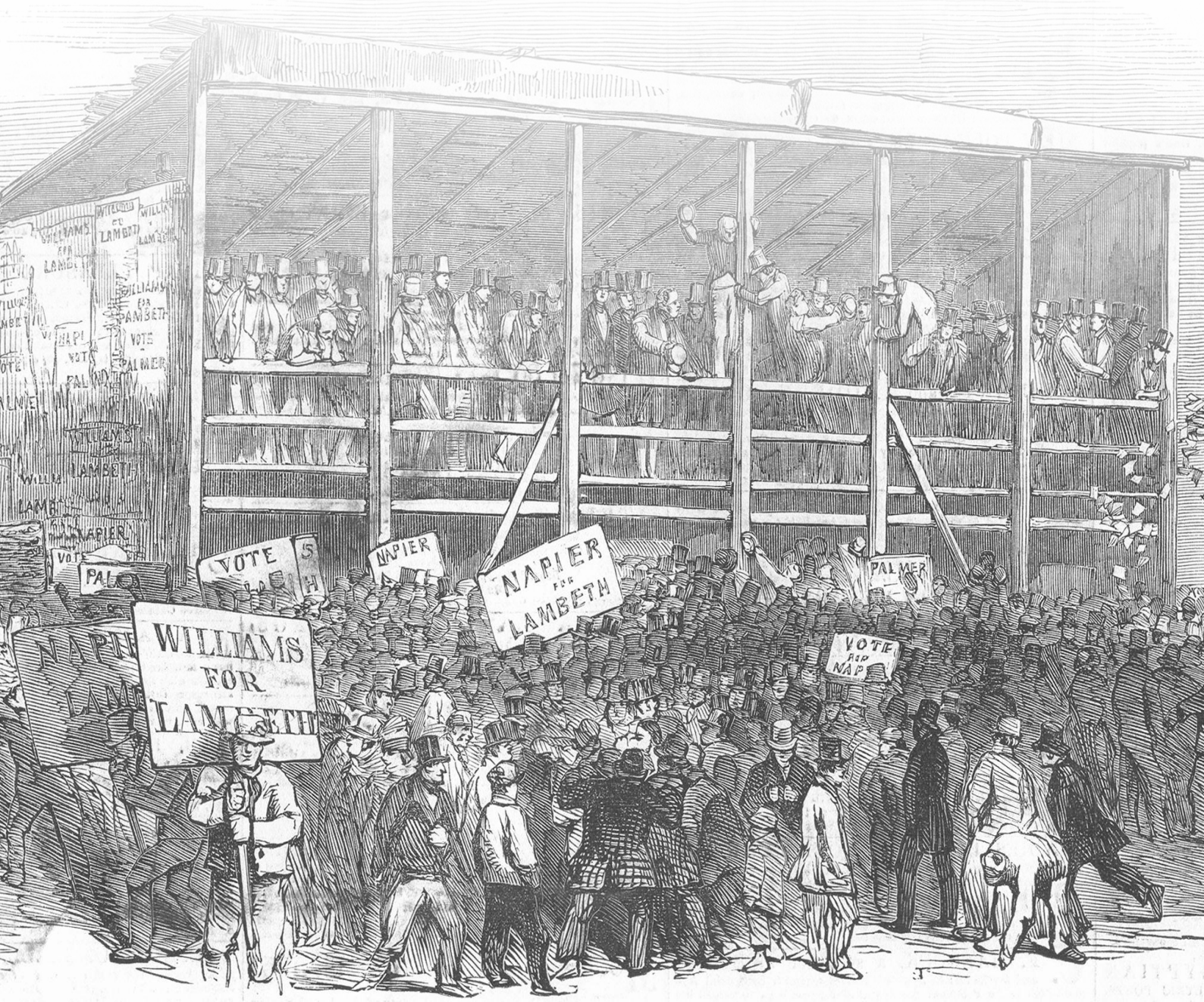
Strengthening the Political Constitution

Policy Exchange

Edited by Richard Johnson



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Acknowledgements

My thanks in the production of this volume goes, first and foremost, to the authors for their excellent contributions. I am grateful to the team at Policy Exchange, who were supportive of this project from the beginning. In particular, I would like to thank Richard Ekins, Iain Mansfield, and Emily Taylor.

This collection has its origins in a conference entitled 'Strengthening the Political Constitution', which I organised in central London in September 2023. The conference was funded by a grant from the Talent and Research Stabilisation Fund of Research England. The conference's purpose was to consider the ways in which the core 'political' elements of the British constitution had been and could be strengthened, after years of weakening parliamentary power, a growing sense of legal rigidity in British lawmaking and governance, and the rising policy influence of arms-length institutions and the judiciary.

The speakers and panel chairs at that conference included Renie Anjeh, Tim Bale, Steven Barrett, Jasmine Bhatia, Lise Butler, Conor Casey, Robert Craig, Eloise Davis, Sagar Deva, Lee David Evans, Jim Gallagher, Julius Grower, Matthew Hanney, John Hartigan, Bryn Harris, Henry Hill, David Klemperer, Tara McCormack, Tony McNulty, Gabriel Osborne, Magnus Pederson, Lee Rotherham, Jess Sargeant, Charlotte Sayers-Carter, Robert Saunders, Chloe Smith, Cornelia van der Poll, Joe Ward, and Yuan Yi Zhu. The conference was attended by a wide range of scholars, members of the public, and political actors, with special note to the Earl Attlee, Alex Burghart, Baroness Deech, Lord Donoughue, and Lord Norton of Louth. All are thanked for their generous contributions of time, experience, and insights. Like the contributors to this volume, they comprise a politically eclectic group, with affiliations to a range of parties and none. Together, however, there is a shared interest in studying how accountable, democratic, and representative politics can be the vehicle and means by which power is exercised in the United Kingdom.

Richard Johnson, Queen Mary University of London, November 2024

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Endorsements

"This collection of thoughtful essays addresses a perplexing paradox. 'Our politics are broken' is one of the most overused clichés of our time. Politics is a dirty word. Parliamentary politics are despised. Yet these things are part of the essential mechanics of democracy. They are all that stands between us and a more authoritarian model of government which we will like even less. Strengthening the Political Constitution is a timely reminder of the value of Britain's political constitution."

Rt Hon Lord Sumption OBE PC FSA FRHistS, former Justice of the Supreme Court of the United Kingdom

"We do not have a constitution in this country. We have constitutional arrangements – a mixture of statute, standing order, precedent – and expectation. If you want to know how those arrangements work, you have to understand their defining political context. This collection of essays will contribute significantly to that understanding – and they have freshness and originality which is welcome in constitutional studies."

Lord Lisvane, former Clerk of the House of Commons

"Too often, the unique features of the British constitution are seen as a source of embarrassment rather than strength. Strengthening the Political Constitution is a welcome reminder of those elements of the British constitution which have seen our parliamentary democracy weather the tests of time. The chapters in this collection address how our ancient constitution, refreshed and adapted to new contexts, has not just served Britain well in its past but also will continue to be a source of vitality for the future."

Rt. Hon. Sir Robert Buckland KC, former Secretary of State for Justice and Lord High Chancellor of Great Britain

"This collection is essential reading for both practitioners and students of the art of political processes. Drawing from a range of political and scholarly perspectives, the authors of Strengthening the Political Constitution agree that we all must pay attention to the central place of Parliament in British democracy."

Baroness Hayter of Kentish Town, former Shadow Deputy Leader of the House of Lords

"The essays in Strengthening the Political Constitution demonstrate the essential importance of politics in government. While technical and legal advice is crucial, and should be carefully considered, governing cannot be a purely technocratic exercise. To govern is to make political choices. These should be made through our democratic institutions, not be farmed off to unaccountable bodies. Remembering this, we can strengthen the public's faith that their vote matters and that they can hold those who make decisions to account and change them if they wish."

Rt. Hon. Lord Spellar, former Comptroller of the Household (Deputy Chief Whip, House of Commons)

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Introduction: Strengthening the Political Constitution

Dr Richard Johnson

Traditionally, Britain has been said to have a 'political' constitution. This is to say that the limits of political action are not set by a codified set of rules enforced by external actors, such as judges. Instead, the boundaries of government are formally limitless and, in practice, constrained by politics and political culture. Constitutional dilemmas, themselves, are typically resolved by political actors rather than by actors who sit outside or above politics. While it is true that there are many legal elements to the British constitution, the law does not dictate what can be achieved through politics. As JAG Griffith wrote, 'law is not and cannot be a substitute for politics'.[1]

This might seem a rather mystical set of abstract claims, but they run through many of the key principles which together make up the 'Westminster Model' of politics, as it has evolved since the achievement of universal suffrage a century ago. Namely, Parliament is sovereign, no Parliament can bind its successor, the British state is unitary, and the House of Commons enjoys primacy within Parliament. This model tends to ensure that governing authority derives from one party winning a House of Commons majority, thanks to the First Past the Post electoral system, on the basis of a policy programme contained in its manifesto. A powerful executive is tasked with legislating for its provisions; convention dictates that the upper chamber cannot block its provisions; an impartial civil service is at the ready to implement the government's policies.

Sometimes derided as 'elective dictatorship'[2] or even (somewhat curiously) 'Bonapartism',[3] this model in fact ensures that governments have the formal capacity to deliver on the pledges they make to the public. This is crucial to maintaining public confidence in the democratic process. Systems which tend to gridlock or legislative chaos, as the academic Harold Laski warned on the eve of the Second World War, can deprive democracy of 'the drama of positive achievement [it needs] to retain its faith'.[4]

Under Britain's political constitution, government is strong in theory but not wholly unfettered in practice. Limits on government exist, but they tend to come through the political process – a strong Official Opposition,

1. JAG Griffith, 'The Political Constitution', *Modern Law Review* 42, 1979: 16.
2. 'Mr Hogg's way to end the tyranny of Whitehall', *The Times*, 12 October 1968.
3. David Klemperer, 'More Bonaparte than Bagehot', *The Constitution Society Blog*, 29 May 2023.
4. Harold Laski, 'The Obsolescence of Federalism', *The New Republic*, 3 May 1939.

scrutiny from both chambers in Parliament, pressure from the media and grassroots, the threat of a confidence vote, and ultimately the potential swinging axe of next general election. Ministers, including the prime minister, are held accountable, both collectively and individually, daily to each other and MPs and at every election to the public. A government which loses the faith and trust of the public does not last long, and just as the electoral system can be very generous in producing healthy majorities for the victorious party, it can be equally exacting in punishing that party at the next election. In this reading of the British constitution, the ultimate judges of politicians are not judges but the people themselves.

The 'New' British Constitution

Between 1997 and 2016, the British constitution underwent a series of far-reaching changes, championed by Labour and Conservative[5] governments alike. Devolution, House of Lords reform, judicial restructuring, restrictions on the power of the executive, the dismantling of the Lord Chancellor, the recall of MPs, directly elected police and crime commissioners and mayors, and the proliferation of quasi-judicial and non-political bodies appeared poised to forge, as Vernon Bogdanor put it, 'a new British constitution'.[6] Although commentators agree that these reforms were implemented without much of a coherent view of the British constitution, they tended to contribute to a weakening of its 'political' nature, especially the centrality of Parliament, in favour of a more formalistic or legalistic one.[7]

None of the Blair, Brown, or Cameron reforms delivered a fatal blow against the political constitution, but in many cases they submerged and stretched its political elements beyond almost all recognition. The power of Parliament became more theoretical and less real, as institutions that fragmented power and obscured political accountability exercised greater practical influence over the policies and decisions which affect people's day-to-day lives. Many academics and constitutional commentators welcomed these reforms. They have tended to treat what were quite contingently introduced changes as if they were sacrosanct, unquestionable features of the constitution.

For example, devolution, while in theory not depriving Parliament of its constitutional right to legislate in Scotland and Wales, severely hamstrung its ability to do so in practice. Indeed, in 2016, the majority-Conservative government went so far as to enshrine that the Scottish Parliament was to be 'permanent' and could not be abolished by a future Parliament without a referendum.[8] Likewise, the creation of the Supreme Court, although not formally 'supreme' *contra* Parliament, became more assertive, including in its intervention over matters that might once have been understood to be non-justiciable, political questions.[9] Rather than allow Parliament to prevent prorogation, as could have been done, MPs waited for legal proceedings to declare that such exercise of the royal prerogative was unlawfully advised.

In the background to the post-1997 constitutional changes, however, was an older and even more consequential act: Britain joining the European

5. Both in coalition with the Liberal Democrats and as a majority.
6. Vernon Bogdanor, *The New British Constitution*, London: Bloomsbury, 2009.
7. John Morrison, *Reforming Britain: New Labour, New Constitution?*, London: Reuters, 2001; Peter Dorey, *The Labour Party and Constitutional Reform*, Basingstoke: Palgrave Macmillan, 2008.
8. This clause could, of course, be repealed by subsequent statute, but it is quite likely it would be subject to judicial review.
9. Carol Harlow, 'Judicial Encroachment on the Political Constitution?' in R Johnson & YY Zhu (eds) *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Oxford: Hart, 2023).

Economic Community (EEC) in 1973. EEC (and, later, EU) membership sat very uneasily with Britain's political constitution. In 1991, the Labour MP Tony Benn wrote that of all the constitutional changes he had witnessed in his lifetime,

> *'The biggest of all was the decision to take this country into the European Communities with the massive change that occurred thereafter, leaving the House of Commons as a municipal authority under the ultimate control of the Brussels administration… The old notions that Parliament controlled the 'Purse and the Sword' and that no parliament could bind its successor have disappeared without a trace, and MPs as a whole seem to have been content to trade their power for status, and join the spectators when the real decisions are taken.'*[10]

As Benn expressed, membership in the European Union required acceptance of a hierarchy of law – EU law over national law. In so doing, it meant that the Parliament which had chosen to join the EU had also bound its successors to this legal regime. A subsequent UK Parliament could not repeal EU law with which it disagreed. It was bound to follow it. It could only reject this hierarchy of law if it exited the organisation altogether. Therefore, while not formally ending parliamentary sovereignty, EU membership put it into hibernation so long as the UK remained an EU member state.

A Constitutional 'Revolution'

In this context, the 2016 vote to leave the European Union can be considered a constitutional 'revolution' in the old sense of the word. Historian of the French Revolution Jean-Clément Martin explained that the historical meaning of revolution was 'a rotation…a return to the original state of things'.[11] In this sense, Brexit was a restoration of the principle that the UK Parliament is the central and the supreme law-making body and that there is no higher law than that which is passed by Parliament.

The reassertion of Parliament's central place in the British constitution has been followed – either directly or indirectly – by other constitutionally 'revolutionary' acts, which have helped to restore some elements of the 'traditional' British constitutional order. The Internal Market Act 2020 importantly protected and strengthened the United Kingdom as a single economic unit. In 2022, the Fixed-term Parliaments Act was repealed, restoring the prerogative to dissolve Parliament at a time of the prime minister's choosing. That same year, the Elections Act expanded the use of the First Past the Post electoral system for some local government elections. In 2023, for the first time ever, the UK government used Section 35 of the Scotland Act 1998 to block a bill passed by the Scottish Parliament from receiving royal assent.

By no means have these 'revolutions' restored the pre-1997 or pre-1973 constitutional order, but they have at least sent an important signal that what had been done to weaken Parliament can (still) be undone. The seemingly relentless march to disempower the Crown-in-Parliament has

10. Tony Benn, 'A Constitutional Campaign', *The House Magazine*, 30 September 1991.

11. Original: 'la rotation des astres et au retour à l'origine'. Martin, Jean-Clément. 2013. 'La polysémie révolutionnaire', *La vie des idées*. https://laviedesidees.fr/La-polysemie-revolutionnaire.

stuttered, if not to a halt, then to a wobblier stride than before.

Together, these changes show there has been a mild shift in the winds of the constitutional reform movement. Brexit is partly to credit (or blame, depending on your perspective), but there has also been a more general reconsideration of the claims made by zealous constitutional reformers since the 1990s. Some of this has simply been borne out through experience. While the advocates of devolution in 1990s argued that granting Scotland and Wales their own assemblies would help to strengthen the bonds of the United Kingdom, the experience of devolution in the past quarter-century has suggested that in fact the opposite has occurred.

Far from fomenting a nationalist revolt against the United Kingdom, recent pushback from the UK government to the Scottish government's insatiable calls for greater powers has arguably strengthened the case for the union, highlighting the relevance of the UK government in all of its parts. Indeed, the UK Government's blocking of the Gender Recognition Reform (Scotland) Bill became one part of a complicated chain of events which undercut the Scottish National Party's hitherto seemingly impenetrable dominance over Scottish politics, with Nicola Sturgeon resigning as First Minister just three months later and the SNP declining to its lowest ebb in years.

Restoring the Political Constitution

While there is a gradual realisation that the promises of the 1990s constitutional reformers have not come to pass, the merits of the political constitution model need more robust articulation. Its critics appear to be more numerous than its advocates within academia. Understandably, if unfortunately, most active politicians see little benefit in getting caught up in seemingly arcane discussions over public law.

Yet, it should be stressed that many voters do care about democracy and self-rule, and once engaged they are interested in having a discussion about these important topics. As Tony Benn once said, 'For people in this country who don't have money or power in industry, it is the vote that is their main safeguard for the future'.[12] It is patronising to believe that only the educated middle classes have opinions about British democracy. Constitutional understanding does not need to be seen as some kind of complex sophistry. People's passion for these topics was obvious from the high levels of political engagement in the 2014 Scottish independence and 2016 European Union referendums. Moreover, it is clear that the British public still regard voting in House of Commons elections as central to their civic involvement. None of the devolved parliaments, directly elected mayoralties, or local councils come close to matching turnout in British general elections, even though in the devolved parts of the UK, devolved representatives now cover far more policy competences than members of the UK Parliament.

One subtle but important difference between what we might crudely call 'political constitutionalists' versus 'legal constitutionalists' is over the culture of politics itself. Legal constitutionalists emphasise using process

12. Tony Benn, BBC Panorama Debate on the Common Market, June 1975.

to arrive at a 'correct' or 'well-considered' judgement. In the legalist understanding, politics is something of a technical exercise, and it has a fairly consensual character. For them, the intense adversarial culture of the House of Commons is to be lamented. Prime Minister's Questions is a national embarrassment. Governments should be composed of several parties, not one, who forge a post-election coalition deal.

Political constitutionalists are more likely to see the clash of ideas as central to democratic politics. They are inclined to see politics as war by other means, and Parliament is the body which contains and facilitates these great fights. Elections are structured around two grand competing visions for the future, and the spoils of war (i.e. the right to rule) go to one, decisive victor. This is a vision of politics which was prized deeply by both Margaret Thatcher and Aneurin Bevan. According to his biographer Michael Foot, Bevan had 'acquired a deep respect, almost love, for the House of Commons'. It was 'a place where given proper use of its possibilities, poverty could win the battle against property without bloodshed'. Bevan 'came to regard Parliament as the most precious political instrument in the hands of the people'.[13]

Foot, himself, was a great believer that politics was a battle of ideas. He celebrated the adversarial nature of British politics and warned against attempts to forge a more consensual form of politics. He agreed with the Conservative prime minister Benjamin Disraeli who once said, 'Above all, maintain the line of demarcation between parties; for it is only by maintaining the independence of party that you can maintain the integrity of public men, and the power and influence of Parliament itself'.[14] If constitutional changes had to be made, Foot argued, 'all reforms which are made should be designed for the purpose of ensuring that the real argument between the parties is able to come out into the open on the floor of the House of Commons'. Foot warned against ill-judged constitutional reforms. 'Above all, we must not take measures which will drain away the political vitality from this place. If that is done, something will be destroyed which it will be very difficult to recreate'.[15] This outlook, connecting Disraeli and Thatcher with Bevan and Foot, is very much the spirit that animates this volume.

About this volume

Too often, public education about the British constitution is dominated by those who seek to change it beyond recognition or who regard its unique features as a source of embarrassment rather than strength. There are also too many commentators who believe that there is an educated, 'correct' view about political and constitutional reform. Those who disagree with them must take their position due to ignorance or malevolence. This is a collection with its fair share of critiques about the British constitution, but it is distinguished by most of the contributors' shared resolve in using those critiques as a way of trying to strengthen rather than diminish its political character.

This collection of essays brings together a wide and distinguished group

13. Michael Foot, *Anuerin Bevan, Vol 1: 1897-1945*, 1966: 227-228.
14. HC Deb 22 January 1846.
15. HC Deb 19 April 1967, vol 745, col 683.

of scholars and politicians to reflect on the merits of the British constitution. In most cases, the contributors propose means of strengthening the 'political' aspects of the constitution and offer critiques of the move to legalism or formalism. These contributions are timely. While they reflect on constitutional changes of recent years, they are also mindful of the future reform agenda. Most notably, the review into constitutional reform written by former Labour prime minister Gordon Brown at the behest of Labour leader (and now prime minister) Keir Starmer has attracted particular attention (and criticism) from many contributors.

This is a politically diverse collection. Contributors include members of the Conservative, Labour, and Liberal Democrat parties, as well as those who are affiliated to no party. The collection includes two former ministers – one Labour, one Conservative – as well as a Conservative hereditary peer, the Earl Attlee, whose grandfather was the Labour Party's greatest prime minister. One of its contributors was the Conservative Minister for the Constitution; another was political adviser to the Deputy Prime Minister Nick Clegg, a Liberal Democrat, on constitutional matters. Some contributors are experienced scholars; others are fresher academics, lawyers, and political commentors. Together, they are defenders of the power of Parliament. From their varied contributions, readers will hopefully see that although the arc of history is long, it does not inevitably bend to legal constitutionalism. The political constitution can be repaired, restored, and strengthened.

Part I - Government
1. The Doctrine of Confidence: The Selection of Party Leaders in Westminster

Robert Craig

Introduction

The doctrine of parliamentary sovereignty is core to the political constitution. Although parliament's outputs are the highest legal norms of the system, that is but the external, legal manifestation of internal political machinations that are such a critical part of our constitutional discourse. Parliament is the formal venue for representatives to seek the redress of grievances for their constituents as well as being the great debating chamber of the nation and the body that scrutinises the executive.

Parliament is starting to emerge from the political earthquakes caused by the Brexit referendum. The British public decided in that referendum to return power, accountability and control from a cabal of inter-governmental executives to the most important institution we have. It is difficult not to recall the speech made by Peter Shore at the Oxford Union before the 1975 referendum and available online. As he powerfully argued, we had no right to squander a legacy handed down over centuries that parliament makes our laws. We did not execute a King centuries ago to then abdicate our ability to determine our economic, political and legal future to others.

Political power in the United Kingdom is thus concentrated in the Westminster parliament, although not exclusively of course. Within parliament, the tip of the spear of that power is the person who is best placed to command the confidence of the House of Commons, without which the government has no political authority. In the modern system, dominated by parties, the prime minister must command the confidence of the MPs of their party to be best placed to command the confidence of the House as a whole.

From an orthodox constitutional perspective, the current procedures for choosing the party leader for both the Conservative and Labour parties in the UK are fundamentally flawed. Both of the two major parties have

had leaders imposed on them by the party membership who were not the preferred choice of the party MPs. This has significant constitutional implications.

The processes for selecting the party leader for the main two parties in Westminster have undergone considerable changes in recent decades. I am going to focus on the two main parties because historically, they have supplied the person who is asked to form a government by the monarch. If another major party emerges, the constitutional principles in this note would still be applicable.

The short version of the argument in this note is that numerous recent examples demonstrate that breaking the link between the confidence of the MPs in the governing party, and by extension the House of Commons as a whole, is an experiment that has clearly failed. Its failure can be explained properly only by understanding some of the deepest drivers of the political constitution in a Westminster system. Only then can we see why shallow appeals to "democracy in the party" are seriously misplaced.

Cavaliers and Roundheads

Two ancient strands have dominated our constitutional thinking for centuries. I mean, of course, the two camps of Cavaliers and Roundheads. Of course, the Roundheads won. As a result, few people nowadays think of themselves as Cavaliers in the ancient sense. But it must be remembered that the full name of parliament is in fact Crown-in-Parliament. In other words, the Crown – and the Cavaliers - moved inside parliament after the Glorious Revolution. That has important implications in the modern constitution. There is a duality in parliament between the Crown – now represented by ministers and arguably with roots in the Cavaliers – and the legislature, represented by backbench MPs arguably the inheritors of the Roundhead mantle. This generates significant creative political tension.

There are three models that purport to explain that creative political tension. What unites all three is perhaps the most central principle of the UK political constitution which is, of course, the doctrine of confidence - to which we will turn shortly. There are, then, three different conceptions of that central basis for the functioning of parliament in the political constitution:

The Westminster view insists that only MPs secure any kind of democratic mandate at general elections. On this extreme view, the government has only an indirect mandate from the electorate and the Cabinet is but a committee of the House of Commons. Some even argue that the government should have a separate investiture vote to explicitly break the link between the mandate from the electorate to MPs and the mandate of the government. That indirect mandate from MPs survives only as long as the government can maintain the confidence of the House of Commons. This view is gaining ground in public discourse and is the direct underpinning of incredibly damaging innovations such as the now-repealed Fixed-term Parliaments Act (FtPA), the Benn/Burt Act and the Cooper/Letwin Act, the latter two of which were passed against the will

of the government during the Brexit process. This is, at one level, the legacy of the Roundhead perspective and places MPs at the top of the Westminster pyramid.

The opposite extreme could usefully be labelled the 'Windsor view', evoking the royal connection of its famous castle. This view centres on the idea that general elections elect His Majesty's government, not really MPs in any material sense. For the Windsor view defenders, MPs are only there because people voted for the party and the prime minister. The duty of MPs is, ultimately, to vote through legislation put forward by the government. The government controls the business of the House, and the money, and all the royal prerogatives. On this view, the doctrine of confidence operates as a final check on the government but unless a vote of no confidence is successful, parliament is there to act as a conduit to help carry out the government's policies and mandate. This is the legacy of the Cavalier perspective, although the Cavaliers now sit within parliament.

Between these two extremes is the moderate and pragmatic middle ground that I defend. It is known as the Whitehall view. The Whitehall view suggest that at general elections our votes are bifurcated. We vote for a backbench MP *and* the leadership of a political party standing on its manifesto. Both get a democratic mandate from the election. The doctrine of confidence therefore operates in a reciprocal manner. Both halves of the equation possess a nuclear option. The government can call a general election using the prerogative of dissolution. Backbench MPs and the opposition can call a general election by voting no confidence in the government.

A good illustration of the duality of the Whitehall model, and good evidence of its explanatory power, is the different approaches of MPs who leave a political party. Some, like Douglas Carswell, seek a byelection – clearly a Cavalier. Others, like the Roundheads who formed the Change party, do not. Although thankfully only a temporary blip, this delicate balance was badly upset by the FtPA and this unbalanced legislation compounded the constitutional crisis caused by the referendum and the destructive constitutional split between MPs and the government that the referendum created.

The doctrine of confidence

The doctrine of confidence is possibly the most ancient, and certainly one of the most important, doctrines in the UK constitution. It is far older than democracy in this country. It is even older than representative government. It is rooted in one of the most important royal prerogatives which is that the king can do no wrong.

Since the king can do no wrong, it became an accepted constitutional feature that any mistakes must be the fault of the advisers to the king. As scapegoats, they could be fired or even executed because they had lost the confidence of the monarch in their administration of the realm. Famously Strafford remarked bitterly about putting one's trust in princes as he was led away to his execution. Charles I had signed his death warrant

with extreme reluctance but was rumoured to have said during his own preparations to be executed that he was at least able to assuage his guilt over Strafford by his own death.

The doctrine of confidence therefore has ancient roots. The Glorious Revolution remains a key pivot point in our constitutional history. The ripple effect of the events of 30 January 1649 still lap at our constitutional shores. The crucial revolutionary change was that the centre of constituent power shifted, permanently, from the monarch to the Crown-in-Parliament. Cavaliers and Roundheads thenceforth fought out their disputes within parliament.

The doctrine of confidence therefore adapted to the new constitutional reality, as it always does. Rather than needing to maintain the confidence of the king, advisers to the king who administered the realm had to maintain the confidence of the House of Commons. Over time, it became clear that the king had a duty to appoint the person best placed to command the confidence of the House of Commons as their primary adviser, or prime minister.

Even more interesting was the further development that the prime minister and government could demonstrate that they had the requisite confidence to stay in office in two different ways. They could either continue in office with the implicit endorsement that the opposition and others did not bring a motion of no confidence against them. Since MPs in parliament represent the people, the prime minister can legitimately claim to have the confidence of the people through their elected representatives.

Alternatively, the prime minister and the government can seek the confidence of the people directly through a general election before the end of the official five year term. The doctrine of confidence therefore operated at two levels: at the level of the people and at the level of parliament.

A necessary corollary of the ability to go to the country to secure a direct democratic mandate is that the constitutional legal position must adjust to the new reality. It is now clear that a general election operates in a dual manner. We do not just choose an MP, we also choose the government. The election manifesto and party leadership gain their own democratic mandate. In a sense, the parties operate their own first past the post race at the macro level. The party that wins the most votes tends to be able to form the government, although this is not a perfect correlation. In particular, the winning party thus secures a mandate to implement their manifesto which sets out their proposals,

If the party that gets the most votes also secures an absolute majority, then the duty on the monarch is easy. He must invite the leader of that party to be prime minister. Even when there is no overall majority, as we saw in 2010 and 2017, it is likely that the largest party will either be able to form a coalition or confidence and supply agreement such that it is clear who is best placed to command the confidence of the Commons. Note that the test does not require a *majority* of the Commons to support the prime minister, but in such cases, the confidence of the largest block of MPs is almost invariably essential.

