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REFORMING AN UNWRITTEN CONSTITUTION

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I. Introduction

Ideally a constitution should contain the fundamental principles upon which a state exists, and should embody its fundamental values. A constitution is concerned with the structures of state institutions, their relationship to each other, and the relationship of citizens and the state. In this the constitution of the United Kingdom is like all constitutions. It differs from many others in not being embodied in a written document but in a complex mixture of institutional practices; that is of history, custom, tradition, and politics reflected in conventions, procedures, and protocols as well as within the body of statute and common law.

When I decided to speak on this topic, I had in mind the reforms since 1997 and the proposals for further reform put forward since 2007. The spring and summer of 2009 have seen unprecedented interest in, and public condemnation of, the rules governing the expenses of Members of Parliament and the way in which those rules have been used by those Members whose claims have been published in newspapers. This has dramatically illustrated how unsupportable rules, or rules brought into disrepute by perceived abuse, can affect trust in an institution by undermining public confidence. But, despite the topicality of the subject, I do not cover it here. Onora O'Neill has shown the corrosive effects of lack of trust in public figures and institutions.[1] This may have an indirect effect on constitutional arrangements, in particular as to accountability, but also in wider ways in order to re-establish trust. However, the rules and practices about MPs' expenses are not part of the constitution itself.

As traditionally understood, our constitution is neither antecedent to particular laws and rules within the state, which many regard as essential attributes of a constitution, nor formally embedded. Its flexibility has often been seen, in particular by Dicey, as an important virtue. In 2000 the report of the Royal Commission on Reform of the House of Lords described it as "extraordinarily dynamic and flexible with the capacity to evolve in the light of changes in circumstances and society".[2]

Although our constitution is in part contained in statutes and decisions of the courts, many commentators and scholars, and most political scientists, regard it as not principally a legal constitution. Dicey pointed out that Sir William Blackstone, in his *Commentaries on the Laws*

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[1] *A Question of Trust* 2002 (CUP).
[2] Cm 4534, para. 5.1.

of England, did not use the term "constitutional law".[3] Some modern scholars also downplay the role of law in our constitution. In 1995, Peter Hennessey refers the constitution being a rich interplay of history and politics but does not mention law. [4] In 2004 Nevil Johnson gave as one of the reasons for the predominantly empirical and descriptive approach to our constitution, the "relative paucity for most of the twentieth century of legal or jurisprudential contributions to analysis of what the constitution amounts to".[5]

Johnson states that "the constitution is not expressed or understood primarily in legal categories, and for a variety of reasons has not been the object of much legal or juridical interpretation". He thus sweepingly pushes aside the significance of not only decisions from *Entick v Carrington* in 1765, to *Anisminic* in 1969 and *GCHQ* in 1984,[6] but also that of the work of legal scholars. There is a formidable group; starting with Dicey. It includes; Stanley de Smith, the two Wades, ECS and HWR, Robert Heuston, Herbert Hart,[7] and Geoffrey Marshall, who, although a political scientist, took a highly legal approach.[8]

It is not clear that Blackstone would approve of my title. He appeared to be satisfied with the state of our eighteenth century constitution. He described Members of Parliament as "the guardians of the English Constitution", [9] and stated that they, "the makers, repealers and interpreters" of our laws, had a responsibility "to watch, to check and to avert every dangerous innovation". [10] But he also said that Members of Parliament were to "propose, to adopt, and to cherish any solid and well-weighed improvement". In this way they would "transmit that constitution … to their posterity, amended if possible, without any derogation". [11]

Blackstone was writing almost 250 years ago. Our constitution, although by then Parliamentary, was not what we today would call democratic. But the aristocratic and landed elite who governed did so within a balanced system in which the consent of the monarch and both Houses of Parliament was necessary for the enactment of legislation. Blackstone stated "each branch [is] armed with a negative power sufficient to repel any innovation which it shall think inexpedient or dangerous".

Since Blackstone's time we have had a number of waves of constitutional reform and changes. Although our constitution is now democratic or at least far more democratic because of the extension of the franchise between 1832 and 1928 when universal adult suffrage was established,[12] it is far less balanced. It is less balanced because of the abolition of the power of

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3 *Law of the Constitution*, 1885, p. 6, on which see Marshall & Moodie, *Some Problems of the Constitution*, p. 13. Holland's *Elements of Jurisprudence*, 1880, used the term, stating that "the primary function of constitutional law is to ascertain the political centre of gravity of any given state".

4 *The Hidden Wiring* 30

5 *Reshaping the British Constitution*, 10.

6 *Entick v Carrington* (1765) 19 St Tr. 1030; *Anisminic v FCC* [1969] 2 AC 147; *Council of civil Service Unions v Minister of State for the Civil Service* [1985 AC 374.

7 Hart's *Concept of Law* reflects important exchanges in letters between him and HWR Wade about Wade's 1955 Cambridge Law Journal article on sovereignty: see Beatson, (2008) 150 Proc Brit Academy 287, 290-92.

8 E.g. in *Constitutional Theory* (1971)

9 *Commentaries on the Laws of England* vol. 1 p 9. Blackstone's reference to "the English Constitution" is noteworthy in a work published in 1765, fifty-eight years after the Act of Union with Scotland. He was not alone. Bagehot, writing over 125 years after that Act of Union and over 30 years after the Act of Union with Ireland, also writes about the "English constitution". We have moved on since then, but may not yet quite be there. The *Governance of Britain* Green Paper published in July 2007 refers to a "British" Bill of Rights, a term which includes Scotland and Wales but not Northern Ireland. The Government was taken to task for this by the Joint Committee on Human Rights in its 29th Report, *A Bill of Rights for the UK?*. 29th Report (2007/08), HL 165-1, HC 150-1 (10 August 2008), paras. 76 and 85-93.

10 *Commentaries on the Laws of England* vol. 1 p 9.

11 Ibid.

12 Plural voting by owners of business premises and university graduates was abolished in 1948.

the House of Lords to veto legislation in 1911, [13] **the evolution of the principle of collective ministerial responsibility and cabinet government, and the strengthening of the party system.**

Today, while the House of Commons in theory controls the government, save exceptionally, it is the government which controls the House.[14] **For Peter Hennessy "ours is very much the executive's constitution".** [15] **At times, during the latter part of the twentieth century it appeared that Cabinet government was moving towards a system of Prime Ministerial government.**[16] **Bagehot's description of "the close and nearly complete fusion of the executive and legislative powers"**[17] **remains true. The continuing truth of Bagehot's other view, that this relationship between the legislature and the executive is "the *efficient* secret" of the constitution, is, however, debatable. Whatever the current state of cabinet government and, whether or not the relationship of the executive and the legislature produces efficiency, the result is what Lord Hailsham described as "elective dictatorship".** [18]

Parliament's position changed on 1 January 1973 when the United Kingdom became a member of the European Communities – now the European Union. The European Communities Act 1972 provides that Community law should prevail over domestic law, including "any enactment passed or to be passed". It is clear, as the courts recognise, that, while the United Kingdom is a member of the EU, the sovereignty of Parliament has been limited.[19]

