

MACCABAEAN LECTURE ON JURISPRUDENCE

Our Unwritten Constitution

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I THINK IT PROBABLE that when I was invited, several years ago, to give this lecture, it was expected that I should speak about more remote legal history.¹ If so, I can only apologise. In my defence I could cite good precedents for legal historians complaining about constitutional dangers, most notably John Selden, whose name would need no commendation to the founders of this Lecture. But he lived in an age when history provided live ammunition in defence of the liberty of the subject and constitutional monarchy. That kind of legal history is no longer of any forensic value in this country. My concerns today are rooted in very recent history, and came into focus after the inept announcement by Mr Blair on 12 June 2003 that he had abolished the office of Lord Chancellor, apparently without consulting anyone outside his own circle.² I am going to confine

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¹ I am grateful for the many helpful comments which I have received and taken into account. I must in particular thank Dr M. C. Elliott and Professor G. W. Jones.

² Since the lecture was given, the circumstances have been the subject of investigation by the House of Lords Select Committee on the Constitution: *The Cabinet Office and the Centre of Government*, 4th Report of Session 2009–10 (HL 30), published in January 2010, at paras 188–217. It was perfectly obvious at the time that the decision had been taken without professional advice or proper circumspection: see, e.g., Lord Woolf, ‘The Rule of Law and a change in the constitution’, *Cambridge Law Journal*, 63 (2004), 317–30, at 320. The Cabinet Office declined to produce any papers to the Select Committee but claimed it had given advice and (by implication) that the Prime Minister had ignored it. Mr Blair admitted in evidence to the Committee that he had taken the decision on the spur of the moment and that the process was faulty (paras 201–2). The Committee concluded (para. 214) that ‘the Cabinet Office was unable to ensure compliance with proper constitutional norms in the adoption of a change of such significance. It is particularly disturbing that these failures occurred without there being any external crisis which might explain, far less justify, such failures.’

my remarks to the brief period since then, although there is a good case for regarding the progressive surrender of autonomy to the European Union, and the various experiments with inland devolution and local government, as beginning a major constitutional revolution well before 2003 and as raising concerns at least as troubling as those on which I shall be concentrating.³

When I delivered a public lecture in 2004 on ‘The Constitutional Revolution’,⁴ one of my chief complaints was that grave changes were occurring almost daily without much public notice being taken. Five years on, I can hardly complain of a complete lack of publicity—at least for those sufficiently well-informed, and with sufficient leisure, to search the internet regularly for the appropriate keywords. But I have come to the conclusion that the problems which I tried to identify in 2004 have deepened, and that the ‘revolution’ which I then addressed in somewhat pejorative terms is still underway. It is not, however, to be identified with the ‘constitutional renewal’ which the government has proudly announced. In fact, there is such a gulf between the public statements of the government and its actions that one might be forgiven for thinking that the language of ‘renewal’ is more rhetoric than reality, another exercise in ‘spin’.⁵

It is admittedly difficult to separate constitutional matters from matters of political judgement. I am not sure that ministerial incompetence, arrogance, inefficiency, excessive centralisation, or over-regulation, can properly be regarded as unconstitutional, except in the sense that it is generally beyond the power of the people to do much about them. They are certainly not wholly new. Nor am I suggesting that the problems with our unwritten constitution all began under Mr Blair; some of them have a

³ For the broader picture see V. Bogdanor, *The New British Constitution* (Oxford, 2009); and for the pre-2004 reforms see L. Dingle and B. Miller, ‘United Kingdom constitutional reform’ (2004), accessible at <www.llrx.com/features/ukconstitution.htm>. The Human Rights Act 1998 is also a landmark, though in a different way. Britain was bound by the European Convention on Human Rights long before 1998 and that regime still takes priority. The Luxembourg Court, indeed, regards domestic declarations of incompatibility under the Act as legally ineffective. The Act has nevertheless begun to alter the judicial culture in Britain and may have paved the way for judicial review of legislation at some time in the future.

⁴ Available at <www.law.cam.ac.uk/faculty-resources/summary/the-constitutional-revolution/1587>.

⁵ The present administration has achieved a particular reputation for pursuing hidden policies which differ markedly from those announced in public. The most recent example to be uncovered is the policy of unrestricted mass immigration, which was revealed by a former government adviser at the end of October: see the article by M. Marrin, *The Sunday Times*, 1 Nov. 2009, p. 20.

longer history. But the problems have come to the fore in the last few years chiefly because of widely perceived changes in the style of government.⁶

First there is the concentration of power in the prime minister and his special advisers at the expense of the Cabinet and a professional Civil Service. It has become fashionable to speak of an increasingly presidential style of government. But this does not, of course, mean a constitutional presidency: rather, a novel kind of monarchy. The chief difference from classical monarchy is that our quasi-monarch is indirectly elected—very indirectly, in the case of Mr Brown—but, once in power, he is an absolute monarch for a term of years and rules without the partnership of others.⁷ The prime minister would only have to persuade Parliament to suspend the quinquennial system of election and he would really be an absolute monarch. I hope that is still unthinkable; but I am less sure than I was ten years ago. Although the House of Lords retains the power to veto such a measure,⁸ with a reconstituted House of Lords, supinely following the party whip, it would only require a supposed national emergency as a pretext; and we have seen that the government is willing to play that card on occasion.

There is nothing new in the notion that we have an ‘elective dictatorship’. I remember Lord Hailsham coining the term in a lecture in 1976.⁹ But it has become a more common figure of speech, as evidenced by over 9,000 hits on Google—nine times, incidentally, the number I counted in 2004. Without any opportunity for electoral approval or dissent, we have acquired a form of government which appears to operate without reference to traditional advisory mechanisms or public opinion. Proposals of a fundamental nature often come as a surprise to the outside world, because there has been no preceding clamour for them; and I am not sure the Civil Service or even the Cabinet are always made privy either. There has been some show of a return to public ‘consultation’ since Mr Blair’s departure; but the practice of announcing novelties as decided government policy still has the practical effect of making the subsequent process

⁶ This was a matter of comment before 2004: see, e.g., the prophetic assessment by D. Oliver, *Constitutional Reform in the United Kingdom* (Oxford, 2003), pp. 390–1.

⁷ See G. Allen, *The Last Prime Minister: Being Honest about the UK Presidency* (2nd edn., Thorvorton, 2003), at p. 3: ‘The UK Presidency remains unchecked, and it has shown no willingness to seek partnership with the legislature, or the wider nation, even when such a partnership would clearly assist its objectives.’

⁸ Parliament Act 1911, 1 & 2 Geo. V, c. 13, s. 2(1); *Jackson v. Att.-Gen.* [2006] 1 AC 262.

⁹ ‘Elective Dictatorship’, Richard Dimbleby Lecture, published in *The Listener*, 21 Oct. 1976, pp. 496–500. He was, however, more concerned at the use of this ‘dictatorship’ by governments with a small majority than by those with a large one.

of consultation a meaningless charade. No doubt it makes life easier for a prime minister if he can just turn to his chosen advisers on the sofa for guidance.¹⁰ And, since his party commands a majority in the Commons, it must be an irritation to have to bother about consultation, precedents, or even Parliament. But there is reason to doubt whether the presidential model is working well even in terms of managerial efficiency, since it places a heavy emotional and physical strain on the prime minister if he is to be responsible for every detail in person while trying to appear infallible in public.¹¹ There is now widespread dissatisfaction with the growing phalanx of special advisers and policy units, and the replacement of old-style Civil Service mandarins with managers appointed, not to advise impartially, but to deliver at all costs. There is also growing popular despair at the processes of government. This can be associated with the emergence of a political class, disconnected from the rest of society, and with no experience of other ways of life, which is motivated principally by the pursuit of power and the perquisites of power.¹² When members of this class find themselves in government, they assume a strident and unmerited self-confidence about their natural superiority to other institutions and professions and their mission to control them. Not the least troubling manifestation of this trend is the seeming indifference to independent legal advice, an observable consequence of which has been regular confrontation with the courts.¹³ Another is the indifference to truth: it has been very harmful to popular confidence in government that the public has been routinely misled or kept in the dark about important facts. Freedom of information is a worthwhile objective so long as the information is correct and reliable, and so long as it does not drive real decision-making into informal privacy or encourage disinformation. It is a sad reflection on the government which prides itself on the Freedom of

¹⁰ Mr Blair's style of government is now known as 'sofa government', a term popularised by the report of the Butler Inquiry. Mr Straw has distanced himself from 'so-called sofa government': *Hansard*, 24 Feb. 2009, col. 160.

