor and the urgency of the need for reform diminished.
51. Nevertheless, it would be good if a system that enabled the Speaker to perform such a role were instituted. Consideration should be given to whether it would be helpful to identify the process of facilitating government formation as part of the role of the Speaker. The capacity of the Speaker to perform that role might also be better secured if appointment were for fixed terms and renewable outside the election timetable: to enable the Speaker to perform the role immediately after an inconclusive election. There might also usefully be a limit on the number of renewals. Consideration could be given to whether, once elected, the Speaker needs to continue to represent a Parliamentary constituency and to whether his constituents would be better served if he or she were to vacate their seat and allow it to be filled by someone else.
52. There needs to be a strong reaffirmation of the need for impartiality in the role, and that might be further ensured by removing the Speaker’s special connection with one particular locality.

The use by government of powers to make secondary legislation

53. One area where the misleading narrative of an over-mighty executive proved particularly effective in the UK withdrawal from the EU context was in relation to powers to legislate by statutory instrument. Although much of the criticism, and the frequent invocation of Henry VIII, was misconceived, there were beneficial

consequences of the controversy in the devising of new processes, particularly for “triaging”, that acknowledged the need for the Commons not to let responsibility for SI scrutiny fall by default to the Lords.

54. There is scope for the Government to consider how these developments could be built on to enhance the legitimacy of delegated legislation more generally. That could perhaps include some articulated principles as to when its use will be thought appropriate, which should go beyond the essentially incidental question whether it is a power to amend primary legislation.

Treaty negotiation

55. One of the problems for the government in negotiating with the EU has been that it has been hampered by having to negotiate in two different directions at the same time - both with the EU and with Parliamentary opinion at home. In some ways this may be a problem that is unusual, and perhaps relevant only to UK withdrawal from the EU.
56. On the other hand, it may be worth considering how the problem could be mitigated, if the situation arose again.
57. Clearly, it would be assisted if government could find a way to get a mandate from Parliament that did not require it to concede too much too early. One possibility worth considering is whether Parliament and government could together create a supervisory committee for any negotiations, on the model of the Intelligence and Security Committee. Such a committee, while maintaining an appropriate level of confidentiality, could provide private challenge to the government’s negotiating strategy and tactics but also provide reassurance to Parliament by being more representative of a wider range of parliamentary opinion.
58. It is possible that a greater involvement of Parliament in negotiations, subject to suitably clear rules about confidentiality and guarantees against improper exploitation of matters disclosed to Parliament, would also enhance the perception that our relations with foreign states and international organisations should always be regarded as matters of national interest first, and that disagreements about them should be managed within the UK system.

Devolution issues

59. UK withdrawal from the EU has also demonstrated the threat to national unity, and to the sensible conduct of international relations, that is posed by nationalist politics in different parts of the UK. It is very difficult to conduct international relations in the best interests of the nation as a whole, or indeed implement policy on any other reserved matter, if a significant proportion of those whose support would be desirable or even necessary are committed, out of principle, to the interests of only one part of the UK.
60. In this context, UK withdrawal from the EU has also demonstrated a feeling of alienation from politics in many places in England - and particularly in places outside London and the other metropolitan centres. This has not been assisted by the prominence and, from that perspective, more than equivalent status that has been given to the views on UK withdrawal from the EU of those representing the parts of the UK where there is devolution, but which are significantly less numerous in population terms than diverse parts of England.
61. This is not to say that the views from Scotland, Wales and Northern Ireland should not be heard or be regarded as important. Nor indeed does it diminish the importance of the Union to those in many parts of England. It is an issue that has no easy answers. But it does suggest a need to find ways of giving a voice in national affairs to England as a separate entity, and in current circumstances, particularly to England outside London. There seems to be no appetite for an English Parliament or for regional Parliaments. But the Government should consider means to restore a feeling of influence to England - irrespective of the validity of the claim that such influence has in fact been lost. This might be easier and more palatable outside England if UK government organisation drew clearer distinctions for English purposes between matters that are managed for England alone and those that are a responsibility in relation to the whole of the UK or involve the consideration of “cross border” effects, in their widest sense.

Legal advice to Parliament

62. The final constitutional matter to which UK withdrawal from the EU has drawn attention is the question of legal advice to Parliament. This arose both in connection with the innovative use of a procedural device to require the Attorney General’s advice to government to be revealed to Parliament, contrary to all previous convention, and from the constitutionally egregious decision in

the *Wightman* case, in which an MP was able to secure a ruling from the courts on the matters relevant to a debate in Parliament, and on the legal premises on which that debate was to be conducted.

63. Three things would be desirable to respond to these developments.
 - a. Government should invite Parliament to assert its acceptance that the existence and content of legal advice to government from the Law Officers or elsewhere is entitled to be regarded as confidential, and not to be disclosed to Parliament in any circumstances, except where, in the most exceptional circumstances, the privilege is voluntarily waived by the Government.
 - b. Government should invite Parliament to clarify through its standing orders that each House of Parliament is entitled to seek legal advice from the Law Officers of the Crown on any matter relevant to matters before it, including, where they are relevant, matters on which the Law Officers have already advised the Crown.
 - c. Government should invite Parliament to assert with absolute clarity – but preferably not using legislation - that it will regard as a breach of its privileges, and contrary to Art IX of the Bill of Rights, any attempt by one of its members, or anyone else, - for the purposes of proceedings in Parliament - to persuade the courts to rule on any matter in which either House has sought - or is entitled to seek - the advice of the Law Officers of the Crown.



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