

The Constitution: Principles and Development

Research Paper 96/82

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'The Constitution' remains a significant political issue, likely to feature in the next general election campaign. This Research Paper examines the unique, 'unwritten' nature of the UK constitution within the 'Westminster model' of Parliamentary government, and arguments for change or development in the current system ('constitutional reform'). It does *not* cover specific constitutional issues, such as those - voting system, House of Lords, referendum - which are the subject of other Papers, or those - such as the royal prerogative or 'church and state' - which will be included in future Papers, as circumstances permit. This is a constantly developing issue at present, as demonstrated by the two-day Lords debate on 3-4 July 1996 and the debate surrounding the recent publication of Labour's 'draft manifesto'.

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Summary

"The constitution is what happens.... if it works, it's constitutional"¹

'Constitutional reform' embraces the idea that the United Kingdom constitution needs to change, usually in a substantial or comprehensive way. The most radical schemes envisage a written constitution with a Bill of Rights, dealing with most or all aspects of governmental power from the head of state and political executive to the legislative and judiciary. These changes usually involve devolution or federalism; enhanced local government and decentralisation; a new voting system; a revised second Chamber and so on. The views of the three main parties on constitutional reform are described, based on their policy papers and speeches.

As this Paper is not a textbook on British constitutional law or British government, it does not cover *all* issues one might expect to see in such sources. This Paper concentrates on the nature of, and the general principles underpinning, constitutions in general, and the UK constitution in particular. These include concepts such as the rule of law, separation of powers and the role of conventions, all aspects of the more general notions of constitutionalism and limited government. The written and unwritten nature of constitutions is explored, especially in the UK context by reference to proposed draft constitutions, as is the particular question of sovereignty, in its various legal and political meanings, especially in relation to Europe.

Complex political and practical issues of reform methodology, including the adoption of new constitutional arrangements by way of, for example, a Bill of Rights or a written constitution, and the legal issue of the entrenchment of such reforms, are also examined.

Particular aspects of the 'Bill of Rights' debate, in so far as not already examined in the preceding sections of this Paper, are also considered, including the usual 'pro' and 'con' arguments put forward in the last 20 years, as well as the relevance of the European Convention on Human Rights to the content of a UK Bill of Rights.

The final section is a select but extensive bibliography of constitutional issues dealt with in the text of this Paper.

¹ J.Griffith, 1963 *Public law* 402, editorial

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I The nature of Constitutions

This Paper considers two related topics - the nature of the constitution of the United Kingdom and the current debate over changes to current arrangements. The latter is generally described as the 'constitutional reform' debate. The constitution has become a prominent political issue in recent years, not only in relation to particular topics such as the voting system, devolution or the House of Lords, but within other major political issues such as Europe or law and order. The main Opposition parties have made the constitution a major theme of their policies, and the Conservatives have opposed these trends, using defence of the existing constitution as a significant political weapon.²

"What is a constitution for?" On a simple level, a constitution - whether one document or a collection of written documents, or 'unwritten' or 'uncodified' as in the UK - is the set of rules, legal and otherwise, which defines, describes and regulates the structure and operation of the state, its institutions, activities and officials. As such it is both the blueprint and rule book of the state. It will be the *fundamental* law of the state, "the law behind the law - the legal source of legitimate authority"³, and also the *higher* law of the state, superior to other laws.

Yet such definitions are not sufficient to describe the essential political and ideological nature of a constitution. Obvious examples of overtly ideological constitutions were those of communist states such as the USSR. But other written constitutions will also reflect to some degree, the political situation (in its widest sense) of a state and its government at the time of its creation. A constitution may describe the background to its making (eg a revolution, independence, union of states); the essence and purpose of the state and its constitution (eg religious or secular; democratic or otherwise; republican or otherwise), and such matters as its framers deem to be fundamental objectives or aspirations (such as the Republic of Ireland's references to the whole island of Ireland.)

Two common philosophical approaches assume that any constitution embodies either the primacy of the state or of 'the people'. It is often said that one strand of modern Western liberal democratic systems is a concern primarily for the rights of citizens as reflected in their constitutions. Thus a main aim of such a constitution is the protection of the citizen from the potential and actual power of the state, partly through systems of limiting and controlling necessary executive authority and jurisdiction through concepts such as the 'rule of law' and the 'separation of powers'. This type of approach - often defined as *constitutionalism* or *limited government* - has been described by Vile in the following terms: " The great theme

² as was seen in the Prime Minister's campaign in defence of the Union in the latter stages of the 1992 election

³ S A de Smith & R Brazier, *Constitutional and administrative law*, 7th ed., 1994, p.5

of the advocates of constitutionalism.... has been the frank acknowledgement of the role of government in society, linked with the determination to bring the government under control and to place limits on the exercise of its power".⁴

While (mainly English) common law has traditionally been concerned with private, individual rights and duties rather than collective action, the historical trend of British constitutional development has been 'democratisation' of state power that is, 'top-down' change, rather than 'bottom-up' change based on the 'sovereignty of the people'. British constitutional law reflects to some degree this dichotomy, and this can be seen, for example, in the relative novelty of human rights; jurisprudence in domestic UK law, or the current debate over a Bill of Rights.

Clearly no modern, stable, constitutional order can be based solely on either the rights of the citizen or the powers of government. Both issues are implicit in a modern constitution, though Loveland has described how a difference in fundamental emphasis can affect the nature of a constitution:⁵

The concepts obviously cannot be entirely separated. But the premise from which one begins analysis can have an appreciable impact on evaluation of the adequacy of constitutional arrangements in supposedly democratic societies. Different evaluations may be forthcoming if one's preliminary assumption is that the constitution is about what government may do in the light of the rights possessed by its citizens rather than about what rights citizens possess in the light of the powers wielded by their government.

II Constitutional Reform

A. The general issue: an outline

*"Reform! Reform! Aren't things bad enough already?"*⁶

The word 'reform' generally means not just a change, but a change *for the better*. However, like the term 'electoral reform', 'constitutional reform' has become a well-recognised and much used term adopted by those on both sides of the argument. Unless the contrary intention is made clear, the term should be taken in this Paper to mean simply 'deliberate constitutional change'. Constitutional reform has tended to signify in recent years not just *ad hoc* changes to particular areas of our existing 'constitution, but increasingly the idea of producing a

⁴ M J C Vile, *Constitutionalism and the separation of powers*, 1967, p1

⁵ I Loveland "Labour and the constitution: the 'Right' approach to reform?" (1992) 45 *Parliamentary Affairs* 173

⁶ Astbury J. (1860-1939), attributed

written document, or set of documents, dealing comprehensively with 'all' fundamental constitutional issues. This would bring the UK into line with virtually every other country, but there is no reason in principle why that, in itself, should be a sufficient reason for such a major change.⁷ However it is possible to argue that a number of the major constitutional changes proposed could or should only be made *as part of a comprehensive reform package* because of the interlinked nature of the UK constitution. For example, a radical reform of the House of Lords could have implications for the voting system, or for territorial government (devolution, federalism etc.)

Discussion of institutional reform of this nature becomes fashionable from time to time, as it did in the 1960s, generated by academics, the media, pressure groups, Parliamentarians, and others. It may often be prompted by perceptions of the exercise of governmental power, even from apparently opposite ends of the political spectrum, as with Labour governments of the 1970s and Conservative governments of the 1980s and 1990s. Political parties may well become interested in all or part of the constitutional reform package because such changes, as well as being perceived as 'in the public interest', may also be in that party's interest. Thus Liberal/Liberal Democrat enthusiasm for 'electoral reform' is, in part no doubt, due to the effects of the present electoral system on national 'third parties'; Labour's support for devolution is said to be in part a response to the electoral challenge of the nationalist parties in Scotland and Wales, and so on. Opposition parties, at any particular point in time, could be said to be potentially more receptive than governing parties to proposals to change the existing system.⁸

One particular difficulty in the debate and discussion of constitutional issues is that the constitution is both a political subject in its own right and a first-level foundation topic, in that it is one of those issues which underpins all others. This tends to produce the paradoxical situation that the constitution is a subject fundamental to all other political debate but often the object of interest by relatively few enthusiasts.⁹ These enthusiasts may see some or all constitutional reforms (such as changes to the voting system or devolution) as a necessary or, at least, desirable precondition to more specific social and economic reforms, whereas their opponents may regard constitutional debate as not only irrelevant but a time-consuming diversion from more concrete concerns.¹⁰ Worries have also been expressed in these terms about the perceived concentration on complex constitutional issues in the early years of any incoming Labour (or non-Conservative) Government there may be after the next election.¹¹ Perhaps to some extent also, constitutional reform of the more radical type is seen by its supporters (like entry into the EEC since the 1960s) as providing the catalyst for the very transformation in the condition of the UK they may desire or believe to be necessary.

⁷ Section III of this Paper deals with the issue of written and unwritten constitutions

⁸ see generally D Shell, "The British constitution in 1994-95" (1995) 48 *Parliamentary Affairs* 369

⁹ Perhaps Parliamentary procedure is a similar case

¹⁰ House of Lords reform in the late 1960s and devolution in the late 1970s are commonly cited examples

¹¹ See generally, A Barnett, policy coordinator of Charter 88, *The defining moment*, 1996: Constitution Unit, *Delivering constitutional reform*, 1996, and A Adonis, "Avoid big bang" *New Statesman and Society*, 3.5.96, 17

It can be seen therefore that there are a number of interlinked issues under the deceptively simple heading of 'constitutional reform', from desires for fundamental change in the political and socio-economic nature of UK society to more pragmatic or partisan desires to alter specific 'rules' of the political 'game' which may be disadvantageous to particular groups or parties. There will always also be a streak of 'objective fairness' criteria in some demands for reforms. 'Fairness' is a significant component, for example, of arguments for 'electoral reform' or 'more democratic' representation in both Houses of Parliament.¹²

Because the UK has no written constitution in the conventional sense the parameters of the constitutional argument are almost impossible to define. Areas of the political system, such as local government, are often described as 'constitutional' by their defenders when they are perceived to be under threat.¹³ On the other hand some issues - especially moral/ethical issues such as abolition of capital punishment or divorce - are not regarded as *per se* constitutional, where they may be so in states with written constitutions such as the USA or Ireland. The topical question of firearms control is a clear constitutional issue in the USA, as the 'right to bear arms' is protected by the Second Amendment. Over time the 'revolutionary' changes of one era may become the defended status quo of another in the partisan political debate.¹⁴ In relation to local government, for example, some would argue that it is woven into the constitutional fabric of the state, as it provides desirable, or necessary, democratic diversity in the governmental system, yet there is no consensus on the 'constitutionally correct' model of local government, in terms of its structures and functions, as events of the last 30-40 years vividly demonstrate. The balance of central-local relations is ever-changing, and policy-driven, as is the nature of the debate about the very purpose of local government - eg, service delivery *versus* localist representation - and all sides of the argument can find it difficult to pin the 'constitutional' tag acceptably on such a moving target.

Whatever the differing views on the desirability of constitutional change of whatever kind or degree, an important practical question is the methodology of change. This apparently 'nuts and bolts' matter is part of the reform question itself. *How* to change/reform is as important, as a matter of practical politics, as *why* or *what* to change/reform. Proponents of a radical solution of comprehensive reform, through an all-embracing written constitution, perhaps have less difficulty with this in some ways than the supporters of piecemeal or rolling reforms. The major parties have varying agendas on the constitution, and the mechanics of their proposals reflect their views on constitutional change itself.

¹² on which see Background Paper 299, 7.9.92, *Voting systems*; Background Paper 297, 7.9.92, *The Other Place: second chambers and the House of Lords*, and Research Paper 95/95, 6.9.95, *The West Lothian Question*

¹³ This is considered further in Section III of this Paper. Recently the Senior Salaries Review Body, in its review of Parliamentary pay and allowances, has regarded any major changes to Peers' allowances as perhaps requiring "constitutional change", Cm 3330-I, July 1996, para 134

¹⁴ The public ownership vs. privatisation debate and the role and extend of the 'welfare state' are examples of this

Some reformers seek a middle way between a 'big bang' solution and *ad hoc* reform which might be seen by others as mere tinkering. It is possible to envisage a rolling programme of constitutional change within a broad reformist framework, which could, over a period of time, achieve virtually the same ultimate result as a 'revolutionary' written constitution solution. It could be argued that the current Labour policy is similar to this approach, whereas the Conservative view is one of change only where necessary or desirable. Others, such as Professor Brazier, have tended to concentrate on achievable constitutional changes and have therefore focused their thoughts as much on the *process* as on the content of reform: "I part company with several other writers in that I propose changes which might stand a fair chance of being implemented in foreseeable political circumstances. Many people have suggested radical nostrums... without addressing the question of how those ideas would become reality. Some writers seem convinced that the truths which they describe are self-evident, and thus take it as inevitable that those truths will be recognised and translated into constitutional rules and practices".¹⁵

It is a matter of personal judgment how far these various methodological approaches (with the exception of the 'big bang' policy) may ultimately produce similar outcomes in terms of actual constitutional change by legislative or administrative means in the political system of the UK. It should also be borne in mind that some general political debates and disputes may tend to be conducted, to a greater or lesser degree, in constitutional language.¹⁶ Phrases such as 'rule of law' or 'human rights' are often used in, say, the industrial relations or law and order context. Major issues, such as the UK's relationship with the EU, not only exhibit this, where constitutional concepts such as 'sovereignty' are used as ammunition in the political battle, but they can actually increase political and popular awareness of the fundamentals of the system so often taken for granted and relatively rarely openly considered or discussed.