¹¹ This is no new observation. Sir Robert Peel suffered a breakdown in 1846 after shouldering the responsibility for every department of state in person, and it is thought that the failure of the Duke of Wellington's administration in 1830 was in part a result of his trying to do the same. Cf. Allen, *The Last Prime Minister*, p. 7: 'Exhaustion, defeat, humiliation are the only possible endings to a political career in a unitary system.'

¹² See the perceptive and disturbing study by P. Osborne, *The Triumph of the Political Class* (London, 2003).

¹³ See Sir Stephen Sedley's comments in Lord Nolan and S. Sedley, *The Making and Remaking of the British Constitution* (London, 1997), pp. 22–3.

Information Act that it has done as much harm as good by developing the culture of ‘spin’ and promoting ‘sofa government’.

A different problem is that ministers have come to evaluate their performance by legislative hyperactivity rather than effective results. Success is measured in terms of news headlines, most easily captured by announcing something ostensibly new: new targets, new directives, new quangos, new regulations and new statutes. There are around 15,000 pages of new legislation every year, and the present government is famously credited with the creation of some 3,000 new criminal offences. The steady increase in volume has resulted in a corresponding deterioration in the quality of legislation. It is now standard practice to lay bills before Parliament which are little better than outline plans, to be somehow refined as they are pushed through, or (all too often) after they have been passed. Often the main provisions are tucked away in schedules rather than in the body of the statute, rendering them almost unintelligible. In their rush to notch up their contributions to the statute-book, ministers jostle each other for time in the Commons. Why, we might ask, in the 2009 Constitutional Reform and Governance Bill is the Civil Service dealt with in the same measure as bits of the royal prerogative, public order, and amendments to the system for appointing judges? Apparently the government could not spare sufficient parliamentary time to take them separately. That time is allocated by the government, whose stranglehold over Commons business is routinely used to stifle proper debate upon the torrent of legislation which it generates. There has also been a worrying increase in the fast-tracking of legislation so as to preclude scrutiny almost completely,¹⁴ and in the introduction of substantive late amendments to ill-prepared bills, which has the same effect.¹⁵ It is particularly troubling when this careless, helter-skelter approach to lawmaking does not spare even constitutional changes.

And this brings us to the far greater problem, that we have no proper mechanism for constitutional change. The Secretary of State for Justice,

¹⁴ See the valuable report and warnings from the House of Lords Select Committee on the Constitution, *Fast-Track Legislation: Constitutional Implications and Safeguards*, vol. I, 15th Report of Session 2008–9 (HL 116–I). There have been perhaps as many as 500 instances in the last twenty years: *ibid.*, para. 21. The usual pretext is that the government wishes to be seen to be acting speedily in response to recent crises, such as threats from terrorists, pit-bull terriers (the Dangerous Dogs Act 1991) or troublesome judges. The consequence is not merely a lack of time for debate in Parliament, but the lack of scrutiny by Select Committees and the prevention of comment by interested parties outside Parliament.

¹⁵ *Fast-Track Legislation*, paras. 98–106.

Mr Jack Straw, said in a lecture in February 2008 that the constitution exists in hearts and minds and habits.¹⁶ It would have been more accurate to use the past tense. But what he did not say, of course, is that it cannot be appropriate for the settled assumptions, which have worked for so long by consent, to be changed unilaterally by the government whose power they are designed to limit, particularly by the very government responsible for some of the most serious challenges to the Rule of Law in recent history. Even among supporters of the government, there seems to be no fear that some future administration—perhaps formed by a party reflecting popular frustration with the present political class—might abuse the newly increased powers which it will inherit. Short-termists do not comprehend the notion of bad precedents.

The creation of a Department of Constitutional Affairs on 12 June 2003 was even more shocking than the bungled abolition of the Lord Chancellor. Although it has now been renamed the Ministry of Justice, the original name let the cat out of the bag. Mr Blair had simply commandeered the constitution and put it on a par with immigration, defence procurement, or the health service, to be managed on a routine basis as an act of governmental power. That is still the current policy, despite the misleading change of title. In fact the offence has been compounded by the establishment in June 2009 of a Democratic Renewal Council—a surprising name, since its last recorded use was by a military junta.¹⁷ The effect was to transfer responsibility for changing the constitution from a ministerial department (which was bad enough) to a secret cabinet committee. Yet how many people have heard of this arrangement? The press and public seem to have become utterly indifferent to these goings on.

What, then, is the government up to? There is now some evidence of a government plan—though it is not the one the government has announced. According to its own Green and White Papers, the guiding objective is to ‘rebalance power between Parliament and government’, to give Parliament a greater ability to hold government to account, and to surrender or limit powers which in a democracy should not be exercised

¹⁶ ‘Modernising the Magna Carta’, lecture at George Washington University, 13 Feb. 2008, published on the Ministry of Justice website.

¹⁷ The Prime Minister announced in the House of Commons on 10 June that it had held its first meeting the previous day. The Minister of Justice stated shortly afterwards that he was still taking the lead: House of Commons Justice Committee, 11th Report, Session 2008–9 (HC 923), Evidence, q. 2. (The Thai military junta in 2006 called itself the Council for Democratic Reform.)

exclusively by the executive.¹⁸ No one would quarrel with that. In fact, it is exactly what we need. But in practice it is not happening. The Bill which resulted from the proposals relates chiefly to war-making and treaty powers, and to the management of the Civil Service. Those are steps in the right direction, but they fall far short of the announced objectives. The treaty provisions are too late to save us from Lisbon. The problem of special advisers is not to be tackled, and the government has even rejected the advice of Lord Wilson that they should be forbidden to recruit, manage or direct regular civil servants.¹⁹ As to prerogative powers, it was already unlikely that a government would embark on major armed conflict without some form of parliamentary approval. The Iraq war actually gave rise to a proper seventeenth-century-style debate in the Commons; the problem was misinformation rather than the absence of debate. More significant are the prerogative powers which are still not subject to any scrutiny at all.²⁰ A good example is the power to restructure government itself by abolishing ministries and setting up others—something the government does without any public explanation or costing, let alone discussion.²¹ This power is chiefly used, not to increase efficiency, but to favour or remove individuals or to secure votes in the Commons—there are now 120 ministers, and 40 per cent of Labour MPs are on the government payroll. And it is exercised with such dizzying frequency that few ordinary people know what departments are called or what they do.²²

If we try to discern a guiding strategy from the government's statements, we might conclude that it was the Separation of Powers. This is a

¹⁸ Ministry of Justice, *The Governance of Britain* (July 2007), Cm 7170; *The Governance of Britain: Constitutional Renewal* (March 2008), Cm 7342. Rather oddly, the first item addressed in the White Paper is the control of public protest near Parliament.

¹⁹ Joint Committee on the Constitutional Renewal Bill, 31 July 2008, Report, para. 294. Cl. 8 of the Bill requires the Minister for the Civil Service to publish a special advisers' code, but by cl. 7(5) it need not require special advisers to carry out their activities with objectivity or impartiality.

²⁰ It has been suggested that all prerogative powers should be abolished: e.g. A. Tomkins, *Our Republican Constitution* (Oxford, 2005), p. 134. Forty years ago, Diplock LJ remarked that they were a continuing residue of absolute power: *R. v. Criminal Injuries Compensation Board*, ex p. *Lain* [1967] 2 QB 864 at 886.

²¹ This prerogative is not among those which the government listed for consideration in *Governance of Britain*.

²² Besides the Lord Chancellor's Department, remodelled as the Department for Constitutional Affairs (2003) and then the Ministry of Justice (2007), we might instance the Department of Trade and Industry (1970), which after various splits and mergers became the Department of Business Enterprise and Regulatory Reform (2007) and then the Department of Business, Innovation and Skills (2009) after merging with the Department of Innovation, Universities and Skills (2007). Education seems recently to have disappeared by that name.

new-found religion, not much revealed in government scripture before 2003. But it provided a convenient excuse for the bungled attempt to abolish the office of Lord Chancellor, and it has borne fruit in the removal of the ultimate appellate jurisdiction from the House of Lords to the Supreme Court. Yet, whatever the merits of rehousing the highest court, no one could seriously suppose that this elaborate and expensive gesture—which was not properly planned²³—has the slightest practical effect in relation to the Separation of Powers. Indeed, the first members of the new court are to retain their peerages, so that the theoretical (though largely illusory) conflict of interest will continue unaltered. As a piece of ill-conceived symbolism it is far outweighed by the reality of the less trumpeted changes which have placed the Courts' budget under the control of an ordinary government department, subject to competition with prisons, the probation service, tribunals, constitutional reform, and anything else which might be transferred to it in the future,²⁴ a department which will often be appearing as a party before the courts which it runs.²⁵ Unconscious of the incongruity, the government announced that this reform would 'strengthen further the already strong judicial-executive links'.²⁶ We might well conclude that the Supreme Court was an expensive diversionary tactic, drawing attention away from a deliberate and substantial shift in the contrary direction.