We can see, therefore, the absolute centrality of the doctrine of confidence to the selection of the prime minister and their ability to stay in office. The prime minister must have the confidence of the House of Commons. Since that confidence, in the modern system, is a function of the MPs from the party led by the prime minister, it is necessary prerequisite that the prime minister must have the confidence of the MPs in their party. It follows, it is suggested, that the winner must be the first choice of party MPs in the House of Commons.

And that leads finally to the crunch question raised by this note.

Who should choose the leaders of the two major parties?

We have seen in recent years a number of occasions where the party MPs have had a strong preference for a candidate for leadership but that has not been matched by those who actually choose the leader.

This has long been theoretically possible in the Labour Party because the parliamentary party was an offshoot of the trade union movement – so although for decades the choice was made by MPs, the possibility of outside influence was always present. The potential for a different result under the modern leader selection process was seen in the choice of Ed Miliband for leader instead of his brother David who was by far the most popular candidate amongst Labour MPs. Much more famously, and recently, Jeremy Corbyn was overwhelmingly elected by the membership despite having tiny support in the parliamentary party. This set the stage for years of confusion and dysfunctionality in the parliamentary Labour party.

Similarly, Liz Truss was chosen as leader ahead of Rishi Sunak despite him being more popular amongst party MPs. We all saw the catastrophe that ensued, predicted by Sunak. This was also true of Iain Duncan Smith in the runoff against Ken Clarke. The hugely embarrassing eventual defenestration of Duncan Smith was followed by an unopposed coronation of Michael Howard. It could also be mentioned that the rule that the incumbent cannot be on the ballot paper is the only reason Boris Johnson lost his position, and if the membership had been able to vote in 1990, Margaret Thatcher would never have had to resign.

There is something superficially attractive about the idea of asking the membership to vote on candidates for leadership. It might seem to be more "democratic". I strongly disagree. We live in a representative democracy. MPs do not just represent their party. Under the Whitehall model, they also represent tens of thousands of their constituents. The doctrine of confidence is so central to the UK constitution that it ought to be inconceivable that anyone chosen as leader of the ruling party who does not expressly or implicitly command the confidence of the majority of MPs of their own party and therefore, by extension, parliament as whole. As Richard Johnson has pointed out, MPs have the opportunity to assess candidates in the crucible of the House of Commons and the process can be concluded much more quickly.

There is a stark difference between the number of party members, in

six figures, and the number of people represented by party MPs which number in eight figures. The views of MPs are therefore two orders of magnitude more relevant, and the linchpin of the entire system is seriously undermined if the leader of a major party does not command the support of their own party MPs.

It might be thought that a distinction could be drawn between the election of a leader whilst in opposition as compared to election of a new leader whilst a party is in government. Michael Foran has pointed out that leadership elections in opposition do not directly and immediately result in the election of a new prime minister. He points out that the changes to the rules generally took place whilst in opposition. It is true that the potential problems may not be so starkly exposed, but the unavoidable truth is that a party leader in opposition may very well become prime minister after an election, at which point all the same issues listed above in relation to the governing party would immediately be applicable.

At a minimum, the main opposition party will be offering their leader as the putative next prime minister. That person must command the support of the MPs in their party in parliament. A party that moves from opposition to government is likely to retain the vast majority of their existing MPs, almost by definition. If the leader of the opposition does not have the support of their own party MPs, then the core constitutional norm that the person invited to be prime minister must be the person best placed to command the support of the House of Commons may not be true, even after a victorious general election.

In addition, in the event of a hung parliament with a substantial third party, a new opposition leader could become the prime minister even without a general election, if the third party abandons the existing government. The argument for different selection procedures depending on whether the party is in government or not seems weak. It is difficult, although not impossible, to envisage the major parties constructing entirely different internal election procedures for party leader depending on whether the party happens to be in opposition or in government.

It is therefore suggested that the misguided decision of Conservative and Labour parties to make the determination of the leader a matter for people outside parliament, however worthy, is a significant constitutional aberration. The parties should seriously consider reverting to a system where party MPs choose who is the leader of the party.

Conclusion

The essential root of the doctrine of confidence is that the person asked to form a government must be the person best placed to command the confidence of the commons. In a system now dominated by the major parties, that person should never be someone other than the person who commands the greatest support amongst their own party MPs in the House of Commons, and by extension is best placed to command the confidence of the Commons as a whole.

2. Conjuring the Constitution: Bureaucratic Metastasis and the Ministerial Code

Henry Hill

> *Every great magic trick consists of three parts or acts. The first part is called "The Pledge". The magician shows you something ordinary: a deck of cards, a bird or a man. He shows you this object. Perhaps he asks you to inspect it to see if it is indeed real, unaltered, normal. But of course... it probably isn't. The second act is called "The Turn". The magician takes the ordinary something and makes it do something extraordinary. Now you're looking for the secret... but you won't find it, because of course you're not really looking. You don›t really want to know. You want to be fooled. But you wouldn't clap yet. Because making something disappear isn't enough; you have to bring it back. That's why every magic trick has a third act, the hardest part, the part we call "The Prestige".*
>
> Cutter, *The Prestige*

The Pledge

> *"The magician shows you something ordinary…"*

In a 2016 lecture in Kuala Lumpur, Baroness Hale said of the Law Lords that: "however well this arrangement had worked in practice, it could not be justified in principle."[16] The Ministerial Code presents the opposite problem. The theory of it is entirely unproblematic. The practice? Not so much.

The story of the Ministerial Code ('the Code') is a quite straightforward tale of bureaucratic metastasis. Its current iteration started life in 1992 as the much more mundane-sounding Questions of Procedure for Ministers, a document which covered mostly the matters indicated by the title but included some material on ethical conduct. Yet by 2021, the Committee on Standards in Public Life was recommending that everything *except* the ethical content be stripped out and put somewhere else, to save confusion.[17] ('Questions of Procedure for Ministers' would seem an appropriate title for this new document.)

Along the way, what was originally simply a document published

16. Hale, B. (2016). *The Supreme Court: Guardian of the Constitution?* [online] Available at: https://www.supremecourt.uk/docs/speech-161109.pdf [Accessed 28 Jul. 2024].

17. The Committee on Standards in Public Life (2021). *Upholding Standards in Public Life*. [online] p.53. Available at: https://assets.publishing.service.gov.uk/media/617c-02fae90e07198334652d/Upholding_Standards_in_Public_Life_-_Web_Accessible.pdf [Accessed 28 Jul. 2024].

by the prime minister *du jour* has acquired hallowed status – and with it, the inevitable demands for it to be given material force that reflects this spiritual dignity. This process undermines the essentially political character of a central part of the constitution: the formation of government.

Those advocating for such changes are normally cognisant of this danger, and take pains to insist that their particular proposal averts it. Perhaps they even mean it. The danger remains nonetheless, and it is two-fold.

First, by providing a simplistic shorthand to journalists and non-expert observers of government, the Code undermines popular understanding of the regime it describes and, by so doing, inevitably risks shaping that regime into something it was never supposed to be. Second, the much more prescriptive conception of the Code advocated for by those who wish to formalise it is entirely incompatible with the essential political prerogative of the prime minister to choose their own cabinet.

The result looks an awful lot like a classic conjuring trick: take something mundane, and convince people that it is something more. But because constitutions operate on the Tinkerbell principle (if you can make enough people believe something is so, it is so) those advocating reform have every chance of pulling off some real magic: making one of the prime minister's most important prerogatives disappear.

The Turn

> *"The magician takes the ordinary something and makes it do something extraordinary."*

The principle of the Ministerial Code is entirely unobjectionable. It is a set of principles and guidelines issued by the prime minister for the benefit of his or her ministers. It has no formal juridical character. Not only is not legal in nature, it really ought to be non-justiciable at all; it is for the prime minister to determine what, if any, consequences should follow a breach.

In the real world, however – and *contra* Baroness Hale's description of the process by which the Supreme Court came to be – a constitutional instrument cannot be wisely assessed on its abstract character or theoretical merit alone. Its actual operation, and its actual perception by actual human beings, have to be taken into account. It is here that the Ministerial Code falls down. Time and again, commentators – learned and lay – either misunderstand or misrepresent it.

This happens in several different ways. The first is elision: saying that so-and-so "broke the Ministerial Code" often substitutes for actually describing the alleged offence. This happens not only in media reporting, but sometimes even in specialist material. For example, this is from the Institute for Government's official explainer of the Ministerial Code:

> *"In 2017, then-First Secretary of State Damian Green was asked to resign by then-prime minister Theresa May following a breach of the ministerial code. The prime minister had referred Green for investigation by then-cabinet*

> *secretary Jeremy Heywood, who found that he had twice breached the honesty requirement of the Seven Principles of Public Life outlined in the code."*[18]

Nowhere in the post is it mentioned what Green actually did; the use of "following" rather than "over" is a nuance which might well be lost on the intended, non-specialist readership. And if this happens in expert literature, it is no surprise it happens more egregiously in journalism.

Consider the example of Suella Braverman when she, as Home Secretary, asked civil servants if they might arrange for her to take a speed awareness course privately following a speeding offence. She was told that this would not be appropriate and took the matter no further. It was by any measure a trivial story, perhaps of interest to journalists but nothing to warrant official sanction. Yet in the media coverage, it was often as not her "alleged breach of ministerial code" which led the headlines.[19]

By this means trivial potential breaches (e.g. Braverman asking her civil servants if they might arrange for her to take a speed awareness course privately) are conflated with serious ones (e.g. Braverman privately circulating sensitive documents to backbench MPs, for which she had previously been dismissed from Cabinet). This afforded both the press the opportunity to write dramatic headlines about trivial events and opposition politicians a means to try exploit such a story to damage the government and force a resignation, which they took up with gusto.[20]

Some of this may be wilful. But it could also stem from genuine misapprehension of what the Ministerial Code actually is. Even if it began as a handy shorthand for alleged ministerial misconduct, its repeated use has inevitably shaped public (and media) understanding of the Code itself – specifically, the assumption that any breach is a resigning offence. Indeed, this is often cited as part of the case for reform.[21] But there are other cases too, such as that identified by Sir Peter Riddell:

> *Much of the political and media comment has mistakenly depicted the government's announcement of graduated sanctions, such as a public apology or a fine, rather than the sole remedy of a ministerial resignation, as a weakening of the Code, when this represents a sensible and flexible development.*[22]

More serious still – if only because of the especially learned character of the confused – was the row occasioned by David Cameron's decision to update the Code to excise the previous reference to "international law". This decision was a political act, and a fair target for *political* criticism. But the media quoted lawyers who made it sound like a substantial change to the operation of the constitution, if not a challenge to the very idea of the rule of law.[23]

Yet this was not the case: the updated injunction "to comply with the law" encompasses any international law which has been incorporated into UK law. If anything, the original formulation misstated the true constitutional position. As Richard Ekins and Guglielmo Verdirame noted: "Ministers have never been under a general legal duty to comply with international law including treaty obligations. The subject of any such duty is the UK itself."[24]

18. Haddon, C. and de Costa, A. (2019). Ministerial Code. *Institute for Government*. Available at: https://www.instituteforgovernment.org.uk/explainer/ministerial-code [Accessed 28 Jul. 2024].
19. Sparrow, A. (2023). Sunak says he wants more information before decision on Braverman's alleged breach of ministerial code – as it happened. *The Guardian*. Available at: https://www.theguardian.com/politics/live/2023/may/22/suella-braverman-rishi-sunak-speeding-row-ministerial-code-ethics-inquiry-keir-starmer-uk-politics-live [Accessed 28 Jul. 2024].
20. Rogers, A. (2023). *Suella Braverman to stay in post after Rishi Sunak says speeding investigation 'not necessary'*. [online] Sky News. Available at: https://news.sky.com/story/suella-braverman-to-stay-in-post-after-rishi-sunak-says-speeding-investigation-not-necessary-12886648 [Accessed 7 Jan. 2024].
21. For example, in Durrant, T., Pannell, J. and Haddon, C. (2021). *Updating the ministerial code*. [online] Institute for Government, p.14. Available at: https://www.instituteforgovernment.org.uk/sites/default/files/publications/updating-ministerial-code.pdf [Accessed 7 Jan. 2024].
22. Riddell, P. (2022). *Arguments over the Ministerial Code and the role of the Independent Adviser on Ministers' Interests are far from over*. [online] The Constitution Unit Blog. Available at: https://constitution-unit.com/2022/06/10/arguments-over-the-ministerial-code-and-the-role-of-the-independent-adviser-on-ministers-interests-are-far-from-over/ [Accessed 7 Jan. 2024].
23. Taylor, D. (2015). Lawyers express concern over ministerial code rewrite. *The Guardian*. [online] 22 Oct. Available at: https://www.theguardian.com/law/2015/oct/22/lawyers-express-concern-over-ministerial-code-rewrite [Accessed 7 Jan. 2024].
24. Ekins, R. and Verdirame, G. (2015). *The Ministerial Code and the Rule of Law*. [online] Policy Exchange. Available at: https://policyexchange.org.uk/blogs/the-ministerial-code-and-the-rule-of-law/ [Accessed 7 Jan. 2024].

Again, we cannot know for certain whether any particular misrepresentation of the Code was wilful or owed to genuine misunderstanding. But the idea that a prime minister could impose substantive legal obligations on ministers, or lift them, merely by personally issuing or editing a document is not one commonly found in our constitutional discourse. All of a sudden, ordinary documents are being vested with truly extraordinary power – and by people who have no excuse not to know better. Perhaps they want to be fooled.

The problem remains either way, compounded in this instance by the potential second-order confusion which might arise from the coverage. If people read lawyers talking about the Ministerial Code as a thing of profound constitutional consequence, they may understandably assume that it is such. If even those with special training are making of it a false idol, what hope for the rest of us?

The Prestige

"The hardest part…"

But of course, we haven't really done any magic yet. Merely persuading the audience that something is what it isn't is not enough – especially when you haven't persuaded the audience that matters: the prime minister. If they choose not to be taken in, the mundane reality of the political constitution snaps back into focus. And that won't do at all.

This is the second major problem with the evolution of the Code: the predation by the forces of official procedure on what is properly a political and personal process: the formation of the Cabinet.

Those advocating for the Code to be strengthened are usually sensitive to this danger. The Committee on Standards in Public Life, for example, insisted that:

The issuing of sanctions must be a decision solely for the Prime Minister. To create a situation where any independent regulator of the Ministerial Code would effectively have the power to fire a minister would be unconstitutional.[25]

Such concerns are echoed in reports from the Public Accounts and Constitutional Affairs Committee (PACAC) [26], and the Institute for Government[27]. All their proposals protect, in theory, the principle that it is for the prime minister to determine who serves in his or her cabinet.

However, as we noted at the beginning, theory and practice are different things. An holistic, political-constitutional analysis must account not merely for where the power of decision technically rests, but also the choice architecture within which a decision is made, both in terms of institutions and, as this is politicians we're talking about, media and popular perception. This gets to the nub of the problem: political and bureaucratic power operate on fundamentally different and incompatible principles.

Bureaucratic structures constrain individual agency by design. However much we may recoil from the phrase, "I was only following orders" is the basic operating principle of bureaucracy. There are rules and procedures;

25. (The Committee on Standards in Public Life, 2021) pp.55-57.

26. Public Administration and Constitutional Affairs Committee (2022). *Propriety of Governance in Light of Greensill*. [online] House of Commons. Available at: https://committees.parliament.uk/publications/31830/documents/178915/default/ [Accessed 7 Jan. 2024].

27. (Durrant, Pannell and Haddon, 2021) p.9.

so long as they are followed, they shield the people who operate within them. Blame – what Venkatesh Rao described as "organizational dark matter" – accretes to the system or the institution, not the individual.[28] But *only* so long as the rules are followed.

In most organisations this is a feature, not a bug. Following proper procedure insulates both individuals and institutions from blame and legal liability. But in a normal bureaucracy, individuals do not have their own mandates; they are often not allowed, much less expected, to wield power according to their personal judgement.

Such a model cannot be applied to democratic politics. If the people are to choose their representatives, and their representatives to discharge their mandate, politicians cannot be subordinate to a bureaucratic hierarchy the way a normal employee is.

Evidence of the incompatibility of these two approaches abounds in our politics – for example, whenever an effort is made to 'modernise' Parliament, especially with regard to HR, an area of great bureaucratic growth (and thus, waxing bureaucratic power) in other spheres. Take proposals to introduce mandatory 'Valuing Everyone' training for MPs: if someone were to refuse such training, and the voters re-elected them, which should prevail?[29]

Consider also the increasing frequency with which a decision by the Secretary of State (or indeed, other official body such as a planning authority) is overturned in the courts because of some oversight in box-ticking. The outward form of discretionary decision-making by a political actor is maintained, but increasingly disguises the reality of bureaucratic compliance, inflicting huge costs and delay on government decision-making (to the extent it still warrants the label 'government decision-making').

There is no tidy way to reconcile the conflicting imperatives of individual agency and the systematic enforcement of standards. This naturally bedevils reform proposals which claim to do this. Sometimes this is openly acknowledged; PACAC could find "no easy resolution" to the "tension" created by the prime minister's ultimate authority for enforcing the Code when they themselves were the subject of an investigation.[30]

There is none to be found. Any attempt to combine two incompatible systems will eventually resolve into one or the other – and for all the lip-service paid to the vital importance of the political dimension, that seems to be exactly the logic of formalising the status of the Code: that it should be sacrificed to whatever extent is necessary to secure the smooth operation of bureaucratic process.

The Institute for Government, for example, cites Boris Johnson's refusal to sack Priti Patel as evidence that the Code needs to be strengthened.[31] But this was a case of precisely the express exercise of the prime minister's "ability to choose who serves in the government" that they elsewhere describe as being of "fundamental constitutional importance",[32] and none of their proposed changes would preclude it.

Johnson could not have provided a more clear-cut example of

28. Rao, V. (2011). *The Gervais Principle V: Heads I Win, Tails You Lose*. [online] Ribbonfarm. Available at: https://www.ribbonfarm.com/2011/10/14/the-gervais-principle-v-heads-i-win-tails-you-lose/ [Accessed 7 Jan. 2024].

29. Allegretti, A. (2022). *Calls for compulsory MP training to tackle sexist culture in parliament*. [online] The Guardian. Available at: https://www.theguardian.com/politics/2022/may/02/boris-johnson-under-pressure-to-back-compulsory-workplace-training-for-mps [Accessed 7 Jan. 2024].

30. (Public Administration and Constitutional Affairs Committee, 2022) p.4.

31. (Durrant, Pannell and Haddon, 2021) p.5.

32. (Durrant, Pannell and Haddon, 2021) p.8.

political discretion in the face of a system that worked as intended by recommending Patel's dismissal. If advocates for strengthening the Code are sincere about maintaining that discretion, his decision is not evidence of anything; in fact, it ought to be offered as an example of the sort of thing any change would still permit. By adducing it as they have, the IfG authors imply that it was precisely the prime minister's capacity to defy official recommendation (or, if that logic is followed, command) which must be curtailed – and a system where politicians can make the decisions only when they make the *right* decisions has ceased to be a political system at all.

If strengthening the Ministerial Code would restrict the prime minister's freedom of action, the next question is who is empowered at their expense. Power can accrue to abstractions, but abstractions cannot wield it; strengthening the Ministerial Code necessarily means strengthening the officials tasked with enforcing it.

Sometimes the proposed restriction is overt, such as guaranteeing the independent advisor's tenure, granting them the power to initiate investigations, allowing them to propose changes to the Code, or requiring that the prime minister justify himself to Parliament if he demurs from their advised changes.

But the entire enterprise has this tacit object – or at least, the various proposals would all need to have this effect in order to restrict the prime minister's discretion to act as did Johnson over Patel. The whole theatre of process encourages politicians to outsource decision-making, offering them cover if they comply (officials and procedures to shoulder the blame) and risks if they don't (resignations, denunciations for ignoring the Code, *et al.*).

As if by Magic

> *"Oh no sir, this wasn't built by a magician. This was built by a wizard. A man who can actually do, what magicians pretend to do."*

The debate over the Ministerial Code is between two very different principles of human organisation: individual agency and the bureaucratic enforcement of norms. One could, on paper, design a system that split the difference between them. But such a system would not be stable.

Points of friction would be obvious targets for future reform efforts. As we have seen, so too would the persistence of adverse outcomes. Whatever lip-service is paid to the principle that politicians must be free to choose, the adducing of individuals' decisions as arguments for a stronger bureaucracy reveal an understanding of choice that is essentially Fordian: the prime minister may make any decision, so long as it is the correct decision. This is compounded by the way the Code, and supposedly-informed commentary around it, has turned a simple document into a misleading shorthand that implies serious malfeasance.

For that reason, I have previously called for the Code to be scrapped.[33] Failing that, the most sensible practical objective for those concerned

33. Hill, H. (2023). *The Ministerial Code is a shield for cowardly prime ministers and prop for pearl-clutching commentators. Scrap it.* [online] ConservativeHome. Available at: https://conservativehome.com/2023/05/23/the-ministerial-code-is-a-shield-for-cowardly-prime-ministers-and-prop-for-pearl-clutching-commentators-scrap-it/ [Accessed 7 Jan. 2024].

to maintain as much as possible the political character of this aspect of government would be to deconsecrate it – to make it just another boring bit of the machinery of government, rather than the lodestar it is currently misunderstood (or misrepresented) to be. The simplest way to do that would be to break it up into multiple documents, and give each of those documents very boring names ('Questions of Procedure for Ministers', for example) – and not publish them.

That would be perfectly compatible with taking steps to rationalise its operation. Boring does not mean unimportant, and individual adjustments (such as the recent move to clarify different levels of sanction) need not predate upon political discretion.

Such action would require some small measure of courage on the part of the prime minister, who would surely be denounced by those for whom bureaucratic process is a *sine qua non* of 'the rule of law'. Without it, however, we risk waking one day to discover that they have managed to make one of the essential prerogatives of the prime minister's office – and with it, a critical component of our political constitution – disappear. Now that would be quite the trick.

3. The Parliamentary Convention on Authorising War: Authority, Legitimacy and the Political Constitution

Tara McCormack

By the mid-2010s it was widely accepted that the Royal Prerogative power on authorising war had been replaced by a Parliamentary convention on authorising war.[34] Discussion about this new convention has tended to focus on contemporary political arguments and events or to consider this from a normative perspective.[35] In this essay I argue that the move away from the Royal Prerogative can be understood in the context of the weakening of what has been called for short-hand the political constitution.[36]

The essay is structured as follows. Below I situate the rise of the new Parliamentary convention on authorising war in a broader set of constitutional changes in which formalisation and codification are responses to the decline in the old basis for legitimacy: political authority of the executive based on representation, ultimately the sovereignty of the voters. These constitutional changes were formally enacted by New Labour, but with precedents in the previous government[37] and carried on by the Liberal-Conservative coalition and then the Conservative government. I will discuss the development of the Parliamentary convention on authorising war over the course of the 2000s and 2010s and Theresa May's refusal to ask Parliament for authorisation for the bombing of Syria in 2018. In conclusion I consider if May's refusal to go to Parliament represents a return of the political constitution and a relationship of confidence between the government, Parliament and citizens. I will argue that the problem of authority and legitimacy remains.

In the post-war British state, since the full expansion of the franchise, the basis for Parliamentary legitimacy and sovereignty has been ultimately the sovereignty of the voters, the citizens.[38] In this context, the authorisation of the government by Parliament can be understood to be derived from a continuous flow of confidence, the doctrine of confidence.[39] This ultimately is the confidence deriving from representation of the voters and authority derived from here.[40] The doctrine of confidence is a good example of a part of what has been termed the political constitution.[41] A constitution in

34. James Strong, 'Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative Through Syria, Libya and Iraq', *British Journal of Politics and International Relations* 17:4 (2018), 1–19; James Strong, 'The War Powers of the British Parliament: What Has Been Established and What Remains Unclear?', *British Journal of Politics and International Relations* 20 (2018), 19–34; Tara McCormack, *Britain's War Powers, the Fall and Rise of Executive Authority?*, London: Palgrave Pivot, 2019.

35. For example, J Gray & M Lomas, *Who Takes Britain to War?*, London: The History Press, 2014.

36. Richard Johnson & Yuan Yi Zhu, 'Introduction: The Case for the Political Constitution' in R Johnson & YY Zhu (eds) *Sceptical Perspectives on the Changing Constitution of the United Kingdom* 2023, Oxford: Hart. For a critical account of the term, see also Martin Loughlin, 'The Political Constitution Revisited', LSE Law, Society and Economy Working Papers No. 18, 2017.

37. M Louglin, In Search of the Constitution, LSE Legal Studies Working Paper No. 19, 2019.

38. See Loughlin (2019) for a short overview for the changing basis for Parliamentary authority since the English Civil War.

39. See Robert Craig, 'The Fixed-term Parliaments Act 2011: Out, Out Brief Candle' in Johnson & Zhu (2023).

40. Albeit this in itself is a relatively new form of authority. See Loughlin (2019) for an historical overview.

41. Johnson & Zhu, 2023; Loughlin, 2017.

which the parameters are set not by statute or in formal terms but via the relationship between the House of Commons and the government, and the underlying citizens. At any point the House of Commons can withdraw its confidence and the government may in principle fall. But this can also be understood in reverse. The government remains the government by dint of the continuous flow of confidence from the House of Commons to the Government and beneath this is the confidence and support of the voters.

In Britain the authority to declare war has historically been one of a range of powers known collectively as Royal Prerogative (RP) powers.[42] During the 1990s a cross-party constitutional debate arose with particular focus on RP powers including the war power. In short RP powers were originally vested in Monarch. Over the course of centuries and in the context of the changing locus of authority and legitimacy within the British political system, RP powers are now exercised by the executive. The full extent of RP power remains uncodified; however, there are several main RP powers that are well known: for example, the power to sign international treaties and the power to declare war.[43]

The political context for this debate about the RP (including war powers) was that of growing cross party concern with the changing basis within Britain of political authority. In particular, fears coalesced around the matter of the erosion of representation.[44] Over the course of the 1980s and 90s falling voter turnout and changes in party alignment represented some of this erosion.[45] In turn, these changes can be understood in the context of the end of the post-war consensus[46] but it is beyond the scope of this essay to explore this. RP criticism was then part of this broader set of concerns around what was understood to be a fading democratic mandate for governing in the context of an erosion of representation.[47] To relate this back to the doctrine of confidence points above, it is the implicit confidence mechanism that has been steadily eroded as representation has been eroded.

New Labour was elected to form the government in 1997. RP powers had already been criticised by politicians within the party, for example Jack Straw in 1994.[48] The new government embarked on a far reaching and ambitious programme of constitutional reforms that aimed to formalise the unwritten relationship between the House of Commons, the government and the citizens in a context of this relationship being eroded. That is to say to, moving away from the political constitution and towards a formal and juridical one in which implicit authorisation and legitimacy can no longer be assumed. As Loughlin has argued, the aim of these constitutional changes was to construct a new basis for authority and legitimacy.[49]

Examples of the changes included putting hitherto uncodified matters on a statutory basis, such as making more aspects of the constitution subject to the court; establishing the Supreme Court; setting up avenues for contact outside of the main Parliamentary arena, such as devolution; transforming political questions into technocratic ones, such as removing interest rates from Parliamentary control. British policy towards Iraq and

42. For in depth discussion and analysis of the history of RP powers, see R Joseph, *The War Prerogative: History, Reform, and Constitutional Design*, Oxford: Oxford University Press, 2013.

43. House of Commons Public Administration Select Committee, *Taming the Royal Prerogative: Strengthening Ministerial Accountability to Parliament*, Fourth Report Session 2003–04, HC 422, 2004.

44. Albeit there are discussions about what the erosion of representation really signified. For an overview and references, see McCormack (2019, Ch 2).

45. For details and references, see McCormack (2019, Ch 2).

46. F Bartel, *The Triumph of Broken Promises: The End of the Cold War and the Rise of Neoliberalism*, Cambridge: Harvard University Press, 2022.

47. For details and references, see McCormack (2019, Ch 2).

48. House of Commons, 2004, 8.

49. Loughlin, 2019.

then Kosovo also contributed to the discussion on RP war powers. For example, in response to Operation Desert Fox, Labour MP Tam Dalyell attempted a private members bill that would set up a Parliamentary vote on War. In response to the NATO military intervention in Kosovo in 1999, the House of Commons Foreign Affairs Committee argued that in order to ensure legitimacy for future military actions, there should be a vote in the House of Commons.[50]

It was in 2003 that the then British Prime Minister went to Parliament as the Iraq invasion was imminent and asked for Parliament to vote on going to war. The immediate context was the invasion of Afghanistan and the steady build up to the Iraq invasion, a military invasion explicitly argued for by the American state over the course of 2002 and 2003. However, the desired invasion was publicly contested. For example, in Britain and across Europe there were very big anti-war demonstrations, with the British demonstration in February 2003 acknowledged as Britain's biggest ever demonstration (BBC, 2003). As part of a strategy of supporting America's decision to go to war in Iraq, the British Prime Minister actively sought false justifications, for example, as revealed in the Chilcot inquiry (BBC, 2016). Given the contestation about Iraq then, the vote can be understood quite clearly as a request for explicit authorisation from Parliament, in essence a buttressing of authority in which it was felt that the implicit authorisation of the House of Commons based on representation was not sufficient for something that was so publicly contested.