B. Party views

1. Labour View¹⁷

The Labour Party view on the constitution appears to differ from that of the other two main parties. Broadly speaking, the Conservatives support existing constitutional arrangements, with pragmatic, 'rolling' changes as necessary, and the Liberal Democrats believe ultimately in a comprehensive reform scheme including a written constitution. By contrast the Labour Party currently supports a package of individual changes to significant areas of the current constitution within a broad theme of reform but stopping short of a written constitution.

¹⁵ *Constitutional reform*, 1991, pv. See generally Constitution Unit, *Delivering constitutional reform*, 1996

¹⁶ This can be seen in many public sector initiatives, such as the Citizen's Charter or on Open Government

¹⁷ This description is based on the party document, *A new agenda for democracy* 1993, and Tony Blair's 1996 John Smith memorial lecture. See also J Straw, Charter 88 lecture on rights and responsibilities, 26.6.96, and the 'draft manifesto' *New Labour, new life for Britain*, July 1996

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In *A new agenda for democracy: Labour's proposals for constitutional reform*, the aim of the changes was as follows:

The result is a constitution urgently in need of radical change and modernisation. We set out here the basis of a new constitutional settlement, a modern notion of citizenship that establishes new rules to govern the bargain between the individual and society. We recognise the importance of the community acting collectively, but to advance individual freedom, not at the expense of it. Our aim is to create a revitalised democracy which protects the fundamental rights of the citizen from the abuse of power, which proposes the substantial devolution of central government authority, and which insists that the legitimacy of government rests on it being both open and accountable to the people it serves.

and [p.26]:

The result is that our democracy is profoundly flawed. If democracy is about content as well as form, the form of our constitution is imperfect and the content of our democracy even more seriously at fault. The case for change is clear.

It is also right that the Labour Party takes a leading role in making the case for change. The central belief of the Labour Party is that people do not live as isolated units but individuals within a society or community. Individual freedom to develop and prosper is held back by the absence of opportunity, particularly at work and in education - by the presence of powerful interests. The task of the Labour Party is to use the power of the community acting together to advance and liberate the individual.

The purpose of such action is not to give power to government but to give power to people. And it should not be merely through traditional forms of central government intervention that people are empowered. Government itself is a powerful interest that requires to be checked and controlled.

and [pp26-27]:

Precisely because we believe in using the power of the community, through government and in other ways, it is vital that we address the issue of its accountability. In particular, we should be seeking to re-shape the way government works. It is impossible to modernise Britain without modernising government.

We seek, therefore to retrieve the true ideological basis of democratic socialism - action by the community for the benefit of the individual - and set it to work for the modern age.

This requires, in turn, a new constitutional settlement for our country, one which establishes a just relationship between society and individual, one which above all, fundamentally redresses power in favour of the citizen from the state.

This new settlement should be effected in two ways: first it must grant individuals the rights needed to challenge arbitrary decisions and exercises of power that affect them, to guarantee equality of treatment without discrimination and the practical ability under the law to make these rights real. This is correct in itself but it also promotes much greater participation by people in the development of the country's democracy. The fairness of our society comes to be judged by the priority it gives to individual rights; and it encourages a more active idea of citizenship where rights are not simply a list of demands, but are accompanied by responsibilities as part of a contract between citizen and society.

Secondly, it should be based on the diversity of political institutions, each with their independence guaranteed, not on the belief that the government, once elected, should control - directly or indirectly - all other dependent political institutions. This means that the constitution should be subject to the necessary checks and balances, in order to hold the

executive to proper account and to reflect the more pluralist, more decentralised, more devolved government which the people of our country want to see. The idea of a highly-centralised, paternalistic state handing out improvements to a dependent public belongs to a different age. We live in a society today whose culture, lifestyle and aspirations are much more diverse and varied than they ever have been. This must find an echo in our system of government.

The report stated that "we put forward this programme of reform - which we believe is the most fundamental proposed by a major British political party - not simply as an itemised list of policies, but as part of a much bigger framework of ideas that define Labour's vision of the UK's future. Constitutional reform - alongside economic and social change - is one part of a different political agenda for our country. [p.27]

The package of reforms was summarised as follows: [p.27]

- support for a UK Bill of Rights;
 - incorporation of the European Convention on Human Rights into UK law, with a provision that other laws are to be interpreted consistently with the Convention unless expressly provided;
 - because it is recognised the convention is inadequate and outdated, we propose an all party commission be appointed to draft our own Bill of Rights and consider a more permanent form of entrenchment;
 - a strengthening and modernising of anti-discrimination law to provide equal treatment of every citizen;
 - employee and trade union rights;
 - a Freedom of Information Act;
 - reform of the Official Secrets legislation and proper scrutiny of the security services... reform of the Royal Prerogative, with ratification by Parliament of both treaties and the declaration of war,
 - a strengthened Data Protection Act,
 - a recasting of the relationship between central and local government, with the Scottish Parliament, Welsh Assembly and regional councils in England replacing other tiers of administration, and the removal of capping restraints balanced by greater electoral accountability;
 - reform of electoral law;
 - reform of Parliament including the creation of an elected Second Chamber;
 - reform of the judiciary and in particular a new system for the appointment of judges.
- We do not claim this to be the final word on constitutional change. But it is a considerable start.

In his John Smith Memorial Lecture on 7 February 1996, Tony Blair set out the background to his analysis:¹⁸

There are three essential questions in any debate about Britain's constitution:

¹⁸ transcript p.2

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1. Are we satisfied with the way we are governed?
2. If not, do we agree that the root of the problem is over-centralised government and an undeveloped citizenship?
3. If it is, how do we best devolve power and develop citizenship?

He attacked the Conservative attitude of 'no change', setting out his own view of the need for change, especially in the context of his stakeholding ideas: [p.5]

I cannot believe we are so lacking in courage or are so complacent that we cannot rise to the challenge of renewing our democracy. Of course there are crucial points of implementation that can be returned to, in detail, at the appropriate time before the election. But let us first agree the terms of this debate: change or no change. And let those who form the latter camp, opposing all change, justify their position as a matter of principle and not avoid it by skirmishing in the thicket of detail.

It follows from this that I do not regard changing the way we are governed as an afterthought, a detailed fragment of our programme. I regard it as an essential part of new Britain of us becoming a young, confident country again.

The vision is this:

- an economy in which we are enhancing opportunity for people in a new global market of massive economic and technological change,
- society that is one nation, in which all are included,
- a politics in which we are giving power back to the people.

A stake in the economy, a stake in society, a stake in the political system.

Having considered his party's detailed proposals, he concluded: [p.14]

The reforms I have set out will transform our politics. They will redraw the boundaries between what is done in the name of the people and the people themselves. They will create a new relationship between government and the people based on trust, freedom, choice and responsibility. There is nothing about them that is necessarily party political yet they are deeply political reforms because they are concerned with the essence of our democracy and how people can exercise power in our system.

This is a programme for Government. We do not propose, as some suggest, a Great Reform Bill which would attempt all this change at once. The ambition and the extent of the programme I have set out will not be achieved in one Bill but over a period of time.

and [p.15]

The Tories oppose all measures to give people a real stake in our democracy. They want to keep power for the few not the many - for the centre, for the unelected and for hereditary peers.

New Labour wants to give power to the people. To be a government working in partnership with the people, which gives them freedom, choice and responsibility and where the country is more united, more open and more confident about the future than it has been in decades.

That is the choice and this is the future we want to build in the name of John Smith.

I conclude with the words of Thomas Jefferson.

"Men, by their constitutions are naturally divided into two parties. (1) Those who fear and distrust the people, and wish to draw all powers from them into the hands of the higher classes. (2) Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe depository of the public interests. In every country these two parties exist, and in every one where they are free to think, speak and write, they will declare themselves."

2. Liberal Democrat View¹⁹

A useful description of Liberal Democrat policy is contained in the summary to *Here we stand: Liberal Democrat policies for modernising Britain's democracy*²⁰ [pp 3-4]:

The Liberal Democrats are the conscience of Britain's democracy. Alone of the parties, we place the modernisation of Britain's antiquated and ineffective constitution at the head of our priorities. It is central to our philosophy. Without a radical assault on the country's elective dictatorship and the patronising, domineering state it sustains, Britain's political debate will continue to be puerile, its civil liberties threatened, and its economic and social well-being diminished.

Here We Stand sets out a comprehensive package of reforms to revitalise Britain's flagging democracy. Our programme for constitutional change reexamines the whole relationship between the state and its citizens, investing power in the hands of the individuals, communities, regions and nations of the UK. Proportional representation is only one element in the creation of a modern democracy.

We propose to underpin our reforms with a written constitution, codifying and guaranteeing the new political settlement, and making it accessible to all as never before. Under the constitution, the rights of individuals would be spelt out and safeguarded; power would be shifted away from Westminster and Whitehall, to the UK's regions and nations; quangos and public bodies would be opened up to public scrutiny and held to account for their actions; and a fair electoral system would be introduced. We would:

- Entrench a new Bill of Rights within our written constitution, upheld by a Supreme Court.
- Make freedom of information, rather than secrecy, the norm in the UK.
- Establish home rule for Scotland and Wales, and regional parliaments throughout England.

¹⁹ summarised in *Policy Briefings: Autumn 95; Activists' Guide: A Guide to Policy 1995/96*, p.5 and *Pocket Guide to Reform of Government 1996*

²⁰ Federal White Paper 6, 1993; it was based on *We, the people ... towards a written constitution*, green paper 13, 1990

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- Remodel the House of Lords as a democratic second chamber, representing the interests of Britain's regions and nations.
- Uphold the principle of subsidiarity within a democratic European Community to strengthen - not usurp - the integrity of the UK's nations and regions.
- Make moderate state funding available to political parties conditional upon the publication of full accounts specifying the sources of all large donations.
- Introduce proportional representation for all elections.

We believe that the Single Transferable Vote system of proportional representation best meets our objectives of proportionality, retention of constituencies, election of more women MPs and MPs from the ethnic minorities, and avoidance of wasted votes. By contrast, the Supplementary Vote system, promoted by Labour's Plant Committee, is barely more proportional than 'first past the post' and meets few of these criteria. It is therefore totally unacceptable to Liberal Democrats.

A central theme of *Here We Stand* is the need to open up Britain's elitist and secretive political processes, forcing politicians to listen to others and giving the public the right to be heard on issues of policy. To this end, we include novel proposals to:

- Allow non-parliamentarians to become government ministers; and
- Provide for 'Citizens' Initiatives', at local, regional and national level, when called for by a petition of at least 1.5 percent of the relevant electorate; 650,000 people in the case of the UK as a whole.

While others toy with one or two of these reforms, we alone present a coherent package to renovate our democracy. After centuries of piecemeal tinkering, it is time Britain tackled the root problem of its outmoded political institutions. Only by changing not just the things we do, but also the way in which we do them, will we set the framework for Britain's future success and prosperity.

Only the Liberal Democrats are dedicated to the task.

The paper claimed that "Liberal Democrats have been to the fore in campaigning for reforms to address the root causes of Britain's constitutional malaise... [W]e call for the recognition of popular sovereignty in a new constitutional settlement based on a written constitution and a programme of radical reform at all levels of government. Our vision of a modernised, rights-based and decentralised constitution has become the fault-line of British politics" [p.5]. It admitted that "of course, no constitution can of itself solve the problems we confront as a community... But it remains our firm belief that a new political settlement would unleash new energies, breed a new self-confidence, and reduce the pervasive and debilitating feeling of discontent that is gripping the country... Our proposals to modernise the constitution address that fundamental sense of discontent and alienation. They do so in a pragmatic, practical fashion" [p.6].

It attacked the arguments of the defenders of the present constitution, claiming that it has failed, and that "invocations of the 'adaptable' constitution and its susceptibility to 'rolling' change are generally self-serving platitudes, cynically designed to bolster the case against reform of any kind".²¹ It claimed that "Liberal Democrats are not cavalier with our constitutional heritage. But unlike the Conservatives and Labour we believe in the British tradition of progressive reform, to keep our political system responsive to contemporary demands" [p.8]. The "mechanical reassertion of the 'Sovereignty of Parliament' remains the stock-in-trade of most politicians. Yet this concept is ever more outdated and irrelevant" and the 'rule of law' concept was primarily concerned with the supremacy of the legal order, whereas it is the *nature* of that order, and its protection for individual and group rights, which was most relevant. "For Liberal Democrats constitutional reform and a written constitution are neither breaches of British tradition nor ends in themselves. Rather, they represent a revival of the British tradition of institutional flexibility which long made the United Kingdom the envy of other would-be democracies... The destruction of Britain's elective dictatorship is our over-riding objective. Only by doing so can we hope to empower individual citizens, protect their rights and enhance the effectiveness of government" [pp 8-9].