The most recent wave of reform began twelve years ago. The Manifesto on which the Labour party fought and won the 1997 election contained commitments to hold referenda on devolution, to incorporate the European Convention on Human Rights, and to enact freedom of information legislation. In his prefaces to the two Devolution White Papers published in July 1997 and the Human Rights White Paper published in November of that year, Tony Blair, then Prime Minister, stated that "the government ... are committed to a comprehensive programme of constitutional reform".[20] **Since there have been four phases to date, the most recent one as yet incomplete, it is perhaps more of a tsunami than a wave.**

Last year, I referred to reforming an unwritten constitution as a dangerous activity --- rather like pulling on a loose thread of wool on a pullover. You do not know whether you are going to remove a blemish and tidy things up or whether you are going to end up with no pullover.[21] **I said this as an aside to a discussion of the accountability of the judiciary, and have since reflected on it more broadly.**

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[13] The power and composition of the House of Lords was significantly changed on three occasions after 1911. In 1949 the power to delay legislation was shortened. In 1958 provision was made for the appointment of Life Peers, and in 1999 statute disqualified all but ninety-two hereditary peers (elected by the other hereditary peers) from sitting and voting.

[14] Sir Ivor Jennings, *The British Constitution* (1962) p. 78.

[15] *The Hidden Wiring* 142.

[16] Seymour-Ure, "The Disintegration of the Cabinet" (1971) *Parliamentary Affairs* 196; Hailsham, "The Future of Cabinet Government" Granada Guildhall Lecture 1987.

[17] *The English Constitution* (1867), p 65.

[18] *The Dilemma of Democracy* (1978), pp. 9-11.

[19] *R v Secretary of State for Transport, ex p. Factortame Ltd. (No. 2)* [1990] 1 AC 603, 658-9 (Lord Bridge); *R v Secretary of State for Employment, ex p. Equal Opportunities Commission* [1995] 1 AC 1.

[20] His preface to the Devolution White Papers for Scotland and Wales, both published in July 1997 stated: "the government is pledged to clean up and modernise British politics. We are committed to a comprehensive programme of constitutional reform. We believe it is right to decentralise power, to open up government, to reform Parliament and to increase individual rights": *Scotland's Parliament* Cm 3658, *A Voice for Wales* Cm 3718. Four months later in November 1997, in the Preface to the White Paper on the Human Rights Bill (*Rights Brought Home: The Human Rights Bill* Cm 3782), there was no reference to "cleaning up" British politics.

[21] Judicial Independence and Accountability", Address at Nottingham Trent University 16 April 2008, (2008) 17 Nottingham Law Journal ??; *Judicial Review* 1; (http://www.judiciary.gov.uk/docs/speeches/beatsonj040608.pdf).

There is little a serving judge can appropriately say about the substantive issues dealt with in the recent reforms and canvassed in the proposals for further reform because they concern the formation of policy on matters which might in the future come before the courts. But it is possible to consider the process; that is the way the government has gone about it, the methods used, and the nature of what is happening. What are the implications of the fact the process is a staged one? Would a more holistic approach be better suited to constitution building? Are we able to see whether we are at the beginning of what will be a paradigmatic change in our constitutional arrangements? Does what is happening mark a move from a political or customary constitution to a legal one?

It is too early to be able to give a definitive answers to these questions. Not only are the recent changes still bedding-in, but the process is not complete. I shall be concentrating on the government's initiatives, but it is important not to forget the very important contributions in the reports of Parliamentary Committees, in particular those of the Joint House of Lords and House of Commons Committee on Human Rights (hereafter "the Joint Committee").

In March 2008 a White Paper (which is not white but mainly black), entitled *The Governance of Britain – Constitutional Renewal*[22] was presented to Parliament. It deals with seven discrete topics. In March 2009 the government published a Green Paper (which is not green but white) entitled *Rights and Responsibilities: Developing our Constitutional Framework*[23] dealing with a Bill of Rights and Responsibilities.

The Lord Chancellor, Jack Straw's Foreword to the "*Constitutional Renewal*" White Paper states that the government needed to go further than the devolution, human rights and freedom of information legislation enacted eight to ten years earlier because "constitutional arrangements constantly evolve and require renewal".[24] The foreword to the *Rights and Responsibilities* Green Paper by the Lord Chancellor and Michael Wills, a Minister of State in the Ministry of Justice, states that two assumptions are driving the proposals. The first is that "in healthy societies power is never concentrated in the hands of a few but diffused as widely as possible". The second, expressed in rather vivid (almost breathless) language, is "that the struggle can never cease" because "power always clusters, chemically, round the powerful" and that "it requires rigorous and vigorous activity to reverse this law of nature".[25] These are essentially assumptions about the need for checks and balances, and, if valid, they extend beyond the issue of a Bill of Rights to constitutional reform generally. They suggest that the important reason for constitutional change is in order to balance or re-balance power. Also, the assumptions give the impression of a continuing process, with the constitution constantly changing.

II. Developments since 1997 summarised

Many of you will be familiar with what has occurred and what is now under consideration. But it is first necessary to summarise developments since 1997.

(i) The first stage: 1998-2003

1998 saw the enactment of five major pieces of constitutional legislation. [26] The Human Rights Act 1998 (hereafter "the HRA") in practice incorporates the European Convention on Human Rights into our domestic law. Three statutes devolving significant power to a Scottish

[22] CM 1770 (2008).

[23] CM 7577 (March 2009).

[24] P. 5

[25] Ibid., p. 5(x).

[26] Vernon Bogdanor describes the programme of constitutional reform between 1997 and 1999 -- the first stage of the current wave -- as the most radical since the Great Reform Act 1832, although he has also stated that none of the reforms are as significant as that Act or as the Parliament Act 1911: in Bogdanor ed, *The British Constitution in the Twentieth Century*, p. 690.

Parliament and to Northern Irish and Welsh Assemblies were enacted. The House of Lords Act 1999 disqualified the vast majority of hereditary peers from sitting and voting. Despite a Royal Commission report in 2000, and government White Papers in 2001 and 2007[27] proposing first a wholly appointed house and then one in which half the members are elected, no further steps have been taken.

The electoral systems for the devolved bodies and for the European Parliament[28] are proportional rather than the traditional "first past the post" system used in elections to the House of Commons. Although Tony Blair's forewords to the White Papers published in 1997 all stated that one of the elements of the government's comprehensive programme of constitutional reform was a referendum on the voting system for the House of Commons, this has not been taken forward. It does not feature in any of the recent proposals and appears to have been kicked into the long grass.

Additionally, during this period the government agreed to legislate to improve access to information held by public bodies, and, driven by serious criticisms of the sources from which political parties finance themselves, to legislate to control political donations and expenditure at elections. A Freedom of Information Act and the Political Parties, Elections and Referendums Act were enacted in 2000. The effect of the publishing information about MPs allowances and expenses brought into the public arena as a result of a freedom of information request shows the significance of the Freedom of Information Act. [29] The fact that the Parliamentary authorities claimed they were exempt from the Act and the matter had to be resolved by litigation[30] shows the importance of effective mechanisms for the enforcement of rights. Finally, 2000 also saw significant reforms to local government by requiring the introduction of a cabinet, a city manager, or a directly elected major instead of the former committee system.