Real judicial independence is, of course, crucial; but here also the government is pulling in the wrong direction. It would have been far better if the final decision on appointments had remained in the hands of an old-style Lord High Chancellor rather than a minister in the centre of the political arena, advised by a body which he appoints himself. The woolly

²³ Lord Neuberger MR said on the wireless (Radio 4) on 7 Sept. 2009 that it was settled over a glass of whisky and that no thought had been given to the possible constitutional consequences. The presenter of the programme, Joshua Rozenberg, estimated the cost to be at least £80 million. It is true that there was a consultation paper, *Constitutional Reform: a Supreme Court for the United Kingdom* (July 2003), CP 11/03, but the 'consultation' followed rather than preceded the government's decision and views were not sought on whether such a court was necessary or desirable.

²⁴ Postscript: in March 2010 responsibility for legal aid was transferred to the department, so that the government may impose direct control on access to justice.

²⁵ It is an open secret that, for this reason, the reform was strongly opposed by the senior judiciary. At the Lord Mayor's dinner to the judges in July 2009, the Lord Chief Justice complained that the decision was announced informally by a minister writing in a Sunday newspaper.

²⁶ Announcement on the Cabinet Office website. Cf. Lord Woolf, 'The Rule of Law and a change in the constitution', at 323, who made the further point (in relation to the Department of Constitutional Affairs) that 'the Department could give directions to the Court Service staff which result in the courts becoming a tool of Government policy'.

language of section 3 of the Constitutional Reform Act 2005, which commendably purports to preserve judicial independence, does not apply to the appointment process and is not enforceable in the courts. All this matters, because the government is far from neutral. A thread running through their proposals has been the desire to decrease emphasis on experience and achievement and to increase ‘diversity’. The Constitutional Reform Bill originally sought to give the government power to redefine ‘merit’ for the purpose of judicial appointments, a proposal Lord Falconer was reluctant to give up. They now want to achieve a similar end by setting targets for the Appointments Commission, perhaps even quotas. This might make sense for lay magistrates; but if superior judges were chosen in order to fill quotas or represent sectional interests it would not only be patronising and insulting to minorities but, more importantly, it would destroy confidence in the judiciary. A superior judgeship is more than a mere job-opportunity. If it is seen as a mere job, political appointments will be easier to make. And political appointments will soon be on the agenda. Ministers have from time to time indicated a desire to have confirmation hearings, in which politicians can veto candidates; and the impetus for political control of this kind will only increase if judges are given more constitutional powers.²⁷

But the chief respect in which the government does not really believe in a separation of powers is the relationship between the government and Parliament. As Lord Scarman said in 1989, ‘We have achieved the total union of executive and legislative power which Blackstone foresaw would be productive of tyranny.’²⁸ Four years later, the Appeal Committee of the House of Lords actually equated the intention of government spokesmen

²⁷ On the potential politicisation of the judiciary see Bogdanor, *The New British Constitution*, pp. 65–8. Professor Bogdanor concluded, rather optimistically, that the appointments procedure has been isolated from political interference. In his view, this would make it safe for judges to become more answerable to Parliament and its Select Committees with respect to their general approach: *ibid.*, pp. 85–6.

²⁸ Lord Scarman, “*The Shape of Things to Come*”: *the Shape and Future Law and Constitution of the United Kingdom* (Warwick, University of Warwick, 1989), p. 12. See W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford, 1765), p. 142: ‘In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate [legislator *later eds.*] may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed . . . with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject.’ Cf. *ibid.*, pp. 51, 154, on the same theme.

in the Commons with the intention of Parliament.²⁹ It was a natural mistake, given that Parliament is widely seen as merely applying its rubber-stamp to government bills. Not that the lack of separation is in itself tyrannical. It has been an accepted feature of our constitution for at least a century that the government may pass any legislation it wishes, provided it is not too shocking. Unfortunately, the broad principle operates whether or not the legislation is properly thought out, whether or not it rides roughshod over minorities, or over long-acknowledged principles such as the rule of law, whether or not it has undesirable side-effects, whether or not there is adequate time for scrutiny or consultation, and whether or not it is generally acceptable to the public or even to their elected representatives on the back benches. The inability of the House of Commons to hold the government to account was actually recognised as a problem in the *Governance of Britain* White Paper, but not surprisingly the government has shown little practical interest in finding a remedy.

The principal check is the House of Lords, to which I shall return. The House of Commons is almost completely ineffective. It is sometimes said that a back-bench member of Parliament has fulfilled his main function on the day he is elected, the purpose of the election being to determine the party which will form the government rather than to impose any check on it once formed.³⁰ Some apologists have argued for an invisible effectiveness, in that back-benchers are more inclined to revolt than they were fifty years ago.³¹ That is debatable, since it is known that former administrations took soundings before decisions were made, to avoid the potential embarrassment of open opposition to positions already taken. At any rate, there has been little sign of restraining influence in the constitutional sphere. Strong contrary evidence is provided by the infamous story of clause 11 (later clause 14) of the Asylum and Immigration Bill

²⁹ *Pepper v. Hart* [1993] AC 593; see J. H. Baker, 'Statutory interpretation and parliamentary intention', *Cambridge Law Journal*, 52 (1993), 353–7. It was dissented from by the serving Lord Chancellor, Lord Mackay of Clashfern, albeit on pragmatic rather than constitutional grounds. There is now reason to hope that the aberration will not be followed: A. Kavanagh, '*Pepper v. Hart* and matters of constitutional principle', *Law Quarterly Review*, 121 (2005), 98–122.

³⁰ This is particularly true of back-benchers on the government side. It is widely rumoured that Mr Blair, emboldened by a large majority, once ordered Labour members to spend less time in the Commons, where their presence was not needed, and devote their time to spreading the government word out in the country. See R. J. Johnston, P. Cowley, C. J. Pattie and M. Stuart, 'Voting in the House or wooing the voters at home: Labour MPs and the 2001 general election campaign', *Journal of Legislative Studies*, 8 (2002), 9–22.

³¹ Professor Bogdanor has gone so far as to say that we should no longer speak of an elective dictatorship: *The New British Constitution*, pp. 288–9.

2003. This provided that there should be no appeal or judicial review in respect of decisions by the new Asylum and Immigration Tribunal, whether for want of jurisdiction, error of law, or breach of natural justice. This clause was opposed by Lord Irvine when Lord Chancellor because it was contrary to the tradition of the rule of law; and some suspect that his removal from office was related to this disagreement. It was the subject of strong attack by Professor Bogdanor, who said it was a ‘constitutional outrage, and almost unprecedented in peacetime . . .’.³² It was attacked publicly by the then Lord Chief Justice, Lord Woolf, in a lecture at Cambridge, after he and ‘other members of the judiciary’ had advised that the clause was ‘fundamentally in conflict with the rule of law’,³³ and also by another former Lord Chancellor, Lord Mackay, who said it was ‘obnoxious’.³⁴ It was condemned by the Constitutional Affairs Committee of the House of Commons as unprecedented; they said it was contrary to constitutional principle to remove judicial oversight of lower tribunals and executive decisions when life and liberty were at stake.³⁵ Alarming, and this is my point—none of this had any effect. The Bill passed the Commons, after a spirited debate in which no one but a junior minister spoke in favour and thirty-five Labour MPs voted against. It was only the threat by Lord Irvine himself to speak against it in the House of Lords which forced his successor to back down. I should make it clear that the controversy was not about asylum or immigration policy: it is perfectly legitimate to argue that the policy should be more ferocious, or even made to work, and the vast funds spent on immigration judges diverted to public welfare.³⁶ The dispute was about the Rule of Law.