The paper set out the case for "the enactment of a codified, entrenched constitution" [p.9]

Of course, no written constitution can guarantee good government or civil liberties: these depend, above all else, upon the traditions, education and habits of mind of governors and governed alike. But written constitutions can play a crucial role in forming such habits and traditions. More than that, they can help provide stability, coherence and certainty to the political process, not least because they can usually - and quite properly - be altered only by a special procedure requiring evidence of broad popular consent.

1.3.2 By contrast, the British 'unwritten' constitution,.... is fragmented, incomprehensible to most people and often incoherent. It fails entirely to define and promote the positive rights of the citizen; instead, it rests upon a negative description of what is forbidden.

1.3.3 Britain would benefit significantly from a written constitution. For the first time, British citizens would be able to discover the essentials of their government, and their basic rights, from a single document. The role and powers of that government, and the nature of those civil rights, would for the first time be defined in law and effectively secured from arbitrary attack by a bare majority in the House of Commons. For these purposes the constitution should be as succinct and comprehensive as possible.

3. Conservative View

As the main focus of opposition to the reformist views of groups such as Charter 88 and the major Opposition parties, the Conservative approach to the constitutional question deserves to be examined in some detail. It is traditionally based on respect and support for existing institutions, a philosophy that would not easily be comfortable with the radical, comprehensive approach required by a new written constitutional settlement. On the other

²¹ p.7, citing the 1992-93 'Taking Stock' exercise on Scottish government, as an example

hand there is a strong Conservative belief in constitutionalism; support for limited government and the rule of law, and the individual over the state. These attitudes could, in principle, accommodate constitutional enactment of, for example, a Bill of Rights or even a written constitution, but perhaps one which substantially codifies existing philosophies and arrangements rather than one which is the vehicle for radical innovation. Lord Hailsham's views have been influential in this respect. In *On the Constitution* (1992) he stated: "With a small 'c' this is a conservative book. That is to say I believe in change which is cautious, continuous, evolutionary and carefully thought out, but in its consequences radical ... based on the conviction that, over the centuries, the British Constitution has proved one of the most successful political structures ever devised by the wit of man".²² As Nevil Johnson has noted, "it has been a persistent theme in British Conservative thought that political institutions should not be constructed on abstract principles. Indeed, more than that, it has frequently been asserted that they cannot be so constructed and that any attempt to do so is foredoomed to failure".²³

An influential Conservative writer in this vein in recent years has been John Patten. He has quoted with approval Lord Falkland's dictum, 'when it is not necessary to change, it is necessary not to change': "We British have a knack of trying to fix that which is not broken... Sensible grown-up and relaxed countries like the UK in the 1990s ... do not need constitutional demolition-gangs to move in with their new, written edifices."²⁴ His statement of the Conservative approach was as follows [pp 15-6]:

The leave-our-constitution-alone majority is normally patronised, and characterised by written constitution-mongers as 'unthinking', 'complacent' or 'uninterested'. They are none of these things. Sensible people view the constitution as akin to a well-built house of character. They view demands that it be torn down and replaced by some modern, pretentious edifice, the design for which exists only on paper, as unappealing. However, to defend our constitutional structure is not the same as saying 'leave well alone'. A solid structure only remains such by continual attention to its mortar. Even the best of houses will need occasional repair, and perhaps even structural modification.

and [p.19]:

Conservatives take the constitution seriously. To be complacent about it is to render it vulnerable to attack and possible replacement. The Conservative approach to the constitution is one of conservation through change, or what I have termed rolling constitutional change. It is an approach that results in change which is necessary but not always dramatic... This approach is one which I believe goes with the grain of the British people. Radical reforms have been rejected time and again at general elections... The national psyche seems rather ruminative about constitutional matters and is essentially indistinguishable from the Conservative approach of reflecting on matters as they stand and making changes when they are necessary: that is what characterises rolling constitutional change.

²² 19XX p.1. See also his concluding chapter, "Final thoughts"

²³ "Constitutional reform: some dilemmas for a Conservative philosophy", chap 6 of Z Layton-Henry (ed), *Conservative Party Politics*, 1980

²⁴ "Rolling constitutional change", in J Patten and F Vibert, *Modernising British Government*, 1993

Unlike radical reformers, "the Conservative approach derives its strength from observation, from drawing on the experience of past generations and on a recognition that it is best to proceed on the basis of what presently exists. What exists may not be the ideal, but it is the real world" [p.20]. He believed that radical reform as currently proposed was not thought through, because the reformers "have misunderstood the environment in which they seek to develop it... The problem with the constitution-mongering attitude ... is that most of those who adopt this approach, with a few honourable exceptions, have simply forgotten what a constitution is... [p.22]. Existing checks and balances, especially through Parliament, already constrain the Government: "These essentially complex and reinforcing constraints seem more preferable to the British people than an all-embracing document" subject to non-democratic judicial or constitutional review. He conceded that Conservative experience of 'big bang' reform -as with the NHS and local government in the early 1970s - were not always successful, but a rolling approach will by the turn of the century ... have steadily introduced a new constitutional settlement affecting the people of this country.... The Citizen's Charter offers, in effect, rolling constitutional change. The effect is a ratchet one. Once a new individual form of individual constitutional empowerment is introduced, it cannot be reversed" [p.28].

He believed that the constitutional debate presently taking place is not of 'necessary change' *versus* 'no change'. It is a debate between a collectivist philosophy and a Conservative philosophy, and in his view "the collectivist philosophy dictates grand schemes of reform to be imposed from above... The Conservative philosophy dictates a very different approach, one of balance... The state, therefore, becomes a servant of the citizen, to provide the legal framework within which the citizen can operate as a free individual, not the reverse". He concluded [p.30]:

It is this approach, with the emphasis on the citizen as a free and responsible individual within his or her community that dictates the Conservative approach to the constitution. The Conservative approach to constitutional change is thus one of step by step modification, learning from experience and building on strength while tackling emerging weaknesses. The result is not inaction, but clear, targeted action. The result is the success of specific measures geared to particular needs. The result over time is a significant shift in the relationship between the citizen and the state in favour of the citizen. What our opponents seem to want, but will never achieve, is precisely the opposite.

Professor Minogue has also attacked what he has described as 'the constitutional mania': "A permanent feature of British political life is some conviction about the global cause of all our woes... Since the 1980s ... opinion has settled on the British constitution, or, as some would say, the lack of one, as the primal fault".²⁵ He diagnosed this as a symptom of low national self-esteem as the desire to imitate other nations, because the UK is isolated in having its peculiar constitutional arrangements. "Human beings are much given to seeking salvation, and constitutionalism is one current version of salvation seeking... We are all, in the ordinary

²⁵ K Minogue, *The constitutional mania*, CPS study no 134, 1993, p.5

business of life, fallible creatures, but those who seek to reconstitute us must themselves display the virtues they claim for their scheme. Otherwise constitutional reform will merely be one more futile attempt to escape what we have already done to ourselves by earlier rationalist adventures: cheapening politics by overextending its range" [p.35].

Professor Norton's 1992 Swinton lecture described his view of the 'Conservative way forward'.²⁶ He argued that reformers had "no clear grasp of what makes a constitution, no clear conception of what shape the constitution should take, and no understanding of the nature of the real constitutional issues that this country needs to be, and is, addressing today. Consequently, their advocacy of constitutional reform is not so much irrelevant as dangerous, distracting us from the real ... the vital ... issues that need addressing". He claimed that "Conservatives, in contrast, have a very clear grasp of the nature and shape ... in real and normative terms ... of the constitution"; successive Conservative governments have been "a dynamic force in constitutional change" and "the present Government has a far better grasp of what needs to be done than reformers who seem determined to keep away from the muddy waters of real politics". The reformers' approach was "fundamentally flawed", being "essentially escapist" by seeking simple solutions [p.6]. It was also "a misunderstanding of the very nature of what a constitution is" because a constitution is not only state structures, relationships and legal rules; "a 'real', as opposed to a 'paper', constitution embodies values and attitudes that are embedded in the minds and instincts of the governors and governed" [p.7]:

It is the embodiment of values that is crucial. Values dictate relationships and behaviour. Advocates of a new constitution claim the existing one permits executive domination through the doctrine of parliamentary sovereignty: that is, that the courts cannot strike down measures passed by Parliament. So long as a government enjoys a parliamentary majority, it can basically obtain legislative sanction for whatever it wants. Yet government in this country is constrained. It is constrained by a number of checks and balances, checks and balances that - I will argue - are now more extensive than they were at the time of Dicey's great work in the nineteenth century; and checks and balances that are not confined to bodies that enjoy political muscle.

According to Norton, the reformers' emphasis on the formal nature of constitutions leads them to draw on foreign experience, especially Europe and the USA, citing Mount's *The British constitution now* as an example of support for American constitutional principles, and of accepting constitutions at face value [p.8]:

There is far more to constitutions than the wording of formal documents. One has to go beyond the documents to explore the inherent value system as well as the interpretation of those documents in order to grasp the essence of the constitution. When you do so, you find the British constitution is far more durable and complex, providing greater constraints on government, than Mount and other reformers realise.

²⁶ P Norton, *The constitution: the Conservative way forward*, CPC, 1992

Reformers do not offer a clear vision of the shape of a new constitution, only "disparate building blocks ... all drawn together in a written constitution... We are told the ingredients but not what the end product will look like... [R]eformers take issue with particular parts of the existing constitutional arrangements and then offer particular prescriptions. The starting point is not a clearly delineated normative framework. Little attempt is made to think through how the various changes proposed will actually relate to one another".

This analysis was the "negative case for retaining present arrangements. In other words, the case for change is not made". There was also a positive case for retention of the existing arrangements, based on the notion that "political authority rests on the twin pillars of effectiveness and consent" and the "essential balance" to be maintained between them [p.10]:

Parliament is the central agent in maintaining this balance. It is a delicate role: if it pushes too far, it risks jeopardising effectiveness. If it doesn't push far enough, it risks jeopardising consent.

The role of Parliament is thus crucial. It is a role recognised and accommodated by the Westminster model of government. This model is at the heart of the constitution. It evolved from the experience of government in the period from 1867 to 1914 and combines essentially constitutional precepts and institutions with a recognition of prevailing political realities. It combines Tory and Whig theory: the Tory emphasis on strong government and the Whig imperative of a strong Parliament, and of government operating within the limits set by Parliament. Party is the central agent in the relationship, party itself providing the essential means through which government may govern and the party *system* providing the mechanism for critical scrutiny of whatever the government proposes.

In essence, it is an executive-centred model, but positing an executive that is both responsible and restrained. The electoral system facilitates - though does not guarantee - the return of a single party to government. That government, through party, is then able to deliver a coherent programme of public policy. The specifics of that programme are subject to parliamentary scrutiny and approval, the government remaining responsive to electors through Parliament and ultimately responsible to them at the next general election.

Norton argued, indeed, that the Westminster model is increasingly suited to modern conditions. "My argument is that conditions have never fitted the model precisely but that the potential to do so is greater than before. In other words we are not moving away from the Westminster model but rather moving towards it". In particular, [p.11]:

The balance inherent in the Westminster model - that between the executive and the legislature - has tended to be skewed in the twentieth century in favour of the executive. However, conditions over the past twenty years have shifted the balance somewhat in favour of Parliament - not greatly, but to an extent that suggests the potential of Parliament to act as an effective scrutineer and a body capable of setting the broad limits within which government may operate. MPs are not as irrelevant as critics claim. If they were, we would have now a completely different governmental structure in the United Kingdom, we would still have the poll tax, we would have Sunday trading in England and Wales, and Mrs Thatcher would still be Party Leader. Whatever one's opinion on the issues, the examples point to the *potential*

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of Parliament. Parliament may not yet be quite as strong as the Westminster model may posit, but that is not an argument for introducing a new bill of rights: it is an argument for strengthening Parliament. That, on the evidence available, is both desirable and achievable.

Summing up, Norton emphasised that opposition to Charter 88-style constitutional reform is not the *status quo*: "Conservatives view society as evolutionary ... not static. Where there is a proven need for change, then change there must be: but change in order to strengthen, not to destroy. It follows therefore that our approach to the constitution must be one of vigilance, not complacency. That vigilance entails looking at existing institutions in relation to the tasks we expect them to fulfil. The Westminster model provides a guiding framework" [p.13]. He denied the reformers' argument that European involvement requires constitutional reform, as the UK is presently the 'odd one out' without a written constitution: "That is nonsense. There is no 'rest of Europe' to follow. There is no common pattern".²⁷ Concluding, he claimed that "far from being complacent, sitting apart from constitutional debate, the Conservative party is able to offer a track record of tangible changes and a lead in the very real debate about the future of Europe. It is not the Conservative Party that is sidelined in debate. It is Charter 88" [p.15].