(ii) The second stage: 2003- 2007

The second stage of the present wave of reform concerned the relationship of the judiciary with the other two, more powerful, branches of the state, the legislature and the executive; that is Parliament and the government. It lasted between June 2003 when the Lord Chancellor, Lord Irvine, was dismissed and the government purported to abolish the office, and either 2005 when the Constitutional Reform Act (hereafter "the CRA") was enacted, 1 April 2006, when that measure came into force, or May 2007 when the Ministry of Justice was created.

Unlike the reforms in the first stage or the proposals since July 2007, there was no advance warning of this to anyone outside government. Even the Lord Chief Justice was not informed. It appears that the government saw this as principally a change in the machinery of government and not something of constitutional significance. The House of Lords' Select Committee on the Constitution said the announcement was made "without any apparent understanding of the legal status of the Lord Chancellor". [31] It was a classical example of our habit, in Lord Hailsham's words, of "acquiring [our] institutions by chance [in this case over some 1,000 years] and shedding them in a fit of absentmindedness". [32] Such consultation as

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27 *A House for the Future* (2000); *Completing the Reform* Cm 5291 (2001); *House of Lords Reform* Cm 7027 (2007)

28 European Parliamentary Elections Act 1999.

29 In their foreword to the recent Green Paper Jack Straw and Michael Wills state, the FOI Act "has established transparency as a mechanism for empowering the individual against the state": CM 7577 p. 5 (xii). Cf Nevil Johnson, who doubted the Act would have substantial constitutional significance: *Reshaping the British Constitution,* (2000), p 170.

30 *Corporate Officer of the House of Commons v The Information Commissioner and others* [2008] EWHC 1084 (Admin) (Sir Igor Judge PQBD, Latham LJ and Blake J).

31 6th Report of Session 2006/7 HL 151 (July 2007), para. 12.

32 "The Future of Cabinet Government" Granada Guildhall Lecture 1987.

there was about the key principles and the practical arrangements that would be needed occurred only afterwards.[33]

At this stage it suffices to say that these changes were subsequently justified as increasing the separation of powers between the three branches of government, which they did. It, however, seems that the immediate motivation for them was the removal of a Lord Chancellor who was a thorn in the flesh of a Home Secretary who was under the influence of populist pressures. The reform increased the separation of powers in three ways. First, it ended the position whereby the Lord Chancellor, a senior member of the Cabinet, was also Head of the Judiciary and a judge, and Speaker of the House of Lords. Secondly, a Judicial Appointments Commission was created, and the role of government ministers in the appointment of judges was significantly reduced. Thirdly, from this October the final court of appeal in the United Kingdom will formally cease being a committee of the House of Lords, one of the two legislative chambers, and become a separate Supreme Court situated in the former Middlesex Guildhall. Their Lordships' request that the postal address be changed from Little George Street to something they considered matched the dignity of the new court [34] succeeded in the summer of 2009

But the process did not end there. In 2007, only four years after its creation, the government abolished the Department for Constitutional Affairs and announced the creation of a Ministry of Justice. This brought together responsibility for the administration of justice and prisons. Again, there was no consultation before the decision was taken.[35] The government again saw the decision as simply a change in the machinery of government and not, as the judiciary did, one with constitutional significance.[36] That significance came from the competition within a single
ministerial budget between the financial needs of prisons and those of the courts and the legal aid system.[37]

(iii) The third stage: July 2007 to March 2008:

There has been consultation in the most recent two stages of the present wave of reform. The *Constitutional Renewal* White Paper[38] presented to Parliament in March 2008 followed five consultation papers. It deals with seven discrete and very different topics. These are: managing protest in the vicinity of Parliament; the role of the Attorney-General as the legal adviser to the government and in relation to prosecutions and prosecution authorities; judicial appointments; treaties; the civil service; war powers; and flag flying on government buildings. Other than in Northern Ireland, flag flying on government buildings has not been seen as a seminally important constitutional topic, and I put it to one side.

Of the other topics, judicial appointments had been considered in the process that culminated in the Constitutional Reform Act 2005. The JAC was established to select people to recommend to the Lord Chancellor. Section 63(2) provides that selection must be solely on merit and section 64 that, subject to section 63, the JAC must have regard to the need to

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[33] The principles and practical arrangements were negotiated by a working party acting on behalf of the Lord Chief Justice and Judges' Council, and representatives of the new DCA. The resulting agreement, "the Concordat", was entered into by the Lord Chancellor and the Lord Chief Justice.

[34] *Sunday Telegraph*, 14 December 2008; *The Independent*, 15 December 2008.

[35] The 6th Report of the House of Lords' Select Committee on the Constitution states that it appears that the first the Lord Chancellor and the Lord Chief Justice knew of the plans was a Home Office leak in the Sunday Telegraph: 2006/7 HL 151 (July 2007) paras. 20, 61-63.

[36] 6th Report of Session 2006/7 HL 151 (July 2007) § 58; Lord Falconer of Thoroton LC's Evidence on 1 May 2007, Q 416 and Q 419.

[37] Lord Justice Thomas, "The position of the judiciaries of the UK in the constitutional changes", Address to the Scottish Sheriffs' Association, 8 March 2008 (http://www.judiciary.gov.uk/docs/speeches/ljt_address_to_scottish_sheriffs.pdf). See also Beatson, note 21 above.

[38] CM 1770 (2008).

encourage diversity in the range of persons available for appointment. The Lord Chancellor only has power to reject a recommendation on specified grounds and with reasons, but he may also require the JAC to reconsider.

In July 2007, fifteen months after the JAC started working and before the outcome of the first selection exercise for appointments to the High Court Bench under the new system, the Prime Minister stated that "the government (a) should consider relinquishing its residual role in the appointment of judges" and (b) was willing to give a role to Parliament in their appointment.[39] There have since been two selection exercises for appointments to the High Court, resulting in 34 appointments to date, and 4 others have been informed they will be appointed as vacancies arise. [40] In 2008 Jack Straw, the Lord Chancellor, told the House of Commons Justice Committee that expectations that the new system would lead to a more diverse judiciary had so far not been fulfilled. At the end of April 2009 a judicial diversity panel chaired by Baroness Neuberger was appointed. Two newspapers reported (in identical terms) that the panel had been selected by the Lord Chancellor "to propose ways to speed up the appointment of judges who are not white men".[41] Baroness Neuberger has stated that the question of quotas will be considered. [42] What are the implications of this return to the topic so soon after the establishment of the Judicial Appointments Commission?

(iv) The fourth stage: March 2008 to date:

This stage involved the discussions of a Bill of Rights and Responsibilities which led to the publication of the *Rights and Responsibilities* Green Paper[43] in March 2009. At the early stages of the discussions, there were indications by ministers that the process might involve revisiting the Human Rights Act. The *Rights and Responsibilities* Green Paper, however, states that the government will not resile from the HRA or alter or dilute the enforcement mechanism in the HRA for the rights it protects. It also states that fundamental rights cannot be legally contingent on the exercise of responsibilities.[44] There has, however, been reconsideration of what bodies and functions are "public" and thus directly subject to the provisions of the Human Rights Act and the ECHR. The decision of the majority in House of Lords in *YL v Birmingham City Council*[45] that a private residential care home was not performing a "public function" for the purposes of the HRA when providing services to an elderly person funded by a local authority pursuant to its statutory duties was criticised by, *inter alia*, the Joint Parliamentary Committee on Human Rights. The government has legislatively reversed the decision in *YL* and thus changed the effect of the HRA in relation to

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[39] Constitutional Reform statement 3 July 2007: http://www.number10.gov.uk/output/Page12274.asp.