It was after this that the RP and war powers became increasingly a matter for political debate. For New Labour, it was explicitly seen to be part of the unfinished business of the constitutional reforms but it is important to note that this was very much a cross party concern and the problem of the RP is explicitly linked by both parties to concerns about a lack of legitimacy and authority.[51] When the Liberal-Conservative coalition formed the Government in 2010, it was acknowledged by the Leader of the House Sir George Young that there was a Parliamentary convention that Parliament should debate any commitment of troops.[52] Then Prime Minister David Cameron subsequently went to Parliament twice to ask for explicit authorisation for military intervention. Firstly in 2013 to request authorisation from Parliament to join in with a proposed American bombing campaign against the Syrian government, and then in 2015 to join in a proposed international military coalition against ISIS (also in Syria).[53]

In 2013, Parliament said no to joining in with the military campaign against the Syrian government. In response there were anguished arguments made that from now on, no government would dare to commit military action without Parliament. In 2015 Parliament approved Cameron's request to engage in military action against ISIS. In 2016 then Defence Secretary Michael Fallon confirmed in a written statement the existence of the convention but also explained that there were no plans to put it onto a statutory footing.[54] However, in April 2018 then Prime Minister Theresa May joined with Macron and Trump in bombing Damascus ostensibly as

50. For details and references, see McCormack (2019, Ch 2).
51. Ibid.
52. HC Deb, 10 March 2011, Vol 524, Column 1066.
53. For details and references, see McCormack (2019, Ch 3).
54. HC Written Statement, HCWS678, 18 April 2016.

a warning to and retaliation against the Syrian government for the use of chemical weapons. May did not ask Parliament for authorisation. The then leader of the opposition, Jeremy Corbyn, called an emergency motion the following day which would have allowed Parliament to in effect tell the government off for failing to ask for authorisation. However, Parliament voted against the motion, that is to say, Parliament expressed support for the government's decision not to ask Parliament for direct authorisation.[55]

There is a question that is raised with reference to the April 2018 decision made by then Prime Minister Theresa May not to recall Parliament to authorise air strikes on Syria. If previous decisions to consult Parliament derived from a need for explicit authorisation and legitimacy from a Parliamentary vote in the context of attenuating representation and political authority of the old sort, how do we understand 2018? It is tempting to assume that May's refusal to ask for explicit authorisation is symptomatic of the return of the political constitution. Does this represent the return of the implicit flow of confidence that had been previously the foundation for the government? Any Parliament can ultimately call a vote of no confidence in a government if it feels this is justified. Thus, one might be tempted to assume that therefore when that does not happen the government enjoys the confidence of the House of Commons.

However, I would suggest here that it would be incorrect to assume a return to what we might call the political constitution for short hand, which would imply a robust relationship between government and Parliament, underlain by popular representation. The dynamic I would suggest is both a weak Parliament and a weak executive existing in a context in which a political relationship between the government and citizens is attenuating. The context for the 2018 decision by the Prime Minister not to recall Parliament was that of Brexit stasis. Parliament, frozen by the fact that the majority of MPs did not wish to leave the EU and therefore to represent the voters, was refusing to carry out the results of the referendum. However, in that given situation Parliament did not wish either to topple the government as it would also mean MPs' seats would be put to the vote. Equally, the government had gone to the voters to ask for a stronger mandate and had come away with a minority government. As Loughlin has argued, the Brexit stasis represented 'a crisis of parliamentary representation, with a gulf opening up between the positions of leave and remain voters inadequately represented by their constituency MPs, and, since the Government was split, not overtly on leave and remain but on acceptable terms of leaving, a crisis of governmental authority.' (Loughlin, 2019, p17).

In the 2019 election the Conservative party again formed the government but this time with a majority of 80 seats. Under that government, we saw executive action with minimal Parliamentary support, for example Covid policy choices; signing of AUKUS; support for Ukraine. The point here is not to make an argument about the correctness or otherwise of these heterogeneous policies but that the dynamic has been towards the executive driving policy and a quiescent Parliament that has preferred not

55. See McCormack (2019, Ch 3-4) for details and references.

to rock the boat.

The erosion of what can be called for short hand the political constitution is the consequence of changing basis for political authority and the attempt to create different kinds of authority and legitimacy. This wider context remains. The Brexit vote and subsequent several years of political freeze suggest that the problem of political authority is one that remains. In its place we are seeing a new kind of polity emerging which is not based on representation but one that has yet to find alternative sources of legitimation. The retreat from the Parliamentary convention on authorising war is not I would argue a return to doctrine of confidence. Rather than confidence, I suggest that what we are seeing is an absence of confidence within the political class that derives its support from within rather than from the voters.

4. Law Officers, Government Lawyers, and the Political Constitution

Conor Casey and Yuan Yi Zhu

Government lawyers play an important role in the policy-making process. They offer legal advice to ministers on policies, outline the relevant legal risks they might face, while at the same time offering constructive advice on ways to deliver them and mitigate any identifiable risks. Alongside the courts and Parliament, they can help ensure that the rule of law is an ever-present consideration in the work of the government.

In these following pages, we offer some thoughts about how we can structure and organize the work of government lawyers so that they can continue to help ensure respect for the rule of law is embedded in the policy-making process, while respecting the fundamentals of the political constitution. Here we suggest that we can make strides toward this goal by ensuring that current dual political-legal status of the law officers is preserved and clarify the limitations of the roles of civil service government lawyers.

Law officers: leave well alone

The organization of government lawyers in England and Wales has a pyramid-like structure. At its base are career civil service lawyers who provide day-to-day legal advice to ministers and officials on legal questions. The Government Legal Department ("GLD")—which has a staff of around 2,000[56] and is headed by the Treasury Solicitor[57]—fulfils this function for most government departments and ministers. Some departments, like the Foreign Office and Cabinet Office, might rely more heavily on their in-house legal advisors. Thus, the lawyers in the GLD play a critical role in ensuring that the routine work of dozens of departments—from administrative decisions to the formulation of legislation both primary and secondary—are compliant with statutes, human rights law, and constitutional conventions.

At the apex of the pyramid are the law officers. Though its composition has varied over the years, this group is today generally accepted as including the Attorney General for England and Wales, the Solicitor General for England and Wales, and the Advocate General for Scotland (who advises

56. https://www.gov.uk/government/publications/workforce-management-information-for-gld-ago-and-hmcpsi-201819.

57. Barry K Winetrobe, 'Legal Advice and Representation for Parliament' in Dawn Oliver and Gavin Drewry (eds.), *The Law and Parliament* (Butterworths, 1998) 95.

the UK government on Scots law). Historically, the law officers were eminent lawyers who acted as the sovereign's personal legal advisers, fiercely representing their interests in legal proceedings. Over time, the law officers eventually became salaried ministers of the Crown, appointed and removed on the advice of the prime minister. The typical profile of a law officer today is that of a qualified lawyer with (varying degrees) of experience in practice who is also a political figure; as a member of one of the Houses of Parliament, a member of government, and member of the governing political party.

The law officers will only consider a tiny fraction of the legal questions facing the many departments making up the machinery of government. Most legal issues will be dealt with by the GLD as well as counsel instructed to provide specialized advice. The main role of the law officers is to provide legal advice to government on the most important and sensitive legal questions of the day. When a legal issue has immense policy repercussions, is politically sensitive, or has received a range of different legal opinions from different government lawyers, the Cabinet will invariably turn to the Attorney General for legal advice and guidance. Legal advice given by the law officers takes precedence over that of any other lawyers advising the government, whether it be civil servant lawyers working in the Government Legal Department or the senior barristers – treasury counsel – retained by the Government to advise on acutely important legal matters.[58] By convention, when the law officers advise that a course of action is unlawful and has no respectable argument in domestic law, the government will not proceed.

The work of the law officers has attracted much scrutiny from would-be constitutional reformers over the years, and the institution has faced intermittent calls for quite far-reaching reform. During Gordon Brown's time as prime minister, he pushed for reform, a call backed by the House of Commons Constitutional Affairs Committee. At the heart of calls for reform is the belief that their present set up of the law officers—with its dual legal and political aspects—is unwise and should be swapped in favour of a more apolitical model. Behind this conviction is an implicit deep scepticism that striking a sound balance between the different dimensions of the law officers' current role—the legal and political—is a realistic possibility.

One of us (Conor Casey), in a report for Policy Exchange and in various academic writings, has consistently argued that wide-ranging change is unnecessary and unwise. He has made the point that the current configuration of the Attorney General and Solicitor General as law officers with legal and political dimensions works well and that moving to an alternative model of, for example, law officers without any political involvement is not worth it, and has potential serious downsides. Casey has also consistently maintained that concerns that the law officers are excessively politicized are misplaced or overstated and fail to acknowledge features of the political constitutional framework in which they operate.

First, there are the conventions that strongly deter law officers from

58. "The constitutional position so far as legal advice to government is concerned is clear. The government's only legal advisers are the Law Officers of the Crown...It is the Law Officers of the Crown who are responsible and politically accountable for all legal advice to government. All other legal advice (whether from civil service lawyers or from lawyers commissioned from "standing counsel" or private practice) is provided by them to government in their capacity as delegates of the Law Officers, or so far only as it is expressly or impliedly adopted by the Law Officers." See Sir Stephen Laws KCB QC (Hon), 'The Treasury Devil and the scandal that never was' (Policy Exchange, 20 June 2022) https:// policyexchange.org.uk/blogs/the-treasury-devil-and-the-scandal-that-never-was/.

allowing political concerns or pressure to taint their decisions or cause them to sign-off on government policies under flimsy legal justification. Secondly, there are systems and procedures in place which help the law officers provide high-quality advice. For example, law officers regularly choose to inform their advice by consulting with a range of other government lawyers, or with independent external barristers with relevant expertise. Finally, on issues of exceptional national importance governments have begun to disclose the substance of the advice, either in full or precis form; an increase in transparency that aids parliamentary debate and public scrutiny.

Indeed, the political background of the law officers is in fact an asset to their work. The political background of the law officers better informs them about the policy goals and priorities of the government of which they are part and the pressures it may be under. It enables them to explain to colleagues more effectively why particular avenues for action must be varied if they are to be lawful, and the ability to offer politically attuned and constructive advice. The political status of the law officers lends weight to any advice given since it is coming from those who share the government's goals and aspirations. Moreover, the traditional arrangement for the law officers ensures they are politically accountable for their every decision, statement, and piece of advice.

The benefits of the current legal-political nature of the law officers were, happily in our view, acknowledged by the House of Lords Constitution Committee in its January 2023 report on the role of the law officers and lord chancellor in the UK constitutional order. On balance, the Committee rejected far-reaching changes to the law officers, finding that their current dual capacity as lawyers and politicians provided them with a helpful "understanding of the political context in which their legal roles take place, and bolsters their clout with ministers" (p. 5) The Committee stressed the importance of law officers having legal expertise and personal qualities of "mind, autonomy and strength of character" that allow them to deliver impartial legal advice to the government, but considered that this did not require radical alterations to the status quo (p. 77). What is particularly welcome is the fact that the Committee acknowledged, and gave due weight to, the very many advantages that flow from the law officers' political dimension, and the report is cognizant of the many conventions, processes, and safeguards that ensure the legal and political aspects of their work are complementary and not in deep tension. These are qualities of the law officers that can go unappreciated, particularly in a current political climate where the designation of a public office as 'political' can trigger negative connotations. The government's response to the report welcomed its findings and expressed commitment to the status quo.

When it comes to the law officers, then, in the years ahead the chief task for political actors and citizens committed to safeguarding the political constitution will be to stave off potential reform; the kind that would seek to transform the law officer's role into a career civil service position

that is purely technocratic and apolitical. As has been noted extensively in legal scholarship, this style of legal advisor can tend toward conservatism and caution when giving legal advice and be less likely to approach legal analysis with the same inclination to constructively assist the government to implement its policy mandate while staying within lawful bounds, at least when compared to a lawyer whose office has dual legal-political dimensions.

This approach to legal advice can therefore risk developing several pathologies. It might, for example, excessively legalise the policy-making process, hamstring the political branches from testing the boundaries of the law where it is uncertain, and prevent or impede good-faith dialogue between the political branches and courts about matters such as the content of the law, the extent of constitutionally permissible change, or how the law should be best interpreted. It also cannot be overlooked that there are democratic accountability costs which accompany embracing a highly technocratic and apolitical model of chief legal advisors, given that it will inevitably allow unelected lawyers to wield considerable influence and power over the policy-making process.

Government lawyers: clarifying the limits of their role

On 15 November 2023, the United Kingdom Supreme Court ruled that the Conservative government's Rwanda asylum plan was unlawful. In reaction, the government formed proposals to salvage the core of the Rwanda plan and making it possible to remove asylum seekers who entered the UK unlawfully to Rwanda to have their claims processed there, all with the objective of discouraging further channel crossings. The government's response was to introduce the Asylum (Safety in Rwanda) Bill, which proposed suspending those provisions of the Human Rights Act 1998 that might otherwise be invoked in litigation to prevent the removal of asylum seekers to a third country and provide that the Home Secretary may proceed with removals even if asylum-seekers successfully seek interim relief from Strasbourg to block their removal from the UK.

According to reports in The *Times* in the week prior to publication of the Bill, some elements of these proposals apparently faced "a lot of push back" from Government lawyers. On 4 December 2023, it reported as follows:

> *"Government lawyers working on the emergency legislation are also refusing to approve the most hardline version that would opt out of the European Convention on Human Rights (ECHR), The Times has been told.*
>
> *They are said to be 'very, very reluctant' because it would breach the civil service code, which dictates that officials must not back an approach that does not comply with international law…*
>
> *Government source said: 'They [Government lawyers in the Home Office and the Attorney General's Office] are very very reluctant. They're saying this is against the civil service code, that you have to abide by international law.*

> *They were always quite worried about that. They're part of the wider legal community — they're not going to push their future careers under the bus. There's a lot of pushback from the government legal department.'…*
>
> *Another official warned that no legislation can take away the right for an individual to challenge their deportation on the basis that Rwanda is unsafe for them on specific personal grounds."*

Whether this reporting offers an accurate description of what government lawyers precisely said is perhaps debatable, given that if it *does* offer an accurate recording of what these civil servants believe, then it suggests some have an extremely poor grasp of their proper role in the constitutional order.

As noted above, while the law officers only deal with a fraction of the legal questions facing the government, the lawyers who work in the GLD field thousands of legal queries every year. Lawyers in the GLD offer legal advice to ministers touching on countless policies, advice that is supposed to both outline the relevant legal risks they might face, while at the same time offering constructive advice on ways to deliver them and mitigate any identifiable risks. Indeed, even the most pressing legal questions – the kind that tend to reach the desk of the law officers – will likely have been considered at first instance by lawyers in the GLD.

It is well established that government lawyers do not provide legal advice in terms of binary "lawful" or "unlawful" answers. Rather, they tend to provide advice in terms of legal risk, assessment of which is governed by a legal risk guidance framework issued by the Attorney General. The most recent guidance, issued in 2022, states that the term legal risk includes an assessment of any "risk of a court, whether domestic or international, deciding that something is unlawful". This is what makes civil servants who work as government lawyers such an essential cog in the law-making process – they help ensure that the policies of the government of the day are drafted cognizant of their various legal obligations.

What is so troubling about the recent reporting in The *Times*, however, is that it appears to vastly, and dubiously, overstate the role and proper constitutional function of those civil servants working as government lawyers. As one of us has written in a recent Policy Exchange paper:

Constitutionally speaking…Ministers clearly do not need approval from Government lawyers to proceed with a piece of legislation, even if it is found to be very legally risky, for example if it is at risk of being declared incompatible with Convention rights. Government lawyers play an important role but are advisers only. They are not a court and have no authority to issue binding directives to Ministers.

Of course, a government lawyer is under no obligation to advise that something is lawful when their professional and considered judgment is that it isn't. A government lawyer may find themselves in the "exceptional" circumstance that there are "no respectable arguments" that can be made for a policy's legality. But this fact alone does not give them any authority to block or veto anything. The guidance on legal risk clearly outlines the

obligations of a civil servant who find themselves in this situation; the guidance provides that their only role is to inform their line manager. Their line manager, in turn, can bring these concerns to the attention of the law officers who can then offer their own legal assessment, which then takes precedent over all other departmental government lawyers. There is, therefore, no basis whatsoever to suggest government lawyers have any authority or role in – as The *Times* puts it – "refusing to approve" a government proposal, policy, or legislative initiative due to concerns about its legality.

This point cannot be overstated: it is a core principle of the constitution that civil servants have no separate legal personality apart from their status as servants of the Crown. Civil servants are indispensable in helping the government fulfil its constitutional responsibilities and its duty to govern for the good of the realm day and night 365 days a year; handling the "open horizon of responsibility for the wellbeing of all the people of the realm, in the ceaseless flow of unpredictable events" that impact political communities.[59] They are also an important cog in the UK's democratic machinery, because they are critical to facilitating the party in government that has gained the most seats at a general election implement its policy programme and manifesto commitments. But they are, in the end, *servants* and not *masters* of the Crown and its ministers; and as such they certainly have no authority to 'block' or 'veto' a policy; nor do they have any legitimate entitlement to refuse to work on a policy due to personal objections without risking dismissal.

The central principle of the political constitution, that civil servants are fully accountable to ministers; and ministers are fully accountable to Parliament for all their and their departments' actions and omissions,[60] can only retain its coherence and integrity if civil servants do not assert or attempt to exercise authority – like deciding which policies should proceed for consideration by Parliament – for which they have no constitutional responsibility, or accountability, for. For this reason, we suggest (somewhat reluctantly given how axiomatic it should be) that for the avoidance of all doubt it might be worth clarifying that these principles apply with full force in the context of the proper role of government lawyers.

59. John Finnis, *Judicial Power and the Balance of the Constitution*, Judicial Power Project (Policy Exchange, 2018), 141.

60. In 1985, the then Cabinet Secretary and Head of the Home Civil Service, Sir Robert Armstrong, issued a memorandum to the House of Commons restating the basics of the constitutional position of the Civil Service. See The Armstrong memorandum, 'Duties and Responsibilities of Civil Servants in relation to Ministers', HC Deb, 26 February 1985, cols 128–30W.

Part II - Parliament
5. Repealing the Fixed-term Parliaments Act

Rt Hon Chloe Smith

I have some rarities in my political CV. I was a Baby of the House at 27. By my 40s I am fortunate to have served as a minister under all five recent Conservative Prime Ministers, from David Cameron's first day in May 2010 to leading one of the newest departments under Rishi Sunak in 2023. I was Constitution Minister across a decade, for the Coalition, May and Johnson governments.

I developed deep expertise and delivered complex legislation including electoral law, royal governance, the economic and constitutional arrangements that flowed from leaving the EU, and I oversaw intergovernmental relations plus major digital transformation that enabled every citizen to register to vote online. But there are not many ministers who have had the duty to repeal the very legislation that they implemented some years before! Something extra rare? That repeal left nothing in its place. It was "as if the Fixed-term Parliaments Act 2011 had never been enacted," and by design the replacement power was not to be found in the law.

I'm contributing this short essay in support of the political constitution, because I believe firmly in the democratic power that is at the heart of the United Kingdom's arrangements. Not all power is written. Some power is raw and organic. I can add some small observations about how, in practicality, a minister can deliver this grand concept.

Think back to the days of 2019. Politics, but most of all the public, had been through a lot. People had given their clear view in the EU referendum; Parliament had made a meal out of it. A series of fights resulted in a ridiculous Parliamentary deadlock where the Fixed-term Parliaments Act (FTPA) prevented resolution.

After the blockage eventually gave, the mandate from the 2019 General Election was clear. Both the Conservative and Labour parties recognised in their manifestos that the Fixed-term Parliaments Act had to go. Of course, the Conservatives placed this in a broader context of getting Brexit done plus something more: "more important than any one commitment in this manifesto is the spirit in which we make them. Our job is to serve you,

the people."[61]

As Constitution Minister, I set out to repeal the FTPA with care. The Dissolution and Calling of Parliament Bill was introduced in May 2021, but only after a Joint Committee was appointed to carry out the statutory review required by the old Act, and scrutinised the draft new Bill. We drew on the select committee's work too, and we took views from academics and indeed observed lessons from history when the prerogative operated previously. I was also grateful to all prior living Prime Ministers who shared their experiences of the constitution with me.

Constitutional reform needs a clear case and moment for change.[62] The need for change away from the FTPA was crystallised by the failure of the FTPA in 2017 and 2019. So what to replace it with? There were two central arguments underpinning the choice of replacement: that the previous prerogative power was tried and tested, and that the ability to dissolve for an election ultimately puts the decision back where it belongs, with the people.

Thus I laid an unusual Bill before Parliament, which entirely removed one system and returned to precedent. This shift saw us rejecting a legislated design for dissolution and confidence, and reviving a model based on unwritten prerogative power. This had stood the test of time and could be trusted once again.

Is it possible to revive such powers, some asked? How do you know what the power is and who holds the power if you don't write it down? Would the courts respect it, in an increasingly activist climate? My clauses were as clear as they could possibly be, stating that the powers that were exercisable before are exercisable again, "as if the FtPA had never been enacted", and adding that the powers are non-justiciable.

But can't the power to dissolve be abused, some asked? Answering almost every concern of that kind is that truth that, in our modern democracy, the people can reward or punish any behaviour that they observe, if dissolution is granted. So power is back in the hands of the people, and is organic and simple, rather than residing in an artificial framework that had even hindered dissolution. As Dicey said: "the right of dissolution is the right of appeal to the people".[63]

The preference for codifying and writing things had supporters in Parliament during the passage of the Bill, such as in the arguments for keeping a role for the House of Commons in allowing a dissolution. My view is that these arguments were weak and were essentially second-order, given the clear case for change, the clear rationale for returning to the *status quo ante*, and the clear democratic underpinning of the tried and tested arrangements. They were also unnecessary, given the visceral realities of holding confidence in the House of Commons, which the old Act tried to control; far more effective to let that particular type of raw power take its natural course.

Furthermore, they could have strayed into new codifying territory such as by trying to write out the principles which might govern the monarch's decisions; this would likely have been quite inadequate to the need for

61. Conservative Party, 2019 Manifesto

62. R Johnson and Y Y Zhu, editors, *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Oxford, Hart, 2023). Essays including by Brian Christopher Jones, Tony McNulty and Philip Norton make this point beautifully. I was delighted to join contributors at a conference entitled *Strengthening the Political Constitution*, 12th September 2023.

63. AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edition (London, Macmillan, 1927), 291.

flexibility that is required in acute moments of crisis. As I said regularly during the work of the Bill: history shows a strong PM typically governs for four years, some try to go on for five, and anything short of that is a national emergency.

MPs and Lords agreed and the Bill had clear passage, which also reflects democratic principles on another level, given we were delivering a shared manifesto commitment. The agreement on the Act is even itself a form of power, this time through consensus: parties agreed that this is how the power works, and therefore the power is respected.

Ultimately, this Act has been a stark reminder of the need for our political constitution. A political constitution that can channel raw power, allow for the people to choose and to be the real court of appeal, flex to circumstances as organically as possible without needing a complicated framework – this is the strength of our long-standing tradition.

To me, stewarding that constitution has been a personal and professional privilege. There have been clear challenges for governance in turbulent times, but through all the ins and outs of national life, our established democratic arrangements allow people to have the final say. Our political constitution gives a good foundation on which millions of people go on to build their own lives and livelihoods. We should all be proud of that.

6. The Centrality of the House of Commons to the Political Constitution

Rt Hon Tony McNulty

Over recent years, it has been argued that the UK has "been undergoing a process of transition from a 'political' to a 'legal' constitution."[64] Various reasons have been given to support this argument. These include membership of the EU [until 2016 at least], the expansion of judicial review, the rise of 'common law constitutionalism' and the raft of constitutional reform measures put in place by the last Labour Government. However, in each case Parliament itself has been the determinant and architect of this change and can itself reverse each of these changes. Parliament gives and Parliament can take away – the essence of parliamentary sovereignty.

Parliament is the supreme legislative body of the United Kingdom. The Commons is a legislative factory that, as well as being the national forum for political debate, both sustains the government in power and is the centre of parliamentary scrutiny of the government.[65] The balance between these functions is important and at the core of the political constitution but, in the first instance, primacy needs to be given to the facilitation of any government's ability to govern. Nevertheless, it is necessary to understand the importance of the scrutiny function. The Government needs to get its business through, and this means controlling most if not all time and business in the Commons, but it needs to seriously understand that the scrutiny function of the Commons is central to good government. The Commons needs to hold the government to account, and this role is a central feature of the political constitution. This tension between governance and scrutiny is not a new dilemma but is fundamental to the discussion around the importance of political nature of the constitution and the central role of the Commons. It has been highlighted recently with events around Brexit and, more recently, the last government's Rwanda policy. Howarth sees it as a battle between Westminster [Parliament] and Whitehall [the executive].[66] In both worlds the Commons is central, but from differing perspectives. Any proposal to reform the constitution needs to understand this and should start with an appraisal of the roles and functions of the Commons if it is to succeed by improving the politics of the UK.

64. McHarg, A (2008) Reforming the United Kingdom Constitution: Law, Convention, Soft Law *The Modern Law Review* Volume 71 November 2008 No 6 p.853

65. See for further elaboration McNulty, T (2022) 'Reform of the House of Commons: A Sceptical View on Progress' in Johnson, R and Zhu, Y.Y (eds.) (2023) *Sceptical Perspectives on the changing constitution of the United Kingdom*, Hart Publishing, Oxford pp. 151-172 p.154

66. See Howarth, D (2021) 'Westminster versus Whitehall: What the Brexit Debate Revealed About an Unresolved Conflict at the Heart of the British Constitution' in Doyle O, McHarg A, and Murkens, J (2021) *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure*. Cambridge: Cambridge University Press.

In the topsy turvy world of today's politics the political constitution has been in the news as rarely before. Supreme Court decisions on certain aspects of Brexit and the recent debate on the last Government's proposals for outsourcing asylum decisions to Rwanda have underlined the importance of the UK's unwritten constitutional settlement and the abiding feature at its core – the centrality of the House of Commons and the notion of parliamentary sovereignty.[67]

The last Government sought to present the debate on Rwanda as about defending parliamentary sovereignty, protecting the government's integrity and ability to govern, and ensuring that it is free from foreign court diktats.[68] In reality, there was a deliberate confusion between the sovereignty of Parliament and the will of the government – they are not the same thing. The last government's reactions to recent Court judgements was misplaced. The Supreme Court was not seeking to usurp the authority of the Government, but rather to ensure that the Government complied with the will of Parliament as exercised through the House of Commons. In the recent judgement on Rwanda policy,[69] the Supreme Court made no political judgement on the policy and nor did it challenge the presumption of the lower courts that the outsourcing of asylum decisions could comply with the law and with the refugee convention. The Court's role was and is to ensure that Parliament complies with the various instruments – legislation, treaties, conventions, international law – that Parliament itself has committed to. Given the sovereignty of Parliament, it is free to release itself from any of these commitments – including international law or treaty obligations. The Court did not introduce new policy or make a political judgement on existing policy. The Court cannot do Parliament's job for it – and nor should it provide cover for the overtly political embarrassment that changes to policy might cause government.

The problems for the last Government revolved around the perceived and legal safety of Rwanda as a destination. The fault was not the laws passed by or the treaties entered into by Parliament, but the interpretation by the Government of existing laws and treaties passed by Parliament. In effect, the Court was telling Parliament either to abide by the laws and treaties that it had already passed – given the sovereignty of Parliament – or to change those laws to overcome the problems. It was neither trying to usurp the role afforded Parliament on the constitution nor to take on a political role itself – as many on the government side would claim. Lee Anderson[70], then a Conservative MP and a deputy Chair of the Party, argued that '…we should ignore the laws and send [those arriving in small boats] back on the same day."[71] David Gauke[72], a former MP and Justice Secretary was appalled at this and described it as an 'extraordinary and surely an unacceptable opinion..' for such a high-ranking Conservative to hold.[73] Former Home Secretary Suella Braverman[74] contended that "… the entirety of the Human Rights Act and the European Convention on Human Rights, and other relevant obligations, or legalisation, including the Refugee Convention, must be disapplied by way of clear 'notwithstanding clauses.' She went on to suggest that "… judicial review, all common

67. Supreme Court (2017) UKSC 5 R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant); Supreme Court (2019) UKSC 41 R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland); Supreme Court (2023) UKSC 42 R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent) and others

68. HC Deb,12 December 2023, Safety of Rwanda (Asylum and Immigration) Bill, Vol 742, Cols. 747-852

69. Supreme Court (2023) UKSC42 This is made clear in paragraph 2, p.4.

70. Conservative MP for Ashfield since 2019, since elected in 2024 as a Reform UK MP for the same seat.

71. Op. cit Gauke (2023) p.2

72. David Gauke, former MP for South-west Herts 20056-2019 and former Justice Secretary 2018-1019

73. Gauke, David (2023) Defeat in court on Rwanda policy is no reason to abandon the rule of law. Conservative Home 20th November 2023 at https://conservativehome.com/2023/11/20/david-gauke-defeat-in-court-on-the-rwanda-policy-is-no-reason-to-abandon-the-rule-of-law/ pp1-7

74. Conservative MP for Fareham since 2015 and former Home Secretary

law challenges and all injunctive relief…must be expressly excluded."[75] Again a clear confusion of the sovereignty of Parliament with the will of government.

Some in the government might have wanted to go this far, but others sought to satisfy the Court through the Safety of Rwanda Bill.[76] The Government was playing a dangerous game. If they went too far one way, they would have incurred the wrath of moderates who would broadly support Gauke's line, if they went too far the other way, they would risk losing the support of the 'Braverman' tendency. In addition, at the time Rwanda itself made clear that it did not want the government to go further in satiating demands on the Right. All this left, at the time, the former Home Secretary, James Cleverly in a position where he had to make a rather bizarre statement under section 19(1)(b) of the Human Rights Act 1998. He told the Commons that he was "unable to make a statement that, in my view, the provisions of the Safety of Rwanda (Asylum and Immigration) Bill are compatible with the Convention rights, but the Government nevertheless wishes the House to proceed with the Bill."[77] In other words, the Bill did not comply with the express wish of Parliament as laid out in the 1998 Human Rights Act. In fact, the Bill went against the constitutional settlement – the sovereignty of Parliament and the centrality of the Commons. The last Government did not, of course, have to comply with the Human Rights Act. It was free to scrap it or derogate from particular sections of the Act if they were found to be an impediment to what they wanted to achieve. But scrapping the Act or derogating from, it would have been embarrassing. This however is a different argument to that from those who suggest that the Human Rights Act commands some sort of 'higher status' of law than any other piece of legislation. The embarrassment factor for the government of scrapping it or derogating from parts of it does not render it unconstitutional or wrongly entrenched.