The immediate outcome was satisfactory; but it was only a temporary respite. There have been several attempts in the last few years to confer arbitrary power on the government, not only in emergencies but in everyday situations. We have rightly criticised the Bush administration over Guantánamo Bay, and yet the United States Supreme Court—fortified by English precedents of the kind Selden used—was at least able to override the government and declare *habeas corpus* inviolate and available to

³² *The Guardian*, 11 Feb. 2004.

³³ *The Independent*, 4 March 2004; Lord Woolf, ‘The Rule of Law and a change in the constitution’, at 327 (adding: ‘and should not be contemplated by any government if it had any respect for the rule of law’).

³⁴ *The Times*, 27 Feb. 2004.

³⁵ House of Commons Constitutional Affairs Committee, 2nd Report, Session 2003–4.

³⁶ It is not clear now what the true government policy has been: see above, n. 5.

aliens.³⁷ It is ironic to reflect that those precedents count for nothing here, since in England it is the convention that common law cannot override a statute.³⁸ We now have several Terrorism Acts,³⁹ which have caused considerable tension with the Rule of Law as we know it,⁴⁰ and even tougher measures may be in train. Traditional modes of trial are in danger; and the more serious the charge, the lower (some say) should be the standard of proof. But the problems caused by terrorism have at least received a good deal of public and judicial scrutiny, and I will not pursue them now.

Not limited to terrorism, however, was the Civil Contingencies Act 2004 (c. 36), a project modelled on the the wartime Defence of the Realm Acts⁴¹ but of almost unprecedented scope in peacetime.⁴² Amongst other things, the Bill would have empowered a secretary of state to take emergency powers to do *anything that could be done by Act of Parliament*, including the requisitioning and destruction of property without compensation, and the

³⁷ *Rasul v. Bush*, 542 US 466 (2004). An *amicus curiae* brief was submitted by legal historians. A similar brief was submitted in *Boumediene v. Bush*, 476 F. 3d 981 (2008), in which the Supreme Court made only a passing reference to history.

³⁸ According to some commentators, the Anti-terrorism Act of 2001 was the first time since the seventeenth century that *habeas corpus* had been withdrawn. That is not quite right, since it happened for brief periods in 1745, 1791 and 1817; but it is still a rare event.

³⁹ For the passage of the Anti-terrorism, Crime and Security Act 2001 (passed in the wake of 9/11), and the incidental derogation from the Human Rights legislation—the United Kingdom being the only country in Europe to think this necessary—see A. Tomkins, ‘Legislating against terror: the Anti-terrorism, Crime and Security Act 2001’, [2002] *Public Law*, 205–20; *A. v. Home Secretary* [2005] 2 AC 68 (Belmarsh Prison case).

⁴⁰ See, e.g., the five House of Lords decisions in *A. (No. 1) v. Home Secretary* [2005] 2 AC 68 (the Belmarsh decision); *A. (No. 2) v. Home Secretary* [2006] 2 AC 221; *Home Secretary v. J. J.* [2008] 1 AC 385; *Home Secretary v. M.*, *ibid.* 440; *Home Secretary v. E.*, *ibid.* 499.

⁴¹ Note, however, the Emergency Powers Act 1920, 10 & 11 Geo. V, c. 55. This was passed during the miners’ strike of Oct. 1920, reviving some of the temporary powers which had been introduced during the Great War. The powers were not invoked until the miners were locked out in March 1921 for refusing to accept cuts in pay; the situation then was considered so grave that troops were placed on alert, and steps were taken to raise a national volunteer force (numbering some 70,000 when it was stood down in April). The original typed warrant dated 31 March 1921 for the proclamation declaring the state of emergency, with the sign manual of King George V, is in the writer’s collection (MS 336).

⁴² There was once more caution even in war-time. It is noteworthy that when in 1940 the Security Executive—worried about communist revolutionaries—proposed a new defence regulation making it an offence to attempt to subvert duly constituted authority, the Permanent Under-Secretary at the Home Office (Sir Alexander Maxwell) advised that: ‘Our tradition is that . . . every civilian is at liberty to show, if he can, that . . . the duly constituted authorities are composed of fools and rogues . . . This doctrine gives, of course, great and indeed dangerous liberty to persons who desire revolution . . . but the readiness to take this risk is the cardinal distinction between democracy and totalitarianism.’ What is even more remarkable is that the war-time government accepted his advice: H. Hinsley and A. Simkins, *British Intelligence in the Second World War*, vol. 4 (London, 1990), pp. 57–8.

prohibition of ‘movement’ and assemblies; to create an offence of failing to comply with his regulations; and to establish an ad hoc criminal tribunal to try offenders. There were several provisions for ministers to ‘disapply’ sections of the Act itself.⁴³ Much of this was watered down before it became law—but it was a serious warning of what powers the government would like to possess. The government declined a request to insert a sunset clause: emergency is no longer a finite event.⁴⁴ And it declined to exempt legislation of major constitutional importance from the disapplication clause.

I am quite prepared to accept that extreme measures would be needed to cope with, say, a nuclear attack on London. But neither the Bill nor the Act as passed was confined to nuclear attacks, or air-raids on the Palace of Westminster. The Act, as passed, applies to any ‘emergency’—defined as an event or situation which threatens serious damage to human welfare, the environment, or national security; and the government clearly believes that such emergency measures apply to economic emergencies such as bank failures.⁴⁵ It is not confined to terrorist acts, but includes any loss of life, illness, homelessness, damage to property or human welfare, and disruption of communications and transport. As if this definition was not wide enough, the Bill would have enabled a minister to extend it—that is, extend the scope of the statute itself—by Statutory Instrument.

It has become fashionable to speak of clauses such as the power-to-rewrite clause in the 2004 Bill as Henry VIII clauses, though in fact they have little or nothing to do with the Tudor period.⁴⁶ The first example of

⁴³ This euphemism was unknown to the law a generation ago, though it appears in several recent statutes: e.g. Representation of the People Act 2000, s. 11. It may have originated with delegated legislation, on the footing that it is inappropriate for a delegated authority to ‘repeal’ its parent authority. It was used for a similar reason by the Divisional Court in 1989, when it allowed EU law to override a parliamentary statute: *R. v. Secretary of State for Transport, ex parte Factortame* [1991] 1 AC 603.

⁴⁴ It has recently been urged by a House of Lords Select Committee that there should be a presumption in favour of inserting a sunset clause into all legislation passed with unusual haste: *Fast-Track Legislation*, para. 198.

⁴⁵ The Landsbanki Freezing Order 2008 (SI No. 2668), freezing the assets of the Icelandic Bank, was expressly made under the 2001 Act.

⁴⁶ According to the Parliament website, the name alludes to the Statute of Proclamations 1539, which gave the king power to legislate by proclamation. This is very misleading. The 1539 statute certainly empowered the king to issue proclamations with the advice of his Council, and enacted that such proclamations should be ‘obeyed, observed, and kept, as though they were made by act of Parliament’. But this raised fears at the time, which were long debated in Parliament, and in the event the Commons were unwilling to change the constitution by giving the king an unbridled unilateral power to legislate. The statute made it clear that it did not authorise proclamations to be made to the prejudice of any person’s life, liberty, or property, or in breach of any

a Henry VIII clause occurs in the Local Government Act 1888,⁴⁷ and such clauses were still sufficiently uncommon in 1929 to provoke the then Lord Chief Justice to warn of the New Despotism which they threatened.⁴⁸ It is only in very recent times that they have been widened to empower ministers to rewrite parliamentary legislation as they think fit.

A disturbing example occurred in 2006, when the government attempted in the Legislative and Regulatory Reform Bill to sideline Parliament quite independently of any 'emergency'. The government sought to give its ministers the power to amend, repeal or replace any Act of Parliament simply by making an Order.⁴⁹ This was said to be potentially helpful in reducing red tape. That sounded wonderful: we all want to reduce red tape. The press and the opposition were taken in and did not notice the small print, and the government almost got away with it. The sheer enormity of the proposition was drawn to public attention by a letter written to *The Times* on 16 February 2006 by six Cambridge Law professors.⁵⁰ Some of its defenders thought the offending clause was just a result of over-zealous draftsmanship, that it really was primarily intended to reduce red tape. It was nothing of the kind. If it had been, the government would have accepted amendments. Instead, they fought hard to defend the indefensible and even refused to insert safeguards for fundamental liberties. The letter-writers had the honour of being denounced by Lord Lipsey in the House of Lords as six silly professors who were not living in the real world.⁵¹ Yet this was not even a Henry VIII clause, as understood in 1929; it was more like the Enabling Law of 1933. The

laws or customs currently in force. It was repealed in 1547. See J. H. Baker, *Oxford History of the Laws of England*, 6 (Oxford, 2003), p. 64. The Act concerning Peter-Pence 1533 (25 Hen. VIII, c. 21) gave the king power to abrogate the parent Act by letters patent; but the power was limited to that statute, which conferred on the king ecclesiastical powers which he was seen as having the right to decline.