[40] Between April 2006 and October 2007 appointments to the High Court continued to be made under the old system on the basis of the last High Court competition run by the Lord Chancellor. 16 candidates were appointed as a result of the first High Court competition by the JAC: 14 men and 2 women. The second High Court competition by the JAC was completed in October 2008; 22 people were recommended for appointment (17 men and 5 women), and to date, 11 have been appointed (8 men and 3 women). The others have informed that they will be appointed as vacancies arise. Figures released in July 2008 showed that, taking the total number of appointments at all levels, the percentage of women and black and Asians appointed since the JAC started to work has fallen: 29th Report of Joint Committee on Human Rights (2007/08), HL 165-1, HC 150-1.

[41] *The Independent*, *The Daily Telegraph*, 29 April 2009.

[42] http://www.justice.gov.uk/news/newsrelease280409b.htm (Ministry of Justice Press release, 28 April 2009). Lord Judge CJ has said that he is determined to encourage and achieve greater judicial diversity but is opposed to a quota system: http://www.judiciary.gov.uk/docs/speeches/lcj-speech-diversity-conf.pdf (Diversity Conference, 11 March 2009): http://www.judiciary.gov.uk/docs/speeches/lcj-encouraging-diversity-240409.pdf (Minority Lawyers' Conference, 25 April).

[43] CM 7577 (March 2009).

[44] Ibid p. 10, 2.22, 4.24, 4.29, 4.31.

[45] [2008] 1 AC 95 (Lord Bingham and Baroness Hale dissented).

care homes.[46] It is considering whether, in the light of the decision if in *YL,* the definition of public authority in the HRA itself should be clarified. Again, what are the implications of a return to this topic?

In the *Rights and Responsibilities* Green Paper the government asks whether it is desirable now "to express succinctly, in one place, the key responsibilities we all owe as members of UK society, ensuring a clear understanding of them in a new accessible constitutional document and reinforcing the imperative to observe them".[47] It states that "if there is a deficit in relation to responsibilities, it is not in relation to their existence but rather in the expression of them" because these duties are imposed in "a patchwork way, and often without framing them explicitly in the language of responsibility".[48] It also asks whether the range of social and economic entitlements which go beyond the civil and political rights in the European Convention on Human Rights but are "scattered across the UK's legal and political landscape"[49] should be brought together with the responsibilities in a Bill of Rights and Responsibilities.

Although the principle of *habeas corpus* and the right to trial by jury in more serious criminal cases are deeply embedded in our system – the roots of the latter go back to the 14th century – they are not to be included in the Bill of Rights. The Green Paper acknowledges the "deep cultural attachment to jury trial"[50] in the UK. But it relies on the fact that many other countries do not have it, that it is not necessary for compliance with Article 6 of the ECHR, and the different position in Northern Ireland. It also states that trial by judge alone would give better and more transparent justice because of the duty of a judge to give reasons and refers to the debate about whether, for example, particularly serious fraud cases can be presented to a jury properly.

Paragraph 3.31 of the Green Paper states, perhaps somewhat paradoxically, that additional protections in relation to liberty of the person or fair trials "may not be necessary as the belief in their fundamental nature is already so deeply entrenched, culturally and politically, and there is no fundamental threat to them". I say this is perhaps somewhat paradoxical because: (a) the Green Paper's stated policy is to bring together rights that are scattered in our law, (b) it states there needs to be a broad consensus for the contents of a Bill of Rights, and (c) it recognises that we have a deep cultural attachment to trial by jury and refers to a Rowntree State of the Nation Poll in 2006 which recorded that 89% of respondents think the "right to a fair trial before a jury" should be included in a Bill of Rights.[51]

The Green Paper refers to a range of approaches from a "declaratory and symbolic statement" to "a set of rights and responsibilities directly enforceable by the individual in the courts". [52] The government states that, while it will not resile from the HRA,[53] it does not consider the new rights and the new responsibilities are necessarily suitable for expression as a series of new legally enforceable rights and duties. [54]

III. An assessment of the process of reform

Having given a summary of the developments and proposals at something of a gallop, I return to the questions I said I would consider. What, if anything, do we learn from the way the government has gone about its programme of reform? Is this staged approach (including re-consideration of matters dealt with at an earlier stage) suitable for constitution building?

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46 Health and Social Care Act 2008, s 145.
47 Ibid., p. 9.
48 Ibid., 2.24.
49 Ibid.
50 Ibid., 3.30.
51 Ibid 3.29. See 29th Report of Joint Committee on Human Rights HL 165-1 HC 150-1 para. 125.
52 Ibid., 4.2, and 4.6 ff.
53 Ibid p. 10, 2.22, 4.24, 4.29, 4.31.
54 Ibid., pp. 9, 10 and 4.25.

Should there have been more attention to obtaining consensus – by a Speakers Conference or a Royal Commission, perhaps chaired by a suitable non-political figure?

Is the process just another step in the evolutionary development of our Constitution or will law in the narrow sense replace history, custom, convention and politics as the predominant part of our constitution, as powerful voices, including Lord Scarman and Lord Hailsham,[55] urged during the 1970s? Political scientists are divided about this. Vernon Bogdanor believes that the changes indicate we are moving towards a legal constitution but that the journey will be a long one and we are at present, "constitutionally speaking, in a half-way house".[56] He also believes that some of the changes are irreversible – although at the present stage this is political rather than legal irreversibility.

Nevil Johnson, however, considers that "the outcome of a great deal of effort appears to be a more tenuous version of a customary constitution than existed only a decade ago".[57] He states that "the most serious of all contemporary constitutional challenges [is] how in a democratic society … the executive power is to be restrained and kept within bounds". He states that sound institutional practices until recently thought to be binding are in a state of decay. He says the reason for this is "the obsessive pursuit of party manifesto promises and the pursuit of sectional interests at the expense of the interests of the wider majority".[58] Johnson notes the consequent criticism of Parliamentary sovereignty and the increasing deployment of the argument that "… rights are only worth having if they are formally posited and set apart from both the processes of political accommodation in a democratic society and from the moral values that any rational person can be expected to acquire through participation in the shared patterns of social life". He does not, however, consider that there is compelling evidence of "…a widespread rejection of one of the most important factors underpinning the customary constitution, namely, respect for convention as a crucial element in constitutional practices".[59] If this is so, the process will produce a new version of the customary constitution.