The latest detailed expression of the Conservative position came in the speech by the Prime Minister to the Centre for Policy Studies on 26 June 1996.²⁸ Mr Major said that the constitutional debate was "about the very nature of our nation. About the United Kingdom, and the constitutional fabric that underpin our freedoms and make us what we are." He described the British constitution as "complex and, in many ways, intangible," but: [p.1]

Well I don't claim to be a constitutional expert. But I am a politician and a citizen, and it is from that practical experience that I want to address the issues. Because the constitution is not, to me, simply a matter of institutions - Parliament, the Crown, our legal system. At its heart I believe it's about individuals and individual freedom, How we influence and control the kind of nation we live in. The Constitution is shorthand for our rights and our democracy.

He warned of the dangers to the fabric of the constitution of the wrong sort of change: [p.2]

We are fortunate. The British constitution is vibrant and robust. But it is not indestructible. People must realise that our Constitution is not a piece of architecture that one can re-engineer by knocking down a wall here or adding an extension there. It's a living, breathing Constitution. Its roots are ancient, but it has evolved. And it has been stable, because it has popular support.....

²⁷ p.11. He cited as an example article 120 of the Dutch constitution, which states that the courts cannot review the constitutionality of statutes.

²⁸ Conservative Party PN 374/96, 26.6.96. See also the speeches by the Party Chairman, Dr Brian Mawhinney on 7 February 1996, Conservative Party PN 77/96, and by the Lord Chancellor, Lord Mackay of Clashfern, to the Citizenship Foundation on 8 July 1996, and see D Hurd, *Conservatism in the 1990s*, CPC, 1991

So our constitution isn't just dry institutions and legalistic relationships. It embodies a set of values, a legacy of understandings, that have developed year by year over the centuries - an understanding that is breathed in Parliament, reflected every day in the media, taken for granted in the saloon bar arguments about the state of the Nation.

He said that "a living constitution changes with the times. Look at the history of this century and the changes there have been... Not change for change's sake. Not the result of some technocratic plan. Not to serve the interests of the institutions themselves. There have been changes to strengthen the links with the individual citizen who they are there to serve. That's the kind of constitutional change that I support. Practical change, not grand plans. And above all, change that is driven by what people want. Conservatives believe in giving the citizen the reins wherever possible" [p.3].

He denied that the Government had centralised power, except when it was necessary. Freedoms, especially of the individual, were central to his philosophy, and were preserved by vigorous policies. .."In Britain it is our Parliament... that is, and should be, at the centre of that democratic, political process. That's why piecemeal reforms that threaten to erode the power and supremacy of Parliament are so dangerous". For these reasons he also opposed a Bill of Rights: "I simply don't believe that you could enshrine in a single piece of legislation the British conception of freedom.... And we have no need for a bill of rights because we have freedom. Any attempt to define our freedoms by statute would diminish Parliament's historic role as the defender of individual freedoms. Judges would become the guardians of a written constitution or bill of rights, and the supremacy of the elected representatives of the people in Parliament would - for the first time since the 17th Century - be eroded" [p.6]. Major political issues, such as Sunday trading or abortion, "should be decided by elected representatives, not judges and courts".

This relationship between the judiciary and Parliament was based "not on any formal separation of powers, but on a silent boundary: a boundary of mutual restraint. No-one has the power to make final pronouncements about that boundary. But collectively, as part of our living constitution, I believe we all know, understand and respect where that boundary lies". However he did not accept that judicial review had put that boundary under pressure, as some claim, by putting the Government in conflict with the courts. Judicial review was "a function of the increasing complexity of administration, and the legislation which governs it" and it was "clearly right" that the executive power was exercised properly, using the correct procedures. "This is merely an example of our constitution working. But, by the same token, it is of course ultimately up to Parliament to decide the laws on which judges and courts make their judgements. In our constitution, Parliament is supreme, because the people are supreme. Parliament is the process through which the representatives of the people control the Executive" [p.7].

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The Prime Minister described Parliament as "where things happen. It is the voice of the people of Britain.... it is the focus of the nations' unity at times of national grief or outrage. And it is the theatre for the great convulsions of political history," and warned that "no-one should lightly contemplate tampering with an institution that is so ancient and yet so alive" [p.8]. Yet it was capable of improvement, such as that of the past 17 years. He wanted to carry on the process, by reforming the Parliamentary calendar and the legislative process. That "is the sort of constitutional change I favour: it identifies a problem, and comes up with a practical solution which could help. It is not change for change's sake" [p.10]. Within this framework, he went on to criticise proposals for federal European 'superstate' and radical plans to reform the House of Lords and to introduce proportional representation, and, more widely, to the devolution proposals which would threaten the Union.

On the last issue he denied that there could be a fair comparison between his Government's proposals for an Assembly in Northern Ireland and the other parties' proposals for a Scottish Parliament or Welsh Assembly. For example, the Northern Ireland parties did not compete to form the government of the UK, and the Northern Ireland Assembly would not have tax-raising powers. These differences "explain why a solution tailored to the special circumstances of Northern Ireland would not threaten the stability of the United Kingdom" [p.13]. By contrast he attacked the Opposition plans for devolution, especially on West Lothian Question grounds;²⁹ and in relation to proposals for a tax-levying Scottish Parliament, as well as the Labour plan for pre-legislative referendums in Scotland and Wales.³⁰

Mr Major announced a concerted Ministerial campaign on all aspects of the constitution: "This will be the most thorough debate on the constitution for a generation". He concluded his speech by emphasising the Conservative approach of supporting "practical change that would solve real problems or improve the way our constitution works.... I don't make any apology for defending what works. I'm a Conservative and I reject change for change's sake... Our constitution is the lifeblood of the United Kingdom. It upholds our freedom. It binds Parliament and the Government to the Citizen. It provides the checks and balances that prevent abuse of power. It cements the Union together [p.19].

In his peroration he said he would "defend our tradition, our heritage and guard against any needless change which threatens the institutions that make us one nation. It is that which makes me a Conservative and Unionist. To conserve what is best. To change what is needed. And to make one nation a stronger nation."

²⁹ on which see Research Paper 95/95, Sept. 1995

³⁰ Announced by the Shadow Scottish and Welsh Secretaries on 27 June 1996

III Constitutions Written vs Unwritten

As the United Kingdom is one of the few countries in the world without a written constitution in the sense of a document (or set of related documents), it has been argued from time to time that in reality the UK does not have a constitution at all in any meaningful sense.³¹ The more conventional British view is that our 'constitution' exists not in one document, but in a number of sources such as statute, common law and convention. In this sense it could be more accurately said that the British constitution is not unwritten but 'uncodified', in that many 'constitutional' provisions are indeed in writing.³² This view may often go on to assert that, as all countries have a 'constitution' in a wider sense, the form and location of constitutional rules are not so important as the content of those rules, and, in any case, no written constitution can contain every constitutional rule.

However the existence or absence of a written constitution, in the narrower sense, can have a number of significant consequences. In a legal sense, constitutional rights and duties may well be a form of 'higher law', legally superior to ordinary legal rules embodied in common law or statute. Such a system would fundamentally conflict with the sovereignty of Parliament - which means that nothing is superior in law to Acts of Parliament, and that the courts cannot void legislation - although European developments since the early 1970s have profoundly affected traditional notions of Parliamentary sovereignty.³³ Other than this European aspect, certain statutory and other legal rules may be regarded by some as being 'higher, constitutional' law, most notably the provisions which created the union between Scotland and England. However this matter has never been definitively resolved³⁴, and the conventional view (certainly amongst English lawyers) is that Parliamentary sovereignty remains intact, other than in the EU context.

The very act of writing a constitution throws into relief the purpose or purposes of constitutional change. Broadly speaking, change can either be *formal* (substantially the codification of existing arrangements) or *substantive* (the enactment of new arrangements).³⁵ In general the results of exercises based on either motive will be the same in law, although motivation may be important for the 'entrenchment' and interpretation by the courts of the written document(s). The more radical the changes, the more likely perhaps the judiciary will be to recognise and accept a new constitutional legal order.

³¹ eg FF Ridley "There is no constitution..." (1988) 41 *Parliamentary Affairs* 340. It could be suggested that the *Instrument of Government* under the Protectorate in the 17th century was a form of written constitution

³² The term 'unwritten' in this Paper should be taken as meaning 'uncodified'

³³ On which, see Section V of this paper

³⁴ see C Munro, *Studies in Constitutional Law*, 1987, chaps 4 & 5

³⁵ or a combination of the two

Dawn Oliver analysed three of the drafts of written constitutions on offer in the early 1990s - those of the Liberal Democrats in 1990,³⁶ Tony Benn's *Commonwealth of Britain Bill* in 1991,³⁷ and the IPPR's *The Constitution of the United Kingdom* in 1991³⁸ - and noted some important theoretical and practical issues from five perspectives:³⁹

- (i) *legitimacy*: The Liberal Democrat draft (hereafter "LD") stated that sovereignty lies with the people of the UK, but no referendum was proposed for its adoption (although it would have been enacted by a Parliament elected by PR), with many of the particular 'constitutional reforms' - such as devolution and a Bill of Rights - already in place. Tony Benn's version (hereafter "Benn") provided for ratification of a constitution and any further amendments to it, (and of a voting system for Parliament) by referendum. Oliver noted that validation by referendum does not necessarily guarantee continuing legitimacy; the electorate may well, for example, regard it as a referendum on the government of the day. To be legitimate over time, a constitution must be regarded as 'good' and satisfactory.
- (ii) *justiciability*: Not all constitutions provide mechanisms for legal redress through the courts for all (or any) of their provisions. The LD constitution expressly provides such redress only in respect of violation of rights and freedoms, but justiciability may be implied for the rest of its provisions under ordinary common law principles. The IPPR constitution has a presumption of justiciability except where expressly stated otherwise. The Benn constitution adopts a different approach, making it a duty of the President, Government and the courts to use their best endeavours to secure its 'Charter of Rights' but Oliver believed there was no intention to allow the judiciary to overrule legislation or common law as 'unconstitutional'. Difficulties can arise in the area of social and economic rights as opposed to more traditional civil and political rights. The LD constitution does not contain the former category, while the IPPR version does, but does not make them justiciable. Such rights can be difficult to define (eg 'right to work', 'right to proper housing', 'right to good education') and are often thought to be best left to detailed legislation. There is also suspicion in some quarters of the willingness or ability of the judiciary to understand the importance of such rights.
- (iii) *detailed content*: This is a function of the complexity of the governmental system and the purpose of the constitution itself. Writers such as K. C. Wheare have adopted a minimalist approach as Oliver noted [pp 146-7]:

K. C. Wheare, in his book on *Modern Constitutions* (1966), was clear about what a constitution should contain: 'The very minimum, and that minimum to be rules of

³⁶ J MacDonald QC, *We the People*, Federal green paper no.13, appendix

³⁷ the latest version of which is Bill 57, 1995-96

³⁸ later republished as *A Written Constitution for the UK*, 1993; see also J Cornford, "On writing a constitution" (1991) 44 *Parliamentary Affairs* 558-71

³⁹ D Oliver, "Written constitutions: principles and problems" (1992) 45 *Parliamentary Affairs* 135-152

law.' Writing a constitution raises all sorts of issues about what it is appropriate to put in and what may be left out; much of what is left out may be 'constitutional' in the sense of being relevant to and important for the system of government, and is likely to be found in ordinary legislation-passed to flesh out the actual constitution. A constitution does not have to be, and Wheare would have said that it ought not to be, the sole source of constitutional law.

Some issues in some constitutions may be thought inappropriate to a governmental document, such as moral/religious/ethical matters (eg 'prohibition' in the USA). The LD and Benn constitutions generally assume the continuation of the existing governmental system except where otherwise stated, but the IPPR draft takes a 'root and branch' approach, making its constitution the sole source of power, so that existing inconsistent laws or practices would cease to have effect. It therefore had to set out its system comprehensively. Further detail would arise from the formalisation of previously unwritten conventions such as ministerial responsibility or the appointment of a Prime Minister.

- (iv) *hierarchy of laws:* Other than in the European context, Acts of Parliament are currently supreme law. Written constitutions usually provide for some degree of *entrenchment* of themselves, and, perhaps secondary 'constitutional' laws.⁴⁰ The LD constitution could only be amended by bills passed by 2/3 majorities of Members of both Houses sitting separately, whereas the IPPR version permits amendment of some of its provisions by 2/3 majorities of members present and voting, and, where relating to devolution, of the relevant Assemblies also. The last point demonstrates the potential complexity in a devolved or federal system.
- (v) *neutrality:* Are there principles of constitutionalism common to all (democratic) systems which are not politically or ideologically partisan? If this includes protection against the fallibility of government and citizens, then, according to Oliver, "what is needed is a finely balanced system of checks and balances to provide the necessary protection" (including free and fair elections, individual rights and liberties, political and legal redress of grievances and so on) "but within this set of checks and balances, the legislature could pass any law, and there would therefore be scope for a wide range of political parties to win power and for policy to be influenced by a range of ideologies... In other words, it should be possible to create a 'neutral' constitution, but only operating within this set of what could be termed 'liberal democratic' principles" [pp 150-1].