In a forceful critique of the Rwanda Act in the context of the constitution as well as in substance, Chris Bryant[78] outlined why it was wrong on so many levels. He explained why it would not work as a deterrent; why, given that it sailed so close to illegality, it would simply result in protracted legal battles; that given the ouster clauses appellants would have to go straight to the ECHR not UK courts; and that changing a statement of fact by statute law was fatuous. He said that "…declaring that somewhere is safe does not make it, of itself, safe. We can no more change reality by law or legal diktat than we can by mere imagination"[79] – notwithstanding Dicey's statement that 'neither more nor less than this, namely, that Parliament… has the right to make or unmake any law whatever'.[80] This went to the heart of the previous government's less than rational definition of parliamentary sovereignty. Bryant went further still arguing that the then Rwanda Bill asserted a new doctrine – the sovereignty of ministers – rather than defending the sovereignty of Parliament and, finally, that now was not the time to undermine human rights or a rules-based order.[81]

In 2019, the then Government was appalled at the Supreme Court judgement in the case of Miller v The Prime Minister and tried to present

75. Op.cit Gauke (2023) p. 3-4
76. Home Office (2023) Safety of Rwanda (Asylum and Immigration) Bill at https://assets.publishing.service.gov.uk/media/65709c317391350013b03c36/Rwanda_Bill_as_introduced.pdf
77. Home Office (2023) Safety of Rwanda (Asylum and Immigration) Bill: European Convention on Human Rights Memorandum 6 December 2023
78. MP for Rhondda since 2001
79. Bryant, C (2023) HC Deb,12 December 2023, Safety of Rwanda (Asylum and Immigration) Bill, Vol 742, Cols. 785-787
80. Dicey, A. V. (1885 [1959]). Introduction to the Study of the Law of the Constitution (Tenth edition). London New York, Macmillan pp. 40-43
81. Bryant (2023) Op.cit Col.785-787

it as an attack on democracy.[82] It sought to present its case as a defence of parliamentary sovereignty and once again it seemed to confuse government sovereignty with parliamentary sovereignty. In the judgement, Lady Hale, the then President of the Supreme Court, was clear that the UK is a representative democracy and that the House of Commons exists because the people have elected its members. She added that "…the Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that."[83] This is central to the notion of a political constitution and the concept of parliamentary sovereignty. The Government draws its legitimacy from the fact that it can command a majority in Parliament. It is Parliament that is sovereign, and it is clear that the Commons is central to this sovereignty as the elected chamber. Lady Hale asserted that the government is therefore "… accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts."[84]

She went on to ask "… whether the Prime Minister's action [in proroguing Parliament] had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account."[85] Lady Hale's argument offers a fundamental and accurate assessment of the foundational core of the constitution. It does not signify the Court stretching into political intervention but rather a reassertion of the fundamental rights of Parliament and the centrality of the Commons. She concluded that this was "… not a normal prorogation in the run-up to a Queen's Speech."[86] Crucially the Government had found itself in this position because, as she stated, it could not command the '…confidence of the House of Commons' – although in this ridiculous scenario created by the malign influence of the absurd Fixed-term Parliaments Act, the Government could not command the confidence of the Commons for its policies but did in fact command confidence for its own survival. The ludicrous situation at the time saw the Johnson government begging to be killed but the House of Commons refusing to pull the trigger – largely out of concern for issue specific to Brexit. Arguably, Parliament could have legislated against the government prorogation in early September when it met to pass the Benn Act[87], but it remains doubtful whether it would have secured a majority so to do. The Commons knew what it was against but was less sure, across party divisions, what it was that it was in favour of – hence the Court's action. [88]

If a government cannot command a majority for its deliberations in the Commons, then is it both reasonable for the Supreme Court to intervene and make a judgement in the context of the constitutional architecture that prevails. It was the Court that was defending the primacy of Parliament, not, as the Government suggested, the other way around.[89] The fact that the government at the time had no majority is central to the role of the Court here.

The counterargument here is that the political constitution is being

82. Supreme Court (2019) UKSC 41 R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)

83. Ibid. para 55-56

84. Ibid para 55-56

85. Ibid. Para.55-56

86. Ibid. para 56

87. European Union (Withdrawal) (No. 2) Act 2019

88. See Russell M and James L (2023) *The Parliamentary Battle for Brexit'* OUP Oxford and Shipman, T (2024) 'No *Way Out'* William Collins London

89. See also McHarg, Aileen (2020) "The Supreme Court's Prorogation Judgment; Guardian of the Constitution or Architect of the Constitution?", Edinburgh Law Review 24(1): 88-95

challenged by runaway courts and a level of judicial activism that undermines the sovereignty of Parliament. On 27 January 2020, under the heading 'People we elect must take back control from people we don't. Who include the judges [sic],' Braverman wrote in *ConservativeHome* that "…Traditionally, Parliament made the law and judges applied it. But today, our courts exercise a form of political power. Questions that fell hitherto exclusively within the prerogative of elected Ministers have yielded to judicial activism: foreign policy, conduct of our armed forces abroad, application of international treaties and, of course, the decision to prorogue Parliament ."[90]

All these specific complaints about judicial overreach are rooted in decisions made in the first instance by Parliament – foreign policy, armed forces, treaties and indeed, the prorogation of Parliament. A minority government may well get frustrated by its inability to get things done but that is not the fault of either Parliament or the Court. It cannot be right for Parliament to ignore contraventions of laws and treaties passed by Parliament. Again, the government confused parliamentary sovereignty with government supremacy. There is another argument entirely separate from this in terms of prerogative powers, but that is for another time.[91] The fear here is not a legal constitution usurping the political constitution, but the courts not doing what the Government wants them to do.

The real threat may be of a government that continues to govern without due recognition of the legal and diplomatic framework within which it has to operate. As with Rwanda, the last government seemed to be under the illusion that parliamentary sovereignty means that it can do whatever it chooses to do. It can but only with the legitimacy drawn from a majority in the Commons and by using the democratic tools at its disposal. Despite the absurdity of its policy position, there is almost an honesty to the 'Braverman tendency' view that anything that gets in the way of government ambition should be torn down - HRA, EHRC, various other conventions and treaties and any number of laws. This does at least have the merit of clarity and the absence of fudge. However, it does not recognise that there is a price to pay for the sovereignty of Parliament in the form of redress, accountability, and scrutiny – by Parliament and not by the Court.

The ongoing debate between the merits of a legal constitution and a political constitution represents a false dichotomy. Much would need to change, including the sovereignty of Parliament and the centrality of the Commons, for the legal to prevail. Although this is unlikely to happen deliberately, it could still happen by stealth if the importance of these two foundational constitutional pillars is not recognised. Further, they could be undermined by well-intentioned reform that again underestimates the importance of sovereignty and centrality.[92] Loughlin suggests that commentators like Tomkins get unnecessarily diverted into this conflict between the legal and the political. He goes on to assert that it is politics that should prevail and that the issue is not "… whether we have a legal or political constitution" but rather "it is how the idea of law within the

90. Braverman, S (2020) 'People we elect must take back control from people we don't. Who include judges'. Conservative Home 27th January at https://conservativehome.com/2020/01/27/suella-braverman-people-we-elect-must-take-back-control-from-people-we-dont-who-include-the-judges/

91. See for example, Strong, James (2015) "Why parliament now decides on war: Tracing the growth of the parliamentary prerogative through Syria, Libya and Iraq", *British Journal of Politics and International Relations* 17(4): 604-622 for discussion on parliament and some prerogative powers.

92. See for example Latham-Gambi (2020) "Political Constitutionalism and Legal Constitutionalism—an Imaginary Opposition?" *Oxford Journal of Legal Studies*, Vol. 40, No. 4 (2020) pp. 737–763; Kavanagh, Aileen (2019) "Recasting the Political Constitution: From Rivals to Relationships." *Kings Law Journal* 30:1 PP. 43-73; Murkens, Jo Eric (2017) "Democracy as the legitimating condition in the UK Constitution" *Legal Studies* 38 pp.42-58

political constitution (i.e., the constitution of the polity) might best be conceptualized."[93]

The key starting point in this debate should be whether these core elements of the constitution – parliamentary sovereignty and the centrality of the Commons - are worth fighting for and are indeed, along with the rule of law, the foundational core of UK democracy. A political constitution, as Bellamy would contend, is one which recognises that a legislature premised upon majority rule, periodic elections and party competition will 'institutionalize mechanisms of political balance and political accountability that provide incentives for politicians to attend to the judgments and interests of those they govern'.[94] This description is not that dissimilar to Lady Hale earlier in the Miller 2 Judgment. These are intensely political matters that need to stay in the political realm. Government secures parliamentary sovereignty through this majority. It is about governing and should not be depoliticised.[95] Part of the price is precisely Bellamy's 'mechanisms for political accountability' – this is central to the durability of the sovereignty of Parliament and the centrality of the Commons – in short, the political constitution.

In 2010, Gee and Webber argued that "… support for the idea of a political constitution seems to be dwindling."[96] It is clear that support for a political constitution has dwindled further much as the support and indulgence of politics has in general. But bad Parliaments and ill-equipped MPs should not be the basis for either constitutional change or reform without understanding the consequences. They contend that the problem, in part, is that much of the workings of a political constitution are not visible, and where they are "…they often take the form of the rough and tumble of day-to-day politics that 'offend most of our rational and all of our artistic sensibilities'."[97]

Griffith argues that this invisibility matters as the "… theory of the constitution is full of ghosts striving to entangle us with their chains"[98] but nonetheless needs to be addressed. As I have suggested elsewhere, there "… is a price for government dominance of business and control of parliamentary time"[99] and that price is a recognition of the legitimacy of parliamentary scrutiny and its role in keeping the executive in check. This should be the price for governing in a mature way reflecting the interface between government and Parliament. It rests, as Judge suggests, in a "… willingness of government to be scrutinised and a willingness of Parliament to scrutinise, alongside a singular capacity: the ability of Parliament to scrutinise." [100] He highlights that there is a 'dark side' to scrutiny connected to what White contends is an "excessive fear of governments of 'failure and public criticism' and 'blame and scapegoating' which result in 'defensive reactions' by the executive." [101] It will be interesting to see how the new government with such a large majority facilitates this scrutiny role for the Commons. The need for scrutiny does not abate simply based on the size of the government's majority.

There needs to be an extensive review and revisit of these key elements of the constitution – parliamentary sovereignty and the centrality of the

93. Loughlin, M (2006) 'Towards a Republican Revival?' *Oxford Journal of Legal Studies*, Summer, 2006, Vol. 26, No. 2 (Summer, 2006), pp. 425-437, Oxford University Press p.435-436

94. Bellamy, R (2007) Political *Constitutionalism: A Republican Defence of the Constitutionality of Democracy* Cambridge University Press, Cambridge viii

95. See also Gee, Graham and Webber, Gregoire N (2010) 'What Is a Political Constitution?' *Oxford Journal of Legal Studies*, Vol. 30, No. 2 (2010), pp. 273–299

96. Ibid. p. 287

97. Ibid. p.287

98. Griffith, JAG (1951) 'The Place of Parliament in the Legislative Process: Part II' (1951) 14 *Modern Law Review* 425-436, p.436

99. Op.cit. McNulty, T (2022) p.165 'Reform of the House of Commons: A Sceptical View on Progress' in Johnson, R and Zhu, Y.Y (eds.) (2023) *Sceptical Perspectives on the changing constitution of the United Kingdom*, Hart Publishing, Oxford pp. 151-172

100. Judge, D (2021) 'Walking the Dark Side: Evading Parliamentary Scrutiny' *The Political Quarterly*, Volume92, Issue2, April–June 2021pp. 283-292 p.283

101. White, H (2015) *Parliamentary Scrutiny of Government* London, institute of Government quoted in Judge (2021) Ibid p.283

Commons. The government, at the tail end of its terms, seems to offer little in this regard other than an apparent fear of anything that can prevent it from doing what it wants to do at a time when it is also clear that it does not have a clue what it wants to do. Never has a precious government majority of over 80 – historically large by any definition – been so frittered away and wasted. While the previous government was thrashing about in apparent disarray blaming all and sundry for its incompetence and inaction, will the political constitution fare any better from the new Labour government? The signs for the preservation and development of the political constitution, parliamentary sovereignty and the centrality of the commons are not encouraging.

The nature of the political constitution and the centrality of the Commons have come under renewed scrutiny in the context of the proposals for reform that were circulating around the Labour Party about its policy offer before the recent election – especially the proposals in the Commission chaired by former Prime Minister, Gordon Brown.[102] The key proposals, revolve around reform of the House of Lords and the introduction of what is referred to as 'constitutionally protected social rights.' These rights are as contentious as the reform to the second chamber and need to be reviewed in full elsewhere. Here, it will be argued specifically that the proposals for the reform of the Lords will fundamentally undermine the centrality of the Commons and this in turn will have deleterious effects on democracy, the political nature of the constitution, and the potential programme of the new Labour government.

These discussions seem to have been rooted in a rehash of the 'same old, same old' from the political reform lobby – change the electoral system, reform the Lords, devolve power more and similar proposals. These are ready made and long argued solutions looking for problems and do not necessarily reflect the solutions that may or may not be needed today. There are issues with the constitution, but much more thought is required to address them than that which has been offered to date.

There is little evidence that Labour is alive to the argument expressed by Cruddas that the "…retreat towards the law and the continental constitutional separation of powers, and away from democracy and parliamentary sovereignty, have been very powerful tendencies within the left over the past fifty years."[103] Elements of the left seem as over enamoured by the legal routes as their Tory counterparts are appalled by them.

Much of the Labour discussion on constitutional change seems to revolve around a response to the Tory much-lamented 'levelling up' narrative or the now faded glory of an SNP ascendency and the prospect of what once seemed an imminent second referendum in Scotland. At least in part, some of the proposals in the Brown Commission[104] seem to be based on the unfinished business of an imperfect devolution agenda developed through the prism of taking on the SNP rather than determining what will work for the UK. The picture overall is of a patchwork offering that is primarily reactive and not rooted in a modern constitutional settlement

102. Labour Party (2022) The Brown Commission: A New Britain: Renewing our Democracy and Rebuilding our Economy Report of the Commission on the UK's Future. The Labour Party

103. Cruddas, J (2017) Foreword in Ekins, Richard and Gee, Graham (2017) *Judicial Power and the Left: Notes on a sceptical tradition* Policy Exchange London p.7

104. Op.cit. Labour Party (2022) especially ch.11

and the political constitution needed for the next era. The new government is looking to correct this asymmetry, but it is not clear how or at what price in terms of the constitution.

It remains unclear the extent to which the Commission reflects Labour's agreed proposals on constitutional reform. They certainly do not figure is the first Kings Speech of the new government. The proposals – particularly on the Lords and new 'constitutionally protected social rights' –would have benefitted from consideration against five key questions:

- How does any reform enhance the role of the government once it has secured a majority in the principal chamber?
- How does any reform increase the ability of the government to carry out its nationally focussed mandate and its ability to govern on a UK-wide basis?
- How does any reform preserve the centrality of the Commons and improve the roles and functions of this principal chamber of parliamentary governance?
- How can there be any effective constitutional reform without a root and branch review of these roles and functions of the Commons?
- Do the reforms impinge on the political nature of the UK constitution? Is the upshot an enhanced role for the legal realm?

Whilst the Commission nods towards some of the concerns raised for the political constitution and the centrality of the Commons, it does not begin to address these questions, particularly how the Lords can be reformed at all without any consideration of the existing centrality of the Commons and its roles and functions. The Commission asserts that changes "… can be made, consistent with the longstanding principle of the supremacy of parliament, to safeguard the constitutional allocation of power."[105] It is far from clear what this new 'constitutional allocation of power' actually is. Even a cursory analysis of the proposals indicates that their cumulative impact undermines this supremacy – the sovereignty of Parliament. Further, little consideration is given to the reasons behind the centrality of the Commons. Unicameralism is dismissed in a sentence '…simply abolishing would therefore leave a significant gap in our constitution'[106] and there follows a rudimentary summary of over 100 years of history of putative Lords reform, and an even more simplistic summary of second chambers elsewhere. Interestingly, given the Commission's focus on remedying the apparent shortcomings of the devolution settlement, it makes no mention of the fact that unicameralism is appropriate and seem to work for the devolved institutions of Wales, Scotland and, intermittently, Northern Ireland.

The Commission attempts to address some of the key constitutional issues by looking at the things that a second chamber should not do but fails to address the issue of how a competing franchise – an elected second chamber – could be kept away from these things. An elected second chamber would certainly want a '…role in the forming or

105.Labour Party (2022) Ibid. p.135
106.Ibid.p.136

sustaining governments', '…responsibility for decisions about public spending or taxation, including National Insurance', and 'be able to reject legislation but should be able to propose amendments.'[107] It suggests that the limitations on its power should be clearly set out in the statute '… which creates the new chamber, so that there is no ambiguity about the relationship between it and the House of Commons." It does not explain how this can be so readily achieved with these reforms when it has eluded politicians seeking reform over the last hundred years.

The new second chamber is described as having four broad functions.[108] The first of these is 'constructive scrutiny of legislation and government policy, as the House of Lords at its best does today' although no rationale is offered as to why, not least with its own mandate, this scrutiny should always be constructive. Further, who will determine what is constructive or otherwise. Secondly, the new chamber should bring '…together the voices of the different nations and regions of the UK at the centre of government' although this seems to be an attempt to deal with the unfinished business of devolution and the vexed question of devolution in England. Thirdly, for reasons far from clear, the new chamber is afforded a role in some aspects of the 'adherence to Standards in Public Life.' So, a new set of elected politicians will be charged with some aspects of ensuring standards in public life. The proposal by Bryant[109] for a new Parliamentary Standards Reform Bill that brings all the codes of conduct and other aspects of behaviour under one regime including the Ministerial codes of conduct offers greater clarity. It is essential that all this work is kept in the Commons – it goes to the centrality of the Commons. No reason is offered as to why these duties should be in the new chamber.

The most shocking proposal in the context of the political constitution is the last one – giving the new chamber supposedly '… precisely drawn powers to safeguard the constitution of the United Kingdom and the distribution of power within it.'[110] This would fundamentally undermine the political constitution and the centrality of the Commons and shift power to the second chamber under the guise of 'safeguarding the constitution.' The Commons is expected to vote away its own powers to the second chamber and the newly elected second chamber is supposed to be happy with a limited role. Astonishingly, the resolution of disputes over what is constitutional or not is given over to the Supreme Court and the second chamber will '...be required to refer the question to court, most likely directly to the Supreme Court, for an authoritative judgement on whether the constitutional protection powers are engaged.'[111] This would represent a crucial shift away from both parliamentary sovereignty and the centrality of the Commons – and towards a legal constitution.

So, on the one hand the last Conservative government, or at least significant elements within it and on its backbenches, were seeking to defend Parliamentary sovereignty and the centrality of the Commons in the face of what they see as overweening legal activism. On the other hand, some of the proposals for the new Labour Government suggested by the Brown Commission are argued by those keen to move further and

107. Ibid. p.138

108. Labour Party (2022) Op.cit. Chapter 11, pp.134-143

109. Bryant, C (2023) *Code of Conduct: Why We Need to Fix Parliament – and How to Do It* Bloomsbury Publishing London pp.196-198 See also White, H (2022) *Held In contempt: What's wrong with the House of Commons?* Manchester University Press Manchester for similar discussion.

110. Labour Party (2022) Op.cit. p.

111. Ibid. p.141

further towards legalistic solutions to constitutional and political issues that empower judges and the courts. The outcome of both approaches is a very real threat to the political nature of the constitution and the centrality of the Commons.

As Jones would have it the "UK's unwritten constitution is built on … political foundations, and puts its faith in the most transparent, most diverse, and most democratic institution that we have: parliament. And that may be something to hold on to and build on, rather than tear down and replace."[112] Wittingly or otherwise, there is a risk that both parties may tear down and replace the current constitutional foundations to pursue, on the one hand, a short-term party management in the face of electoral annihilation and, on the other, predetermined reforms that are fashionable albeit untried and untested.

Oversimplistic solutions that seek to manage party division and government failings should be dealt with politically and not pseudo-constitutionally in the guise of defending the Commons against the courts and international pressure. They should be dealt with politically and not in the name of some sort of pseudo-radicalism.[113] Griffith said, back in 1979, that devices such as written constitutions and Bills of Rights or any other such devices "…merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political. I believe firmly that political decisions should be taken by politicians. In a society like ours this means by people who are removable"[114] He also went on to say that "… of course our existing institutions, especially the House of Commons, need strengthening."[115] He was and is right – particularly in the context of holding the government to scrutiny and account. Any initial constitutional reform should start with the Commons and should be predicated on a fundamental review of its roles and functions within the context of not only centrality but also parliamentary sovereignty. Anything less than this would, as Diamond suggests, simply be another exercise "… in grafting change onto the existing Westminster model. The cumulative effect [of which] has been to further distort the very pathologies … each incremental reform sought to address."[116]

A revitalised democracy requires nothing less than an energised Commons confident in its relationship with the government because it has finally been taken seriously enough to have its entire constitutional *raison d'être,* roles and accountabilities reviewed and confirmed. This can only happen when a government understands that the price to pay for the durability of the political constitution and the centrality of the Commons is a reassessment and recalibration of the scrutiny and accountability functions of the Commons. It may just be that a government elected with a comfortable majority of 170 and 411 MPs is confident enough to 'start at the beginning' in term of constitutional reform and look in sharp detail at what and how the Commons fulfils its roles.

Once the roles and accountabilities of the Commons are properly

112. Jones, Brian Christopher (2023) 'In defence of the UK's unwritten constitution' *Institute of Government/Bennett Institute for Public Policy Cambridge* p. 16

113. Others such as Russell, M White, H James, L (2023) "Rebuilding and renewing the constitution Options for reform" *Institute for Government/Constitution Unit* London make an interesting contribution to the debate that can be endorsed in part if not wholly.

114. Griffith, JAG (1979) 'The Political Constitution' *Modern Law Review* Volume 42 January 1979 No. 1 p17.

115. Ibid. p.17

116. Diamond, P and Richards, D (2023) 'Can Labour's plans for constitutional reform deliver a "new politics"? LSE Blog 11th January 2023 at https://blogs.lse.ac.uk/politicsandpolicy/can-labours-plans-for-constitutional-reform-deliver-a-new-politics/

determined, a clear agenda for broader reform can be generated. I have argued elsewhere "…this is the basis for genuine and lasting reform."[117] Incremental reform risks creating more of Diamond's enduring pathologies and distortions. Reform that starts from the premise that the country requires an avowedly political constitution, with parliamentary sovereignty and a reinvigorated Commons at its core, can be the foundation of the new form of politics so often talked about but never delivered.

117.McNulty, T (2022) p.172

7. The Perils of Reforming the House of Lords: A Practitioner's View

The Earl Attlee TD

I have been in the House of Lords for over 30 years and reform or the need for it has always been on the agenda although, strangely, nothing much ever seems to happen! It is relatively easy to identify some apparent weaknesses in the institution but much harder to propose and implement sensible reform that would improve matters. The weaknesses identified are usually the result of actions or inaction by various prime ministers but are not themselves good arguments in favour of wholesale constitutional reform. Furthermore, many think that they know what the problems are, but they don't!

The Role of the House of Lords

Sadly, many fall into the trap of considering the composition before considering what the role should be. Along with many others, I would suggest that the role is to revise legislation, to be an additional check on the executive and a source of expertise. Only by understanding the role can any sensible proposals be made. Of course, there is nothing wrong with considering changing the role so long as there is clarity about how any indispensable functions are to be provided.

Perhaps revising legislation is the most important role of the Lords. The Commons is quite good at deciding on the general principles of a bill, but relatively poor at looking at the detail and so some new clauses of Government bills can get through without any scrutiny at all. This is because, in normal times, the Government of the day enjoys an overall majority in the House of Commons, thus it is very difficult to defeat the Government in the Commons. It is important to understand that an MP cannot guarantee to have an amendment even debated because Mr Speaker groups and selects amendments for the benefit of the House and to meet the needs of the guillotine, something which the Lords does not have.

In the Lords, with one exception, nothing on God's Earth can prevent a peer from tabling a relevant amendment and having it debated to the extent that he or she desires and then calling a division (vote) on it. The exception is a money bill which is one that is certified by the Speaker as

only dealing with the money. Revising legislation really means changing it by means of an amendment agreed by either house. Since the Government does not have an overall majority in the House of Lords, it is quite easy for an amendment proposed by a competent and effective peer to be passed in the Lords that will require the Commons to 'think again.' This very fact means that ministers will often seek to avoid a vote by finding some solution to a problem raised by a peer provided that the issue has merit. It should be pointed out, in this context, that since the Government usually has a majority, the term "Commons" in effect means the Government.

Those proposing significant reform of the Lords must make it clear whether they envisage the reformed House routinely defeating the Government or will the reformed upper house have a built-in Government majority as in the Commons? If the latter, they need to consider how our unwritten constitution would evolve to deal with the new situation. The danger is that the judiciary will see fit to intervene, because nobody else will be able to say "no" to the Government. So rather than have several hundred peers decide against the Government but, normally, giving way to the elected House at some point because they know their place, we will have the judges making policy decisions no matter how hard anyone tries to show otherwise.

A frequent criticism of the House of Lords is that it is unelected. But so too is the judiciary. We need to look around the corner and see what would happen if the House of Lords, or an upper House, was elected and largely reflected the views of the elected House. If the upper House was in sympathy with the Commons and merely went through the motions of revision, confining itself to drafting and cross reference errors and, most importantly, could not stop malign legislation, what would happen? In our unwritten constitution, surely the courts would intervene to fill the vacuum. We have already seen the courts intervene on the prorogation issue when, actually, Parliament had plenty of tools to prevent itself from being prorogued if it did not want to be. Ultimately, there could be a vote of confidence in the Government on the issue in the Commons or simply a motion of a humble address from either House that Parliament does not want to be prorogued. Make no mistake, the House of Lords is a constitutional back stop and has a very deep Parliamentary tool kit and many of the tools do not normally ever see the light of day.

Some would see the greater involvement of the courts rather than using an effective upper House as a positive development, but I see dangers. Firstly, the courts are hopeless at balancing the needs of the minority with the majority. Thus, we see judgements that protect an individual but act against the interests of many others. The advocates before the superior courts are very skilled and well paid for their efforts, whereas, in Parliament 'paid advocacy' is prohibited.

Whilst it is true that many members of the House are or were professional politicians, there are many who are not. They are either eminent in their own field or came in through a non-political route and bring to bear their own profession and practical experience of life. It is really important to

understand that this class of peer would be extremely unlikely to seek elected office because they would not want to go through all the effort required. Only some system of appointment (with a reasonably long tenure) can provide the upper house with independence, knowledge, and expertise.

Furthermore, for most peers the result of the next general election is a short-term consideration without serious personal consequences. Unfortunately, we are seeing in the House of Commons, many members who enjoy limited experience outside of the Westminster bubble and in some cases, have never had a revenue earning job for any length of time. Furthermore, the vast majority of the House of Commons have never run any sort of decent 'train set' for which they are responsible.

The expertise, experience, knowledge, and credibility of peers enables them to convince the House of Lords that there is a problem with Government policy, or lack of it. Conversely, it is very telling when such a member tells the House that there is not a problem because it avoids a wild goose chase.

Perceived Problems

Drastic reform of the Lords is often proposed but in fact most of the perceived problems can be addressed without constitutional reform so it might be worth looking closely at some regularly quoted problems.

One problem that is not often aired in public is that the House of Lords is hideously London-centric, especially within the Conservative party. Party leaders are advised who to appoint by their advisers who are already firmly in the Westminster bubble. The good news is that the membership is ethnically quite diverse because party leaders and the House of Lords Appointment Commission (HOLAC) have been actively promoting diversity. What they have not been doing is recruiting from the regions.

It is frequently reported that members of the Lords can collect £342 just for turning up and this is broadly true. However, those who complain about the current system need to understand its real weaknesses and be able to, at least, sketch out a better one. In 2010 the Senior Salaries Review body tried and failed on both counts.

As I commute and only rarely stay overnight in London, the rate of allowances is fine provided that they are uprated according to inflation. However, it should be noted that those who cannot commute were expected to pay for their overnight accommodation out of this money and this would tend to discourage membership from the regions. Since I originally drafted this article, the House has introduced a £100 overnight allowance which will help a little.

Since 1992, apart from when engaged in international aid operations or military exercises and operations, my sole activity has been to be a full-time working peer in the House of Lords. What those who make the 'just turning up' argument may not be aware of is that, apart from the four years when I was a minister, I have accrued no pension rights even after working in the Lords for 30 years.

During the COVID lockdown, whilst the House of Lords had some functionality, most members were only able to claim a fraction of their usual allowances. This resulted in some members suffering extreme financial distress because, like me, many peers have no private income. Without the allowances we could not afford to be active peers. Neither is there any sickness scheme so when I was ill in 2022 with a life-threatening illness, I received no financial support from the House of Lords.