Does the government see the process as anything more than one of "modernisation" and increasing "transparency"? The terms are fashionable but ambiguous because they give no idea of content or core values, and no indication that the process is one that will be rational and systematic as opposed to a managerial response to particular problems as they arise. The contexts in which the terms are used do not always assist. For example, the most recent Green Paper refers to the aim of "entrenching" fairness,[60] but also states that Parliamentary sovereignty resides at the heart of our constitutional arrangements.[61]

(i) The motivations for the reforms

The Government White Papers and consultation documents display different, although sometimes overlapping, motivations for the various changes and the proposed reforms.[62] I have identified the following:-

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55 Scarman *English Law – The New Dimension* 1974, *Why Britain needs a written Constitution* (1992); Hailsham *The Dilemma of Democracy* (1978).

56 Bogdanor in Bogdanor ed., *The British Constitution in the Twentieth Century* 2003 719-21 and (2004) 120 LQR 242, esp. 259.

57 *Reshaping the British Constitution* 2004 p. 5.

58 Ibid 16.

59 Ibid 36.

60 CM 7577 (March 2009), p. 4.

61 Ibid., p 5.

62 The Joint Committee on Human Rights discerned a number of possible motivating factors behind the government's interest in a Bill of Rights. After listing them it states that it "… regret[s] that there is not greater clarity in the Government's reasons for embarking on [the] politically ambitious course of drawing up a Bill of Rights" and that "a number of the Government's reasons appear to be concerned with correcting public misconceptions about the current regime of human rights protection under the HRA. We do not think that this is in itself a good reason for adopting a Bill of Rights."

- To balance the power of the executive;
- To increase accountability and in particular democratic accountability;
- To increase transparency and clarity;
- To enhance public confidence (by correcting public misconceptions about, in particular the Human Rights Act, but also about, for example, the role of the Attorney-General);
- To encourage interest by the public in politics, or at least to arrest the decline in their interest in politics; and
- To foster a stronger sense of shared citizenship.
- A managerial motive of enhancing efficiency and effectiveness in the delivery of services. It is particularly evident in relation to local government, but is also seen in relation to the operation of other institutions. It can, for example, be seen in relation to the House of Lords in its secondary and revising role, and in relation to the enforcement of rights by British citizens, in particular by "bringing home" the rights enjoyed under the European Convention on Human Rights.

With the exception of devolution, none of the manifesto commitments since 1997 nor the reforms since proposed have been a direct response to widespread popular pressure. This is not surprising. In 1993 Andrew Adonis, then a promising Oxford historian, now a peer and a Minister of Transport, published a book about the peerage and the political system presciently entitled, *Making Aristocracy Work.* He said: "Only once since the Napoleonic wars – the great Reform Act of 1832 – has far reaching constitutional change come as a direct response to popular pressure. And even then Earl Grey's Whig government, alarmed as it was, retained control over the formation and implementation of its reform legislation". Adonis considered that "…since 1832 constitutional revision in Britain has almost exclusively been the work of governments anxious, first and foremost to broaden the basis of consent for the executive".[63]

(ii) A durable process?

I return to the process. Any reform is more likely to endure if there is a broad measure of agreement. In a statement made about a Bill of Rights, but of more general application, the Joint Committee considered there should be "sufficient consensus across party lines to make the process … a truly constitutional event rather than a party political one".

My summary shows the variety of approaches used since 1997. They range from manifesto commitment or consultation, followed by White Paper, decision, and legislation, at one end of the spectrum, to decision, followed by consultation and negotiation with interest groups, and then legislation, at the other end. Save for reform of the House of Lords, where there was a Royal Commission chaired by an opposition peer,[64] so far the process has not formally involved the opposition political parties or indeed independent persons.[65] Lord Adonis's statement , however, shows us this is not remarkable.

In the case of devolution there was no party consensus (and there were indeed divisions within the two larger parties) but the government sought to make the process constitutional by referenda. This appears to have been successful in that there are no proposals now to reverse what has happened.[66] One of the features of our constitution, however, is that there are no rules as to when to hold a referendum: it is the government that decides whether to do so. Before 1997 the criterion seemed to be whether the issue was one on which the government

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63 *Making Aristocracy Work: The Peerage and the Political System in Britain 1884-1914* (1993), p. 278.

64 Lord Wakeham. The members of the Commission included members of all the major parties.

65 Other parties have, of course, contributed to the debate, in 2002 a Joint Lords and Commons Committee was established to consider House of Lords reform, and there were cross-party talks on House of Lords reform before the government's White Paper in 2007: Cm 7027.

66 Cf., however, the referendum on the EC in 1975, has not led to acceptance of our membership, only in part because of subsequent developments; the Single European Act, and the Maastricht and Lisbon Treaties.

party was deeply divided[67] or it concerns the integrity of the United Kingdom.[68] A significant extension to the Welsh devolution scheme without a referendum has taken place as a result of the Government of Wales Act 2006. That Act also makes provision for further devolution, in particular of power to legislate, but only if, *inter alia*, it is approved in another referendum.

In the case of the Human Rights Act, there was no Royal Commission, formal involvement by opposition parties or referendum. Even though in reality all it does is, as the government stated, is to bring rights we all had "home", it remains controversial and a matter of contention between the two main parties.[69] The Lord Chancellor has said that the reason the HRA has not become an iconic statement like the US or South African Bills of Rights is because our statements of rights have been the product of evolution not revolution.[70] That may be part of the reason, but it may also be because the HRA was not preceded by a deliberative process that was seen to be independent or by an expression of popular will in a referendum.

The position is similar in the case of the various proposals in the *Governance of Britain White Paper* and in relation to a Bill of Rights. Despite the acknowledgement of the need for a "broad consensus" for a Bill of Rights, the government appears to be seeking this by an extended and widespread process of consultation in all parts of the country involving citizens' summits and citizens' juries, and with Parliament's contribution taking the form of a debate,[71] rather than by the formal involvement of an independent body such as a Royal Commission or popular endorsement by referendum.

(iii) A fragmented process

The position on referenda is one illustration of the fact that the process remains fragmented rather than holistic. Some aspects of the process suggest that our constitution resembles the common law in being, in Lord Goff of Chieveley's words, kaleidoscopic in the sense that it is in a constant state of change.[72] These characteristics can be shown in a number of ways.

First, the reformed constitution, as seen in particular in the case of devolution, remains a mixture of statute, convention, and the decisions of the courts.[73] The formal position whereby sovereignty remains in the United Kingdom's Westminster Parliament has been moderated in a classical manner. Detailed non-statutory arrangements – concordats – between the UK government and the devolved administrations enable the effective management of joint, concurrent and overlapping powers.[74] In the case of devolved powers, although the legislation is premised on the continued sovereignty of the UK Parliament, the government stated that it would not 'normally' legislate with regard to devolved matters without the consent of the Scottish Parliament and the Northern Irish and Welsh Assemblies.[75] "Sewell" motions, named after Lord Sewell, then Under-Secretary of State for Scotland, who during the passage of the Scotland Act stated the government would expect a convention to this effect would be established, have almost invariably been passed in such cases, although they have not always been.

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67 Referenda were held on EC membership (1975) and devolution for Scotland and Wales (1979).

68 By s. 1 of the Northern Ireland Constitution Act 1973, Northern Ireland shall not cease to be a part of the UK without the consent of a majority of its people voting in a border poll.