Oliver recognised that this approach could be criticised for adopting a minimalist role for the state, ignoring substantive equality or social and economic rights [p.151]:

⁴⁰ see Section VI of this Paper

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Here we are back to the earlier question of what is to be put in a constitution and the extent to which it should be justiciable. Broadly 'liberal democratic' constitutions such as the Macdonald and IPPR documents do not make express, justiciable provisions for matters such as the role of the state or substantive equality, but it does not follow that they are not neutral. What they do is to establish a framework that is neutral in the sense that it enables government for the period of its tenure to pursue non-neutral policies, policies for a larger or smaller role for the state, for promoting equality or competition, for expanding or contracting social and economic rights; but these powers of government are always subject to duties to account, to checks and balances and elections.

Concern about neutrality in this context is more often about the neutrality of the existing social and economic system and the balance of power in society than about the neutrality of a constitution. It has often been argued, especially by the left in politics, that the social and economic system favours capital against labour, that it has an in built bias against socialism.' It would not be possible for a neutral constitution such as we are considering here, and of which the Macdonald and IPPR Constitutions provide examples, to guarantee the reversal of this position, although it could make it possible.

The director of the IPPR, James Cornford, has described the process of drafting its proposed constitution. He claimed that "it is the belief that restraints on the executive and on the centralisation of power must be given constitutional rather than political force that has become a common theme of reformers. The need for the entrenchment of rights both for individuals and devolved governments implies a constitutional document" [*op cit*, p.561]. Despite differences of interest and diagnosis by the various organisational and individual constitutional reformers, "just as there is a common diagnosis of the constitutional problem, so there appears to be emerging a similar model of the future constitution" [p 561]. It is *unionist*; proposing decentralisation or devolution rather than the break-up of the UK. It is basically *conservative*, accepting (apart from the Benn version) some form of monarchy, with the Executive continuing in Parliament, with Cabinet government (subject to ministerial responsibility) and domestic Parliamentary supremacy. Changes would be within these criteria eg PR, revised second chamber, devolution, entrenchment and so on. He notes that "this agenda is so far removed from the everyday concerns of British politics that one may question whether it deserves serious consideration" [p.562]. He believes that the national question, and Scotland in particular, answers this question. From this, he justified the IPPR approach of fundamental reform [p.567]:

If the first step has to be taken, others will and you might as well have a clear idea of where you are going and why. The constitutional changes proposed for Scotland are radical and in principle incompatible with current constitutional conventions. If they are enacted, with or without adjustments to the Union bargain, they will prove unstable and unacceptable either to Scotland or to the rest of the United Kingdom, particularly England. There is a general case for the decentralisation of government, quite apart from the need to give greater expression to national identity.

IV Principles

This section considers three principles central to the present constitutional system of the United Kingdom. These are not, of course, the only (or perhaps even the main) constitutional concepts in this country. Others, such as the 'unwritten' nature of the UK constitution, have already been considered; sovereignty is discussed in the next section, and others, such as the royal prerogative, are not examined here. However, the three principles considered here underpin much of the present constitutional discussion, each in its own way. Inevitably, only a brief overview can be presented.

A. Constitutional Conventions

"So let us delete those pages in constitutional textbooks headed *Conventions*, with their unreal distinctions and their word puzzles and talk about what happens and why what happened yesterday may not happen tomorrow".⁴¹

The 'unwritten' nature of the UK constitution makes the role and function of conventions even more important than they are in states with written constitutions.⁴² In countries with a written constitution, the terms of that fundamental document may not accurately represent the reality of the political and governmental system. The USA constitution, for example, does not envisage or describe the dominance of the Presidency or of the Federal government in modern American politics. No constitution that purports to be workable and 'permanent' can hope to foresee, still less deal with, every form of political and administrative eventuality (some brought about by technological or other external developments), and some balance between 'flexibility' and 'rigidity' is deemed necessary to allow for organic change.

In the UK constitution, where there are (if one accepts the Diceyan tradition of Parliamentary supremacy) no constitutional 'higher laws', and no universally agreed set of constitutional enactments and common law, the role of conventions is central as they describe, at any point in time, the practical workings of the political and governmental system, and the actual, rather than the theoretical, distribution of power among the various organs of the state. Perhaps the most fundamental example is the role of the Sovereign who, in theory, wields much legislative and administrative power, but who, in reality, very rarely acts other than on the advice of her Ministers. She cannot, for example, on her own initiative, dissolve Parliament, dismiss the Government or refuse to assent to bills passed by Parliament (save, perhaps, in the most exceptional circumstances). In other words the very operation of the Executive of the UK rests almost totally upon a foundation of constitutional convention.

⁴¹ J A G Griffith, 1963 *Public Law* 402 (editorial)

⁴² in this sense, 'convention' does not mean, as in international law, a treaty

Conventions are those 'rules' or practices which relate the formal theory of the constitution to the practical realities of the day, by *modifying* the strict law, or by *expanding* it, for example. They "provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep in touch with the growth of ideas".⁴³ Some legal texts prefer other terms such as 'non-legal rules'.⁴⁴ There is no accepted definition of the term 'constitutional convention'⁴⁵ but most formulations emphasise that it is (i) a binding obligatory non-legal rule, that is something different from a rule of law enforceable in the courts;⁴⁶ (ii) created, amended (or even rejected) by political actors other than by way of legislation or common law; (iii) a practice which is generally accepted by those affected by it and whose enforcement relies on political rather than legal sanctions and (iv) not generally reduced to writing. As such a convention is more than a simple political fact (such as the existence of political parties); moral/ethical rule, or rules enforced by the courts or Parliament.

Given the inexact nature of conventions as described, the methods by which they are created or established are inevitably of crucial importance. Geoffrey Marshall, in his 1984 study *Constitutional conventions*, identified a number of methods.

- (a) *series of precedents*: there are, however, the difficulties in identifying exactly when a convention crystallises and the extent to which no political precedent can be exactly identical to a present state of affairs. The convention of individual ministerial responsibility is a good example.⁴⁷
- (b) *deliberately created* either by unilateral pronouncement (usually by the Government or Prime Minister) or by agreement by the relevant actors. An example was the acceptance earlier this century by the UK Parliament not to legislate for the dominions, notwithstanding the doctrine of Parliamentary supremacy. This was given statutory effect by the *Statute of Westminster 1931*.
- (c) *general underlying principles*: the obvious example is the notion that majorities, whether in Parliament, local government or elsewhere, should not use their potentially unlimited power in an oppressive way in relation to minorities. Thus, in Parliament, the Opposition and other non-Government parties are granted representation in committees, debating time on the Floor and so on.⁴⁸ Conventions, in this sense, provide the vital constitutional checks and balances that are often explicit in written constitutions. When such understandings are thought to have broken down to some degree, there may be a resort to legislation (as in various local government areas) or other written guidance (as in the patronage or ethics field).

⁴³ Sir I Jennings, *The law and the constitution* 5th ed, 1959, pp 81-2

⁴⁴ Wade & Bradley, *Constitutional and administrative law*, 11th ed, 1993, pp 19-30

⁴⁵ Le May's definition is perhaps the neatest: "the general agreements among public men about the 'rules of the game' to be borne in mind in the conduct of political affairs", *The Victorian Constitution*, 1979, p.1

⁴⁶ see for example the convention of collective Cabinet responsibility, discussed in Research Paper 96/55, 30 April 1996, and *Attorney-General v Jonathan Cape* [1976] QB 752 (Crossman diaries case)

⁴⁷ see Research Paper 96/27, 22 February 1996

⁴⁸ see Marshall, *op cit*, p.9

Jennings suggested a series of tests for identifying conventions, which, although not universally accepted, provides a useful working definition:⁴⁹

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it. And then, as we have seen, the convention may be broken with impunity.

From time to time, the courts have been asked to examine the effect of a convention. The Crossman diaries case has already been noted; another interesting instance is the series of cases concerning the patriation of the Canadian constitution in the early 1980s.⁵⁰ The judges in such cases have distinguished the effect of a breach of convention from a breach of law. An action may be described as 'unconstitutional' if it is in breach of a recognised convention, but it will not thereby be unlawful (although the convention may be of assistance in the formulation of a judicial decision, by aiding, for example, statutory interpretation). Wade & Bradley's textbook considers this point:⁵¹

In general, however, it is often not easy to determine whether the boundary between constitutional and unconstitutional conduct has been crossed, especially where there turns out to be no universally accepted rule of conduct. Different politicians may well take opposing views of the constitutional propriety of the acts of a government. Lawyers should be slow to condemn proposals for new legislation as unconstitutional - not only so that the coinage of constitutional debate should not be debased, but also because lawyers are seldom unmoved by other political considerations.

During the 1980s some local government legislation was sometimes described as 'unconstitutional' and concerns about the development of the civil service in recent years have led to calls for a statutory basis for its establishment and operation. The 'constitutionality' of party leadership elections affecting the premiership itself is sometimes questioned, as in 1976, 1990 and 1995.⁵² The effect of a breach of a convention may be political, affecting an individual (such as the resignation of a Minister, MP or other public figure) or a course of action where one party feels no longer bound by a convention breached by another.⁵³ A breach or breakdown of a convention may lead to legislation or other formal guidelines to enforce the position; the *Parliament Act 1911* being an obvious instance.

⁴⁹ Jennings, *op cit*, p.135

⁵⁰ see C. Turpin, *British government and the constitution*, 3rd ed, 1995, pp 93-102

⁵¹ *op cit*, p.26

⁵² on the last, see P Hennessy, *The hidden wiring*, 1995, pp 14-23

⁵³ eg, following UDI by the rebel Rhodesian Government, the UK Government felt relieved of its self-denying ordinance not to be legislate for the colony: *Southern Rhodesia Act 1965*

In summary, conventions are an important feature of the UK constitutional system, as they fill out some of its 'gaps'. However, they are difficult to identify or define, and their effect will vary in the political circumstances existing at a particular time. Conventions assist, to some degree, the prediction of future events and the conduct expected of relevant political actors, but they cannot be equivalent to legal precedents. There is, for example, a very strong expectation - a convention - that a Prime Minister should sit in the Commons nowadays. Yet a peer, Lord Halifax, almost succeeded Chamberlain in 1940 and the Earl of Home was appointed in 1963 while a peer. Although Lord Home swiftly disclaimed his peerage and entered the Commons through a by-election, there was nothing in constitutional law to prevent him taking office as a peer or indeed remaining as Premier in the Lords if he retained a Commons majority.

B. Separation of Powers⁵⁴

The concept of 'separation of powers' is an important one in constitutional thinking. It has both a superficial simplicity and a deeper complexity, not least because it has both a descriptive and a prescriptive element. The notion has a long history of political thought, back to Aristotle, through Locke and Montesquieu. The conscious adoption of 'separation of powers' principles by the framers of the American constitution in the late 18th century ensured its importance in subsequent constitution-making.

Put simply, it is based on the idea that there are three classes of Governmental function, each carried out by a distinct organ of Government. These are:

- (i) the executive function, carried out by the Executive (in a British context, some divide this into the Monarchal Executive and the Political Executive) and,
- (ii) the legislative function, carried out by the Legislature, and
- (iii) the judicial function, carried out by the Judiciary (the courts).

The normative or prescriptive element is in two parts:

- (a) the three functions should be operated by three organs of Government, and
- (b) to allow some (or, in some views, any) mixing of the three functions and, in particular, the three organs is a threat to liberty.

There is an initial definitional problem when the doctrine is examined. For example, is delegated legislation an exercise of legislative power by the Executive? Are judicial decisions based on, for example, statutory interpretation, exercises of legislative power by the Judiciary? Are the various schemes of administrative decision-making (eg, by inspectors, officials, regulators, tribunals and ministers) exercises of judicial power by the Executive?

⁵⁴ See generally Wade & Bradley, *op cit*, chap 4 and C Munro, *Studies in Constitutional Law*, 1987, chap 7, as well as the Lord Chancellor's speech to the Citizenship Foundation, "Parliament and the courts: a constitutional challenge?", 8.7.96

There is obviously a range of ways in which the doctrine can be applied or not in a constitution. At one extreme there could be complete mixing of all the functions in one organ or person, such as an absolute monarch or dictator. At the other is the idea of absolute separation, with no overlapping. A constitution which seeks to apply the latter idea may well, as in the USA instance, incorporate various 'checks and balances' to ensure that no single arm of the Government can reign supreme over the others (and presumably provide some interdependence to ensure the effective operation of Government by the various organs notwithstanding the strict theoretical separation).