A further problem with the current scheme is that allowances can only be claimed for days when the member is present in the chamber, votes or sits on a select committee. Therefore, when I have travelled overseas visiting military operations as a parliamentarian, I was not able to claim anything. A similar problem arises with select committees. When out of the country on select committee duties, members can only claim half the daily rate. Readers will not be surprised to find that I declined to join a select committee solely because of this problem. It also discourages peers from undertaking Parliamentary visits away from London and the Home Counties.

The current system of allowances penalizes those peers who live in the regions and at the same time makes it impractical for peers to visit places like the Clyde shipyards because they would be better off staying in the House for strong financial reasons.

It is often pointed out that the allowances are tax free. It is complex but there are good reasons for this being so. In any case, if they were taxed, they would have to be increased to make them have the same value but, for which class of peer? One on high taxable earnings or one on low taxable earnings?

Another problem arises with the pay of Lords ministers who are often much more experienced than their Commons counterparts. When I stepped down from the Government in 2014 after 'an internal difficulty', it did not take long to get back into political favour. Unfortunately, the pay of a Lords minister is so poor that it is simply not worth doing when the effort required is taken into consideration. A senior tube train driver gets paid much more. Worse still, many Lords ministers are unpaid and have to rely upon their attendance allowances. As explained, a peer must be in the House to claim their allowances, but this is not consistent with ministerial duties- which often requires them to be out of the country. Access to a private income should not be a pre-requisite to being a Lord's minister.

Much attention is rightly placed on the size of the House of Lords and this is entirely within the gift and responsibility of the various recent Prime Ministers. It is true that some members very rarely attend but actually this does not matter since there is a negligible cost involved. Prior to the Blair 'reforms' the membership was far higher than it is today, but many never turned up and so it did not matter. What actually does matter is the number of active members and this has increased significantly and has produced negative effects.

Perhaps there is a perverse inverse law that states that the effectiveness

of each individual peer is inversely proportional to the number of active peers. This is because there is a largely fixed amount of time and speaking opportunities available each year. Prior to the 2010 Parliament, if I got sufficiently irritated on a particular issue I could go to the clerks and say "Right! Oral Question, Next available slot, to ask HMG: Why is it doing (or not doing) X." It never occurred to me that there might not be a "next available slot."

Nowadays, there is a ballot for Oral Questions and indeed, Questions for Short Debate. I currently have two important issues that I am desperate to raise by means of an Oral Question and I could have tabled them in the past and they would have come up for debate within about three weeks. I no longer can do so and therefore I have been made less effective.

Composition

In the light of the negative effects of having too many active peers, it is tempting to propose an upper House with far fewer members. However, it must be understood how many peers are required just to fill the Government Front Bench, the Opposition Front Bench, and the domestic committees let alone the select committees. In addition, a broad membership is required to have some expertise or at least an understanding of most areas unless, of course, being 'a source of expertise' is taken out of the role of the House of Lords. To take one example, there are only a handful of peers with any knowledge of maritime affairs. If you shrink the Lords, experience would be lost.

The US senate only has one hundred members. This results in a US senator being far more powerful than either a congressman in the House of Representatives or a member of the House of Lords. Each US senator will have a large and influential staff. US senators tend to be old, and the minimum age is 30. Incumbency is a big advantage during elections. During the 2010-15 Parliament when the Government was, in accordance with the coalition agreement, toying with Lords reform, I went around the Commons saying that I would quite like to be Senator Attlee of South Hampshire! The point being that I would be much more powerful and better known than the local MPs.

If we have a change of government, the current composition in the House of Lords might be a problem as the incoming government would have to appoint a lot more peers, just to be able function effectively. It may be possible to deal with this by means of a cull, as was done with most of the hereditary peers. This is certainly a precedent. Looking around the corner, the disadvantage is that good quality experienced people may be reluctant to take a party-sponsored seat because of the risk, at some point in the future, of losing it having altered their career plan to suit the House.

When I started in the Lords in 1992, to get from the Commons to the Lords, you really needed to have been a cabinet minister, preferably in more than one department, or a very senior member of the House, e.g., Speaker, deputy speaker or held in stratospherically high regard. Being a junior minister once would get you nowhere. Nowadays it is easy to get

into the Lords from the Commons without ever holding an important office in that House. The statistics show a much higher proportion of the House having been in the Commons. Parties tend to be appointing peers to the House because they are highly political rather than being eminent or experienced in anything. The number of Special Advisers (from the Commons) to the Peerage also appears to be increasing.

As far as the independent crossbench peers are concerned, individually, by and large, they perform a sterling service but there is a difficulty. A very large proportion of them have a very good background in public service, academia or law. This is fine but I cannot recall any cross bencher proposing a reduction in public expenditure. Not many have advocated less regulation either! This is not an insurmountable difficulty. The Prime Minister of the day could ask House of Lords Appointment Commission to ensure that the Crossbenches have a better balance of public and private sector experience.

I am an elected hereditary peer and I have done nothing to earn a place in the Lords, but I must have done something right to get elected to carry on after the Blair reforms! I think that maintaining the principle of appointment for life, or until retirement, is much more important than retaining the by-elections for hereditary peers when one of them dies. However, I would gently point out that the standard for election as a Conservative or Crossbench hereditary is very high. Furthermore, often a hereditary peer will have only a modest political background and in the case of the crossbenches very little indeed. As far as I am concerned, my loyalty is to the House of Lords and the party comes a long way behind. It would be possible to stop the by-elections and even retire the existing hereditaries but doing so will not stop Prime Ministers overpopulating the House.

Gordon Brown's Proposal

The former Prime Minister, Gordon Brown, after careful consideration has proposed changing the role of the House of Lords so that it becomes some sort of senate of the regions with far fewer members, as I understand it. If this is to happen, it will be necessary to find some way of ensuring that the Commons can revise its own legislation. Unless it is merely to be a talking shop, it will have to have some power over Government expenditure within the regions. I am not convinced that the House of Commons will readily give up any of its financial powers even though the Government very rarely loses a vote on financial matters unlike in the US Congress although, by our standards, it is not a good model. The other difficulty is the one I have already referred to and that is the courts stepping in to fill the vacuum that would be created by not having the Lords in something like its current form.

The British Constitution is a very clever, flexible and finely balanced mechanism. If we make a mistake like the Fixed-term Parliaments Act, which had very serious unintended consequences for what was supposed to be a sensible reform, we can relatively easily change it back by another

Act of Parliament because no Parliament can constrain a subsequent one. We have indeed repealed the FTPA albeit with a few minor tweaks. However, if you undertake a big bang reform of the Upper House and change its role, you have to be certain that you will be correcting a serious fault in the constitution. There would be no going back as with the FTPA.

Most of the legitimate concerns about the House of Lords can be met by the Prime Minister of the day simply adhering to Lord Hennessey's 'Good chaps' theory of Government' and a few changes to the system of allowances plus appointing more peers from the regions. However, there are some minor legislative changes needed. First, the House of Lords Appointment Commission needs to have statutory powers to veto Prime Minister's appointments to the House of Lords on the grounds of probity or lack of sufficient experience to justify a peerage. This should not have been necessary but recent events have made it so. Consideration could even be given to giving HOLAC a role in determining the size of the House and balance between the parties.

Morally, the other essential piece of legislation is to ensure that there is no such thing as an unpaid minister. This can be achieved by legislating to ensure that the number of ministers allowed is equal to the number that can be paid. However, even after this, Lords ministers will still need access to a private income if they are to have a standard of living commensurate with their role and responsibilities.

If it is desired to be rather more 'regional' a Prime Minister needs only to take three actions. First, appoint more peers from the regions rather than London and the Home Counties. Second, change the system of Lords allowances so that those who cannot commute are not far worse off than those like me who can and compensate peers who undertake legislative duties off the estate (such as on parliamentary trips). Finally, ask the House, via the Leader of the House of Lords who is a cabinet minister, to set up regional select committees. The question is: would the Committees have any powers?

Conclusion

In conclusion, the House of Lords is not perfect but contrary to an oft-used quotation, when a practitioner explains how it works and why things are as they are, it looks rather better. Many propose reforms when they do not even understand the current role of the House. The most common complaints about the House of Lords are outside of the control of the House and are largely in the gift of the incumbent Prime Ministers.

Part III - Beyond Westminster
8. Devoscepticism: The Case for a Stronger Centre

Magnus Pedersen

Devolution is the transfer of some powers held by the Parliament of the United Kingdom in Westminster to directly elected sub-national bodies.[118] Where this differs from normal local government is that devolved authorities claim a constitutional status and even superiority, in some areas, from Westminster. While the UK Parliament remains supreme in theory, its authority is increasingly challenged in practice.

Devolution includes both the Scottish and Welsh Parliaments, as well as attempts to implement what the Brown review calls 'double devolution' in English regional government: like the aborted North-East Assembly and the rise of 'Metro-Mayors' in the 2010s. Directly elected mayors differ from local councils in that they possess a personal mandate which they use to claim an authority to speak for their local area in a way that is superior to central government. Regional government in England would likely mirror claims made by the devolved governments of Scotland and Wales, purporting a kind of moral constitutional superiority to Westminster, even if this ignores the theoretical supremacy of the UK Parliament.

In this paper, we shall come to see that devolution in the United Kingdom is sustained by many myths, forming a consensus in Westminster which is, in reality, open to question. Devolved administrations are not sovereign and lack a legal basis beyond statute law passed by Westminster. Their claim to derive authority from popular sovereignty is dubious, especially considering their democratic deficit. A string of under-publicised failings expose the limits of local government competency over public services, and the ideological zeal of many in Westminster for devolution is misdirected from other issues.

A 'union of nations'?

In a federal republic, or dual monarchy, a single sovereign exists independent from the states which make up the union. The states which make up the United States of America have all ratified the U.S constitution and may not join the Union without doing so; the constitution is sovereign in the U.S political system and states retain a right to decide on changes to

118. See Vernon Bogdanor, 'Devolving and Not Forgetting' in R Johnson & YY Zhu (eds) *Sceptical Perspectives on the Changing Constitution of the United Kingdom*, Oxford: Hart, 2023, 291.

it, as it is by assenting to the constitution that they are a part of the U.S.A. In the 17th century, England and Scotland comprised a dual monarchy under the House of Stuart; the English and Scottish states remained separate; united by shared fealty to a single sovereign. In the historical case of Norway-Sweden, the Swedish crown recognised a separate constitution for Norway as a precondition for taking up the Norwegian throne; and for this reason Norway had an independent legislature which could proclaim independence unilaterally. In all these cases, there is something outside the legal systems of component states exercising sovereignty over them; this is what makes a genuine federation.

The United Kingdom differs from these examples in that it is a unitary state. In the Act of Union in 1707, the English and Scottish Parliaments jointly transferred their powers to the single Parliament of an entirely new state. Scotland did not retain a Parliament and cabinet under the English crown, to which it was bound by any sort of constitutional document. Scotland rather dissolved its own Parliament into the English one creating a unitary sovereign body. The Act of Union 1707 is not a document signed, separately, by England and Scotland; it is a piece of statute passed by the Westminster Parliament, separately ratified by the Scottish Parliament which duly dissolved itself and is now represented by the Parliament in Westminster. The Act of Union can be repealed by a Parliamentary majority in Westminster and until such a repeal, it commands the consent of Scotland in the form of Scottish MPs sitting in Westminster.

The devolved assemblies existing today are not the descendants of the sovereign bodies signatory to the Act of Union (today, represented in Westminster) but the statutory creations of the Westminster Parliament. They derive the whole of their authority from acts passed by the Westminster Parliament; and, if they were ever to become independent, it would be via the consent of Westminster and not via unilateral declarations. The Scotland Act 1998, establishing the Scottish Parliament, affirms the power of Westminster to "make or unmake any law whatever" in Scotland, including the abolition of the Scottish Parliament.

The Scotland Act 2016, however, went much further. Passed by a Conservative-majority government, it declared, 'The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements'. The convention that no (UK) Parliament can bind its successor means that a future UK Parliament could repeal this legislation. Thus, ultimately, the convention of a self-denying ordinance alone stands against the possibility of Westminster abolishing the Scottish Parliament.

It is traditionally argued that devolution is necessary to preserve the Union. The Brown Review was released to extensive media commentary about the need to 'save' the Union with the preferred method being further devolution; is this supposition accurate? The passage of the Scottish Parliament Act 1998 seemingly had no effect on separatist sentiment. The Scottish National Party only gained support after the Act, becoming Scotland's ruling party for a decade long period in which the

first referendum on Independence was mooted. By contrast, Unionism possesses no dangers inherent in overapplication. As we have seen, there is no way for the 'Union' to break apart without the Westminster Parliament repealing the Act of Union; this could be done as the result of a successful referendum backed by the ruling party in Westminster but it could not happen by a unilateral declaration on behalf of the Scottish Parliament. In practical terms, if the Scottish Parliament persisted in an illegal declaration of independence, Westminster has authority over the British armed forces, taxation and government accounts; any illegal devolved administration would be unable to pay its employees or secure its own borders for more than a month. Historical precedent supports this. It was only via an act of Parliament in 1922 that the Republic of Ireland was able to leave the United Kingdom.

An argument sometimes floated, when it is conceded that the devolved assemblies are not sovereign, is that repealing them would see Britain ostracised by a backlash from the international community. We have several cases of recognised liberal-democracies rolling back the demands of independence movements without significant international ramifications. In 2017, the Parliament of Catalonia attempted to hold a referendum on Independence without recognition from the Spanish government; the Catalan government was dismissed and direct rule imposed from Madrid. Spain remains a key member of NATO, the E.U and global financial institutions with no lasting effect from the actions on its international reputation. Germany forbids secession from the Federal Republic by any of its states and independence movements do not control a single state government. Adopting a more sceptical line towards devolved administrations would bring the UK into the continental mainstream rather than ostracise us from it.

Is devolution popular?

If devolution is not essential for the survival of the Union, why is the Westminster consensus so pro-devolution? There is a broad, crossbench impression that devolution is popular; in the Brown Review, the findings of polling on questions like 'Local government should have more powers' are used to justify this assumption; it is worth examining the democratic deficit among many local and devolved administrations to see how credible the assumption is.

The Senedd in Wales is a case study in how unpopular localism has serious consequences. A referendum called by the Labour government in 1997 saw the devolution framework accepted by 50.3% with a turnout of barely over 50% of the population. A majority of the Welsh population never consented to be ruled by a separate administration from Parliament. Turnout in elections for the new assembly from 1997 to 2021 has never been more than 50% of the population. In the complete history of the Senedd, it has never represented even half of the Welsh people; being established with the approval of barely a quarter. Welsh turnout in the 2019 general election stood at 66.6%, clearly suggesting that Westminster

has a better claim to represent the majority of people in Wales.

The democratic deficit of devolved authorities has serious consequences. In 2020, the United Kingdom enforced a mandatory quarantine in response to the outbreak of Coronavirus. The Coronavirus Act reflected devomaximalist orthodoxy in Westminster; it gave powers to enforce quarantine, close schools and fire NHS staff to the ministers of devolved assemblies. In the Welsh context this meant that a body elected by less than half the population was given powers over bodily autonomy greater than any Welsh government in a century. Hundreds of people were served fines or imprisoned by an authority which they were unlikely to have voted for; while Parliament, the elected sovereign body, was apparently powerless to defend them; this represents a serious failure of the social contract.

A different set of questions arise when considering the legitimacy of the Scottish Parliament and its claim to represent a distinct 'nation' within a 'union of nations'. Around seven hundred thousand Scots live in England; yet none of them were allowed to vote in the 2014 referendum on Scottish independence, which would've seen their families and friends consigned to the other side of a hard border with a new country. If Britain truly is a 'Union of Nations', it makes no sense for those who see themselves as a member of one nation to be disqualified from a say in its future by virtue of living in another. At the same time, the Scottish Parliament gave all EU citizens resident in Scotland a right to vote in the same Independence referendum; it is not tenable to argue for this while forbidding Scots in England from having a say in an existential question like Independence. What this reveals is that devolved administrations can effectively select the constituency electing it, an inversion of the relationship characterising popular sovereignty.

English devolution has been dogged by similar unpopularity. In 2004, the people of the North East of England rejected the planned 'North Eastern Assembly' in a referendum by a clear majority of 75%; the 'No' campaign emphasised that this would mean more politicians and higher taxes without any substantial changes to key services. The electorate apparently agreed. It was the first of New Labour's devomaximalist projects to be soundly rejected at the ballot box and the cutbacks to sovereignty were duly put on hold. Nonetheless, over a decade later, the Conservative government felt the need to impose a new devolved authority over the North East with a budget of £2.3 billion and powers over health, policing and transport. It is only the latest of several large, expensive devo-maximalist authorities set up by Conservative ministries since 2010 including the Mayor of the West of England (2014), the West Midlands Combined Authority (2023) and the Mayor of Teesside (2017). None of these devolution deals were subject to a vote from the people living in these regions, yet they transferred crucial responsibility over economic development and public services to new authorities. Turnout for the Tees Valley Metro Mayor election was just 21.3%; for the West of England it was just under 30% while for Manchester it was 28.9%. These are tiny minorities to elect officials who

may make demands of the national, elected Parliament.

Is devolution effective?

Examining devolution to English local government provides a good test of the third question: if devolution is unnecessary and unpopular; is the policy encouraged because devolved governments are more effective?

The pattern by which powers are distributed to English local government was set by the late 2010s: directly elected mayors, following the London model, were to be established, over new 'combined local authorities' through referenda and then given tailor-made deals with the Department for Communities and Local Government (later the Department for Levelling Up). These devolution deals are important because they may, in the future, act as a way of entrenching the policies of past governments via an appeal to the 'rights' of local authorities. The last Conservative government's commitment to Net Zero, is an example of a political choice contingent on the will of the elected government but several devolution deals signed in the past decade have included specific, legally binding commitments to Net Zero funding for devolved governments; should a future Parliament try to get rid of Net Zero, we can imagine devolution being used as a Trojan horse to maintain discredited policies outside democratic control.

The funding for devolved authorities remains largely national; devolution deals, typically, involve taking local branches of nationally funded bureaucracies - such as the NHS - and giving local authorities supervisory powers over them. In 2023, payments on local government debt overtook all other forms of local government spending. 2023 saw a string of bankruptcies in English local government: in September 2023, Birmingham Council, one of the largest in the country, declared bankruptcy after spending over £720 million since 2012 paying equal pay liability; yet this was not, apparently, enough to convince Westminster to cancel the £1.5 billion devolution deal agreed with the indebted council the following March. Croydon, Cheshire, Woking and Liverpool are among other councils in severe financial straits with Moodys predicting 45 councils will ultimately go bankrupt this decade. Humza Yousaf, the former leader of the SNP and First Minister of Scotland, has called for the devolved administration in Scotland to have the power to issue bonds on the international markets. The precedent of English devolved governments with debt suggests the consequences of such a move will be dire; so long as the Barnett Formula is in effect, this will mean that English taxpayers will be funding the debts of a government in which they have no representation. This is a failure of basic democratic principles. It also suggests that attempts to devolve powers of taxation to English local authorities, as the Brown review recommends, will very swiftly be followed by calls for the power to issue bonds, which the evidence suggests will increase the risk of systematic bankruptcy and the bailout of failing regions by London.

Britain's housing crisis has become well-documented in recent years; yet it is rarely linked to the pro-devolution orthodoxy in Westminster.

One of first powers to be devolved from Whitehall to local government, with the 1947 Planning Act, was that of granting planning permission; if it were true that decisions are best made on a local level, the endemic NIMBYism of local councils ought to be anomalous. Metro Mayors, in some devolution deals, have also been granted powers to green-light development; yet this has failed to significantly improve housebuilding in combined local authorities. It would suggest that the problem is inherent in the selection pressures of local democracy itself; housebuilding, like infrastructure, is a national priority, the benefits of which can only be assessed on a national level, the beneficiaries of housebuilding can and ought to lie outside the narrow bounds of devolved administrations: hence, any successful YIMBY movement is going to have to be aggressively centralist.

Defending the Political Constitution

A final question worth asking is why devolution is so popular with political elites: broadly defined as lawmakers and opinion-formers in journalism and NGOs. The answer is that arguments for devolution are frequently confused with arguments for decentralisation. It is pointed out that a diversity of authorities allows for greater variation of policies, which, by analogy to the principles of Darwinian selection, will eventually produce better policies for everyone as the successful examples proliferate through competition and mimesis. The problem with this analogy is that devolution, in its current form, does not allow for selection pressures or sufficient variation to allow for evolutionary change. Devolution is *internally values-locked*; devolved administrations are mirror images of Parliament: it tends towards recreating the political class in miniature. The type of decentralisation you see in historically dynamic periods, like Renaissance Italy, was driven by competition with decision-making power held by individuals, rather than elected bodies. Devolved authorities cannot compete with each other. When they fail, they are bailed out by the national taxpayer. In contemporary China, rapid economic growth has partly been achieved through the broad powers over planning and infrastructure given to local party secretaries and regional governors. It is this sort of system, where technocrats appointed from the centre are given freedom to experiment in their localities, that better resembles what the 'Darwinian' argument for devolution aims at.

Devolution has escaped adequate scrutiny at the research level; fortunately, the moment this scrutiny is applied, devolutionist schemes have tended to collapse swiftly, suggesting the consensus is more a case of the Emperor's New Clothes than any ideological commitment to the cause. The Brown Review is currently the most dangerous threat to the political constitution. A renaissance of the political constitution would begin by opposing any attempt to impose further devolution via an Act of Parliament. Sir Keir Starmer has signalled his willingness to compromise on some of the recommendations, such as the House of Lords, which shows that further, sustained critique would be rewarded. Morale is

indeed improving with regular beatings.

However, if the political constitution is to survive those who believe in it must be more than reactive. The future asks a new generation of policy thinkers and MPs to build a programme positively committed to expanding the sovereignty of the Parliamentary executive. They will think boldly about alternative ways of doing local government via professionalised, technocratic leadership appointed from the centre. MPs should be far more ambitious about using the power of Parliament against local authorities. Finally, new opinion polling is needed to clarify public dissatisfaction with local governments. At the moment cliches such as 'voters prefer decisions to made locally' are used to justify massive devolution schemes and changes to the constitution with multi-generational ramifications. Think tanks and pollsters ought to invest in targeted polling around alternative questions such as "Do you think local politicians do a good job?", "Do you trust your local council?", "Are you happy with the Met Police/TFL/ Mayor of London?" to better capture the full scope of public opinion and strengthen democracy.

9. International Law and the Civil Service Code

Conor Casey and Yuan Yi Zhu

In recent years, there has been continuing controversy as to whether civil servants, including government lawyers, should obey the instructions of the government if they potentially clash with the United Kingdom's international legal obligations. In December 2023, it was reported that civil service lawyers refused to 'approve' the Asylum (Safety in Rwanda) Bill because it would potentially allow ministers to infringe international law. As a partial response to the controversy, the government issued draft guidance, making it clear that the ultimate decision on whether to proceed or not with a removal against international law was that of the minister, to which civil servants are expected to defer.

The origins of the dispute can be found in the Civil Service Code (and related codes such as the Diplomatic Service Code), which were given statutory basis by the Constitutional Reform and Governance Act 2010. In its relevant portion, they state that "You must… comply with the law and uphold the administration of justice".

What constitutes "law" under this section has been the subject of debate, with some pointing to the fact that in litigation over changes to the Ministerial Code, the government took the position that "law" included both domestic and international law".[119] Yet this does not advance matters as much as it might appear, for it will be obvious that, insofar as "law" may include international law, it can only refer to that portion of international law which applies to the United Kingdom. In other words, a treaty to which the United Kingdom is not a signatory is indisputably "international law", but it cannot be that ministers and civil servants are bound to obey it.

This brings us back to the trite proposition that the United Kingdom's relation to international law is one that is generally described as being "dualist", that is to say international treaties to which the United Kingdom is a party are not part of the laws of the United Kingdom, and cannot be enforced by the courts of the country, unless they have been "incorporated" into United Kingdom law via legislation. As to customary international law, which was once said to be part of the common law, that proposition has been heavily qualified in recent case law, which is unsurprising given the tremendous differences which exist between what was known as the

119. https://www.civilserviceworld.com/news/article/new-guidance-on-rwanda-scheme-may-be-of-limited-comfort-to-civil-servants

"law of nations" and customary international law as it exists today.[120]

Moreover, it has always been recognised that both dualism and parliamentary sovereignty mean that the United Kingdom may breach its international obligations lawfully *as a matter of United Kingdom law*, and that there will be no remedy in municipal courts for such a breach. As Diplock LJ (as he then was) said, "[T]he Crown has a sovereign right, which the court cannot question, to change its policy, even if this involves breaking an international convention to which it is a party and which has come into force so recently as fifteen days before."

Such a power is not merely exercised for capricious reasons. In the words of the former Lord Chief Justice Lord Judge, "[A]lthough Parliament is expected to respect a Treaty obligation, it is not bound to do so… For us this principle, embodied in a constitution which is partly written and partly unwritten, underpins the rule of law and represents the rule of law in operation." Or as Professor David Feldman puts it, "The principled reason is the desire to uphold constitutional guarantees, including the Rule of Law, and keep in the hands of the nations the democratic control of and accountability for national law and policy, in order to maintain the legitimacy of politics and public law in the state. The pragmatic reason is that international obligations may be contrary to the national interest and may derail important national objectives."

Hence, when civil servants are expected to "comply with the law", they are expected to comply with the laws of the United Kingdom, which may or may not include the portion of international law which, as a matter of international law, are binding on the United Kingdom. If the sovereign legislature of the United Kingdom explicitly breaches or allows for breaches of international law through legislation, civil servants will be expected to abide by the municipal law as enacted by Parliament. Similarly, if ministers require civil servants to draft such legislation, they are obliged to comply, just as they are obliged to comply with a request to amend a municipal statute. The United Kingdom's dualist character, as well as parliamentary sovereignty, require nothing less, unless one seriously contends that the relevant provisions of the Constitutional Reform and Governance Act 2010 have overthrown these basic constitutional principles in their entirely.

Furthermore, we are fortified in reaching this conclusion by the fact that international law generally imposes duties not on persons, but on states. In the case of the Rwanda legislation, if its application were to have given rise to a breach of the law, the breach would have been attributed to the state and not on its subordinate civil servants, so that there can be no question of civil servants "breaking" international law, insofar as the latter is "law" in the relevant jurisdiction of the United Kingdom.

Therefore, in order to reaffirm the proper position of international law within the United Kingdom legal order, as well as to avoid future controversies whereby civil service lawyers may have qualms about their duties under the relevant code, we propose to insert a new provision in the Civil Service Code and similar documents making it clear that "comply with the law" means the laws in force as a matter of municipal law,

120. https://www.bailii.org/uk/cases/UKHL/2006/16.html; https://www.bailii.org/uk/cases/UKSC/2017/3.html

and that the requirement does not absolve civil servants from assisting ministers in introducing new legislation or to take actions which are lawful under United Kingdom municipal law, even if such action or legislation may conflict with the United Kingdom's international legal obligations as a matter of international law. Breaches of international law of course should be considered sparingly; but it is ultimately up to ministers and to Parliament, and not Civil Service lawyers, to make the relevant decision.

10. The European Convention on Human Rights: Should We Stay or Should We Go?

Bryn Harris

Introduction

As any theologian could tell you, Jews and Christians agree that scripture promises a Messiah but disagree whether he has come yet. During the Disputation of Barcelona of 1263, the Jewish scholar Nachmanides put a tricky question to the Dominican friar opposing him: if Jesus really was the Messiah, as the Christians believe, and the harbinger of universal peace, then why aren't things much better than they are? Put simply: *is this it*? The Jews may be forever waiting for their Messiah – but for Christians he came and it made no difference.

Unlikely as it may seem, this holds good as an analogy with the Human Rights Act 1998. If, as promised upon its enactment, the Act 'brings rights home', then we are entitled to ask twenty-six years on: *is this it*? When it comes to our basic liberties, and in particular freedom of speech, is this really as good as it's going to get? Has incorporation of the European of Convention on Human Rights in fact done little for – or even harmed – our freedom to speak our minds?

This paper makes the argument that clinging close to the Convention is indeed one reason why British freedom of speech is in poor health, and that moreover we shouldn't be surprised: the Article 10 protection is too weak, too qualified, and the Convention itself systematically degrades the importance of free political speech. In turn, and more seriously, the incremental replacement of political deliberation with legal argument is depriving us of the advantages of a political constitution, and diminishing the quality of our public reasoning.

The Convention as implemented in law

When a Bill starts life in Parliament, under section 19 of the Act the minister in charge must state whether or not the Bill is, in his or her view, compatible with the Convention. The wording makes plain that following Strasbourg is the expected default: if the Bill is incompatible, the minister must 'make a statement to the effect that although he is unable to make

a statement of compatibility the government *nevertheless* wishes the House to proceed with the Bill.' This has happened on only four occasions since 2000.

Section 3 of the Act directs courts to presume that Parliament always intends to legislate compatibly with Convention rights, and to interpret statutory provisions so as to give effect to them 'so far as it is possible', even if that means departing from the legislative intent of Parliament in that specific provision.

Section 2 of the Act directs courts to 'take account of' the case law of the European Court in applying Convention rights. As is well known, UK courts have bound themselves to a deferential approach, choosing to follow any clear and constant line of Strasbourg jurisprudence, absent special circumstances.

In cases where a statutory provision cannot be made compatible with the Convention as interpreted by the European Court, UK courts can issue a section 4 declaration of incompatibility, thereby leaving it for Parliament to decide whether to remedy the incompatibility (which it usually does). Again, the presumption is towards compatibility – section 10 creates a fast-track for ministers to amend primary legislation found to be incompatible by the courts.