69 David Cameron has called for it to be replaced with "a home grown British Bill of Rights": speech to mark the 60th anniversary of the UN Universal Declaration of Human Rights: *The Guardian, Daily Telegraph, Daily Express,* 9 December 2008.

70 Mackenzie-Stuart lecture, Faculty of Law Cambridge, 25 October 2007.

71 *Green Paper* Cm 7577 Ch 5.

72 "The Search for Principle", (1983) 59 Proc. Brit. Acad. 169, 186. Constitutional change differs because more of the individual changes will be more major than the majority of changes to the common law as a result of court decisions, which are in minute particulars.

73 Eg *Somerville v Scottish Ministers* [2007] 1 WLR 2734, discussed below.

74 Rawlings (2000) 116 LQR 257.

75 Ibid 268.

Secondly, after the first stage of reform, some proposals for reform appeared primarily to be a reaction to political problems rather than about building institutions or raising aspirations. This appears to be the position in the case of the reforms to the office of Lord Chancellor and the subsequent creation of a Ministry of Justice, although they have led to significant institutional changes.

In other cases there has been less change. The process could be seen as largely clarifying the existing constitutional position by putting it into written form. In the case of the role of the Attorney-General, the government stated it was "fully committed to enhancing public confidence in the office",[76] presumably because of the perception fuelled in much debate by commentators that the use made by the government of the Attorney's advice about the legality of the Iraq war undermined that confidence.[77] The proposal to put the position about the prerogative to wage war in a House of Commons resolution may also be designed to restore confidence. The discussion about that issue in the White Paper shows all the difficulties of putting a constitutional convention into a written, in this case "soft-law", form. The understandable need for flexibility to ensure security and surprise means the basic rule will be displaced in such a wide number of situations, as determined by the Prime Minister, that there is little additional certainty, clarity, or even transparency.

Thirdly, the process shows willingness to park difficult problems, such as reform of the House of Lords, the West Lothian question, and consideration of the electoral system for the UK's Westminster Parliament. These are undoubtedly difficult problems. But parking them can itself be problematic, especially if it is done after the journey has been started by tackling the easier part of an issue. This is perhaps most apparent in the problems created by proceeding with devolution without addressing the consequent problems resulting from an asymmetrical devolution system.[78] It is, however, also apparent in the case of House of Lords reform, where the easy part was getting rid of the hereditary peers, but the result is that, save for the ninety-two elected hereditary peers, we now have an entirely appointed House, albeit subject to some scrutiny by the Appointments Commission.

Some of the difficult problems were not parked. They were simply overlooked or underestimated. For example, when the changes were made to the office of Lord Chancellor, there was a debate about the need to protect the independence of the judiciary from government. The government maintained that the reform would enhance it.[79] That was a valid debate. But there was no public debate and little internal debate about the other aspect of judicial independence; that is the independence of a judge from in particular more senior judges. This has been a major issue in other European systems and there is Strasbourg jurisprudence on the topic.[80]

This issue is likely to become more important in this country, both in relation to "court" judiciary and to "tribunal" judiciary, and recent developments may mean that more formal safeguards for internal independence are required. For instance, senior judges have increased

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[76] *Governance of Britain* White Paper paras 32-3, referring to the Green Paper.

[77] See also Lord Bingham's criticism of the Attorney-General's stigmatisation of judicial review as in some way undemocratic: *A v SSHD* [2005] 2 WLR 87, at [42], described by Lord Steyn as "the most eloquent and magisterial judicial rebuke to an Attorney-General since Lord Denning in *Gouriet v UPOW* [1977] QB 729, 761 admonished the Attorney-General to bear in mind the words of Thomas Fuller over 300 years ago: 'Be you ever so high: the law is above you'": [2005] EHRLR 349, 350.

[78] Since the lecture, "the English question" and the possible answers to it have been analysed by the House of Commons Select Committee on Justice in its Fifth Report of Session 2008-09 (HC 529-I), "*Devolution: a decade on*", published on 24 May 2009.

[79] There is, however, a difference between the relationship to government of the Lord Chief Justice and "court" judiciary, and that of the Senior President of Tribunals and "tribunal judiciary" under the Tribunals, Courts and Enforcement Act 2007. The Senior President is to be responsible to the Lord Chancellor and is required to report to him by section 43 of the 2007 Act.

[80] *Sranck v Austria* [1984] 2 EHRR 351; *Findlay v UK* [1997] 24 EHRR 221 (courts martial). See also *R v Spear* [2003] 1 AC 734.

administrative responsibilities and "managerial" responsibilities over other judges – not of course in the way they decide individual cases – but about overall caseload, where they sit, and which cases are allocated to them. Again, the movement from the common law paradigm of direct appointment to the bench from the legal profession to more appointments by way of promotion within the judicial hierarchy may mean those lower down need appropriate protection. Some of the functions formerly exercised by the Lord Chancellor alone must now be exercised concurrently with the Lord Chief Justice. Some saw the formal addition of the Lord Chief Justice as fostering the independence of the judiciary from the executive. But it can also be seen as fostering the independence of the judge from those superior to him in the hierarchy by requiring the consent of the Lord Chancellor, who may be more independent because he is further removed from the issue, for example time taken to complete judgments or deployment at a particular court.

The fifth aspect of the process which is worthy of note is the willingness of government to revisit an issue relatively soon after dealing with it. The most notable examples of this concern the judiciary. The return to the topic of judicial appointments happened less than three years after the grandly entitled Constitutional Reform Act 2005 came into force and the JAC was set up, and arguably before the JAC has had time to have an impact.[81] Was it really thought that within three years of the JAC's creation it would have begun to change the face of the English judiciary? Why did the role of the Minister in appointments need revisiting so soon when it had been the subject of extensive debate at the first stage? And does the abolition of the Department for Constitutional Affairs only four years after its creation suggest that the decision to create it in 2003 was flawed?

There was more justification to the revisiting of the 1998 devolution settlement in Wales in the GWA 2006. There was dissatisfaction with the complex and fragmented nature of the arrangements under the 1998 Act. Sir David Williams described them as "shrouded in a haze of constitutional ambiguity".[82]

I have referred to the hints given by ministers at one stage that the Human Rights Act might be revisited and to the change made and the further change contemplated as to the meaning of "public authority" and "public function" under that Act. If, as the government maintains and has been accepted by the courts, the HRA and the CRA and the JAC are part of our new constitutional settlement, what do these ways of dealing with issues recently settled, and with a decision of the highest court in the land, tell us about the nature of the process? Such revisiting, particularly so soon, appears more part of the warp and woof of politics or micro-management than constitutional amendment.

Finally, the knock-on effects of the reform do not appear always to be appreciated by government. What I have said about the internal independence of the judiciary is an example of this, but the best examples concern devolution. So the initial references in the Constitutional Renewal *Green Paper* about a Bill of Rights do not mention devolution. The Joint Committee on Human Rights thought this was "rather surprising".[83] Indeed it is. Some of the rights and liberties beyond those in the ECHR that the Green Paper suggests might be contained in a Bill of Rights concern devolved matters, for example health, social services and education. It appeared that, at least until the October 2008 report of the Joint Committee on Human Rights, the government had not involved the Scottish Executive in the process.