Between these two extremes there is the idea of the *mixed* or *balanced* constitution, as the UK constitution is often described; where there is some degree of mixing and overlap of functions and organs of Government, either deliberately or by accidental historical development. In an unwritten or uncodified constitution, such as that of the UK, the boundaries may be difficult to identify, and any overlap or mixing which is regarded as undesirable may be described as, for example, encroachment. The 'Westminster model' of Parliamentary Government, classically described by Bagehot, is virtually the antithesis of 'separation of powers' theory, with almost the whole political Executive being members of the Legislature. The idea of 'mixed Government' is that it is the degree of connection, rather than separation, that itself provides the 'checks and balances' necessary to prevent Governmental tyranny and preserve individual liberty. As such, both 'separation of powers' and 'mixed' Government are predicated primarily on a 'limited Government' approach to the State as a potential threat to liberty rather than primarily as a positive force for collective action.

It is sometimes claimed that not only does the UK constitution not conform to strict 'separation of powers' theory but that such theory should not be used at all in describing the constitution. De Smith & Brazier's textbook notes "No writer of repute would claim that it is a central feature of the modern British constitution". But it continues: "However, a brief survey of the doctrine brings out more clearly some features of the British system of Government".⁵⁵ This is perhaps an understatement, as using the doctrine not only serves to illuminate some of the central features of the UK system, such as the Executive's dominance of Parliament, but also because some of the central Governmental figures, such as the judges, operate, or say they operate, within the terms of the doctrine.

The judiciary's attitude is of particular interest for the purposes of this Paper. The development of administrative law, and, in particular, judicial review (especially in England) is based on the notion of judicial supervision of the legality of administration. Judicial review, as an issue, is beyond the scope of this Paper, but its rapid development in the last 30 years, and the frequency with which the courts will tackle issues of high political importance and controversy has often thrust the procedure and the judiciary to the forefront of political discussion. Judges who frequently deal with English judicial review cases are

⁵⁵ *Constitutional and administrative law*, 7th ed, 1994, p.19

relatively regular contributors to the wider constitutional debate, due, perhaps, in part to the experience of European jurisprudence through EU and ECHR cases. The judicialisation of highly controversial political and social issues can often be seen to put the judges 'in conflict' with Ministers and the Parliament. In some situations the judges will step back and state that a particular matter should be settled not by the courts but by political means. In such circumstances they will often employ 'separation of powers' language as the explanation of, or justification for their decision, especially when it is a matter of statutory interpretation. A classic example of this was the litigation over the steel strike of the early 1980s. The union sought to increase pressure on British Steel by extending action to private sector companies not directly party to the dispute. The companies sought injunctions, and the case turned on the language of the industrial relations legislation concerning the 'furtherance of a trade dispute'. The Court of Appeal granted the injunctions, Lord Denning being concerned about the "disastrous effect on the economy and well-being of the country". However, the House of Lords was clearly alarmed at the Court of Appeal's reasoning, based not so much on statutory interpretation as on extraneous political/social motives. Lord Diplock declared:⁵⁶

at a time when more and more cases involving the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our Constitution it is Parliament's opinion on these matters that is paramount.

However, the use of the word 'Parliament' in this context, while strictly accurate in constitutional theory, perhaps masks the political reality that legislation is (in general) that of the Government, rather than some 'autonomous' body called Parliament. The courts' 'dispute' therefore is, in practical terms, often with the political Government,⁵⁷ rather than 'Parliament' as such.

⁵⁶ *Dupont Steels v Sirs* [1980] 1 All ER 529 at 541

⁵⁷ for a recent instance, see Research Paper 95/64 *Criminal Injuries Compensation*, concerning *R v Home Secretary ex p Fire Brigades Union*

To sum up this very brief overview: appreciation of 'separation of powers' notions can assist in an understanding of the present constitution, and perhaps provide some criteria for those seeking some degree of constitutional change or reform. As well as being relevant to second-order, but important issues such as the role and extent of delegated legislation or the administration of the legal system, it is central to fundamental constitutional issues such as the relationship between Executive and Parliament.

C. Rule of Law⁵⁸

This is another dictum which, when applied to the constitution, can be both simple and extremely difficult to explain. Put simply, it requires those in authority to act in accordance with the law, rather than in some arbitrary fashion in accordance with their own preferences, whims or discretion. As such, it is an unexceptionable, even self-evident statement of the UK constitutional system. It had an obvious importance in the historical replacement of a ruling Monarchy by a democratic political Executive. Wider applications of the proposition often stem from the formulation of the Victorian jurist A V Dicey:⁵⁹

It means, in the first place, the absolute supremacy of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the "administrative law" (*droit administratif*) or the "administrative tribunals" (*tribunaux administratifs*) of France. The notion which lies at the bottom of the "administrative law" known to foreign countries is that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.

The "rule of law," lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

⁵⁸ See, for example, J Jowell, "The rule of law today", chap 3 of J Jowell & D Oliver, *The changing constitution*, 3rd ed, 1994

⁵⁹ *Introduction to the Study of the Law of the Constitution*, 10th ed, pp 202-3

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Others have expanded this to claim that law should be *open* (ie, known by those bound by it), *not retrospective*, *general* (ie, based on a principled system rather than a series of arbitrary commands), *clear* and *stable*.

While propositions that law, rather than arbitrary power, force or the like, should be the basis of relations between the individual and the State, Dicey's determination that the State should not operate under special laws granting it privileges, immunities and powers not available to citizens (a situation he believed to exist under continental systems of administrative law) has clear echoes of modern political arguments and ideologies based on the role and size of the State and its relationship with its citizens. The growth of systems of administrative bureaucracies with their decision-making tribunals and scope for wide official discretion and centralised control and direction of private property and conduct which are implicit in the modern welfare State, has given rise to concerns on the Right. These are often described in 'rule of law' terms, by those who seek to reduce the size and power (allegedly arbitrary or discretionary) of the State, and subject necessary State power, as practicable, to the ordinary law and courts.⁶⁰

At a constitutional level, such theories often follow Dicey in believing that personal liberty and personal property, which is a precondition of liberty, is best protected by ordinary laws rather than special laws such as Bills of Rights or written constitutions. However, supporters of such constitutional reforms will argue the opposite: that such special methods are necessary to preserve and protect the rule of law, to prevent the deliberate or casual loss of liberty through the legislation and actions of majoritarian Governments buttressed by Parliamentary legislative supremacy. In other words, it is the 'ordinary law' basis of liberty that is the risk to the rule of law.

It can be seen, even from this brief, simplified overview of the rule of law, that it is a concept which, once developed, enters into the heart of the political arena. It becomes part of the vocabulary of the collective *versus* individual debate concerning the relationship between the citizen and the State, which is at the heart of constitutional theory. Indeed, it can often seem that the notion of the rule of law is capable of being used in so many different ways that it is in danger of meaning, in constitutional terms, almost anything and nothing.

⁶⁰ see F. Hayek *The road to serfdom*; I. Gilmour *Inside right*

V Sovereignty

Sovereignty is one of the most complex and emotive of constitutional concepts, not least because of the variety of inter-related meanings it has in modern political debate. This often results in arguments where the opposing parties can be talking at cross-purposes because they each have their own view of 'sovereignty'. At one end of the spectrum in relation to a state, is the notion of *political* or *actual sovereignty*, the degree to which it has the power of independent, autonomous action without interference from external (or internal extra-governmental) forces of whatever kind. Many nominally independent states in history have had the outward attributes of sovereignty, recognised for some or all purposes as such in international law, but which in reality have been under some form of external or internal military, financial, criminal, economic, religious or other influence or control. At the other end of the argument is the notion of *legal sovereignty*, the formal, constitutional degree of independence of a nation-state, recognised as such in domestic and international law, through membership of international organisations such as the UN or EU or otherwise. Within a state, legal sovereignty describes where the ultimate source of legal power lies over the whole state for all purposes, or, in a federal or devolved system, in parts of a state or for some purposes.

A. Sovereignty of Parliament

The sovereignty of Parliament is the expression of legal sovereignty in the United Kingdom. It was described as "the very keystone of the constitution" by A V Dicey, the Victorian jurist most associated with the doctrine.⁶¹ His formulation is the starting point for much modern discussions of sovereignty [pp 39-40]:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further that no person or body is recognised by the law of England as having a right to override or set aside the law of Parliament".

Several doctrines fundamental to the UK constitution can be derived from Dicey's definition. First, that legal sovereignty, or as it is often described, the *legislative supremacy* of Parliament, is a legal rule, a description of the relationship between Parliament and the courts. The courts are bound to accept, and to give effect to, any law duly effected by 'Parliament' (ie, Commons, Lords and Monarch), and an Act of Parliament is the ultimate expression of law (not necessarily the case in states with written constitutions). No law enacted by Parliament can be questioned as to its validity by any court or other body; there is no 'judicial review' by any supreme or constitutional court.⁶² Thus the legal sovereignty of Parliament is the UK constitution's 'rule of recognition' or '*grundnorm*', in the terminology of the legal

⁶¹ *The Law of the Constitution*, 10th ed, 1965, p.70

⁶² The EU situation is considered below. UK Courts can, of course, *interpret* legislation

philosophers H L A Hart and Hans Kelsen respectively. Some examples can illustrate this legal rule. The Courts have ruled (or confirmed?) that the legislative supremacy of Parliament is not limited by international law;⁶³ independence or home rule of former colonies;⁶⁴ fundamental civil liberties;⁶⁵ or any form of so-called 'higher law' such as natural law, law of God or natural justice.⁶⁶

Second, several practical consequences for constitutional development and 'reform' result from the notion of legal sovereignty. Territorial changes such as devolution can be complex because any scheme which preserves the existing constitutional norms of sovereignty must organise the hierarchical distribution of legislative power between the sovereign Parliament and the tier(s) of devolved Parliament(s), in much the same way, if at a more elevated level, as, say the relationship between Westminster and local authorities. Again, the theory of sovereignty means that no Parliament can bind its successors, and this inability of Parliament to prevent any law from being later altered or repealed by a Parliament means that, in principle, no scheme of constitutional change - Bill of Rights, devolution, even, perhaps, a written constitution itself⁶⁷ - can be *entrenched* - made secure against any or easy amendment or repeal - in the legal order. The recent schemes by proponents of Scottish devolution and of some form of a Bill of Rights demonstrate how difficult (perhaps impossible) it is to reconcile formal, legal entrenchment (as opposed to 'political-moral' entrenchment) with conventional sovereignty.⁶⁸

This Diceyan doctrine of the legal supremacy of Parliament is essentially an English concept developed over more than three hundred years. There is a powerful legal argument put forward by, in the main, some Scottish jurists that challenges the conventional conception of the British constitutional order as the product of many centuries of unbroken legal development. They argue that the various treaties and Acts which have made the modern 'United Kingdom' are fundamental constitutional documents which *precede* and *create* the present UK 'Parliament'. This is often known as the '*born unfree*' argument, and usually centres on the 1707 Union between England and Scotland.⁶⁹ The Union legislation declared that the two kingdoms of England and Scotland "shall ... for ever after be united into one kingdom by the name of Great Britain" (*Art. I*) and "that the United Kingdom of Great Britain be represented by one and the same Parliament of Great Britain" (*Art. IV*). Thus, as the Union was, in law, effected by treaty between two sovereign states and enacted by Acts of

⁶³ eg *Mortensen v Peters* (1906) 8F(J) 93: limits of territorial waters; *Cheney v Conn* [1968] 1 All ER 779: Geneva Conventions

⁶⁴ eg *Manuel v A-G* (1983) 1 Ch 77: Canada

⁶⁵ eg *R v Jordan* (1967) Crim LR 483: *Race Relations Act 1965*

⁶⁶ *British Railways Board v Pickin* [1974] 1 All ER 609 at 614, Lord Reid (alleged invalidity of a private Act on Parliamentary legislative procedure grounds)

⁶⁷ or any statutory 'constitutional' guarantees, such as those for Northern Ireland

⁶⁸ On which see Section VI of this Paper

⁶⁹ see esp. J D B Mitchell, *Constitutional Law*, 2nd ed, 1968, pp 92-8; C Munro, *Studies in Constitutional Law*, 1987, chap 4; *Stair Encyclopaedia*, vol 5, pp 137-62

both the Parliaments of England and Scotland, the argument is that this Union precedes and creates the Parliament and therefore is, in relation to it, its constituent, ultimate document authoritatively defining and limiting its powers. The inherent sovereignty of the English Parliament up to 1707, did not necessarily carry over into the legal power of the new Parliament and thus had no legal effect after the Union either at all or at least not in relation to Scottish provisions of the Union expressly entrenched against amendment or repeal.

There are, however, contrary arguments, concentrating on the lack of legal effect of statutory forms of purported entrenchment before⁷⁰ or after 1707. There are a number of statutory provisions since 1707 which have apparently 'breached' the Union's terms, but the significance of these instances is the subject of lively debate. Perhaps a more powerful argument is one which concentrates on the geo-political realities of the early 18th century, and the dominance of England over its northern neighbour. Whilst a new state of Great Britain was clearly created, the notion that a totally new Parliament was born with no characteristics of the pre-Union English Parliament is, in political terms, not credible. Even the Union legislation itself, in its provisions on Scottish representation for example, implicitly acknowledges that the reality corresponded more to a continuation of the Westminster Parliament, enlarged and renamed by the Union. The 1800 Union with Ireland, in different political circumstances, as a political 'absorption into an existing state' rather than the legal creation of a totally new state, is an even clearer demonstration of the gap between constitutional theory and political reality.