⁴⁷ Lord Rippon, 'Henry VIII Clauses', *Statute Law Review*, 10 (1989), 205–7.

⁴⁸ Lord Hewart, *The New Despotism* (London, 1929). This led to the report of the Donoughmore Committee, which seems now to be completely ignored.

⁴⁹ Legislative and Regulatory Reform Bill 2006, cl. 2. This was an inordinate extension of the power contained in the Regulatory Reform Act 2001 (c. 6), s. 1. Among earlier vague but more circumscribed precedents was the Local Government Act 2000 (c. 22), s. 6, which empowered the Secretary of State to amend, repeal, revoke or disapply any enactment which obstructs local authorities from taking steps to promote the well-being of their communities.

⁵⁰ There were more signatories, but only six names were published. See also J. H. Baker, 'A Charter for Despots' (the editor's title), *Parliamentary Brief*, 10 (2006), no. 5, pp. 7–9; J. R. Spencer, 'Contempt of Parliament', *ibid.* 5–6.

⁵¹ Speech of 13 June 2006. It was the same Lord Lipsey of Tooting who wrote approvingly in a book review two years earlier of 'a new philosophy for Labour capable of turning into reality Blair's dream of eternal power': *The New Statesman*, 21 June 2004.

House of Lords Constitution Committee woke up to what was happening, and said the Bill would markedly alter the respective roles of minister and Parliament.⁵² Even then, the government was minded to push ahead, offering the assurance that it would not abuse the new power. That, of course, is the moment to worry—when a government says, ‘Trust us, we don’t need a constitution any more: we are so righteous that we will never do anything wrong.’ That was exactly how the Enabling Law was presented to the Reichstag on 23 March 1933:⁵³ ‘The Government will use these powers only in so far as they are essential for carrying out vitally necessary measures. The number of cases in which a necessity exists for having recourse to such a law is very limited.’ I do not suggest that constitutions can prevent tyranny; they can, however, facilitate it.⁵⁴

In 2006, fortunately, we were saved—saved by the threat that the House of Lords would scupper the Bill. Notably it was the Lords and not the Commons which served to protect Parliament. And that, I suppose, was another nail in their coffin. The underlying lesson was not absorbed in the corridors of power, and things have not changed under Mr Brown and Mr Straw. For example, clause 55 of the present Constitutional Reform and Governance Bill⁵⁵ provides that a minister may by statutory instrument make any provision that he considers ‘appropriate’ in consequence of the Act, and that such an order may ‘amend, repeal or revoke any provision made by or under an Act’—that is, any other Act. So ministers now seek the power even to rewrite constitutional statutes. These clauses are now installed in government computers, and they are given a little stretch each time they are dropped into place.⁵⁶ There are also more

⁵² ‘Letter from the Chairman to the Lord Chancellor’, 23 Jan. 2006, printed in House of Lords Constitution Committee, 11th Report of Session 2005–6 (HL Paper 194), p. 24, appendix I.

⁵³ N. H. Baynes (ed.), *The Speeches of Adolf Hitler*, 1 (London, 1942), pp. 246, 420; A. Bullock, *Hitler: a Study in Tyranny* (London, revised edn., 1964), p. 269. The initial pretext was the Reichstag Fire, presented as an act of terrorism. Six days earlier, the Reichstag Fire Decree had suspended the German equivalent of *habeas corpus*, curtailed freedom of speech and assembly, and authorised telephone tapping.

⁵⁴ The Law of 1933 has been described as ‘a vital step towards consolidating [Hitler’s] dictatorship’: I. Kershaw, *Hitler 1889–1936: Hubris* (London, 1998), p. 468. Hitler took the trouble to have it renewed twice when it expired.

⁵⁵ The Bill was introduced by Mr Straw in July 2009, overtaking the Constitutional Renewal Bill introduced in March. A similar provision (cl. 57) in the earlier Bill was criticised by the Joint Committee on that Bill on 31 July 2008, HL 166–1, paras. 361–2.

⁵⁶ Clause 75 of the Banking Bill introduced on 7 Oct. 2008 gave the Treasury what is expressly called a ‘Power to change law’, a power by Order to amend any statute or rule of common law ‘for the purpose of enabling the powers under [Part I] of the Act to be used effectively’; and it provided that such an Order might make provision with retrospective effect ‘in so far as the

concealed varieties, such as that under which the Home Secretary recently sought to confer sweeping new powers on local authorities under the Proceeds of Crime Act.⁵⁷ At best, these clauses acknowledge that statutes prepared with haste need constant rewriting; but it is a high price to pay for sloppiness, since it prevents proper scrutiny and avoids professional draftsmanship.⁵⁸ Even where powers are subjected to the affirmative resolution procedure, there is no possibility of amendment and the time for debate is minimal. Nor is the availability of judicial review a satisfactory solution,⁵⁹ since only those who can afford litigation in the High Court will be able to find out which orders are valid and which not. At any rate, we now know what the Government means by ‘rebalancing power’ between the executive and Parliament. There is enough similar-fact evidence to prove a deliberate programme of shifting power *towards* the executive.

Some of these problems have no legal solution under our present constitution. They were avoided in the past by those conventions which existed in hearts and minds and habits. Since these no longer count for anything, we have all been reflecting on the desirability of a written constitution. The government is against this, so there has been another diversionary tactic in the form of proposals for a new Bill of Rights. The first proposal concerned a range of ‘Civil and Political Rights’, few if any of which are inherently controversial. But the effect of putting them into a new statute would be to create a parallel and possibly conflicting human-rights regime with no obvious purpose—unless, of course, the United Kingdom can be somehow disconnected from Europe. It is then pro-

Treasury consider it necessary or desirable for giving effect to the particular exercise of a power under this Act’. The clause was criticised by the Select Committee on the Constitution, because of its retrospective application: HL Constitution Committee, 3rd Report, 21 Jan. 2009 (HL 19); 11th Report, 18 May 2009 (HL 97). The words ‘or desirable’ surpass even the Enabling Law of 1933, which in its terms was limited to necessity. In November 2008, the government introduced a Planning Bill, clause 118(5) of which would have empowered *commissioners* to modify or repeal statutes relating to any matter in respect of which they might make an order. This seems to be the first attempt to confer legislative powers on a body, as opposed to a minister.

⁵⁷ This at least caused an outcry in the newspapers: see, e.g., *The Times*, 28 Oct. 2009, pp. 2, 18–19. (Again, it was the House of Lords which saved the day: *Hansard*, 7 Dec. 2009, col. 896.)

⁵⁸ See Lord Oliver, ‘A judicial view of modern legislation’, *Statute Law Review*, 14 (1993), 1–11, at 3 (referring to Henry VIII clauses): ‘It is unfair to the citizen, who is entitled in a democratic society to have the rules by which his life is regulated properly debated and scrutinized by his elected representatives. And, by removing the legislation from the competent hands of the parliamentary draftsmen into those of departmental civil servants, it frequently results in drafting disasters.’

⁵⁹ The courts are now prepared to review orders even where the parent statute gives the minister power in subjective language, e.g. to act as he ‘thinks necessary’. For an early example of this approach see *Commissions of Customs and Excise v. Cure and Deeley Ltd* [1962] 1 QB 340.

posed to insert 'Responsibilities' as well; but, since these are already part of the law, their inclusion in a separate document, in different language, has no obvious constitutional significance and could only cause legal confusion.⁶⁰ More than confusion is threatened by threats to add a new range of 'Economic and Social Rights'. These are found in some other constitutions, but they are not so much legal rights as political aspirations. Fundamental rights are those which no government can lawfully take away. These new 'rights' are not yet in existence but are goals which the government hopes to reach some day, when it can afford to. Now, there is no harm in announcing political goals, especially when they are essentially laudable; but it has nothing to do with constitutional change. It belongs to the same category of law reform as the Fiscal Responsibility Bill, which would halve the national deficit by legislative magic,⁶¹ just as one might reduce the crime rate by abolishing crimes. Misusing the language of rights, however, is potentially dangerous nonsense on stilts—on skates. Even though the rights would not be directly justiciable, judges would be able to take account of them in assessing 'the reasonableness of the measures taken to achieve their progressive realisation'.⁶² This would introduce a new kind of law, empowering the judges to exercise an essentially non-legal function of unknown scope. If they are to be given such a broad role, then it needs much more public debate. It ought not to slip into being unnoticed beneath the cloak of vague aspirational rights to which, as abstract propositions, most people would happily subscribe.