The government has also been criticised by Chris Himsworth[84] for not obtaining a Sewell motion from the Scottish Parliament before the enactment of section 145 of the Health and Social Care Act 2008, although that might have been because it was considered that human

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[81] It was, as the then Lord Chief Justice observed in para. 4.29 of his *Annual Review of the Administration of Justice in the Courts* (31 March 2008), under-resourced: see http://www.judiciary.gov.uk/docs/lcj_review_2008.pdf.

[82] In Miers ed., *Devolution in Wales* (1999), p. 6.

[83] para 100.

[84] (2009) 77 *Amicus Curiae* 2.

rights is not a devolved issue. [85] Himsworth has also expressed concern about the empowering by the Tribunals Courts and Enforcement Act 2007 of the transfer of categories of applications for judicial review from the Court of Session, a Scottish Court, to the new Upper Tribunal, a UK Tribunal, on the same basis in Scotland as in England, without a Sewell motion.[86] This may be over-sensitive. If the subject matter of the proceedings concerns a devolved matter, it does not appear that the Tribunals Courts and Enforcement Act empowers it to be transferred. [87]

Even where reforms proceed in parallel, some knock-on effects may not be foreseen. During the first stage of reform the overlap between the devolution proposals and the HRA was appreciated. The competence of the devolved assemblies was to be limited, and it was to be beyond their power *inter alia* to do anything incompatible with Convention rights. Convention rights are protected both by the devolution statutes and the HRA. At the time the legislation was being enacted it was assumed that the regimes had been carefully aligned to produce a single constitutional package. However, although, by and large the legislative schemes are consistent, the decision of the House of Lords in *Somerville v Scottish Ministers*[88] shows they do not protect Convention rights in identical ways.

In *Somerville's* case it was held that the twelve-month time bar on proceedings under the HRA did not apply to proceedings under the Scotland Act. It was a majority decision; two of the three judges sitting who had previously been English judges dissented. Technically, the difference between the majority and the minority turns on a fine analysis of the relevant legislative provisions. At bottom, however, it may turn on a difference between them as to the desirability of remedial consistency within the Scotland Act, which is concerned with lack of competence on grounds other than incompatibility with Convention rights, and remedial consistency as to breaches of Convention rights in the UK. Lord Hope, Lord Rodger, and Lord Walker considered the SA to be free-standing and to contain "everything that is needed by way of legislation for the proper working of the system that it lays down" and its own system for dealing with acts or failures which are incompatible with the convention". [89] The minority regarded the HRA and the Scotland Act (and by implication the other devolution statutes) as part of a constitutional package to be construed to produce uniform protection of Convention rights and uniform limits to that protection.[90]

(iii) A rebalancing process?

Let us return to the two assumptions the government says govern the *Green Paper on Rights and Responsibilities*; not to concentrate power in the hands of a few, and for there to be rigorous and vigorous activity to reverse the inherently centripetal nature of power to cluster around the powerful.[91] I have suggested these assumptions are essentially about the need for checks and balances, and, if valid, extend beyond the issue of a Bill of Rights to suggest that

85 In her evidence to the Joint Committee on Human Rights, Carol Harlow stated (see para. 121) that "human rights are not … a devolved issue" but Himsworth notes (at 7) that human rights are not one of the matters reserved to the UK Parliament by Schedule 5. Since under the SA, s. 126, "the Convention rights" have the same meaning as in HRA, s. 1, and the HRA cannot be modified by the Scottish Parliament (SA Sched 4), the HRA might legitimately be read as empowering the UK Parliament to qualify or extend the rights under it.

86 Himsworth p 7.

87 TCE Act 2007 s 20.

88 [2007] 1 WLR 2734

89 Ibid, at [17-18], [22], [24], [106], [115-117], [125]

90 Tension between consistency and uniformity on the one hand and regional variation is also seen in the differing approaches of English and Scottish judges in the House of Lords as to the effect of unreasonable delay in criminal proceedings (*HM Advocate v R* [2002] UKPC D3; *AG's Reference (No 2 of 2001)* [2003] UKHL 68) , a tension subsequently resolved in favour of the English view in the light of Strasbourg cases decided after the original difference: *Spiers (Proc Fiscal) v Ruddy* [2007] UKHPC D2

91 Ibid., p. 5(x).

the important reason for constitutional changes should be in order to balance or rebalance power.

The main imbalance in our constitution, that the executive generally controls the legislature, has also been seen as a powerful virtue: Bagehot's efficient secret. Notwithstanding the debate about Parliamentary sovereignty, the two leading parties consider that concept should continue to be the cornerstone of our constitution. All the proposals for reform presuppose it. The Human Rights Act, with its provision for a court to declare that a legislative provision is incompatible with Convention rights, but no power to set aside that legislation, provides an elegant model of how to retain sovereignty while giving weight to fundamental rights. This is the model for a UK Bill of Rights favoured by the Joint Committee.[92] The Committee does not favour entrenching a Bill of Rights, assuming it is legally possible to do so.

Since all the proposals for reform presuppose that Parliament will continue to be sovereign, it would seem that the principal way of addressing the main imbalance in our constitution has to be to increase the effectiveness of Parliament as a check on government. I have referred to Lord Adonis's statement in *Making Aristocracy Work* that "...since 1832 constitutional revision in Britain has almost exclusively been the work of governments anxious, first and foremost to broaden the basis of consent for the executive". He also said that ensuring "fair representation, guaranteeing minority rights, and bolstering checks against the executive – the fundamental purposes of a powerful second chamber – have always been secondary considerations."[93] The principle of collective responsibility no doubt precludes him now from regarding that as of any relevance to events since 1997; and to be solely an observation about our history. We should, however, consider the extent to which the reforms introduced since 1997 and those under discussion address the imbalance of power between the executive and the legislature.

First, let us consider the reforms concerning Parliament. The existence of a second chamber is part of the system of checks and balances in the constitution and the need for balance features in the report of the Royal Commission on the House of Lords in 2000, and the government White Papers in 2001 and 2007. [94] Although those reports address the balance between the powers of the two Houses, none questions the pre-eminence of the House of Commons. Their recommendations leave the power of delay much as it is. They are primarily concerned with whether members of the House of Lords should be appointed or elected. They seek to make the House of Lords a more appropriate secondary legislative chamber, complementing and counterbalancing but not threatening the House of Commons. Leaving aside the fact that progress is understandably slow, none of this represents a direct rebalancing of the position of the legislature and the executive. A house containing elected peers may be more inclined to exercise its delaying power. But, so long as the pre-eminent legislative chamber is effectively controlled by the executive, all that tinkering with the position of the House of Lords can do is to delay or embarrass the government on occasion. Any real checks and balances are likely to remain largely political and conventional, rather than legal.