The HRA in constitutional practice

The above is well known, and I have nothing original to say about the meaning of those provisions of the 1998 Act. Their significance for the argument I make here is their overwhelming presumption that the European Court promulgates and defines human rights, with deliberation on such matters by legislators the exception rather than the norm.

Our lawmakers are thus largely released from any obligation to think carefully about how our rights and liberties are to be developed and protected. The constitutional division of labour charges the courts with such matters, while freeing up legislators to focus on, one supposes, what they regard as higher priorities.

As a result, draughtsmen often seem to have little to say about freedom of speech, among other rights. This is an understandable, rather than a culpable, omission. Draughtsmen, with their immense aptitude and love for economy, are not minded to provide for legal effects that will anyway work by operation of law, whether it be the law of the Convention or the common law.

Legislators also seem reluctant to venture into Convention territory. The passage of the Higher Education (Freedom of Speech) Act 2023 – since revoked by the ministerial *fiat* of Labour Education Secretary Bridget Phillipson – asked parliamentarians to consider how freedom of speech and academic freedom should be protected in English universities. Government ministers and officials had in mind a clear policy goal, set out in the Conservative Party manifesto, as well as a shopping list of mischiefs to be addressed through the Bill. Both supporters and opponents of the Bill had clear notions of the sorts of speech that should and should not be

protected. Yet the proposal of Lord Moylan that the Bill actually delineate what is meant by freedom of speech in the academic context, and pick apart what falls within and without its scope (talking in the library, for instance, may be lawful but universities should not be obliged to protect the freedom to do it), met with considerable opposition. While it was recognised that a definition was desirable, peers, among them some formidable lawyers, were willing to go no further than the amendment of former Supreme Court justice Lord Hope:

references to freedom of speech are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the Convention as it has effect for the purposes of the Human Rights Act 1998).

It would be unfair to decry this as poverty of ambition. Genuine confusion and lack of clarity could result from making the courts operate parallel, or even conflicting, definitions of a right. Moreover, what would be the point? So long as Parliament retains the Human Rights Act, it commits itself to a constitutional policy of deferring to Strasbourg on the definition and scope of rights – legislators are surely right to think that, absent a wholesale rethink of that policy, they should abide by that commitment.

The Convention as restraint on politics

Taking the rights as they are stated on the face of the Convention, it seems straightforward that any liberal democracy should and anyway would limit its national law-making, through the democratic process, so as to stay within the Convention. Given the similarity between the common law and the Convention rights (no coincidence given the role played in its drafting by British negotiators) the obligation to abide by the latter should have been unobtrusive.

There were, however, known defects in the drafting of the Convention. Thanks to Brian Simpson's monumental *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2000), we now have detailed insight into the drafting process, and in particular the consistent pressure from UK negotiators to clarify the proposed rights, and the exceptions to those rights, through the sort of precise, granular drafting that typifies (or should typify) Acts of Parliament.

The UK lost this argument. It was agreed instead that the Convention rights should be expressed in open-textured wording, with judges left to work out their meaning and application over time. As is well known, the UK Labour government of the time was unhappy with the text of the Convention when presented for ratification. Lord Chancellor William Jowitt was particularly displeased. 'It is intolerable' he argued in Cabinet in August 1950, 'that the code of common law and statute which had been built up in this country over many years should be made subject to review by an international Court administering no defined system of law.'[121]

Jowitt resumed his attack later that year, saying in the House of Lords:

121.FO 371/72805/UNE1894.

> *When I think that in my library I have the law of this country in book after book, running into hundreds of books, it is remarkable to me that this aspect of the law can be stated in so few paragraphs. The result is inevitably that it is stated vaguely.*[122]

For some, including Brian Simpson, this was little more than the grumbling of a conservative common lawyer opposed generally to declaratory rights documents and international law.[123]

However, Jowitt had a point. The English judges to whom Jowitt was accustomed also developed the judge-made law in the form of the common law, but under the oversight of a supreme Parliament with power to overturn it as it saw fit. While the Convention is overseen by the Parliamentary Assembly of the Council of Europe, and can be amended or augmented by agreement of signatory states, exercising any sort of corrective oversight over the court is conceptually as well as practically difficult. The Convention's purpose of imposing a check on political law-making would be defeated if politicians were themselves able to intervene and direct the court in interpreting and applying Convention rights.

Jowitt was surely right to be concerned about the vagueness of rights that would be applied at the supranational level by judges of unknown quality empowered to adjudicate as they saw fit and without check. Signatory states simply had to trust that the judges would be able to distinguish between, on the one hand, uncontroversial norms fundamental to liberal democracy (and long protected by the common law) and, on the other hand, standards of governance which, while desirable, are matters of reasonable difference to be tested by the open deliberation and argument of the political process. That distinction was safe so long as judges could identify what is truly fundamental to liberty and human dignity. This is, however, far from a given – liberty and dignity are moral and political values, not necessarily explicable by legal learning alone. As such, the Convention was always pregnant with the systemic risk that the political freedom of action of signatory states would be unduly limited.

The Convention versus free speech

We should consider whether the Convention degrades not just the extent of our freedom to speak, but also the importance of political free expression in our political constitution.

Article 10 – a lower standard

It is commonly noted by English judges that the Convention right to freedom of expression is hand in hand with common law freedom of speech. The latter freedom was defined in famously robust terms by Lord Hoffmann, prior to enactment of the Human Rights Act 1998:

> *There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word 'nevertheless'. The judge then goes on to explain that there are other interests which have to be balanced*

122. HL Deb 15 November 1950 vol 169 col 350.

123. AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford: Oxford University Press, 2000, 739-740.

> *against press freedom. And in deciding upon the importance of press freedom in the particular case, he is likely to distinguish between what he thinks deserves publication in the public interest and things in which the public are merely interested….*
>
> *[A] freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute….*
>
> *It cannot be too strongly emphasised that outside the established exceptions (or any new ones which Parliament may enact in accordance with its obligations under the [European] convention) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.*[124]

Lord Hoffmann was here laying down the 'strong form' of common law free speech. Indeed, in a later extrajudicial lecture he made limited modifications to his position in response to horrified accusations that he had privileged free speech over other rights. The basis of Lord Hoffmann's position, however, was uncontroversial common law principle: barring clear prohibitions set out by elected representatives in Parliament, or by judges applying established rules of common law, we have the negative liberty to say what we want.

If we compare the Article 10 right, we might ask if it in fact lags behind common law free speech. Here is the text:

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….
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.

On the face of it, this is a robust protection. However, when we interpret the underlined words in line with the Strasbourg and English courts, a certain enervation takes place.

Everyone has the right to freedom of expression, but this excludes any speech that aims to 'destroy' Convention rights.[125] Such speech includes: 'hate speech';[126] vehement attacks against religious groups accusing them

124. *R v Central Independent Television plc* [1994] 3 All ER 641, 651-2.

125. Article 17 of the Convention.

126. *Gündüz v Turkey*, App. no. 35071/97 (2004).

of terrorism;[127] or negation and revision of clearly established historical facts, such as the Holocaust.[128] Such speech is not free, and interference with it does not have to be justified or proportionate.

The measure interfering with free expression need not actually be necessary, i.e. indispensable – it merely needs to meet a 'pressing social need'. A measure that is necessary must also be proportionate, which means judges enjoy a highly malleable discretion in weighing up the importance of the individual right versus the importance of the measure that interferes with the right, balancing the right of the individual with the general interests of the community, and asking whether, counter-factually, a less intrusive measure might have been adopted. The judicial yardstick for determining what is 'pressing' or 'important' is inscrutable, and not obviously within the institutional competence of courts. Nor is it clear how judges faced with a dispute between parties can satisfy themselves that they know what is in the interests of the wider community.

For a measure restricting freedom of expression to be prescribed by law it need not, as Lord Hoffmann required, be 'laid down by common law or statute.' Enforceable contract terms, for instance in an employment contract or a binding HR policy, are considered 'prescribed by law' by the Strasbourg court by virtue of having a 'basis' in domestic law. The House of Lords held that an NHS Trust's policy for secluding dangerous patients was 'prescribed by law' because, crucially, the policy possessed the 'quality of law' – i.e. was accessible, foreseeable and predictable.

The aim of protecting the rights of others allows courts to balance, as sometimes they must, the right to free expression against other rights, including the expansive right to privacy under Article 8. Even though freedom of expression is held out as a fundamental right, it can nevertheless be outweighed by 'indisputable imperatives' that are not even recognised as rights in law.[129] Again, the judicial criteria for identifying these indisputable imperatives are opaque, and the 'rights of others' have included: the right not to be shocked or affronted by inappropriate material transmitted into the privacy of one's home;[130] the right to be protected against the potential mischief of partial political advertising;[131] and, somewhat notoriously, right of individuals to effective protection by state authorities from the serious adverse effects of climate change.[132]

One might ask whether a right so permissive of qualification – a 'defeasible, fair-weather' right, in the words of John Finnis – really amounts to a fundamental right at all.[133]

Even though there are elements of the Strasbourg jurisprudence that sit uncomfortably with the liberal philosophy of the English common law – should a human rights court really connive at the criminalisation of libel, in the name of vindicating 'honour' against 'insult'? – one must also be fair. When the Strasbourg court decides that an exercise of free expression is important, it is willing to defend it strongly. Its case law on press freedom, academic free expression and political speech is impressive, notwithstanding the court's strong regard for privacy rights.

For those such as myself seeking to protect British free speech, the

127. *Norwood v UK*, App. no. 23131/03 (2004).

128. *M'Bala M'Bala v France*, App. no. 25239/13 (2015).

129. *Chassagnou v France*, App. nos. 25088/94, 28331/95 and 28443/95 (1999), para 113; *R (ProLife Alliance) v BBC* [2003] 2 All ER 977, paras 91 and 123.

130. *R (ProLife Alliance) v BBC*, para 123.

131. *VgT Verein Gegen Tierfabriken v. Switzerland*, App no. 24699/94 (2001) paras 59-62; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312, para 28.

132. *Verein Klimaseniorinnen Schweiz v. Switzerland*, App. no. 53600/20 (2024).

133. John Finnis, *Human Rights and Common Good: Collected Essays* Vol III, Oxford: Oxford University Press, 2011, 42.

Convention offers an undeniably powerful range of remedies. The suspicion abides, however, that it may also be part of the disease.

What are we to do when the Court determines that an exercise of free speech is not so 'important', and susceptible to override by other 'pressing' needs and 'imperatives'? This is exactly what has happened in relation to online speech which the court, like other supranational European institutions, regards with barely disguised distaste.[134] Not only is there no forum presiding over the court that could overrule its determinations, such as an effective parliament, it is also unclear how we could get enough of a grip on those determinations properly to challenge and interrogate them. We can apply no adequate yardstick so as to argue cogently that the court under-measured the 'importance' of a right, and over-measured some countervailing 'pressing social need', or mischaracterised as 'imperative' an interest that should properly be characterised as 'merely desirable'. One may reasonably doubt that legal learning actually equips courts fully to aerate the question of *what matters* – i.e. what is pressing, important and imperative.

It is also undesirable to enshrine the exceptions to free speech quite so grandly. For any government or public authority looking to regulate what we say, prior justification for restrictive rules always exists already. The Convention lays down a royal road, and restrictions can be imposed without much by way of the dust and sweat of argument – presumptive justification is always at hand. I cannot be the only one dispirited by the near-universal custom of appending to every declaration of the right to free speech the inevitable adversative setting out the generous caveats that limit it. Over time the exception comes to be as important as the rule.

The Convention supporter may reply that the UK's political constitution, in which the supreme Parliament may enact any limitation it wishes, is hardly preferable. It may be, however, that the requirement to defend limitations on free speech through political argument sets a higher bar than reliance on wide presumptive justifications in international law. When the deeply illiberal Online Safety Act proceeded through Parliament, it was political challenge that defeated its worst excesses (including the requirement to regulate 'legal but harmful' speech). Arguments about Convention compatibility amounted to little – and, given Strasbourg's unease towards online speech, a legal challenge probably wouldn't have been worth the candle.

Free speech as the fundamental liberty

There is another, more deeply systemic way in which the European Convention, and our close relationship to it, is aggravating as well as curing the poor health of free speech in the UK. Put simply, free speech is less important in a constitution that reserves debate of the most important question in any polity – 'what should our rights and obligations be?' – for the legal rather than the political process.

Freedom of speech is often claimed as the fundamental right that underlies other rights. As early as the 17th century, John Milton in his

134. See e.g. *Delfi AS v Estonia*, App no. 64569/09 (2015); *Zöchling v. Austria*, App. no. 4222/18 (2023).

Areopagitica asked for 'the liberty to know, to utter, and to argue freely according to conscience, *above all liberties*' (emphasis added). This grand-sounding claim is merely logical – we can only secure our basic rights if we are free to argue what they should be, convince others of this belief, associate freely with those who agree and, if necessary, protest against the powerful if they refuse us.

This line of thought influenced the formation of the post-war human rights instruments. The United Nations General Assembly resolved that freedom of information – in Convention terms, the freedom to receive information – 'is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.'[135] Lord Dukeston, serving as the British representative on the United Nations Commission on Human Rights, stated during negotiations over what would become the International Covenant on Economic, Social and Cultural Rights:

> *The first essential was to lay the foundations of the elementary freedoms … it was necessary to begin by proclaiming freedom of speech, freedom of association, and freedom of thought. Without these fundamental freedoms, human rights could not be developed.*

More recently, then Justice Minister Dominic Raab promised that the Government's proposed Bill of Rights would safeguard 'free speech, the liberty that guards all of our other freedoms.'[136]

While encouraging this is also, unfortunately, platitudinous – or, in Jeremy Bentham's withering assessment of rights talk, 'nonsense on stilts'. Free political deliberation may be the supreme form of decision-making in a thorough-going political constitution; however, where the promulgation and definition of rights is governed by a *legal* process, the real 'foundational' or keystone right is the right of access to justice. The effective supremacy of the Convention in this regard in fact *degrades* the importance of expression rights.

We remain free to vent – we can say a whole range of things about our rights, and all sorts of other things. However the *efficacy* of free speech as a right is diminished. As courts are not, and should not be, swayed by protests and other forms of political argument, the power of our free speech to fulfil its most important function – to demand what our rights should be and what our dignity requires, by means of reasoned argument, common cause, and petitioning of democratic representatives – is trivialised.

If we wish to make an effective case for our rights, we must instead speak the artificial language of the law. The rule of law demands no less – the law could never be certain or predictable if cases could be determined by open-ended, anything-goes political argument. As such, then, and despite the fine words to the contrary, it is really the Article 6 right of access to the courts, rather than the right to free speech, that currently vouchsafes all other rights.

It follows too that limiting or simply neglecting the right to free speech is more easily tolerated, because the cost of doing so is so much the less.

135. United Nations General Assembly, Resolution A/RES/59.

136. 'Free Speech to Get Legal Supremacy, Says Dominic Raab', *Daily Mail*, 25 March 2022.

Once free speech, or perhaps more accurately free political speech, is displaced as the 'keystone' right, it does less harm to the fundamentals of our constitution and society if we come to despise it. It may be something nice to have, but it is hardly indispensable.

Conclusion

A constitutional settlement that allows greater political input into reasoning about rights will make our public reasoning better – broader, more diverse and more thoughtful. Our most important rights and liberties should be informed by our best reasoning, and our current settlement does not deliver that. The question we must ask is: can we improve on it while remaining in the Convention? Can a signatory state sustain a dialogue between, on the one hand, judges tasked with adjudicating on and incrementally refining our rights, and, on the other, political representatives who are free from the artificialities of legalism and who have greater institutional competence in reflecting on what matters in the public interest?

The UK could adopt an entirely domestic rights regime while remaining a signatory, and fight it out (or pay the fines) whenever challenged that its regime falls short of Strasbourg standards. Mature democracies should feel entitled to respond to the Court: 'we think you've got it wrong.' This would inevitably be inconclusive, however, and merely prolong the debate. There would be constant pressure to close the gap and re-align with Strasbourg standards, and it would be hard to stop judges from interpreting legislation in line with the UK's international obligations. Moreover, this would be a dishonest compromise: if the UK is unwilling to accept the Convention as supreme arbiter on human rights, as membership requires, then it should do the honourable thing and leave. Given the large parliamentary majority enjoyed by Sir Keir Starmer, a former human rights lawyer and true believer, the status quo will be preserved for some time. It must therefore fall to other parties to think seriously about the Convention, and make such deliberations a part of our political mainstream.

Part IV - Party Perspectives
11. The Brown Review: Thatcher's Latest Creation

Renie Anjeh

At the 2021 Labour Party conference, Keir Starmer announced that Gordon Brown 'will lead our commission to settle the future of the union'.[137] The Brown Review, formally entitled *A New Britain: Renewing Our Democracy and Rebuilding Our Economy*, was published in December 2022, coming in at 60,000 words and 155 pages. While the 2024 Labour manifesto declined to include most of Brown's proposals, they remain, for some in the Labour Party, unfinished business.

To understand the Brown Review, it is worth situating it in the broader political tradition and context from which it emerges. Far from being a bout of 'new thinking' on the centre-left, the former Prime Minister's review is yet another instantiation of constitutional and political reform becoming an article of faith for many on the left. Like many political shibboleths on both left and right, this great interest in reforming the British constitution is largely a consequence of the 1980s. More accurately, it was largely a left response to the premiership of Margaret Thatcher.

To further understand the left's earlier position, it is worth examining the debate between former Conservative Lord Chancellor Lord Hailsham and the socialist legal scholar JAG Griffith. In his 1976 piece 'The Dilemma of Democracy', Hailsham argued that Britain was an 'elective dictatorship' with few checks and balances within our constitution. His proposal was a bill of rights as part of a codified constitution, as a way of combating the so-called 'elective dictatorship'.[138] This earned the consternation of Griffiths who saw this as an attempt to depoliticise issues that were inherently political, removing political issues from the arena of democratic contestation.[139] For Griffiths, such decisions should be taken by politicians – elected by the people – not judges.

This view was mainstream among many on the left, which is unsurprising given the labour movement's historical distrust of the courts and the judiciary. The National Council for Civil Liberties (NCCL) rejected a bill of rights, including the incorporation of the European Convention of Human Rights (ECHR) into UK law. At the 1987 NCCL conference, both Bill Morris, the general secretary of the Transport and General Workers

137. https://labourlist.org/2021/09/we-can-win-the-next-election-keir-starmers-labour-conference-speech/

138. Lord Hailsham, *Dilemma of Democracy: Diagnosis and Prescription*, London: HarperCollins, 1978.

139. JAG Griffith, 'The Political Constitution', *Modern Law Review* 42:1 (1972), 1-21.

Union, and trade union lawyer Tess Gill opposed the incorporation of the ECHR into UK law. The *Guardian* columnist Martin Kettle – then a young writer for *Marxism Today* – breathed a sigh of relief that the Thatcher government had not introduced a 'bill of rights', a decision which he said showed limits to their 'authoritarian populism'.[140] Moreover, Hailsham's view also represented a body of thought on the right, including by those who were well to his right. Friedrich Hayek and Keith Joseph, who unlike Hailsham were much more aligned with Thatcher's thinking, had been supporters of a bill of rights as part of a codified constitution. Even Margaret Thatcher herself proposed incorporating the ECHR into Labour's first devolution bill for Scotland in 1976.[141] Much of this came against a wider context of the left being more sceptical of the ECHR and the judiciary, with the right being more in favour of the ECHR and the powers of the courts. Even a young human rights lawyer named Keir Starmer wrote in 1995 that the terrain had shifted from 'civil and political rights' to a fight for social and economic rights, but 'The European Convention… is now almost redundant in this struggle', having been dreamed up by 'fundamental-rights theorists' from half a century earlier.[142]

As a consequence of Thatcherite hegemony, the left began to reconsider its position on rights and the British constitution. Far from being a middle-class hobby horse, the left came to see constitutional and political reform as a means of resistance to Thatcherite dominance. There was the emergence of the campaign group Charter 88 who proposed constitutional and political reforms in the late 1980s. *Marxism Today* featured debates about constitutional and political reform.[143] There was also a growing academic interest in liberal legalism from the likes of John Rawls and Ronald Dworkin. This pertained to Labour politics too. Robin Cook explicitly justified his support of constitutional and electoral reform because of Thatcher's dominance.[144] John Smith QC, as leader of the Labour Party, said on his views on the constitution: "We do have an elective dictatorship. I myself used to believe in the mysteries of the British Constitution. My experience over the last ten to twelve years, like many people, has caused me to change my mind quite fundamentally on that."[145] It is interesting that Smith, a prominent Labour law officer, came to reiterate arguments - the exact word 'elective dictatorship', no less - first made by a prominent Conservative law officer in order to defend social democracy in Britain. Indeed, a similar shift could be seen in the left's approach to the European Community, with the left becoming supporters of the Community due to Jacques Delors' vision of a social Europe, while the once supportive right became increasingly Eurosceptic. All of this serves to highlight not only the highly contingent nature of many political shibboleths we associate with left and right, but also the context from which the Brown Review should be understood.

However, the history of the left's embrace of constitutional reform – particularly as a means to resist Thatcherite hegemony – does not mean it is wise for the left to necessarily support any reform. One reason for this is the unintended consequences with various constitutional reforms that

140. Martin Kettle, 'The Drift to Law and Order', *Marxism Today* (June 1989), 21.

141. See also, Society of Conservative Lawyers, *Another Bill of Rights?*, London: Conservative Political Centre, 1976.

142. Keir Starmer, 'Can the Entrenchment of Fundamental Rights Contribute to the Realization of Progressive Change?', *Socialist Lawyer* 25 (Autumn 1995), 7.

143. See Max Shock, *Renewing Left-Wing Ideas in Late Twentieth-Century Britain*, DPhil thesis, University of Oxford, 2020.

144. Michael Tugendhat, 'Conservatives should respect the rule of law by protecting European human rights laws post Brexit', *Telegraph*, 23 August 2017.

145. John Smith, 'For a Citizens' Democracy', 1 March 1993. Available at https://www.opendemocracy.net/en/opendemocracyuk/john-smith-and-path-britain-did-not-take/

have been introduced over the last thirty years. As we have seen with the Fixed-term Parliaments Act, the ramifications of asymmetric devolution, the tensions arising from our framework of human rights law, European integration, the overuse of referenda in a parliamentary democracy – one should seriously consider the implications of the reforms introduced (and the logical conclusions of the premises used to justify them). There is also the problem, as suggested by former Prime Minister Tony Blair, that many constitutional reforms attempt to find constitutional answers to what are essentially political problems. This could have been said by one of his former Labour predecessors, Ramsay MacDonald, who said: "The Socialist has been so often offered political instead of social changes that he has come to regard political reform as a red herring which designing capitalists draw across the path of the people when the people are about to run to earth some grievance of real importance."[146] At the very least, this ought to give us reason to pause before rushing to endorse any plans purely on account of it being perceived as 'radical', 'transformative' or 'new'.

Given this, there is much to be concerned about when it comes to the Brown Review. This is due to the very serious political and constitutional implications of what Gordon Brown is suggesting, which appears to go well beyond what he has envisaged. Let us take one example: 'our constitution should guarantee rights and ensure opportunities'.[147] This is one of many examples where Brown suggests our constitution should 'guarantee' various social rights, including free healthcare, or indeed impose a 'constitutional duty' on government to rebalance the economy. What is significant here is that the former Prime Minister appears to be suggesting a codified constitution. If this is not the case, and this isn't what the Review is proposing, then it is simply another Act of Parliament which could be repealed by Parliament (and therefore provides no guarantee of any sort). This would inevitably mean that any Act of Parliament would be subordinate to a codified constitution, with rights embedded in law irrespective of the wishes of any Government. This proposal alone would already amount to a huge transformation of our constitution as such change would end the supremacy of Parliament. It also contradicts the Review's promise to protect the primacy of the House of Commons.

There are also further problems with the Review. One is the proposal to give a new second chamber an explicit veto power over legislation from the House of Commons. Aside from undermining the primacy of the House of Commons, which the Review explicitly said it would not do, it would limit the ability of a Government to pass legislation to enable any social reform or policy that it wishes. Further proposals in this vein, such as entrenching devolution even further and empowering judges (as this is what it would necessarily entail), would further weaken the authority of an elected government to pursue its agenda. All of these constitute further constraints on the role of Government. It would also end our current constitutional settlement where the Government can do as it wishes simply with a majority of one in the House of Commons. One may argue

146. Quoted in YY Zhu, 'Labour's Constitutional Plans are Dangerous', *UnHerd*, 6 December 2022.

147. Commission on the UK's Future [Brown Review], *A New Britain: Renewing Our Democracy and Rebuilding our Economy*, London: Labour Party, 2022, 8.

that limiting the power of the Government in this way is progressive, but such an argument overlooks a wider tradition on the left which saw political constitutionalism as the means of ensuring a Labour government could implement its agenda in full. Brown's proposed undermining of the Government also has further consequences for British democracy too. By weakening parliamentary democracy in this way, and by embedding a set of constitutional requirements that cannot be challenged by any Parliament, the former Prime Minister's proposals would constrain the ability of a voter to support a policy or a manifesto which does not conform to the embedded constitution which Brown favours. If a Government received a mandate from the electorate to pursue its own set of policies, they would be prevented from doing so if it did not align with the new 'constitutional settlement'. The consequence of this is to weaken the ability of voters to determine their own path in a democracy.

This is connected to another flaw in the Brown Review which is that the former Prime Minister is essentially demanding that his own politics - regardless of its various merits - should be removed from the arena of democratic contestation. It is in effect a demand for Brown's politics to be imposed on any government that wished to diverge from it, even if it had the consent to do so from the electorate. Far from devolving or decentralising power, this amounts to a power grab. Whether one agrees with Brown's policy programme or not (and I have sympathy which the intentions behind many proposals), to remove them from the arena of political contestation is to remove choice from voters. To entrench one's own politics in a constitution, insulating them from democratic challenge to them, cannot be said to be democratic. Brown also appears to consider that this could set a precedent for future right-wing governments to go much further in trying to entrench their vision of politics through constitutional law rather than the contingent political contestation. If the left can expand judicial power to place its politics beyond the reach of voters, why shouldn't the right?

Nonetheless, there are some defences of the Brown Review that have been made. One possible defence is the idea that the rights and duties proposed as part of this constitution are areas of 'consensus', a justification used in the Review. However, what the Review fails to consider is that codified constitutions do not necessarily lead to consensus. In the United States, most would agree with the Constitution yet there has been great polarisation over issues as diverse as gun control, affirmative action and, most notably, abortion. Most would agree with the rights detailed in the European Convention of Human Rights. Yet the living instrument doctrine and various rulings from Strasbourg - from immigration to prisoner voting, from Rwanda to even the closed shop - demonstrate that the devil is very often in the details. People may agree with the broad rights and duties in the abstract but come to widely divergent views on how this is applied in practice. It is also worth noting that various issues (for eg. abortion) are far more entrenched as matters of consensus in our parliamentary system which isn't the same in the United States with its codified constitution.

This leads onto another flaw with expanding judicial power. There is the obvious point that such proposals would necessarily expand judicial power in our system, thus giving unelected judges a greater say and clout over inherently political matters that ought to be decided by elected politicians and the electorate (something the left was once deeply sceptical about). However, there is another flaw; that seeking to constitutionally entrench what ostensibly appears to be matters of consensus could even exacerbate polarisation and conflict. Far from ending political contestation over such issues, contestation is removed to the Supreme Court or the new second chamber Brown proposes and away from the democratic arena (as we have seen in the US Supreme Court). Such contestation may hinge on how rights and duties are applied, a point which has already been referred to. As with the US Supreme Court and the ECtHR, judges can take different views about how rights are applied and their scope, which have implications for policy. For example, one might reasonably argue that a right to free healthcare, as suggested by Gordon Brown, might apply to all medicines and treatments (including those not approved by NICE) and others might take a more limited view. Yet under Brown's Review, the decision over this could not be taken by Parliament but by judges. This is an inherently political, value-laden decision, with implications for other areas of government policy (for eg. fiscal policy), which ought to be taken democratically. Yet we could see under Brown's proposals, policies being placed upon a Government (and voters) due to the way the judges interpret social rights under the Brown Review. It is worth noting that judges have their own views, which affects their rulings and their interpretation of legislation (and they tend to come from a particular class or social background). All of this has huge democratic consequences and none of them are good, one of which could be frustration from voters and even a greater loss of faith in the political institutions.

There is no doubt that the proposals in the Brown Review are made with the very best intentions. The Review does seek to address real problems with British democracy and our economy, which critics must acknowledge. Nonetheless, the proposals contained in this Review are contradictory on their own terms. Most importantly, they propose a reckless change to our constitution which undermines Parliament's supremacy, the primacy of the House of Commons and expands judicial power. It seeks to grant unelected political actors a greater say over political matters – thus severely constraining elected politicians, with the concomitant weakening of voters' choice. All of this would serve not to revitalise British democracy but weaken it. It therefore might be worth the left rediscovering its roots in Griffith rather than pursuing Brown's Review.

12. Conservatives and the Political Constitution

Lee David Evans

The United Kingdom's political constitution is one of the treasures of our national inheritance. It is a central element of what British conservatives believe we have been gifted by our ancestors and must pass on - ideally a little improved, but overwhelmingly intact - to our descendants. So as the Conservatives move to the opposition benches after fourteen years in government, what can we say of the party's record on the constitution - and where should it go from here?