The principal question is not whether we should have another Bill of Rights, let alone a Bill of Hopes and Duties, but whether we should have a true written constitution with judicial review of legislation to ensure compliance. It is perhaps a purely academic question in Britain, since no government is likely to agree to confer such a power on judges, and the

⁶⁰ See *Rights and Responsibilities: Developing our Constitutional Framework* (March 2009), Cm 7577, which is a Green Paper concerning a Bill of Rights. Mr Straw admitted in the Commons that the proposed responsibilities were already law, but 'scattered across myriad legal texts'. The answer given to the charge that this renders their declaration purposeless is that, even if they would not be legally enforceable by virtue of their restatement, there would be some psychological value in declaring them in abstract terms: see the debate in the House of Commons, *Hansard*, 23 March 2009, col. 37.

⁶¹ The Queen's Speech, 17 Nov. 2009: 'Legislation will be brought forward to halve the deficit.' The title of the Bill, which has not yet been published, seems to have been borrowed from Nigeria.

⁶² Parliamentary Committee on Human Rights, *A Bill of Rights for the United Kingdom?*, 29th Report for the Session 2007–8 (HL 165–1, HC 150–1), published 10 Aug. 2008.

present prime minister has ruled it out as undemocratic.⁶³ But there is another way in which it could happen. Lord Millett argued on the wireless in April 2004 that introducing a separation of powers would inevitably, if unintentionally, hasten the end of parliamentary sovereignty; and similar ideas have been mooted by other senior judges.⁶⁴ If the government can abandon the conventions of an unwritten constitution, so (in a suitable case) might the judges. Sovereignty of Parliament, it is argued, is no more than a convention. And did not judicial review in the United States of America come about through judicial decision?⁶⁵ That could be the next stage in our creeping revolution, 400 years after *Dr Bonham's Case*.⁶⁶ But it would be a desperate and unwelcome last resort rather than a satisfactory solution, since the judges would be enforcing an unwritten constitution of uncertain scope.

Until the last few years, I was myself wholly averse to the idea of a written constitution, with a supreme court having the power of judicial review, because it would turn unelected judges into legislators. Written constitutions have a mythical quality about them, and it is surprising how many people assume they are much clearer than unwritten constitutions.⁶⁷ In practice the true function of a written constitution is not so much to improve the clarity of the rules as to empower the highest court to strike down legislation according to its own interpretation of the words. The question is therefore whether the time has come to transfer more power to the judges, on the footing that the political constitution has broken down beyond repair. This is far from straightforward, since we cannot assume that the traditional juristic standards of the judiciary will be maintained once they have a political role. The problem is not merely

⁶³ House of Commons Justice Committee (chaired by Sir Alan Beith), 11th Report of Session 2008–9, HC 923, paras. 61–2. Likewise Mr Straw: *ibid.*, Evidence, q. 62.

⁶⁴ See the cautious remarks in *Jackson v. Att.-Gen.* [2006] 1 AC 262 at 302 (Lord Steyn), 318 (Baroness Hale), 323 (Lord Carswell), 327 (Lord Brown). Lord Steyn hinted (at p. 302) that ‘strict legalism’ might have to give way in an extreme case to ‘constitutional principle’. There was a suggestion at the time of the ill-fated ouster clause in the Asylum and Immigration Bill 2003, above (p. 100), that the judges might find a way of striking down such a clause if it became law.

⁶⁵ *Marbury v. Madison*, 5 US 137 (1803). (The power was used very sparingly in the nineteenth century.) The Australian High Court has achieved the same power by judicial decision.

⁶⁶ *Bonham v. Atkins et al.* (1610) 8 Co. Rep. 107, 114; J. H. Baker, *Introduction to English Legal History*, 4th edn. (London, 2002), pp. 210–11.

⁶⁷ Not everyone. Napoleon is often credited with saying that a constitution ought to be brief and obscure. In fact the aphorism is attributable to Talleyrand, who on being advised in 1802 that a constitution ought to be ‘brief and . . . [clear]’, interrupted with ‘and obscure’: ‘Relations particulières avec le Premier Consul’ in *Oeuvres du Comte P. L. Roederer*, ed. A. M. Roederer (1854), iii. 428 (translated).

that judges are unelected—and introducing elected judges is not a recommended solution to that problem—but that the judicial role is different from that of the policy-maker responsible for raising and spending revenue. The case for increasing the power of the judges is that they have tenure, which gives them independence, and that they are trained to pick apart arguments in an informed and dispassionate way. But courts are not best suited to decide on the allocation of finite public resources, especially in the context of disputes *inter partes* in which other claims on those resources are not represented. Judges think in absolute terms, they are not apprised of the whole economic picture, and they are not politically answerable for the consequences of their decisions.⁶⁸

Despite these misgivings, we have to face the question, now that our unwritten constitution has been unravelled, whether judicial review might not be the lesser of two evils. We would not have to follow the American model, on which no one is very keen. There is much to be said for a weaker model, such as the Canadian, under which the highest court can annul legislation but subject to a power (little or never used in reality) for the legislature to reinstate it *non obstante* for a limited period. We have an even weaker model ourselves under the Human Rights Act, under which the judges can declare legislation incompatible with the code without invalidating it. I would suggest that the key to any acceptable model is that it ought not to empower or allow judges to second-guess the legislature on issues of policy requiring taxation or coercion. Judicial review of legislation should ideally operate more like judicial review of administrative action: that is, it should enquire whether the legislature has acted consistently and fairly, and *intra vires*, has taken proper account of relevant factors, and has not taken improper account of irrelevant factors; but it should not substitute the judges' decision on the merits for that of the decision-maker. Nowadays there is a wide perception, right or wrong, that the courts are inclined to over-use their powers under the Human Rights Act and to take the political decisions themselves. That has been a failing of the European Court in Strasbourg, and there is no guarantee that our new Supreme Court will not be tempted to move further in the same direction. We therefore need more reflection on how to define the proper judicial function, how to draw the line between fundamental law and politics. It is far from easy or obvious. To whom, for instance, does it

⁶⁸ Cf. *R. v. Cambridge Health Authority, ex parte B.* [1995] 1 WLR 898 at p. 906, per Bingham MR ('Difficult and agonising judgments have to be made as to how a limited budget is best allocated . . . That is not a judgment which the court can make').

belong to define life and death, or marriage, or a person's gender? A constitutional 'right to life' might seem to empower judges to decide when life begins and ends. But, if in a plural society we no longer defer to Christian Canon Law, it ceases to be clear whether such a question is soluble purely by legal reasoning. The same is true of many other issues seen as fundamental. We should therefore think very carefully before rushing ahead with a codified written constitution. Without first achieving some kind of consensus on the range of matters on which we would be content for judges to override Parliament, perhaps against the wishes of most of our fellow citizens, it would be premature to lock ourselves into a system of judicial review.

It may in any case be questioned whether a written constitution is the best way in practice to solve the kind of constitutional problems which I have outlined. Human rights are comparatively easy. We already have a written code of human rights, though it is not entrenched and already there are moves to amend it. Some think it is better that way. Fundamental laws are admirable in the abstract. The problem with them is that when codified they become absolutes, and absolute law without exceptions for common sense, equity, local conditions, or changed circumstances is often bad law. We have learned that from the Strasbourg experience. Fundamental rights should be kept to a minimum rather than constantly enlarged, and should be open to reinterpretation. The principal case for entrenching them, or some of them, is that it might make it possible for the Supreme Court to reject European legislation which contravened British principles of justice.⁶⁹ Universal human rights were, of course, invented in England,⁷⁰ but they mean different things to different people, and it would not be easy to entrench other English common-law rights, which the European powers would take away, without unduly hampering future parliaments from making minor adjustments.⁷¹

⁶⁹ Cf. A. Senior in *The Times*, 6 Nov. 2009, p. 37: 'Our country is being reborn as a satellite of Europe yet, as the revolution is a bloodless one, it passes without protest. We are alone among the member states in not having a written constitution. This makes us vulnerable to European creep, and the dribbling away of civil liberties.'