Having surveyed both sides of the arguments Munro concluded that "the arguments that Parliament was 'born unfree' are less than compelling. We may say, in any event, that arguments about the special nature of the legislation at most show that limitation of Parliament by it is a theoretical possibility".⁷¹ The supremacy of the Union continued to be deployed by some in Scotland as a legal argument in, for example, recent cases relating to the community charge (or 'poll tax'). The real test will be if and when Parliament ever legislates directly contrary to a core Scottish provision of the Union by, say, abolishing the Court of Session or interfering with the established status of the Protestant religion and the Presbyterian church. There are some *dicta* in the Scottish Courts which do not expressly rule out the possibility of their rejecting the validity of such legislation,⁷² but this is not reflected by the English judiciary.

Because of the legal strength of the sovereignty argument, opponents of absolute sovereignty tend to deploy arguments *within* the existing framework. This '*new view*' concentrates on the '*manner and form*' of legislation, arguing that the acceptance of the rule that Acts of Parliament must be accorded ultimate authority means that the courts are entitled, or even

⁷⁰ eg 1688 *Bill of Rights*

⁷¹ *op cit* p.66

⁷² Perhaps most famously by Lord President Cooper in *MacCormick v Lord Advocate* 1953 SC 396

required, to ensure that the purported legislation is a validly enacted expression of the legal sovereign, the 'Queen-in-Parliament'. In other words courts can look at alleged non-compliance of rules governing the composition of the sovereign authority and the procedure for enactment of its legislation. This argument can be used, for example, to overcome the 'Parliament cannot bind its successors' rule, or to question allegations that an Act was not enacted in the proper form or by the correct procedure. So the courts are not bound to give legal effect to mere resolutions of a House of Parliament as if they were Acts of Parliament,⁷³ but they have not (or not yet) accepted the 'manner and form' argument in its more controversial sense. Thus they will not question the legislation process within Parliament, a matter of privilege,⁷⁴ nor overturn the doctrine of 'implied repeal' of earlier Acts by later Acts covering the same ground.⁷⁵

Despite the fact that it has been argued that if the courts adopted the 'manner and form' argument "they would not be in any way derogating from parliamentary sovereignty but protecting Parliament's authority from usurpation by those not entitled for the purpose in hand to exercise it",⁷⁶ the fact that the courts have continued to adhere to traditional Diceyan theory means that, at present, these arguments cannot be used directly to assist the purported entrenchment of, say, a Bill of Rights or devolution legislation.⁷⁷

B. 'Legal' and 'Political' Sovereignty

Many, including Dicey himself, have sought to distinguish between legal sovereignty and political sovereignty. Indeed Dicey regarded the Queen-in-Parliament (i.e. the legal body comprising the two Houses and the monarch) as the legal sovereign and the electorate as the political sovereign. This latter point is the British version of what in many other constitutions is the idea of 'the people' as the true sovereign, a political concept which is often invoked to confer upon the constitution moral authority and binding force as the supreme source of legal power. Perhaps the most famous example of this is in the constitution of the United States ("We the people...").

F F Ridley notes this contrast between the UK and much of the rest of the world in terms of sovereignty of a state residing with, or flowing from, its people. According to Ridley, "Britain never developed this idea of popular sovereignty in constitutional terms, even if we sometimes talk of the sovereignty of the electorate in political terms. Even if the latter were

⁷³ eg *Stockdale v Hansard* (1839) 9 Ad & ER 1; *Bowles v Bank of England* [1913] 1 Ch 57

⁷⁴ eg *Pickin, op cit*; but what if the failure of a bill to pass in either House was patent?

⁷⁵ eg *Vauxhall Estates v Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estate v Minister of Health* [1934] 1 KB 590

⁷⁶ G Marshall *Constitutional theory*, 1971, p.42

⁷⁷ see the oft-cited but ambiguous authority of *A-G for New South Wales v Trethowan* (1932) AC 526, PC; *Harris v Minister for the Interior* 9152 (2) SA 428, South Africa; *Bribery Commissioner v Ramasinghe* [1965] 2 All ER 785, PC, Ceylon

true it would merely allow the people to choose their government: it does not base the governmental order, the British 'constitution', on their authority and thus only gives them half their right. (Moreover, since a parliamentary majority can change that order, prolong its own life, alter the franchise or reform the electoral system, even the political rights of the electorate depend on Parliament.) What we have instead is the sovereignty of Parliament. Parliament determines - and alters - the country's system of government. If we ask where that power comes from, the answer is broadly that Parliament claimed it and the courts recognised it. The people never came into the picture. The liberal (middle-class) democracies established in Europe had, despite their generally limited franchise, to base their constitutions on the principle that ultimate authority was vested in the people. Britain seems to be the sole exception to this democratic path."⁷⁸

TRS Allan in an essay entitled "The limits of parliamentary sovereignty" in the 1985 volume of *Public Law* has criticised this distinction, as it seeks to separate the legal validity of law-making from any political subjectivity. In other words the traditional Diceyan view, the one which the courts themselves have consistently upheld, requires them simply to have regard to the form of law rather than its substance when considering the validity of legislation. Allan claims that the courts' adherence to the doctrine has a constitutional basis, and that the sovereignty of Parliament "derives its legal authority from the underlying moral or political theory of which it forms a part. The sterility and inconclusiveness of modern debate about the nature of sovereignty stems from Dicey's attempt to divorce legal doctrine from political principle. Legal questions which challenge the nature of our constitutional order can only be answered in terms of the political morality on which that order is based. The legal doctrine of legislative supremacy articulates the courts' commitment to the current British scheme of parliamentary democracy."⁷⁹ He argued that the legal/political sovereignty distinction cannot be an absolute distinction, because it could not apply in extreme cases, and gave the example of legislation to deprive the large section of the population who may be government opponents of the right to vote. Such a statute "could not consistently be applied by the courts as law. Judicial obedience to the statute in such extreme and unlikely circumstances could not coherently be justified in terms of the doctrine of parliamentary sovereignty since the statute would plainly undermine the fundamental political principle which the doctrine serves to protect."

It is in the nature of political and legal argument about such fundamental concepts to test them by postulating extreme cases. Some such as Professor Simon Lee have warned against this approach as unrealistic and unhelpful: "The genius of our constitution is that it is geared to the real world. We all know that Parliament will not pass statutes condemning blue-eyed babies to death so why worry because it could do so? If we try to alter our constitution to combat improbable eventualities, we may prevent too much."⁸⁰

⁷⁸ "There is no British constitution : a dangerous case of the Emperor's clothes" (1988) 41 *Parliamentary Affairs* p.345

⁷⁹ "The limits of Parliamentary sovereignty", 1985 *Public Law* 614

⁸⁰ 1985 *Public Law* at p.633

C. Sovereignty and Europe:⁸¹

The greatest modern crisis for the Diceyan tradition, and the area where the constitutional argument between legal and political sovereignty is most pronounced, is in relation to Europe. The legal relationship since the early 1970s between the UK and the European Communities/Union is not simply one of conventional international law between sovereign entities. The European legal order is unique in its supra-national quality and its effect on the domestic law of member states.⁸² It should be borne in mind in this respect that Diceyan sovereignty grew out of the English common law tradition, whereas the European civil law tradition can lead to a different form of legal reasoning producing different results when determining the hierarchy of laws in a territory. The European Court of Justice has developed a more activist, purposive approach to its jurisprudence to entrench (or create?⁸³) the supremacy of the central legal order over that of the various member states.⁸⁴

From the point of view of domestic law, community law was incorporated by the *European Communities Act 1972*, as subsequently amended.⁸⁵ For many years the UK courts managed to avoid having to pronounce directly and unequivocally on the supremacy or otherwise of Community law in relation to traditional Diceyan sovereignty. Some early case law even suggested that the doctrine of 'implied repeal' still applied so that later UK statutory provisions would prevail over inconsistent Community law after 1972.⁸⁶ Generally though, potential conflicts between UK and Community law were reconciled and resolved through techniques of statutory interpretation and construction⁸⁷, although this approach had its limits if the conflict was apparently irreconcilable. This point came to widespread public and Parliamentary attention in the *Factortame* cases concerning Spanish-owned fishing vessels,⁸⁸ where the House of Lords appeared unequivocally to accept the supremacy of European law in appropriate cases.

The mixture of political and legal sovereignty issues runs through British debate on European issues. In addition to the question of Europe itself, it is generally recognised by all sides that it has implications for the Diceyan tradition of Parliamentary supremacy as such. Thus 'constitutional reformers' may wish to utilise the Community case law as a way of undermining or destroying the UK courts' otherwise complete adherence to the traditional doctrine, whereas those in the other camp may wish to regard it simply as an exception, albeit a significant and growing one, to the general and continuing rule, and some will even seek,

⁸¹ see generally *IGC issues: the European Court of Justice*, Research Paper 96/57, April 1996

⁸² see for example, I Ward "The European Constitution and the nation state" (1996) 16 *Oxford Journal of Legal Studies* 161-174 and T Hartley "The European Court, judicial objectivity and the constitution of the European Union", (1996) 112 *Law Quarterly Review* 95-109

⁸³ As did the US Supreme Court in *Marbury v Madison* in 1803

⁸⁴ see, eg *Costa v ENEL* (1964) ECR 585; *Internationale Handelsgesellschaft* (1970) ECR 1125

⁸⁵ esp. ss 2 and 3 and sch 2

⁸⁶ eg *Felixstowe Docks v British Transport Docks Board* [1976] CMLR 655, Lord Denning MR

⁸⁷ eg *Garland v British Rail Engineering* [1983] 2 AC 751

⁸⁸ see esp. Lord Bridge, [1991] AC 603, 658-9

by complex and imaginative legal reasoning, to accommodate Community supremacy through the 1972 Act within an intact rule of Parliamentary supremacy.

There is no doubting the power of the concept of 'sovereignty' in its political sense in the European context. It was much used in recent years in the context of the Maastricht Treaty, and the political battle for its ratification. The opponents of ratification, which include the remaining outright opponents of British membership of the European Community itself, claimed that the provisions of the treaty, with the ultimate aim of economic and monetary union, meant the end of British sovereignty. That this was regarded as a legitimate, indeed serious mode of argument (whether or not one supports it) is shown by the form of response adopted by supporters of the Treaty and the political developments implied by it. Generally, they did accept that the Maastricht process could mean a loss of sovereignty, and asserted that that outcome was not a bad thing, or that it was a good or necessary thing. They used phrases such as 'pooled sovereignty' or 'shared sovereignty' (which may well be, strictly speaking, a reasonably accurate description) to bypass or defuse what they saw as being, in the British context at least, a potentially damaging argument.

Even resort to the referendum device from 1975 onwards, (and its current proposed application to a variety of constitutional issues from devolution, to electoral reform to European developments) raises the notion of 'the people' as the ultimate political sovereign in the UK, especially where issues apparently affecting the very economic or political nationhood or independence of the country are said to be affected.⁸⁹

Bradley has analysed the effect of EU legal developments on the courts' view of sovereignty.⁹⁰ He concluded:⁹¹

The present relationship between the courts and the legislature is founded upon the attitude which the judges have taken to legislation over many years; it has also accorded with the wishes of successive majorities in the House of Commons. If studied closely, the exact boundaries of legislative sovereignty are, however, difficult to determine, since inferences have to be based on negative evidence.... The fact that in several recent instances British courts have based their decisions upon the orthodox doctrine of legislative sovereignty does not mean that a simple application of the doctrine will solve every problem that may arise. And in the case of British membership of the European Union, we now know that the supremacy of Community law imposes practical limits upon Parliament that are enforceable by British judges.

If it is difficult to be dogmatic about the present extent of the doctrine, then it is even less possible to be dogmatic about the possible effect of legislative attempts to change the doctrine for the future.... If Parliament enacts a statute that seeks to change the fundamental relationship between courts and Parliament, how will the courts respond? In constitutional law, even more

⁸⁹ See *Referendum*, Research Paper 95/23, 1995

⁹⁰ A Bradley, "The sovereignty of Parliament - in perpetuity?" in Jowell & Oliver, *op cit*, esp pp 98-107

⁹¹ pp 106-7, footnotes omitted

than in other areas of the law, the effects of legislative changes are often unpredictable. It is indeed only the eventual decisions of the courts that will determine whether a specific legislative intent on the part of Parliament has or has not been achieved. Decisions of the courts may thus have a creative, constituent effect. A fundamental change of the kind under discussion is unlikely to come about except when Parliament itself gives a definite lead by means of legislation, which the courts accept as being effective to achieve its stated purposes....

We cannot discover the 'right' answer to such future problems by reference solely to existing case-law and dicta. Developments such as the European Union and the European Convention on Human Rights were not within the contemplation of the judges who decided the Railways Act cases in the nineteenth century or the Housing Act cases on implied repeal in the 1930s. By recourse to familiar common-law techniques that are essential to a workable system of *stare decisis*, it may readily be demonstrated that decisions from the past are not decisive of fundamental issues which may arise in the future. Even if the continuing effects of British membership of the European Union are left on one side, the orthodox doctrine of the sovereign Parliament is not an immutable part of British constitutional law.