The proposals about the prerogative power enter into treaties may reflect a desire to rebalance the constitution in favour of Parliament, and, in particular the House of Commons. But it is a modest rebalancing. The proposals require material to be put before Parliament but do not in themselves increase the opportunities for a debate or a vote. That is left to the existing processes in the two Houses. At present the conventional Ponsonby rules require treaties to be published and laid before Parliament before ratification. This very rarely leads to them being debated or to votes being taken. The 2008 White Paper and the Bill attached proposes that some legal effect should be given to a vote against ratification but not that a vote be required. In the case of such a vote by either House the government is required to lay a statement explaining why it considers the treaty should be ratified notwithstanding the vote and would

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[92] para 235

[93] p. 278.

[94] *A House for the Future* (2000); *Completing the Reform* Cm 5291 (2001); *House of Lords Reform* Cm 7027 (2007)

be prohibited from ratifying the treaty until it has done this. If it is the House of Commons that resolves that the treaty should not be ratified, ratification may not take place for 21 days or if, during that time, the House again resolves that the treaty should not be ratified. This process may be repeated "on more than one occasion"[95] which presumably means until the government gets its way or gives up.

So long as the House of Commons is as a general rule controlled by the executive, the proposals about the prerogatives to ratify treaties and to wage war, while possibly clarifying the position by reducing convention to writing, in one case by legislation and in the other a resolution of the House, cannot be seen as significantly increasing its power to control government. It may well be that the new arrangements for public bill committees will in the future prove more effective in re-balancing power between the executive and the legislature, but those have not been presented as part of the government's constitutional renewal programme.

What of devolution? Devolution removes the power of the executive over devolved matters and can be seen as balancing by taking power away. The motivation for it was to strengthen democratic control and to make government more accountable to the people of Scotland, Wales and Northern Ireland, rather than to check and balance the power of the United Kingdom government over matters for which it is responsible, or to make the executive power of the UK government more accountable. In any event, England has not benefited from this form of balancing. No doubt discouraged by the lack of support for regional government in the North-East (in part no doubt because of fears about the cost, and because of the budgetary and target-fed control over English local authorities by central government), the English are left with unelected regional assemblies. They have some local councillors on them, but also many representatives of unelected bodies, and they are subject to the supervision of a UK minister with responsibility for the region.

What of the power of the courts? It is often said that one of the reasons for the development of judicial review of governmental action, first by the common law, and now pursuant to the HRA, was the increasing ineffectiveness of Parliament as a checking institution during the twentieth century and the increasing growth of governmental power. Although rarely expressly acknowledged, these were undoubtedly significant reasons for the widening scope of judicial review at common law.

What of the jurisdiction created by the Human Rights Act? Some of those who campaigned for the direct enforcement of the rights under the European Convention were undoubtedly motivated by the desire to protect fundamental rights against the impact of majoritarian populism on the executive. But for others it was to stop the UK being judged by the Strasbourg Court rather than in UK courts, and to enable our courts to influence the development of the Strasbourg jurisprudence. These were the stated motivations in the government's White Paper. The principal motivation was to make it easier for United Kingdom citizens to enforce rights which they already had but which they were obliged to enforce in Strasbourg after exhausting national remedies. The secondary one was to enable British judges "to make a distinctly British contribution to the development of human rights jurisprudence in Europe".[96] Although more was said during the Parliamentary passage of the Bill when Ministers went further,[97] the motives in the White Paper are of a more managerial nature, aiming to enhance efficiency and effectiveness, rather than about the need to balance the power of the executive.

Our courts have been criticised for using their powers under the HRA improperly, for example to create a right to privacy, or to create rights for undeserving criminals and would-be immigrants. An analysis of what they have in fact done, as opposed to what it has been said they have done, however, shows they have not in fact used their powers under the Act

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[95] Draft Bill, clause 22(6)

[96] *Bringing Rights Home,* 1.14

[97] Lord Williams *Hansard* HL, vol. 582 col. 1308 (3 November 1997); Lord Irvine LC *Hansard* HL, vol. 583 col. 374 (18 November 1997); Jack Straw MP *Hansard* HC, vol. 306 col 781 (16 February 1998).

inappropriately. Their general approach is to mirror the Strasbourg jurisprudence as it evolves but not to stretch our jurisprudence beyond it. This is consistent with the managerial considerations in the White Paper. However, it also shows an acute sense by the judges of the limits of their constitutional role. In Lord Bingham's words in *Ullah* as modified by Lord Brown in *Al Skeini*, the approach of the courts is "no less, but certainly no more" than Strasbourg.[98] While the approach does not preclude the courts from developing the common law, it has been applied with particular firmness by courts when they consider whether an Act of Parliament is compatible with the Convention rights.[99] Moreover, "no less" is not an invariable. The House of Lords has not followed a decision of the Strasbourg Court where it considered that the Strasbourg Court did not understand the legal position in this country and the reasons for that position.[100]

If one compares the contents of *Bringing Rights Home* and the stated approach of the courts since 1998 with some of the pronouncements of ministers after particular cases or about the HRA in general, we have to ask whether some of those who introduced it really understood what they were doing or have since understood the sensitivity of judges to their constitutional role under the HRA and the consequent limits on the courts.

IV. Conclusion

How to draw the threads together? What emerges from all this? First, and perhaps not surprisingly, the fundamental imbalance between the executive and the legislature in our constitution has not been addressed. Secondly, the process has produced a system, the hallmark of which is complexity rather than "transparency", let alone clarity.

Thirdly, more of our constitution is to be found in statutes and other official documents. However, the nature of the process, the attempt to preserve the flexibility of conventional constitutions within any new written format, and in particular the willingness to revisit decisions, means we cannot yet say that we have taken a firm step on the road to making our constitution primarily "legal" rather than primarily conventional.

Dicey contrasted the enduring character of our largely unwritten, and unentrenched, constitution with the entrenched but often short-lived constitutions of other countries. The number of changes since 1997 shows how inappropriate this comparison is today. But even in Dicey's day our constitution only appeared enduring because its fundamental rule, Parliamentary sovereignty, enabled all the other rules to be changed at the will of those in power. A constitution must be more than, in the telling phrase coined in 1768 by Thomas Hutchinson, then Lieutenant-Governor and Chief Justice of Massachusetts, "a mere rope of sand". [101] The model used in the HRA shows how weight can be given to fundamental rights and rules while retaining sovereignty and without entrenchment. But the willingness to revisit constitutional decisions so frequently leaves our constitution with the appearance of being such a "mere rope of sand". Unless a way is found to turn the reform process from a party political event to what the Joint Committee described as a truly constitutional event, there is a danger that this will continue to be the case.

Jack Beatson[*]

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[98] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at [20]; *R (Al Skeini) v Secretary of State for Defence* [2008] 1 AC 153, at [106]. See further the discussion in Beatson, Grosz, Hickman, and Singh, with Palmer *Human Rights: Judicial Protection in the UK* (2008) 1-79 – 1-99.

[99] *R (Countryside Alliance) v Attorney-General* [2007] 3 WLR 922 at [126]; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 2 WLR 781, at [37] and [44] – [46]

[100] E.g. *Doherty v Birmingham City Council* [2008] UKHL 57. So has the Court of Appeal: see *Horncastle* [2009] EWCA Crim. 964 (22 May 2009).

[101] See Mann, "Britain's Bill of Rights", the third Blackstone lecture, (1978) 94 LQR 512, at 533.

[*] A Justice of the High Court of England and Wales.

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