I

The Conservatives took office in 2010 with a constitution almost unrecognisable from 1997. Labour's longest and most constitutionally consequential period in office saw responsibility for swathes of policy in Scotland, Wales and Northern Ireland devolved; the Lords lose the vast majority of its hereditary peers as well as its chief judicial function; a new court, supposedly 'supreme', sit opposite the Palace of Westminster; the Human Rights Act incorporate rights set out in the European Convention on Human Rights (ECHR) into British law; new electoral systems deployed in British elections, including the use of PR for European Parliament elections; and after an almost two-decade absence from British political life, referendums promised and delivered to settle thorny political issues. Together, they amounted to a new constitutional arrangement in which the Westminster Parliament was seriously diminished in the UK's political life.

In opposition, Conservatives had been sceptical of these reforms. In a debate on the Scotland Bill 1998, even after the proposals for a Scottish Parliament were overwhelmingly backed by the people of Scotland in a referendum, Conservative spokesmen continued to warn that 'devolution contains great dangers to the United Kingdom.'[148] Of the new Supreme Court, the Shadow Lord Chancellor described Labour's grand new institution as 'pointless and extravagant'.[149] And when faced with the Human Rights Bill, Conservatives proposed an amendment which said:

> *This House, while confirming its strong belief in human rights, expresses its deep concern at the constitutional implications and deficiencies of the Human Rights*

148.HC Deb (28 January 1998). vol. 305, col. 360.

149.HL Deb (8 March 2004). vol. 658, col. 986.

> *Bill because the Bill weakens one of the foundations of everyone's human rights and fundamental freedoms, which is an effective political democracy…*[150]

Yet under the leadership of David Cameron, acceptance of large parts of the new British constitution became part of the modernisation agenda. Cameron chastised his predecessors for their hostility to reform, for example telling the Scottish Conservatives that 'we fought on against the idea of a Scottish parliament long after it became clear it was the settled will of the people.'[151] In the aftermath of the expenses scandal, which discredited Parliament and so many of its members, Cameron went further still and flirted with new reforms. He told *The Guardian*, 'a Conservative government will seriously consider the option of fixed-term parliaments'[152] and promised 'a massive, sweeping, radical redistribution of power.'[153]

By 2010, as the Conservative stood on the precipice of power for the first time in thirteen years, anybody hoping that a new Conservative government would undo the reforms wrought by Labour looked sure to be disappointed. But the question remained: which road would a Conservative government take - maintaining the constitution as it was, or taking Labour's reforms further still?

II

The need to make an arrangement with the Liberal Democrats after the inconclusive 2010 election settled matters: Britain's new constitution would not only be accepted, but would move further away from the traditional political constitution. The duration of parliaments was fixed, albeit with caveats, whilst a 'recall' measure was introduced which enabled a relatively small number of constituents (10 per cent) to unseat their Member of Parliament in certain circumstances where they had been found guilty of wrongdoing. Referendums, once dismissed by Margaret Thatcher (with the words of Clement Attlee) as a 'a device of dictators and demagogues,'[154] continued to be used to decide upon new mayoralties, electoral change, the UK's relationship with the European Union and even the continuation of the United Kingdom. Dramatic new powers were granted to devolved bodies whilst the Sewell convention, which stated that parliament would 'not normally' legislate in areas of devolved competence, was placed on a statutory footing.

Whilst less consequential than Tony Blair's reforms, these measures combined to take Britain even further away from its political constitution as traditionally understood. As they did so, the country's problems grew. Separatist parties in Scotland, Wales and Northern Ireland, occasionally aided by unionists who flirted with division in the hope of courting nationalist votes, used devolution to drive wedges between the people of the United Kingdom. In September 2014 the continuation of the three-hundred-year-old union between England and Scotland was put on the ballot paper in a referendum. The union survived the vote, but a decade of division within and between constituent parts of the United Kingdom followed.

150. HC Deb (16 February 1998). vol. 306, col. 781.

151. *The Guardian*, 'Cameron seeks to mend ties with Scotland', Available at: https://www.theguardian.com/politics/2006/sep/15/conservatives.uk

152. *The Guardian*, 'A new politics: Electoral reform', Available at: https://www.theguardian.com/commentisfree/2009/may/25/david-cameron-a-new-politics1

153. *The Guardian*, 'A new politics: We need a massive, radical redistribution of power', Available at: https://www.theguardian.com/commentisfree/2009/may/25/david-cameron-a-new-politics

154. HC Deb (11 March 1975). vol. 888, col. 314.

Another referendum took place in June 2016, this time on Britain's relationship with the European Union. Irrespective of whether Britain should or should not have left the EU, it is highly unlikely that it would have done so without the introduction of PR for European elections and the normalisation of referendums as a tool of political decision-making. Both of these developments jarred with what remained of the old political constitution, with MPs effectively surrendering their right to decide whether the UK was in or out of Europe but then tasked with implementing a policy a majority of them never believed in (certainly in the 2015-17 and 2017-19 parliaments). The outcome was predictable: chaos. Worse, for a time it appeared to be unending chaos, with the Fixed-term Parliaments Act preventing the conventional way of breaking the deadlock - a general election. The new constitution not only helped create some of these new Gordian challenges for the British state; it made it much harder for Conservatives in government to handle them.

III

The burden of governing no longer falls upon Conservative shoulders. From their new vantage point on the opposition benches, the party has the opportunity to reflect on their experience in office and how the reformed constitution worked. They should consider whether the radical changes of the past twenty five years - introduced by Labour and Conservative governments - ultimately produced better government or not; if not, why not; and what would make Britain a better governed nation. In some cases this might mean new reforms. But in others it would surely mean returning to older practices which would restore the more traditional and political character of the British constitution. An example of what to do can be found in the repeal of the Fixed-term Parliaments Act, a rare but merciful example of a government clearing up its own mess.

Substantive, legislative reforms should not be the limit of Conservatives' attention. The norms and conventions which have established themselves in British politics, including by Conservatives, should be reviewed, too. If we want to see political (rather than judicial) accountability of the executive, governments have to acknowledge the importance of Parliament's role in providing oversight and scrutiny. Too often over the past quarter of a century this has not been the case. Instead, policy announcements were made on the *Today* programme, budget measures leaked to make the most of a news cycle, and urgent questions in the Commons dodged by senior ministers who put up junior figures in their place. Where the Conservatives were guilty of these mistakes, it makes it harder to insist on better from the new Labour government. But insist they should. And when the party next gets the chance to return to government, it should pledge to put Parliament back at the centre of our political life.

The new institutional framework of British politics makes that a much harder task. No country that values its own future would devolve power to a constituent part over areas as important as health, transport and education and then say that the centre will no longer take any real

interest in these areas, nor will it have any means of holding devolved governments to account. But that is, in effect, what we have done through the UK's model of 'devolve and forget'. To single out one issue, education in Scotland has gotten significantly worse since devolution, but the UK government - and Scottish MPs in Westminster - currently do nothing to intervene and little to hold the Scottish government to account. Conservatives should do what they can (admittedly much less than before the 2024 general election) to make Parliament relevant to all parts of the United Kingdom again. They should argue for the UK government to have a role in strengthening accountability in devolved parts of the UK, for example by using Opposition Day debates to discuss devolved issues. After all, education in Scotland, just as healthcare in Northern Ireland and transport in Wales, remain issues of legitimate interest to the Westminster Parliament and its MPs.

IV

Over a quarter of a century, under both Labour and Conservative governments, Britain has moved further away from its traditional political constitution. This has not only created new issues for the UK, but has made those issues harder to solve. In opposition, Conservatives must demonstrate a renewed thoughtfulness about the UK constitution, seriously engaging with the traditions of the British constitution, critically analysing the changes of the past quarter of a century, and credibly planning to improve Britain's political constitution if, and when, they next have the opportunity to serve in government. If the Conservatives do so, the party could once again fulfil its historic charge to hand over, from one generation to the next, a country that is well governed in the best traditions of the British constitution.

13. The Liberal Democrats and the Political Constitution

Matthew Hanney

Supporters of a legal constitution

For the Liberal Democrats a legal, or written and codified constitution, is a long-held and consistent policy and political objective.[155] And it is a policy where there is clear unity across the party. This is not surprising, as significant other Liberal Democrat policies, such as a federal UK and British membership of the EU and ECHR, also arguably require a legal constitution to provide a coherent constitutional settlement. Given a free hand by the electorate, a majority Liberal Democrat government could be expected to propose a constitution somewhere between that of Germany and Canada.[156]

The intellectual underpinnings of this position rest firmly on a belief in the importance of a robust system of checks and balances, and, over recent years, a growing view that Lord Hailsham's "elective dictatorship" is increasingly coming to pass courtesy of an Executive that is unwilling or unable to exercise self-restraint. Liberal Democrats broadly adhere to the arguments set out by James Madison in Federalist 51:

> *"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."*[157]

And indeed, even its staunchest defenders might struggle to describe the current members of the House of Commons as being anywhere near approaching angelic.

The Liberal Democrats also have sympathy with the position of the Labour leadership commissioned "Report of the Commission on the UK's Future" when it argues in chapter 5 that "the strength of our democracy and vitality of our economy are intertwined… we have to remove the dead hand of centralisation."[158] This echoes a long-held view of the Liberal Democrats that the UK's over-centralised political system causes its economic system to be too reliant on London and the South-East. The UK's over-centralised political system is arguably inevitable given that our

155. Most recently confirmed at the party's Autumn 2023 conference with a vote endorsing this paper PP 153 For a Fair Deal Paper (libdems.org.uk) (Chapter 19 on Constitutional Reform).

156. Maintaining an unwritten / uncodified element of the Constitution, as Canada does, is something that Liberal Democrats would likely be open to.

157. Federalist-Papers-No-51.pdf (bri-wp-images.s3.amazonaws.com)

158. Commission-on-the-UKs-Future.pdf (labour.org.uk)

current political constitution doesn't provide protected and delineated fiscal powers for any layer of government beneath Whitehall / Westminster. Even devolution to the nations of the United Kingdom since 1999 has given only relatively limited meaningful economic levers to the devolved administrations. That such views are being expressed by a Commission chaired by a famously centralising Chancellor, Gordon Brown, is an irony not lost on Liberal Democrats. However, better the zeal of a convert.

Alongside this is a rather more pragmatic dynamic. The Liberal Democrats (and predecessor parties) have not governed alone in the UK for more than a century and are currently the third party of the House of Commons. In the foreseeable future, the party will only ever enter government as part of a Coalition and, fleeting polls in the 2024 General Election notwithstanding, will likely only ever be the third (or fourth) party of the Commons. As such there are elements commonly identified as being central to the concept of the political constitution which are fundamentally problematic for the Liberal Democrats: the bias towards single party government and the privileged position afforded to the main opposition party[159] – this currently being particularly acutely felt when the gap in MPs between the second and third parties is as narrow as it currently is after the 2024 General Election .

A strategic dilemma

These principles however present a challenge for the Liberal Democrats. A political constitution is not our preferred constitutional settlement, and we believe the above are strong arguments against it. Unfortunately those arguments have not yet carried the day. Even after the seismic constitutional shocks of the Brexit and the Scottish Independence debates, which exposed many fragilities and fault-lines in the current constitutional settlement, there appears to be relatively little public appetite[160] for fundamental constitutional debate, let alone reform. This could change: the SNP could win the next Scottish Parliament elections and rekindle the demand for a second referendum; a border poll in Northern Ireland may become more likely; and debates over whether the UK should rejoin the EU may become more prominent. All of these developments could place constitutional reform at the top of the political agenda, but none of them are certain to happen.

One approach, and indeed temptation, for the Liberal Democrats is to accept the most egregious elements of the current constitutional settlement, and do nothing, such as reforming hereditary peerages to allow for gender equality, to ameliorate the indefensible. And instead hope for public disquiet to trigger a more fundamental debate. A 2013 exchange between then Liberal Democrat Leader and Deputy Prime Minister Nick Clegg and Labour backbencher Tristam Hunt at the Political and Constitutional Reform Select Committee touched on this in provocative terms:

> "**Q26** *Tristram Hunt: You do not think it [the House of Lords] is too full? You think there is space for more people or is this a kind of Trotskyist vision to*

159. Jasper Miles, 'Accountability and Electoral Reform' in R Johnson & YY Zhu (eds) *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart, 2023).

160. In most of England at least; clearly in Scotland, Northern Ireland, and arguably Wales and some parts of Northen England there are significant debates over constitutional issues

destroy it by making it ridiculous?

Nick Clegg: *So that it collapses under the contradiction of its own terms?*

Tristram Hunt: Exactly.

Nick Clegg: *That would be very Machiavellian as well as Trotskyite, which I would not recommend as a mix.* "[161]

An alternative approach is the one presented by Jess Sargeant in a recent Institute for Government blog[162], that in essence limited evolution in areas where there may be some consensus would be a more fruitful avenue for the party than revolution where there is none. This is a reasonable case and is one that the incoming Labour administration appears to be influenced by; however, it does not consider that arguably the Liberal Democrats' most politically totemic, and to date lasting, constitutional reform, was secured by the Scottish Liberal Democrats through their unyielding approach to Coalition negotiations in 2003. These negotiations with the Scottish Labour party secured Single-Transferable-Vote (STV) for local council elections. This reform has endured despite a lack of consensus support for its introduction.

There may be a middle ground worth exploring for the party. Similar to the party's recognition that rejoining the EU cannot be achieved immediately and that instead there should be a focus on improving the terms of Brexit, the party can – tacitly at least – recognise that a legal constitution cannot be secured in the short-term and that instead there should be a focus on how the party can improve the functioning of the current political constitution. In many respects this was the strategy that Nick Clegg pursued in Coalition between 2010 and 2015, though it was never articulated in quite such terms.

While not the highest profile of the (attempted) constitutional reforms overseen by the Coalition government, the Recall mechanism for MPs is arguably the one the that has proven most significant and enduring. It has worked largely as intended by its authors in terms of allowing the electorate the opportunity (but not the certainty, as the case of Ian Paisley in 2018 showed[163]) to remove those incumbent MPs who meet the tightly defined criteria of wrongdoing.[164] Though we cannot be certain, it seems reasonable to assume that the threat of a recall petition has also led to disgraced MPs resigning their seats when previously they may have tried to continue until the next election. Former Prime Minister Boris Johnson is the most high-profile example of this.

A mechanism which allows parliament to rid itself of its most disreputable members without, so far at least, succumbing to any risk of unfairly targeting MPs from opposition parties or penalising political views, strengthens the legitimacy and functioning of parliament, and so the political constitution. Why is this example so relevant for the Liberal Democrat view of the political constitution? Because it demonstrates how a reform which was delivered in government by the Liberal Democrats,

161. House of Commons - Uncorrected Evidence - HC 834-i (parliament.uk)
162. The Liberal Democrats should learn from the coalition's constitutional reform failures | Institute for Government
163. Ian Paisley: DUP MP 'stunned' and 'humbled' at keeping seat - BBC News
164. The process and how it has worked in practice is outlined here SN05089.pdf (parliament.uk)

and is consistent with the party's principles, can also serve to enhance the political constitution.

Possible Liberal Democrat reforms to the Political Constitution

On the same basis and criteria, that of a) alignment with Liberal Democrat principles and b) the ability to strengthen the functioning of the political constitution, there are three constitutional reforms that should be considered. None of these will be surprising to students of Liberal Democrat constitutional reform proposals, but I believe all merit reconsideration by those who would otherwise be unsympathetic as being reforms that might strengthen rather weaken the political constitution.

1. Election Reform

This is not the place to rehearse the well-worn arguments for (and against) electoral reform. Instead I want to make the argument that a strong political constitution has a greater need for an electoral system which unambiguously accurately represents the votes of the electorate precisely because of the lack of wider checks and balances on the power of parliament. If the constitutional settlement is going to invest as much unchecked power in parliament as the political constitution does, then the premium on ensuring it is seen as legitimate by as much of the population as possible must be higher.[165] The result of the 2024 General Election also speaks to particular problem if those voters supporting Reform continue to feel that the system is stacked against them. Alliance voters and leaders in 1983 and 1987 took their frustrating results with relatively good grace; there may be a risk that Reform voters and leaders do not prove so mild mannered.

In those countries with a legal constitution replete with checks and balances, then while the problems with first past the post elections will still exist, those groups that feel under-represented by them will often be able to find other routes, through the courts or different levels of government, to advance their positions. Arguably lots of the tensions in the British political system over the recent decade have come about by those groups who are effectively locked out of a meaningful say in parliament through the electoral (and party) system trying to find chinks in the political constitution to advance their positions instead.

2. Lords Reform

The debates over Lords Reform similarly do not require detailed expression here; the relevance of Lords Reform to this argument is that any defence of the political constitution can only ever be as strong as the weakest link in the chain that is parliament. For many that is both the size and, at least some elements, of the composition, of the House of Lords. Almost nobody in the currently seriously defend the inclusion of the hereditary peers in the House of Lords.[166] The selection of legislators, even those

165. A similar argument can be made around the importance of elections to the House of Commons being fought on a level playing field. This desire sits behind the freepost, broadcasting neutrality requirements, and party funding regulations in the Political Parties, Elections and Referendums Act 2000 (PPERA). However, with recent changes in party funding regulations weakening this regime, this is an area that requires further consideration.

166. The Editor makes a valiant attempt in his evidence to the Public Administration and Constitutional Affairs Committee; however, even if one accepts much of the wider argument, this is effectively a case for selection to the House of Lords by a classical lottery system.

with sharply restricted powers, purely on the basis of their parentage is self-evidently anathema to almost any concept of a modern democracy.[167] Only the boldest defenders of the broad status quo in the House of Lords will defend either them, or the current size of the House of Lords. Indeed it appears likely that the new Labour administration will move to remove hereditary peers, and they have a manifesto mandate to do so.

The appointed elements of the House of Lords (including the Bishops) obviously find more allies willing to defend their membership of the legislature, at least with some, often modest, reforms. And for some specific individuals the narrow case for them being thoughtful and productive legislators can be compelling. However, taken together, the appointed element of the House of Lords, including the effective absence of restrictions over numbers or need for geographic or demographic balance[168] is ripe for, at a minimum, the perception of abuse that undermines parliamentary legitimacy. Bluntly, often the reality of those appointments starkly does so too: for example, the *Independent* reported in 2021 that all but one of the Conservative party's 16 treasurers and 22 biggest donors have been offered peerages since 2010. [169]

I recognise the vigorous arguments made that introducing democracy to the House of Lords might weaken the authority of the House of Commons by introducing a competing mandate, something which is naturally problematic for advocates of the political constitution.[170] I make three points in response. Firstly, the current House of Lords wields significantly more influence over the detail of legislation, and over the functioning of the legislative timetable, than is commonly recognised or understood – it is not currently the supine body it is imagined to be. Secondly, there are comparable countries to the UK that have secondary chambers which are both clearly subordinate but which have more democratic legitimacy, the German Bundesrat and French Senate being leading examples. Thirdly, ultimately the composition of the House of Lords is so problematic that unless at least some modest reforms are done it risks contaminating the legitimacy of parliament as a whole.

3. Fixed-terms parliaments

It may seem optimistic, or simply stubborn, to propose a reform which has been tried and then repealed. However, as I have argued elsewhere,[171] the Fixed-term Parliaments Act 2011 was unfairly scapegoated for much wider political failings and paralysis during the 2017–2019 parliament. It is a misdiagnosis of what occurred during that period to think that the Fixed-term Parliaments Act was the underlying problem.

Instead, the issue around fixed-term parliaments is a simple one of the balance of power between the Executive and Legislature. If the Prime Minister is able to dismiss parliament and trigger elections on a whim for potential partisan advantage, without the need to consult Cabinet colleagues let alone seek any form of parliamentary approval or provide any degree of legal rationale to the Monarch, then ultimate power does not rest with the legislature. In many ways this is the ultimate embodiment of

167. 10% of the population supported them in 2021 YouGov Poll Do you think the House of Lords should or should not continue to have places for hereditary peers (i.e. Lords chosen from among those who have inherited their peerages)? | Daily Question (yougov.co.uk)

168. In contrast to say the Canadian Senate which has a set (small) number of members and strict geographic balance mandated.

169. New Tory sleaze row amid report donors who pay £3m get seats in House of Lords | The Independent

170. The case for unicameralism is a fair one, however I believe the backstop role the House of Lords gives – in preventing the House of Commons extending their term or ramming through last-minute legislation for electoral gain - is an important role, doubly so in the absence of a written / codified constitution.

171. The power to call early elections: what next for the Fixed-term Parliaments Act? | Institute for Government

Lord Hailsham's "elective dictatorship."

Many might have historically argued, or at least hoped, perhaps as part of the "good chaps theory of government" that no Prime Minister would act in a demonstrably cavalier way in relation to such powers. But the recent action of Prime Minister Johnson in proroguing Parliament, which was ruled unanimously unlawful by the Supreme Court[172], demonstrates the weakness of this position: if parliament has no means by which to prevent a possible abuse of power by the Executive, which is the case in the triggering of a general election, then there is inevitable risk such an abuse may occur.

The current prerogative of prorogation is just one of the royal prerogative powers which the Executive is able to wield without any requirement for the consent of the legislature. In their recent book *Can Parliament take back control?*[173] leading Liberal Democrat constitutional reform thinkers Paul Tyler and Nick Harvey outline series of wider reforms designed to empower the legislature in relation to the Executive. These include curbing prerogative powers, reducing Henry VIII powers, giving parliament a defined role in government formation, empowering Select Committees and giving parliament more control over it's own time – measures designed at strengthening parliament, and therefore many, if not all, of which could also be further candidates for strengthening the political constitution.

A good problem to face

Should these reforms ever be enacted then it is an interesting, if admittedly somewhat hypothetical, question as to whether the Liberal Democrats would still wish to promote a legal constitution. While the urgency to do so may well be somewhat diminished, ultimately Liberal Democrats should be honest that the answer would still have to be yes, for three main reasons.

Firstly, as the demise of the Fixed-term Parliaments Act demonstrated, without a legal constitution there is always the risk of such reforms being rapidly overturned. Secondly, these reforms, even with some form of national and regional element to the House of Lords, would not adequately address the Liberal Democrat desire for a federal UK.[174] Finally, and perhaps of most fundamental importance, is the underlying truth of Madison's argument: however elected, without some form of external check and balance there can never be a true guarantee that a parliament won't choose to legislate in a fundamentally unjust way.

172. R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) and Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) (supremecourt.uk)

173. Paul Tyler and Nick Harvey, *Can Parliament take back control*, The Real Press, 2023.

174. That said, as Japan and France demonstrate, a unitary government is still compatible with a legal constitution; and the Liberal Democrats would likely still support a legal constitution even should the electorate reject a move to federalism.

14. Accidental Populists: Labour's Turn to Direct Democracy

Gabriel Osborne

You could be forgiven for thinking that the Labour Party is naturally hostile to the historic principles of the British constitution. Labour is a progressive party, whose mantra is one of modernisation and change. The British constitution, in contrast, is widely seen as a bastion of tradition and conservatism. So it is no surprise that while in office between 1997 and 2010, Labour introduced reforms that some believe have given Britain a new constitutional settlement: devolution, the Human Rights Act, Freedom of Information, the removal of most hereditary peers from the House of Lords, and the establishment of the Supreme Court. In spite of the absence of major constitutional reforms in the Labour manifesto, surely Sir Keir Starmer's government will want to finish the job before it leaves office.

Let us assume, for a moment, that all this is true. What, taken together, has been the guiding aim of Labour's constitutional reforms? We might start with the common dichotomy between 'political' and 'legal' constitutionalism. Britain is famously an example of the former. Parliament is legally sovereign, and the limits on the executive come from political procedures, conventions, and the public sphere. Is the Labour Party's aim to establish Britain as a legal constitutional state? Devolution, the Human Rights Act, and Freedom of Information have certainly brought judicial decisions more directly to bear on political life. Gordon Brown's 2010 manifesto even proposed a process towards giving Britain a 'Written Constitution,' with all the implications for judicial review which that necessarily entails.[175] In this light, Labour might appear to be the party of legalism.

Yet it is far from clear that Labour has ever taken conscious steps to give Britain a legal constitution. The party's manifestos and policy reviews from the late 1980s to the present are silent on the matter. The judiciary is discussed in terms of the need to diversify its ranks, and improve access to justice, rather than the need to increase its political power. The Constitutional Reform Act 2005, which hollowed out the role of the Lord Chancellor and replaced the Appellate Committee of the House of Lords

175.A Future Fair For All, Labour Party Manifesto 2010 (2010): 9:2-3

with a Supreme Court, was the product of New Labour's quite separate reforms to the criminal justice system, rather than the result of some grand legal constitutionalist design.

Perhaps more surprisingly, Labour has consistently emphasised its intention to protect the primacy of the House of Commons, the central tenet of political constitutionalism in Britain. This is even the case with the Brown Review, published in 2022.[176] Labour's 2024 manifesto proposes no major constitutional changes in this parliament; although, it does set out a longer-term commitment to 'replacing the House of Lords with an alternative second chamber that is more representative of the regions and nations.'[177] As such, the Brown Review remains the party's most recent extended engagement with the question of constitutional reform. Consequently, it will be referred to at various points in this paper.

In light of Labour's history of constitutional reform, those of us who believe that the Labour Party should be strengthening Britain's historic, political constitution are faced with a puzzle. If we are to make the case that Labour is best served by the political constitution, we need to properly engage with the party's arguments in favour of reform. Yet the impetus behind Labour's drive towards constitutional change seems obscure. You might well share Richard Johnson's perplexity that Labour should be moving away from a political model that offers tremendous benefits to a radical and reforming party.[178] After all, the lack of veto players and the primacy of the Commons enabled the creation of the NHS and the foundation of Britain's modern welfare state.

To explain Labour's conversion, we need to step back from the classic dichotomy between political and legal constitutionalism. Instead, Labour's manifestos, policy reviews, and moves towards direct democracy since the late 1980s, reveal a trend towards 'popular constitutionalism,' characterised by the direct appeal to the will of the sovereign people. The problem with this is that popular constitutionalism inevitably mutates into what is best described as 'populist constitutionalism.' Labour believes itself to be renewing British 'democracy,' but if it continues to adhere to the ancient definition of that protean term, the party risks opening the door not to democracy, but to demagoguery and dysfunction.

To strengthen the British constitution, the Labour Party must be persuaded that, in the first place, political constitutionalism is more properly democratic than popular constitutionalism and, second, that Britain's parliamentary form of democratic representation is the best vehicle for radical change. For, far from being mired in stasis, the British constitution is in fact defined by dynamism and adaptability. It can, and indeed should, be reformed. But such reforms should seek to strengthen the animating principles of parliamentary government, democratic representation, and constitutional dynamism. It is no easy task, but Labour must be persuaded.

Labour's turn towards constitutional reform is a relatively recent phenomenon. For most of its history, the party has worked within Britain's constitutional framework. Clement Attlee's essay on 'The Role of the Monarchy,' written for *The Observer* in 1959, is just one of many

176. *A New Britain: Renewing our Democracy and Rebuilding our Economy* (2022): 141.

177. *Change, Labour Party Manifesto 2024* (2024): 108.

178. Richard Johnson, 'Don't hobble the house,' *The Critic* (July 2023).

testaments to Labour's willingness to introduce radical changes to British society whilst preserving the core principles of the British constitution. Writing in the *New Statesman* against proportional representation and a progressive alliance in 1987, Tony Blair wrote that the 'real question' for Labour 'is why it is not achieving sufficient electoral support,' a question it must face 'irrespective of whether we retain the present electoral system or change it.' 'The campaign for PR is just the latest excuse for avoiding decisive choices about the party's future.'[179]

In the twentieth century, it was not Labour, but the Conservative Party that more often called for constitutional reform. In *The Dilemma of Democracy* (1978), Lord Hailsham called for a Bill of Rights; a proportionally elected second chamber; devolution to Scotland, Wales, Northern Ireland, and the regions of England; and the placement of legal limits on Parliament's legislative powers. The intent of Hailsham's proposals was overtly obstructive, stemming from his belief that the Labour governments of the 1960s and 1970s has been too radical, and that therefore constitutional limitations were required to restrain the party's reforming zeal in the future. It should come as no surprise, then, that the concept of 'The Political Constitution' was coined by J. A. G. Griffith, a man of the Left, in his 1979 article of which Hailsham was the principal target. Griffith's fundamental objection was that 'law is not and cannot be a substitute for politics.'[180] There is a rich tradition of political constitutionalism within the Labour Party.

The turning point was 1987, Labour's third successive election defeat to Thatcher's Conservatives. From the castration of the trade unions to the dissolution of the GLC, Thatcher's 'authoritarian' and centralising style convinced many on the progressive wing of British politics that the country's political system was vulnerable to the domination of an overbearing prime minister, and was consequently in need of fundamental reform. Perhaps the strongest symbol of this new movement was the establishment of Charter 88, whose policy aims were almost identical to Lord Hailsham's nine years earlier. The Labour Party also began to explore constitutional reform in earnest, leading to a succession of policy reviews and pamphlets that reached their highpoint in the mid-1990s.

Labour's central constitutional concern since the late 1980s has been the reform and renewal of 'democracy,' frequently cast in the language of 'change' and 'modernisation' that we associate with Labour in the 1990s. *Meet the Challenge: Make the Change* (1989) set the tone in calling for a 'modern democracy' with a 'modern constitution.'[181] Committing the party to 'radical constitutional reform,' Neil Kinnock's 1992 manifesto declared it 'time to modernise Britain's democracy.'[182] The Plant Report (1993) was entitled *A New Agenda for Democracy*. In 1995, Graham Allen published *Reinventing Democracy: Labour's Mission for the New Century*. Gordon Brown's 2010 manifesto included a chapter on a 'new politics: renewing our democracy and rebuilding trust,'[183] and the official title of the Brown Review (2022) is 'A New Britain: Renewing our Democracy and Rebuilding our Economy.'