⁷⁰ See J. H. Baker, 'Human rights and the rule of law in renaissance England', *Northwestern University Journal of International Human Rights*, 2 (2004), 24–40; A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, 2001).

⁷¹ e.g. the right to rescind a contract for breach of condition. The proposal by the European Commission to abolish this right (draft Consumer Rights Directive 2008, art. 26) has been criticised by the Law Commission and by the European Union Committee of the House of Lords (18th Report, 7 July 2009). If a party is held to be obliged to perform a contract which was only made on condition, after the condition has been broken (and not waived), he is being held to a contract which he did not make.

Enshrining the structure and mechanics of government in a written document would raise problems of a different kind. It would be virtually impossible to codify all the present conventions of the British constitution, especially those which relate to political parties, or the Cabinet, even if it could be decided which of them still exist or ought to be revived.⁷² This is partly because they operate more like equity, or fictions, than rules of law. For instance, the mind boggles at any attempt to codify the present procedures for producing a prime minister, covering every eventuality.⁷³ Entrenched legislation could perhaps solve some of the specific problems I have mentioned.⁷⁴ But to that end there would be no necessity to set the whole constitution in stone, an exercise which might result in too much rigidity and prolixity. A line would have to be drawn between form and substance: would the electoral system, for instance, or the size of the two houses of Parliament, have to be enshrined in the constitution?⁷⁵ And there might have to be different degrees of entrenchment for different levels of constitutional provision, so that special procedures of different kinds would have to be followed for changing them. In choosing between models, we are brought back to the absence of any proper machinery for going about it. It certainly cannot safely be left to the Democratic Renewal Council.

A better place to start a true constitutional renewal would be the House of Commons itself, since prevention is better than cure. This is now widely accepted by everyone except the government,⁷⁶ which has

⁷² Cf. G. Marshall, *Constitutional Conventions* (Oxford, 1984), p. 54: 'It is the fitting in of the exception clauses that makes the drafting of a written constitution for the United Kingdom such a hopeless, Utopian enterprise.' By 1984, the convention of collective responsibility (for example) seemed completely dead: *ibid.*, pp. 55 et seq. See now the full discussion in Bogdanor, *The New British Constitution*, pp. 221–8.

⁷³ A complete written constitution would therefore require some simplifications—perhaps, for example, providing that a prime minister should be recommended to the Queen by a majority vote of the House of Commons. For this and other possible solutions see Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (London, 1991). This showed that it could not be done succinctly: the draft occupies 126 pages. It is worth remembering, nevertheless, that in the 1950s law professors felt it possible to write constitutions for newly independent Commonwealth countries.

⁷⁴ e.g. a law that no department of state should be created, abolished or merged without an Act of Parliament, or that no parliamentary statute should be amended or repealed without some special scrutiny procedure.

⁷⁵ See Bogdanor, *The New British Constitution*, p. 220.

⁷⁶ See *Shifting the Balance: Select Committees and the Executive* (2000), House of Commons Liaison Committee, 1st Report; Hansard Society, *The Challenge of Parliament: Making Government Accountable* (London, 2001); and, only a few days ago, the welcome first report of the Reform of the House of Commons Select Committee, *Rebuilding the House* (HC 1117), published on 12 Nov. 2009.

repeatedly shelved the issue. The use of Select Committees has proved one of the most fruitful reforms of the last thirty years, and it is a shame that the wisdom produced by the committees is so difficult for outsiders to access. Their proper role is not to challenge or seek to change policy, but to scrutinise, warn and criticise. In performing those vital roles, they need to be given more clout, with chairmen elected by secret ballot and with independence from the whips; and perhaps we can learn from Scotland, where they are said to be more effective. Another desirable change which seems to be generally agreed is that the government should lose its absolute control over the management of business in the Commons.⁷⁷ The Commons ought also to take back its audit functions, by discussing estimates and controlling supply. And no doubt there are other procedural measures which will occur to those who know the ways of the House. Some way of capping the volume of legislation is desperately needed, helped perhaps by a more liberal use of the ‘sunset clause’⁷⁸—a true Henry VIII clause, much used in his time—or by requiring a periodic review of the effectiveness of new measures.⁷⁹ None of this forms part of the government’s ‘renewal’ policy; but it is much to be hoped that the present atmosphere of popular disillusionment with the functioning of Parliament will force some improvement in the near future.

For the present, the most effective check on legislation is the House of Lords—effective because its members have tenure and are free to ignore the party whip. Although Labour peers now constitute the largest party in the House, peers have on several hundred occasions in the past decade followed their consciences, or their good sense, to thwart the Labour government in a way that members of the Commons would consider politically or financially risky. There is therefore a true separation of

⁷⁷ At present this is guaranteed by Standing Order 14(1) of the House of Commons, which itself cannot be altered without government cooperation: ‘Save as provided by this order, government business shall have priority at every sitting.’ The Select Committee on Reform of the House of Commons, while acknowledging that the government is entitled to have its own business considered at a time of its own choosing, has proposed the establishment of a Backbench Business Committee.

⁷⁸ A provision that a statute will expire on a given date unless steps are taken to renew it. It is important to note that such provisions can only work if there is adequate time and information available for Parliament to debate the renewal when the time comes: see the comments in *Fast-Track Legislation*, para. 70.

⁷⁹ For some possible solutions to the growing problem of excessive and ill-prepared legislation see *Post-Legislative Scrutiny*, Law Com. No. 302 (2006), Cm 6945. The need for post-legislative scrutiny of all legislation was advocated recently by the House of Lords Select Committee on the Constitution: *Fast-Track Legislation*, para. 208.

powers here, even if the powers were severely reduced in 1911. By a curious reversal of history, the House of Lords has become the principal defender of constitutional liberties, and arguably the more significant legislative chamber, albeit at the cost of endangering its own existence. Having been made more politically correct by the removal of most of the hereditary element in 1999, it has gained confidence; but the sorry consequence is that, in government thinking, it must be made less politically effective. The future of the Lords is, in my submission, the paramount constitutional concern today. Without an effective, independent upper chamber, the entire High Court of Parliament is in danger of becoming fossilised, a magnificent heritage site with no function.

On 7 March 2007 the Commons voted to ignore the conclusions of the Royal Commission of 2000 on the House of Lords and press for an elected (or at least 80 per cent elected) house of senators, composed chiefly of full-time politicians with limited tenure; a few days later the Lords voted (by 361 to 121) in favour of a 100 per cent appointed chamber. Mr Straw subsequently announced his determination to push through the wishes of the Commons, apparently in the (seriously mistaken) belief that this is the course required in a democracy.⁸⁰ Even if such a course is not actually illegal,⁸¹ this is another disturbing example of the government's inability or unwillingness to understand what a constitution is for. How can it be the business of the Commons to tamper with the only effective control on their power? It would never happen in a country with a written constitution—that is, most other countries—but, alas, our constitution provides no specific guidance to those who choose to distort it.

The merits were fully considered by the Royal Commission ten years ago and seemed then to fall on the side of an appointed or largely appointed House. Those of us outside the political class can see that popular elections for the entire House of Lords, even if not tied to general elections for the Commons, are likely to give both houses a similar political constitution and almost certain to make the Lords a clone of the Commons in a more insidious way.⁸² The conditions of appointment

⁸⁰ See, e.g., the government's White Paper of 14 July 2008, Cm 7438. The opposition parties have, most regrettably, failed to provide any opposition to this.

⁸¹ It remains to be seen whether the new Supreme Court will agree with the Court of Appeal in *Jackson v. Att.-Gen.* [2005] QB 579 as to the limits of the Parliament Act in the constitutional sphere. Although the House of Lords reversed the Court of Appeal in relation to the Hunting Act, and did not accept a distinction between constitutional and other enactments, several members of the Judicial Committee reserved their position as to whether there might be limits.