What, then, does the Labour Party mean by 'democracy'? To some

179. Tony Blair, 'Electoral reform ain't the answer,' *New Statesman* (4 September 1987).

180. JAG Griffith, 'The political constitution', *Modern Law Review* 42 (1979): 16.

181. *Meet the Challenge, Make the Change: A New Agenda for Britain* (1989): 55.

182. *Labour Party General Election Manifestos, 1900-1997*, ed. Iain Dale (London, 2000): 336.

183. *A Future Fair for All, The Labour Party Manifesto 2010*: 9:1.

extent, this is a convenient umbrella to mask the disparate roots of Labour's constitutional proposals. Calls for more open government and Freedom of Information, for example, have distinct origins from calls for decentralisation and devolution within the Labour movement, but both have been categorised as drives towards a more accountable democracy. Given that we all, rightly, claim to be democrats, it would be a strange movement for constitutional reform that did not rest, in some way, on a claim to enhance democracy. In some sense, then, democracy's ubiquity has rendered it less meaningful.

Yet to a significant degree, Labour employs 'democracy' with purpose, understanding it as the rule of the people. In the 1992 manifesto, Kinnock declared Labour's 'confidence in our country and in the qualities and potential of its people,' before stating that 'we want to enhance their democratic power too.'[184] In *Reinventing Democracy*, Graham Allen attacked the 'nationalisation of governance' under Margaret Thatcher. 'Our mission is to enact the alternative, and return politics and government to the people.'[185] The Brown Review envisions a 'modern system of decision making [that starts] from the people and is grounded in new ways of consulting, participating, and deciding.' 'New Britain,' it goes on, 'means returning power and control to the people.'[186]

This understanding has led, in practical terms, to an embrace of direct democracy. Labour has stood behind the majority of referenda held in Britain since the 1970s. New Labour's first two terms were particularly active, with the referenda on Scottish and Welsh devolution in 1997, the Greater London Authority in 1998, and devolution to North East England in 2004. Between 1997 and 2010, party manifestos repeatedly promised a referendum on the euro. Labour promised a referendum on the reform of the electoral system of the House of Commons (1997); on the ratification of the European Constitutional Treaty (2005); on AV for the Commons, enhancing the powers of the Welsh Assembly, and eventually on a fully elected second chamber (2010).

Within the party, too, moves towards 'democratisation' have followed a similar trend. In 1981, the Campaign for Labour Party Democracy successfully championed an electoral college of MPs, trade unions, and CLPs to elect party leaders, who previously had been chosen by MPs alone. The electoral college was overhauled by Ed Miliband in 2014, and replaced with one-member-one-vote on the advice of the Collins Review, which aimed for 'a simpler and more democratic process of selection.'[187] Miliband praised the reforms for 'letting people back into our politics.'[188] Affiliated members and 'supporters' were given the right to vote in leadership elections, leading to the election of Jeremy Corbyn in 2015. Supposedly, this was democracy in action.

It is curious that the Labour Party should call for constitutional and democratic 'modernisation' while adopting an understanding of democracy as the rule of the people. This was the conception in ancient Athens (a great democracy, yes, but also a slave-owning and imperial state) in which democracy stood for direct participation of the (free, adult male

184. *Labour Party General Election Manifestos*: 317.

185. *Reinventing Democracy: Labour's Mission for the New Century* (1995): 2-3.

186. *A New Britain: Renewing our Democracy and Rebuilding our Economy*: 8, 50.

187. Ray Collins, *Building a One Nation Labour Party: The Collins Review into Labour Party Reform* (2014): 27.

188. Patrick Wintour, 'Ed Miliband's Labour-union shakeup to "let people back into politics," *The Guardian* (31 January 2014).

citizen) population in government. There have been some developments since then, and an understanding of democracy necessarily rests on an acceptance of its diversity and historical complexity. Alexis de Tocqueville produced the most penetrating studies of democratic modernity without stabilising the concept or his use of it. Joseph Schumpeter and Raymond Aron understood democracy as merely a system of peaceful competition for power. Karl Popper understood it as the means of bloodlessly removing governments, not the empowerment of the people. For the Labour Party to endorse the Athenian conception of democracy is therefore hardly modern. In fact, it is surprisingly conservative.

The defining concept of modern political thought is not the ancient notion of democracy. Instead, it is representation, and its most successful institutional form, parliamentary government, that are the quintessence of political modernity. Of course, representation also has a history, with roots traceable to the ancient world.[189] Nor is it without its own controversies, and the general conception defended here is of substantive rather than descriptive representation. However, few would disagree that our modern concept of representation was fashioned during the political and intellectual upheavals of the seventeenth and eighteenth centuries. We would be justified in saying that one of the crowning successes of modern politics has been the coupling of the substantive core of representation with certain elements of democracy.

We now speak of 'representative democracy,' but this was once a contradiction in terms. For 'representative government' was developed in explicit opposition to democracy defined as the power of the people.[190] Our democratic touchstone – election – was regarded as the naturally aristocratic mode of selection until representative government became known as representative democracy. (The democratic mode was sortition, as in Athens.) The linguistic shift to 'representative democracy' rested on the extension of the franchise. Central to an appreciation of modern representative democracy is therefore an understanding of its compatibility with popular sovereignty. A. V. Dicey was at pains to assert that this political doctrine was not at all at odds with the legal doctrine of parliamentary sovereignty. Far from holding a monopoly over the often-elusive concept of sovereignty, popular constitutionalism might even be said to corrupt it. After all, popular sovereignty means that power originates from, but is not directly exercised by, the people. The people itself cannot, and therefore must not, legislate.

Labour's referenda and internal constitutional reforms amount to a regressive erosion of the principle of representation. They are practical examples of popular constitutionalism, in which the people exercise their power directly. Through the sidelining of the Parliamentary Labour Party, the British electorate has been supplanted by a 'selectorate' of party members. Referenda have reduced parliamentarians to mere delegates, bound to the will of a phantom leviathan. It is not even clear that the British electorate relishes the direct democracy being handed down to it. Turnout is often low: 35% in the referendum on the Greater London

189. Mónica Brito Vieira and David Runciman, *Representation* (Polity, 2008): chs. 1-2.

190. Bernard Manin, *The Principles of Representative Government* (Cambridge, 1997).

Authority; 48% in the North East England devolution poll; 42% in the Coalition's AV vote. Labour wants to return power to the people. It is less than clear that the people want it. Just ask Brenda from Bristol.

Although it did not find its way into the manifesto, the suggestion that Labour might convene citizens' assemblies to consider a range of sensitive issues, including constitutional reform, is the latest manifestation of the party's turn to direct democracy. To some extent, the structural differences between citizens' assemblies and referenda might provide a small degree of comfort. Citizens' assemblies tend to be less divisive than referendum campaigns. Nevertheless, like referenda, they are a means of bypassing proper parliamentary representation and debate. They are, as Luke Akehurst, a member of Labour's National Executive Committee and one of Labour's newly elected MPs, has argued on X, formerly Twitter, an 'abdication of responsibility', which serve ultimately to limit the degree to which policies can be subjected to expert consultation and parliamentary scrutiny. In other words, they are referenda lite.

This essay is about the Labour Party, but it would be grossly unfair to hold Labour as the only party that has undermined Britain's system of democratic representation. The Conservative Party introduced membership ballots for leadership contests in 1998. It also held the most divisive and populist referendum Britain has ever had, which many Tories have since used to undermine British parliamentary democracy. When Boris Johnson lost the confidence of the House of Commons in 2022, he tried to stay in office through erroneous appeals to the 'mandate' he supposedly received directly from the British electorate.[191] Liz Truss tried to rely on the mandate she received from the Conservative selectorate when faced with the same prospect. The Conservative Democratic Organisation was founded among the ruins of the Truss premiership to campaign for a more 'democratic' party, in which, the group hopes, MPs will be less able to thwart the will of party members when it comes to the selection of party leaders.

Few Tory figures represent the party's populist turn better than Suella Braverman. In her resignation letter of November 2023, the former home secretary recounted how she had supported Rishi Sunak despite his being 'rejected by a majority of party members' and therefore 'having no personal mandate to be prime minister,' implicitly lampooning the constitutional principle that the prime minister commands the confidence of the Commons, not whichever constituency on which Ms Braverman chooses to place the most value. She went on to say that by betraying her on immigration policy, the Prime Minister had also reneged on 'what people voted for in the 2016 Brexit Referendum,' thereby twisting the context of that particular vote.[192] There is a bitter irony in the fact that a succession of Conservative ministers and prime ministers have accused the Labour Party of posing a grave threat to Britain in recent years, while they themselves undermine the representative and parliamentary foundations of our democratic system.

A turn to populism is not a turn to modern democracy. In seeking to enhance the powers of the people, we forget that 'the people' in the

191. Chris Smith, 'Boris Johnson's claim of a "mandate" from the people isn't accurate, here's how prime ministers really get power,' *The Conversation* (8 July 2022).

192. 'Suella Braverman letter: the ex-home secretary's full letter to Rishi Sunak,' *BBC News* (14 November 2023).

singular is merely a rhetorical device, not a concrete reality. In supplanting representation, popular constitutionalism strips modern democracy of its soul, the mechanism that gives the people life, movement, and the means of deliberation. Referenda, in contrast, lack an accountability mechanism and deliberative structure. Thus without representation, democracy is left the vulnerable prey for demagogues and charlatans. In this way, by its very nature, popular constitutionalism inevitably mutates into populist constitutionalism. Have we not seen in recent years that direct democracy is no friend of debate, moderation, and civility? Those who claim to be the friends of the people should be wary of how quickly they can be branded as its enemies.

However well-intentioned, Labour's infatuation with direct democracy has proven conservative and misguided. The Brown Review states that it wants to protect the primacy of the Commons, but perpetuates a rhetoric that undermines Britain's parliamentary system. Labour's would-be constitutionalists risk becoming accidental populists. But this need not be so. When the Labour Party has fielded a competent leader with a credible programme for government, the British constitution has served the party well, and the party has served the country well in turn. By winning a parliamentary majority in Britain's political constitution, Labour won the peace, faced the white heat of technology, and revelled in Cool Britannia. Sir Keir Starmer is now the head of a reforming government by dint of that same constitution.

The Labour Party should fight for democracy. But it should fight for a modern democracy that is representative, deliberative, and accountable. This should involve turning decisively away from the Brown Review, which perpetuates an essentialising, populist rhetoric of 'returning' power to the people, and which endorses proposals for the House of Lords that would seriously damage the institution of Parliament. Instead, Labour should promote the ideal of modern democratic representation, as well as taking steps to improve the quality of parliamentary deliberation.

As a first step, Labour could restore the link between MPs and their electorates by abolishing membership ballots for party leadership elections. The present system effectively creates an aberrant two-tier democracy, in which party members exercise greater democratic power than ordinary voters across the country. The Labour Party membership currently stands at around 350,000. There are roughly 50 million registered voters in the United Kingdom. And yet the future of the country is determined, to a significant degree, by a small, self-selecting, and fee-paying group of party supporters. How can this be justified in the name of democracy? At best, it is a form of 'voluntocracy'; at worst, it is an oligarchy of activists, who precisely because of their activism do not reflect the political engagement and priorities of the nation at large. Jeremy Corbyn, Boris Johnson, and Liz Truss were all delivered to prominence by this system, against the better judgment of their parties' democratically elected MPs. As the preceding list demonstrates, the Conservatives should take note here, too. MPs, not party members, should elect party leaders.

Second, Labour could strengthen and protect the House of Lords. The Brown Review's vision of a partially elected second chamber would undermine the historic role that, adapted for the modern world, the Lords can play. Though somewhat vague, Labour's 2024 manifesto endorses Gordon Brown's calls for a more 'representative' second chamber. Yet simply adding more elections does not make for healthier democracy. What we fundamentally need is parliamentary deliberation that is informed, measured, and truthful. Historic defences of the Lords within the 'mixed constitution' often rested on the ability of learned aristocrats to offer 'counsel' to the Commons. The social justification for this view clearly has no place in our society, and so Labour's current plan to remove the remaining hereditary peers is welcome. However, the introduction of an elected element into the Lords would seriously undermine the upper house's ability to bring its currently diverse collection of expertise and political acumen to bear on the legislative process.[193] Election is, regrettably, no guarantee of expertise, or experience. It also limits the independence of those who are elected, and would therefore prevent members of the upper house from criticising the legislative proposals of their own side. Moreover, even a partially elected chamber will likely feel emboldened to challenge the lower house, and potentially even lead to the squabbles and gridlock that characterise Washington. The principle of the Lords must be based on counsel to, not competition with, the Commons. It is this principle that the Labour Party should robustly defend.

British constitutional history is not defined merely by tradition. It is in fact a story of change, disruption, and contestation. Tracing the development of the parliamentary constitution from 1215 and 1265, through to 1688, 1832 and 1911 need not be an exercise in nostalgia, a cynical tailoring of the historical record to the feeble grandeur of English exceptionalism. For in fact history offers the counsel, not the command, of the past. When properly wielded, a historical understanding is the great liberator from the shackles of conservatism and mindless tradition. With this in mind, the new Labour government can strengthen and repair British public and political life. It should be forward-facing, but nevertheless rooted in an agile, historical understanding of the British constitution with the Commons at its heart. With this central principle, the British constitution embodies what James Wilson falsely identified as the great strength of the US constitution: the seeds of reformation are sown in the work itself.

Labour's frequent but erroneous commitments to populist 'democratic renewal' were originally the product of specific historical circumstances. But what began as a response to weakness in the face of the Thatcher juggernaut soon etched itself onto what Leonard Woolf, one of Labour's unsung intellectual lights, would have dubbed the party's 'communal psychology.' In *After the Deluge* (1931), Woolf described communal psychology as 'largely the ideas, beliefs, and aims of the dead.' To understand the history of such ideas is to liberate oneself from 'the tyranny of the dead mind,' which lies behind the phenomenon that 'no people are

193. John Baker, 'House of Lords reform: appointment or election?' *The Constitution Society* (9 August 2011).

more conservative than liberals in their liberalism and revolutionaries in their revolutions.'[194] Codified constitutions and ancient understandings of democracy are remnants of this dead mind. True radicalism will come from strengthening the institution of Parliament, which history has shown to animate British public life, and the principles that form its lifeblood: representation, deliberation, counsel, and moderation. That is how Labour will repair Britain. In the end, it is progressive moderation, not regressive populism, that will make radicals of us all.

194. Leonard Woolf, *After the Deluge: A Study of Communal Psychology* [1931], 2 vols. (London, 1937), 1: 28-32.

Conclusion: The 'Political Constitution' in Historical Perspective

Robert Saunders

In Britain, the case for the 'political constitution' is often strikingly historicist in character. In contrast to the futuristic rhetoric of the Blair era, with its emphasis on 'modernisation' and 'reform', critics of devolution, human rights law and 'the rise of judicial power' speak of 'restoring' what Richard Ekins calls 'our traditional political constitution'. They seek to roll back what some see as a 'new British constitution', forged in the 1990s, and call on Parliament to restore a 'traditional model' of government. For the former Conservative leader, Michael Howard, the task is 'to restore the balance of the constitution', while the former Attorney-General, Robert Buckland, described the constitutional agenda of the Johnson government not as 'an authoritarian executive power grab' but as a 'return to the political constitution model', reaffirming 'what was at one time … very conventional thinking'.[195]

By contrast, supporters of a written constitution, electoral reform or a stronger apparatus of rights often berate what they regard as an outdated constitution in urgent need of 'modernisation'. They cast Britain's constitutional arrangements as 'an anachronism' rooted in the 'ancient past, unsuited to the social and political democracy of the 21st century'; 'a tangle of historical accident held together by a gloss of tourist-friendly ceremony'. The task, on this view, is not to reanimate the dry bones of the past but to step boldly into the constitutional future, establishing a 'modern' constitution 'fit for the 21st century'.[196]

Curiously, both sides deploy a common framing, though they turn it to different ends. Each pits an 'old' against a 'new' constitution, and each broadly accepts a model of the 'traditional' constitution in which the courts play little role, in which power is concentrated in Westminster and in which there are few constraints on the executive, so long as it retains the confidence of its own MPs. But what if that reading of constitutional history could be challenged? What if the past offered different readings of political constitutionalism, which recognised the primacy of 'politics' without engorging the power of the executive? Such readings might offer something to both sides of the constitutional divide, while expanding the

195. Richard Ekins, *Protecting the Constitution: How and why Parliament Should Limit Judicial Power* (Policy Exchange: London, 2020), pp. 5-9; https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf; Richard Johnson and Yuan Yi Zhu, *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart: Oxford, 2023), pp. 7-9, 121.

196. Political and Constitutional Reform Select Committee, *Second Report: A New Magna Carta?* (HMSO, 2014), https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/463/46308.htm; Natalie Bennett, 'Letter: It's time the UK had a written constitution', *Financial Times*, 22 September 2020, https://www.ft.com/content/034d31c3-005f-4eeb-b590-a6f9bc74b169. For similar language, see also *Building a New Scotland: Creating a modern constitution for an independent Scotland* (Scottish Government, 2023), https://www.gov.scot/publications/building-new-scotland-creating-modern-constitution-independent-scotland/pages/1/.

range of possibilities bound up in a 'political constitution'.

To illustrate this, I want to think about what 'the political constitution' might have looked like in the 'long' nineteenth century. Perhaps tellingly, the term did not exist in its current manifestation: Victorians might speak of 'the political constitution of the House', meaning the number of MPs from each party, or 'the political constitution of the Leeward Islands', meaning the case for or against a confederation; but the contrast between 'political' and 'judicial' constitutionalism was not widely made.[197] Nonetheless, it was in this period that much of the rhetoric of the 'political constitution' was forged. The nineteenth century was the age of the great reform acts and the rise of parliamentary democracy; when the monarch retreated from the mainstream of politics and the general election established itself as the crucible of political life. Terms like 'parliamentary sovereignty', 'the rule of law' and 'the prime minister' became central to the political lexicon, articulated by writers like A.V. Dicey, Walter Bagehot and Erskine May who retain a canonical authority today. Yet its constitutionalism is not always clearly understood. A fresh look at this period can offer some different ways of thinking about 'political constitutionalism', which might be helpful in rethinking the challenges of the present.

I

The Victorians took their constitution very seriously. Prime Ministers wrote books on the constitution; historians grew rich selling constitutional histories; and all the great mass movements of the period centred on constitutional change. It was a point of pride, not that Britain *lacked* a constitution, but that it *had* one. As the radical philosopher Jeremy Bentham boasted:

We have a Constitution. *We* have our liberties, our rights. Our kings have boundaries to their authority.[198]

That last point – 'Our kings have boundaries to their authority' – was crucial. What defined 'constitutional government' was not a sacred text, or a special body of law, but the fact that power was not arbitrary or absolute. It was bounded by law, subject to rules and constraints, in ways that protected the 'rights' and 'liberties' of 'the freeborn Englishman'.[199]

So what did Victorians have in mind when they invoked 'the constitution'? The answer was a complex blend of laws, rights, customs and institutions, woven together into a story about English or British history. In some cases, the focus was on legal protections, like trial by jury, habeas corpus or the common law. In others, it centred on ancient rights or liberties: freedom of the press, freedom of assembly, the power of petition or (perhaps most surprisingly, from a modern perspective) the right to bear arms. Those liberties might be challenged or upheld in the great institutions of the state, such as Parliament, the Courts and the established Church. (This was, after all, a 'Constitution in Church and State'). The blurring of politics, convention and the law was never more apparent than in 'the High Court of Parliament': an institution with both legislative and judicial functions, whose authority drew on precedents and

197. See, for example: 'The Birmingham Town Council – Its Political Constitution', *Birmingham Daily Post*, 4 November 1873, p. 4; 'Position of the Parties', *Liverpool Daily Post*, 21 January 1910, p. 7; 'Suggested Reform of the Political Constitution of the Leeward Islands', *Antigua Standard*, 21 April 1886, p. 2.

198. Jeremy Bentham, *A Comment on the Commentaries*, I.6, 56-57.

199. For Victorian constitutionalism, see G.H. Le May, *The Victorian Constitution: Conventions, Usages and Contingencies* (Duckworth: London, 1979); R. Saunders, 'Parliament and People: The British Constitution in the Long Nineteenth Century', *Journal of Modern European History*, 6:1 (2008).

conventions reaching deep into history and myth.

That brings us to what we might think of as a classically Victorian doctrine: the theory of parliamentary sovereignty. The idea, most famously expressed by A.V. Dicey, that Parliament had 'the right to make or unmake any law whatever', and that no other body had the right to override or set aside those laws, was never uncontested. Victorians argued endlessly about the existence of 'fundamental laws', or rights that could not be breached. The feminist and constitutional writer Josephine Butler described the Contagious Diseases Acts of the 1860s, which subjected certain classes of women to detention without trial, as laws that were '*contrary* to law, when judged by the higher laws of the Constitution, to which every law in England is … amenable'.[200] In 1886, as Gladstone prepared to legislate for 'Home Rule for Ireland', Queen Victoria informed MPs that the Act of Union was a 'fundamental law' that could not be disturbed.[201] In the years before 1914, Conservatives argued consistently that the laws passed by Parliament were 'tainted laws', that were not binding on citizens. A future prime minister, Andrew Bonar Law, was almost certainly complicit in supplying weapons to paramilitaries in Ulster, on the grounds that 'there are things stronger than parliamentary majorities'.[202]

Such debates tend to be overlooked today – not because they were unimportant, but because in practice there were very significant constraints on the exercise of parliamentary sovereignty. Those constraints were not some unhappy deviation from the ideal: they were central to the case made by its advocates. Their decline offers a reminder of how the doctrine has changed since its Victorian heyday.

This is nowhere more apparent than in the apostle of parliamentary sovereignty, A.V. Dicey. Dicey did more than any other writer to popularise the notion of parliamentary sovereignty, but he added two important riders that are sometimes overlooked. The first was that 'Parliament' was made up of *three* institutions, not one: 'the King' (whose powers were increasingly exercised by the Cabinet); 'the House of Lords'; and 'the House of Commons'. Those institutions operated in conscious tension: like the mother-boxes in a science-fiction movie, the full power of Parliament could only be unlocked when those three parts were 'acting together'.[203] Achieving that was surprisingly hard: even in the Commons, party discipline was generally weak and governments with powerful leaders and large parliamentary majorities frequently struggled to pass their legislation. So while it was true, in theory, that Parliament could repeal the Union, disendow the Church or abolish the monarchy, actually *doing* so was genuinely difficult. Passing a measure such as the Great Reform Act or the third Home Rule Bill could require multiple elections and years of parliamentary time. This was as much about *dividing* power as it was about *concentrating* it – and the tensions this generated were a feature, not a bug. As Edmund Burke had famously put it, 'the People cannot suffer … whilst there is a Contest between different Parts of the Constitution'.[204]

For Dicey, the erosion of that model – and the growing concentration of power in a single chamber, dominated by a single, highly disciplined

200. Josephine Butler, *The Constitution Violated* (Edinburgh, 1871), p. 31.

201. *Hansard* 302, 21 January 1886, 34-35.

202. Robert Saunders, 'Tory Rebels and Tory Democracy: the Ulster Crisis, 1910-1914', in R. Carr and B. Hart (eds), *The Foundations of Modern British Conservatism* (Continuum: London, 2013), 65-83.

203. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, eighth edition (Macmillan: Basingstoke, 1915), pp. xvi, xviii, 3.

204. See H. Kumarasingham, 'The Historical Constitution', in Peter Cane and H. Kumarasingham (eds), *The Cambridge Constitutional History of the United Kingdom: Volume 1* (CUP: Cambridge, 2023), p. 30.

party – was profoundly alarming. In an attempt to rebuild the checks on power, he began to champion a new constitutional device: the post-legislative referendum. Important bills, he argued, should be put to the country before becoming law, in order to 'curb' what he called 'the absolutism of a party possessed of a parliamentary majority'.[205] For good or for ill, this was not the model set out by Richard Johnson and Yuan Yi Zhu in 2023: a constitution by which a 'party which can secure a bare majority in the lower chamber of Parliament can rule the country with virtually no limitations whatever'.[206] That is a much more recent model, at its peak from the late-1940s to the mid-1990s, that would have appalled Dicey and alarmed many of his successors.

Dicey also prized a second security, which was 'the rule of law'. Parliament could, of course, change the law – that, for Dicey, was the essence of parliamentary sovereignty – but its members were not *above* the law; nor should they attempt to lift ministers above the law. This was another reason why Dicey deplored the 1911 Parliament Act, which not only stripped the House of Lords of its veto but also included an early version of an 'ouster clause'. The Act gave extensive powers to the Speaker of the House of Commons to decide when its provisions had been met; and those decisions, it declared, 'shall not be questioned in any court of law'. Dicey deplored that provision, because it removed any constraint on a corrupt Speaker, operating under the instruction of a simple party majority. 'The House of Commons', Dicey noted, 'has on more than one occasion claimed … to be above the law of the land'; 'such claims have rarely been of advantage or credit'.[207]

This was parliamentary sovereignty, but not as we know it. It viewed parliament as an *arena* in which power was *divided*, and in which consent had to be won from competing institutions; not as a *power-source*, granting god-like powers to the largest single party. It was a vision of parliamentary sovereignty that *diffused* power between different institutions, rather than *concentrating* it in the hands of the executive. It was bounded by, and answerable to, law.

That vision also left large parts of what we might now think of as 'government' to institutions outside Parliament. Well into the twentieth century, much of what we regard today as the core business of parliament was done outside it; indeed, once defence spending is subtracted, expenditure by central government only overtook that of local government after the First World War. Extra-parliamentary institutions could be municipal, provincial or even national: long before 'devolution', the established Church of Scotland retained its own legislative assembly at Edinburgh, at a time when church politics was as fundamental to the business of the state as welfare or education are today. That this is so rarely recognised as a form of devolution speaks more to the prejudices of the present than to the politics of the past.

Of course, the fact that Victorians believed these things does not mean that we should too. The Victorians held all sorts of views that we repudiate today, on subjects ranging from women's rights to men's facial hair. But

205. Dicey, *Introduction*, p. xcvii.
206. Johnson and Zhu, *Sceptical Perspectives*, p. 7.
207. Dicey, *Introduction*, pp. xxxviii-xxxix.

we do need to appreciate how much both the theory and the practice of 'parliamentary sovereignty' have changed over time. As so often in British constitutional history, this was not a conscious project: it was largely a by-product of other changes, such as the tightening of party discipline, the increasing reach and complexity of government, and centralisation in Whitehall. Even the Parliament Act was meant to be a temporary measure, until such time as it was possible – in the words of the preamble to the Act – 'to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis'.[208] As late as 1947, Winston Churchill deplored what he saw as the new-fangled idea that 'Total powers are to be given to any Government obtaining power at a General Election … to carry whatever legislation they choose during their five years spell'. To such claims , he insisted, 'democracy says, "No, a thousand times No"'.[209]

II

What might we conclude from all this?

If what we mean by a 'political constitution' is that one party can win a majority in the House of Commons – perhaps with as little as 34% of the vote – then do whatever it wants for five years, unless its MPs vote 'no confidence' in the government; or that ministers can lift themselves above the law; or that Westminster should tolerate no alternative centres of power, we can of course make that case. But we should recognise how comparatively recent that model is; that its emergence was as much an 'innovation' or a 'new constitution' as devolution, the referendum or the ECHR; and that the latter emerged in part as a response to the weakening of older political checks. There is a case to be made for an unconstrained executive, but we should not pretend that this is hallowed by history, or a return to the 'traditional' constitution.

As the examples above remind us, 'political constitutions' come in many different forms. It is perfectly possible to argue – on either normative or historical grounds – for a 'political constitution' that better *constrains* the executive; that seeks to *diffuse* power, rather than concentrating it; and that does not try to lift ministers above the law. Whatever the strengths or weaknesses of devolution, electoral reform, a revised second chamber, citizens assemblies, the referendum or reforms to parliamentary procedure, these are manifestly *political* checks. If the point is that we don't want checks at all, so long as a government commands a majority in the Commons, then we can make that case. But we should not call this '*the* political constitution'.

Indeed, it might be better to stop talking about '*the* political constitution' altogether, and to think instead about 'political constitutionalism'. How robust are the political checks on power today? How easily can people use political methods to do the things for which constitutions exist: to defend their liberties; to bring about change; to settle their differences without violence?

If people are turning increasingly to the courts, or to international

208. Parliament Act, 1911, https://www.legislation.gov.uk/ukpga/Geo5/1-2/13/introduction/enacted.

209. *Hansard* 443, 28 October 1947, 714-15; *Hansard* 444, 11 November 1947, 214.

institutions, or to direct action, or to a written constitution, we might see that, not as an attack to be repelled, but as a sign that our political constitution is unwell. A system that inflates the power of a single party, far beyond its share of the popular vote; that denies vast swathes of opinion any representation in Parliament; that lets governments drive through far-reaching legislation in a single day; that increasingly concentrates legislative, as well as executive, power in the hands of ministers, through the abuse of secondary legislation; that is passing ever more draconian restrictions on protest – something that has always been regarded as part of Britain's constitutional arrangements – is not fulfilling the tasks for which constitutions (whether political or judicial) historically exist. In this sense, the challenge to political constitutionalism comes not from the courts or the devolved parliaments, but from the engorging of power by the unitary executive.

The desire to 'restore' Britain's 'traditional constitution', to reset 'the balance of the constitution' or to reaffirm what was once 'conventional thinking' is a legitimate constitutional impulse. So, too, is the desire to look chiefly to political, rather than judicial, mechanisms to do the work of constitutional politics. But political constitutionalists should be as attentive to the ways in which power has historically been constrained, diffused and limited by political institutions as to those by which it has been gathered, concentrated and unleashed. Then it may be possible to say again, with Bentham, '*We* have a Constitution. … Our kings have boundaries to their authority'.

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