⁸² Cf. Oliver, *Constitutional Reform*, pp. 200–1.

would only attract those who are already politicians—many of whom would doubtless find a salaried seat in the Lords more congenial than the tedious constituency work which now falls to a member of the lower house. The important element of membership with experience of the real world would be squeezed out,⁸³ as would the present social diversity of peers. The House would be enslaved by party politics and its valuable function of taking the wider view endangered. Why is this thought necessary or desirable? There is no democratic reason why all the Lords should be elected. Granted that an elected government is entitled to have its policies passed into legislation, it does not follow that the product should be rough or unworkable or unconstitutional; and it is in everyone's interest that problems be ironed out before a bill is passed rather than pursued in the courts afterwards. Unquestionably, there are grave objections to the present process of nomination to the Lords, which has all too often been used to enoble second-rate or unseated politicians: the kind of people who might pay for peerages or take cash for questions, or even a Speaker who has been effectively ejected from office. Setting up an independent appointments commission would not be without difficulty,⁸⁴ though there is an informal model already in place; whatever the difficulties, any sensible system of appointment would seem preferable to general election.⁸⁵

I have only been able to touch on a few of the myriad questions which have been stirred by the constitutional turmoil of the last seven years, and in a very superficial way. But a general observation I should like to underline before I end is that they are interrelated. Most important of all, the question whether we need a written constitution, and more power vested in judges, is directly and necessarily connected with what happens to the House of Lords and the political constitution.⁸⁶ There is little indication

⁸³ An extensive survey of other legislatures concluded that 'None of the overseas second chambers studied here achieve the same reputation for expert membership as the House of Lords': M. Russell, *Reforming the House of Lords: Lessons from Overseas* (Oxford, 2000), p. 306.

⁸⁴ There are no overseas precedents to guide us: *ibid.*, p. 328.

⁸⁵ Cf. Bogdanor, *The New British Constitution*, ch. 6, where it is assumed that a reformed Lords must have democratic legitimacy conferred by election. Professor Bogdanor nevertheless sets out cogent reasons why an elected Lords would be less effective than the present House. The same premises have led Lord Bingham to suggest that the House of Lords should be abolished, and the function of scrutinising legislation transferred to a Council of State, of similar size to the present House of Lords but without any legislative function: 'The House of Lords: Its Future?', Jan Grodecki Annual Law Lecture, University of Leicester, 22 Oct. 2009.

⁸⁶ Cf. Oliver, *Constitutional Reform*, p. 384: 'The political constitution depends heavily upon a culture of self-restraint on the part of constitutional actors. If that culture should disintegrate, then the remaining advantages of the arrangements would disappear and the case for a law-based constitution with more judicialism would become the stronger.'

in the government's approach of any coherent strategic vision, and perhaps that is an inevitable result of our constitutional arrangements. Yet much of the recent activity seems to have been a result of short-term expediency: abolish the office of Lord Chancellor as a clever way of removing Lord Irvine; weaken and politicise the House of Lords because it has proved vexatious; scatter 'power to change law' clauses in bills to save the bother of careful draftsmanship. Typical of this approach was the Parliamentary Standards Bill, rushed through Parliament in July 2009 to appease journalists on the expenses front, with no awareness of the wider constitutional implications which were only pointed out in the nick of time.⁸⁷

If there is to be constitutional reform, there ought to be some new mechanism, independent of government, and of the House of Commons, to consider it as a connected whole. The House of Commons Justice Committee, in its report of 21 July 2009, proposed a constitutional convention;⁸⁸ and that might well be the best solution, however problematic its own constitution and authority might be.⁸⁹ But it should not be expected to deliver results within a short timetable.⁹⁰ The mad rush of the last seven years has proved to be the wrong approach.⁹¹ Constitutions must rest on a broad consensus, and we are some way from having any kind of consensus as to what is required. No independent convention will reach agreement at its first meetings. Indeed, it might be advisable to begin with a Royal Commission to prepare the ground and frame the questions.⁹² A convention should also resist the temptation to redesign the constitution from scratch, in minute detail. Since the reality is that whatever is proposed would need government support, the effect would be to offer dozens of proposals from which ministers could choose the

⁸⁷ House of Commons Justice Committee, 11th Report of Session 2008–9, paras. 38–9. The Lord Chief Justice pointed out in a speech at the Mansion House in July that introducing judicial review of parliamentary affairs threatened to bring the judiciary into direct conflict with Parliament.

⁸⁸ *Ibid.*, paras. 90–2. Cf. V. Bogdanor, 'We need a new Constitution for Britain', *The Times*, 1 June 2009: 'Important constitutional reform should not be a knee-jerk reaction to crisis, but the result of popular reflection. To be effective, it needs to be a product of popular wishes, not something implemented from on high. All that a government can do is to initiate a debate.'

⁸⁹ This is helpfully discussed in Bogdanor, *The New British Constitution*, pp. 228–30.

⁹⁰ Justice Committee, 11th Report (see above, n. 63), para. 88 (pointing out that the government's present timetable is over-optimistic).

⁹¹ Even Mr Straw now admits that 'Constitutional change should be approached with caution': *Rights and Responsibilities*, 7. He has expressed the view that a written constitution is twenty years away: 'Modernising the Magna Carta', see above, n. 16.

⁹² This is Professor Bogdanor's suggestion: *The New British Constitution*, p. 229.

easy ones while shelving the important ones. And it should be borne in mind that unduly radical changes would divide moderate opinion so as to prevent acceptance. The best way ahead is to seek a broad consensus on the big questions.

In connection with consensus, I would end with the observation that no sensible progress can be made without a greater public awareness of constitutional matters and involvement in the debate.⁹³ The hearts and minds must be re-engaged. Politicians no doubt suspect that there is not much door-step interest in questions which may seem abstract or academic, and no political profit to be gained from pursuing them.⁹⁴ Mr Blair famously tried to put down Mr Hague in the House of Commons in 2000 by saying: ‘I don’t know whether people in his pubs and clubs are talking about pre-legislative scrutiny, but they are not in mine. These are good issues for academics and constitutional experts, but they are not the big issues that Parliament should debate.’⁹⁵ This absence of basic awareness has suited the government well and has been reflected in the press, which—despite the acuity of many individual journalists—feeds the public appetite for personal scandals and no longer seriously reports parliamentary debates, let alone Select Committee reports. When a lord chancellor’s wallpaper can attract as much media attention as the abolition of his office, it is hardly surprising that the sordid but titillating business of outrageous expenses claims should fill more column-inches than the far more important constitutional questions currently hanging over us. Yet busy citizens, such as lawyers, have no time to delve into the recesses of the internet on a regular basis to find out what is going on, and so the response to White Papers has been quantitatively thin. It is not that intelligent people are not interested; I have found from giving public lectures on the subject that there is actually great interest and concern amongst lawyers and the lay public alike. But most people simply do not know enough, in detail, about what is happening, and it is all happening too fast. The lack of awareness is also the fault of our educational system. What can the long struggle between Crown and the Commons, the Petition of Right, *habeas corpus*, and all those things which were in the

⁹³ Cf. *The Governance of Britain* Green Paper of 3 July 2007, which Mr Straw announced as ‘the first step in a national conversation’.

⁹⁴ Professor Bogdanor notes that during the 1997 election campaign the respondents to a poll put constitutional issues lowest among their priorities (14th out of 14): *The New British Constitution*, p. 6. He attributes this, at least in part, to the absence of a written constitution: *ibid.*, p. 10. There is certainly far more interest in constitutional issues in the United States.

⁹⁵ *Hansard*, 13 July 2000, col. 1097.

blood-stream of Selden's contemporaries, mean to a generation which has studied no history before 1914 or to lawyers who have studied no constitutional history before 1972?

It may be too late to reverse the present revolution, which has happened so fast that we have all been left gawping. Optimists may be pleased by that; there are always those who enjoy seeing inveterate institutions 'shaken up' and who prefer rapid change (whatever it is) to slow evolution. Some of the reforms have indeed been desirable. My own chief concern is not with change as such, but with the dismal reflection that we no longer have a constitution, in the sense of a set of conventions which set the bounds of executive power and keep the government within those bounds, conventions which—though unwritten and flexible—can be abandoned only by general consensus and after careful thought. The consensus of the last century or more has ended, and the government has stormed into the void, constantly tinkering with constitutional arrangements as a routine exercise of power and without much regard to the consequences. I expect some people will think me a silly professor, an alarmist, to voice such a complaint.⁹⁶ Life still goes on more or less as normal. You and I are still free to air our views in public, and we do not have friends who have been incarcerated for expressing their opinions (as Selden was), let alone eliminated. But constitutional slippage is highly dangerous; for when power is allowed to become unlimited and unbalanced, the lessons of history are, I would suggest, alarming.

⁹⁶ Cf. Lord Carswell in *Jackson v. Att.-Gen.* [2006] 1 AC 262 at 323: 'An unwritten constitution, even more than a written one, is a living organism and develops with changing times, but it is still a delicate plant and is capable of being damaged by over-rigorous treatment, which may have incalculable results.'