VI Creation and Entrenchment

These two issues are dealt with together here because, as is generally recognised on both sides of the constitutional debate, the mode of creation of new constitutional arrangements (whether in one or more documents) is crucial to the extent of its entrenchment in the UK system. The more the method of creation resembles existing enactment procedures, the more likely, it is argued, that the new arrangements can be regarded as a development of, rather than a radical break with, the present constitutional system. The more the method of creation is distinct from existing enactment procedures, the more likely that the new system can be seen as intended to be a radical break with the past, and its traditional principles, such as Parliamentary supremacy. Some states may wish to resort to imaginative devices so as to maximise public involvement in the creation of a constitution. A recent interesting example is the constitution-making exercise in South Africa, through its Constitutional Assembly, which was intended to be a "transparent and inclusive process" including nearly two million written submissions and petitions; nearly 1300 public meetings, and a multi-media multi-lingual campaign. The new Constitution was adopted by the Assembly on 8 May 1996.⁹²

Parliamentary legislative supremacy ('sovereignty of Parliament') is at the heart of this debate in a UK context as it is the fundamental rule which makes a radical break either extremely difficult or legally impossible.⁹³ The breach of the otherwise watertight Diceyan notion of sovereignty (at least in the view of the English courts) caused by membership of the EU,

⁹² For full details of the constitutional process, see the extensive series of pages on the Internet - the home page is <http://gopher.constitution.org.za/>. See also S Kentridge, "Bills of Rights - the South African experiment" (1996) 112 *Law Quarterly Review* 237-61, and H Corder, "South Africa's transitional constitution: its design and implementation", 1996 *Public Law* 291-308

⁹³ on sovereignty generally, see Section V of this Paper

through the *European Communities Act 1972*, as amended, can be viewed either as an exception to the Diceyan rule which in all other respects remains intact, or as the breach which, logically and practically, destroys the rule itself. In other words the judiciary, having accommodated EU supremacy in its area, may be more receptive to arguments that the notion of Parliamentary supremacy can be modified or even rejected in the face of other novel constitutional realities such as a Bill of Rights, written constitution or devolution Acts.⁹⁴

These arguments boil down to the relationship between Parliament and the courts;⁹⁵ a view that if Parliamentary legislative supremacy is a legal rule enforceable and enforced by the courts, the courts can alter the rule by amending or rejecting their traditional view in the light of clear and new constitutional arrangements established by Parliament. In other words, there may be a situation, not of Parliament wishing the courts to uphold Diceyan sovereignty, but wishing them to modify or reject it in the face of its clear contrary legislative intentions in the constitutional context. Reformers therefore often seek to indicate as clearly as possible to the judiciary, by means, for example, of the novelty of the creation process for new constitutional arrangements, Parliament's intention and wish that the new system override traditional sovereignty to the extent enacted.

However, one interesting, and perhaps significant, development is the recognition by the Scottish Constitutional Convention - a body which includes the Liberal Democrats and Labour and which has sought to develop innovative devolution proposals - that entrenchment of devolution legislation can not be guaranteed under the present UK system:⁹⁶

The Convention is adamant that the powers of Scotland's Parliament, once established, should not be altered without the consent of the Scottish Parliament representing the people of Scotland. The main method by which that will be achieved will be by the moral, and political rooting of the institution in the lives of the Scottish and indeed the British people. The popularity and the contribution of the Parliament, along with its purpose and its relevance, will ensure its existence more than any constitutional or legal mechanism.

Scotland's Parliament will be established by an Act of the Westminster Parliament. The Scottish Constitutional Commission, who studied this matter exhaustively on our behalf, concluded that in theory under Britain's unwritten constitution such an Act can be repealed or amended without restriction. The Convention however is firmly of the view that through widespread recognition of the Scottish Parliament's legitimate authority, both within Scotland and internationally, such a course of action is both practically, and politically impossible.

No Westminster government would be willing to pay the political price of neutralising or destroying a parliament so firmly rooted in, and supported by, the people of Scotland.

⁹⁴ on the EU aspect, see Research Paper 96/57, *IGC Issues: the European Court of Justice*, 30 April 1996, and Lord Lester, "European Human Rights and the British Constitution" in J Jowell and D Oliver, *The Changing Constitution*, 3rd ed 1994

⁹⁵ on 'separation of powers' issues generally, see Section IV B of this Paper

⁹⁶ *Scotland's Parliament, Scotland's right*, 1995, pp 18-19

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Therefore we will build our Parliament on the strongest of all foundations, namely the settled will of the Scottish people themselves.

This is a Parliament inside the United Kingdom which we are creating, making laws and revising laws in a country where the law and legal system are different and distinct. Not only that but it will have been brought into existence on a plan which through its unique Constitutional Convention, has involved the vast majority of Scotland's MPs and MEPs, almost all Scotland's local authorities, representatives of the churches, trades unions, business interests, women's groups, ethnic minorities and other civic groups. It would be a foolish government which chose to meddle with a settlement based on such an unprecedented consensus.

Although the concept of supreme Parliamentary sovereignty is often simply stated there have been exceptions where entrenchment has been effectively achieved whatever the constitutional law may say. The status of the Church of Scotland and the nature of consent from the Church for any legislative changes concerning it is one relevant example. Our whole involvement in the European Union has anyway had significant effects on the purity of the concept of Parliamentary sovereignty, with laws created in European institutions having primacy over laws passed in Westminster.

We therefore believe that there could, and should, be some way of formally embedding the powers and position of Scotland's Parliament. The Convention partners strongly recommend that in advance of the Scottish legislation being placed before Parliament at Westminster there be a clear commitment by Westminster made through a Declaration of the Parliament of the United Kingdom of Great Britain and Northern Ireland that the Act founding the Parliament should not be repealed, or amended in such a way as to threaten the existence of Scotland's Parliament, without the consent of the Scottish Parliament and of the people of Scotland, directly consulted through general election or referendum. The principle thereby enshrined by the solemn declaration of intent of the Parliament of the United Kingdom would be that a democratic institution of government like Scotland's Parliament would not be unilaterally weakened or abolished by Westminster.

The very formality of the commitment would be there as a significant and visible reminder of the special nature of the institution which had been created. It would be reinforced by the increasing importance of European Union constitutional structures in providing international recognition of the powers of regional and local government which will combine to strengthen the position and security of Scotland's Parliament.

To sum up thus far, there are three basic questions on entrenchment:

- (i) *Should* any new constitutional arrangements be entrenched in some way against the usual operation of Parliamentary supremacy?
- (ii) *Can* they be so entrenched?
- (iii) Would entrenchment give the 'undemocratic' judiciary enhanced power to determine constitutional issues, even over the wishes of 'democratic' elements of the system, in an inappropriate way?

The first question is one which most reformers answer in the affirmative, especially in relation to a Bill of Rights, as the legal protection of rights from the potentially arbitrary and capricious whim of temporary majorities is at the heart of the reformist argument. At a broader constitutional level, such entrenchment can assist in the permanence and stability of a constitution by restricting scope for (too-easy) amendment or repeal.

Lord Scarman made an influential contribution to this debate in 1974:⁹⁷

When times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will, however frightened and prejudiced it may be, of Parliament.... It is the helplessness of the law in face of the legislative sovereignty of Parliament which makes it difficult for the legal system to accommodate the concept of fundamental and inviolable human rights. Means therefore have to be found whereby (1) there is incorporated into English law a declaration of such rights, (2) these rights are protected against all encroachment, including the power of the state, even when that power is exerted by a representative legislative institution such as Parliament.

Lord Lester, a long-term campaigner, put the case more graphically:⁹⁸

Normally only the very young have fantasies of omnipotence. Growing up involves accepting the necessity for laws, rules and limits. A mature Parliament would not insist upon the continuous assertion of its fantastical absolute powers at the expense of individual justice." A mature Parliament would use its sovereign lawmaking powers to confine those powers within proper constitutional limits.

Even where reformists accept that liberties and rights are not under serious threat, they believe that some entrenched guarantees would provide *better* protection: "The case for a Bill of Rights rests rather on the belief that it would make a distinct and valuable contribution to the *better* protection of human rights. Certainly it would not solve all problems".⁹⁹ Note that these arguments for some form of entrenchment, and dilution of Parliamentary legislative supremacy apply equally to any proposed Bill of Rights or written constitution, although the latter being the foundation of a new legal order, would be more likely to deal with the issue directly. Enactment of a Bill of Rights within the *existing* constitutional arrangements would imply, though not logically require, some consideration of entrenchment within a system still based on Parliamentary supremacy. This leads on to the practical question of *how* entrenchment can be achieved.

The extract cited above from the Scottish Constitutional Convention report demonstrates how even innovative reformers can appreciate the difficulties of entrenchment, especially within the existing system. A state commonly acquired a new constitutional order following some fundamental political event such as a revolution (e.g. the USSR post-1917), defeat in war (e.g.

⁹⁷ *English Law - the New Dimension*, 1974, p.15

⁹⁸ "Fundamental rights: the United Kingdom isolated?", 1984, *Public law* 46 at 71

⁹⁹ M Zander, *A Bill of Rights?*, 3rd ed 1985, p.91

West Germany post-1945) or independence (e.g. the USA post-1776). Such an upheaval can facilitate the creation and acceptance of new constitutional norms and legitimacies. It could be argued that the UK (or, perhaps, England) has not experienced such fundamental political change since the 1640-1707 era, and that it is this long period of continuity which has led to the strength and stability of existing norms such as Parliamentary supremacy.

Various academics and politicians have made suggestions for forms of entrenchment, especially schemes which could be accommodated within the existing constitutional structure. Schemes tend to concentrate on statutory formulations which would express Parliament's wishes with regard to the relevant applicable provisions of a constitution or Bill of Rights, directed at the public at large and the judiciary in particular. One solution could be to accept that effective entrenchment is impossible and regard a Bill of Rights as an ordinary statute, if one of a special character. Any entrenching quality will therefore depend on the legislation's moral/cultural rather than legal force i.e. 'rigid' in practice even though 'flexible' in theory. There could be a requirement that any proposed legislation in conflict with the Bill of Rights should be accompanied by a formal statement to Parliament by the Government to that effect, a requirement which "ought to place a particular responsibility on Ministers to explain why they wished to act in that way, so exposing them to criticism and perhaps political unpopularity."¹⁰⁰ This is a variant of the "government health warning" approach.¹⁰¹ Where conflicting, legislation would contain a clause expressly declaring that it is being enacted notwithstanding the relevant provisions of a Bill of Rights or constitution.¹⁰² Other statutory schemes seek to direct the judiciary on how to interpret any potentially conflicting legislation, and which legislation should be given priority. Again such schemes would ultimately be subject to the over-riding doctrine of Parliamentary sovereignty. A novel variant of influencing the judges is Sir William Wade's proposal for provision in the judicial oath of office that the judges enforce and uphold the appropriate constitutional provisions:¹⁰³

All that need be done in order to entrench any sort of fundamental law is to secure its recognition in the judicial oath of office. The only trouble at present is that the existing form of oath gives no assurance of obedience to statutes binding later Parliaments. But there is every assurance that if the judges undertake upon their oath to act in some particular way they will do so. If we should wish to adopt a new form of constitution, therefore, all that need be done is to put the judges under oath to enforce it. An Act of Parliament could be passed to discharge them from their former oaths, if that were thought necessary, and to require them to be resworn in the new terms. All the familiar problems of sovereignty then disappear: a fresh start has been made; the doctrine that no Parliament can bind its successors becomes ancient history; and the new fundamental law is secured by a judiciary sworn to uphold it...

This is, as it appears to me, the one and only way in which we can take command of our constitution without having to wait for some sort of political revolution, which is most unlikely to arrive just when we want it, and without having to contrive some artificial legal discontinuity... [M]erely by a change in the judicial oath a new judicial attitude can be created,

¹⁰⁰ R. Brazier, *Constitutional reform*, 1991, p131

¹⁰¹ The term coined by Liberty in its *A people's charter: Liberty's Bill of Rights*, 1991, pp 23-4, on which see F Klug and J Wadham, "The 'democratic' entrenchment of a bill of Rights: Liberty's proposals" 1993 *Public Law* 579-88

¹⁰² as in the 1982 Canadian Charter of Rights and Freedoms, on which see R Penner "The Canadian experience with the Charter of Rights: Are there lessons for the United Kingdom?" 1996 *Public Law* 104-125

¹⁰³ *Constitutional fundamentals* (1989 ed.) pp47-9, extracts

and that is all that is needed. Fundamentally the question simply is, what will the judges recognise as a valid Act of Parliament? If they solemnly undertake to recognise a new grundnorm and to refuse validity to Acts of Parliament which conflict with a Bill of Rights or other entrenched clauses, that is the best possible assurance that the entrenchment will work. Always in the end we come back to the ultimate legal reality: an Act of Parliament is valid only if the judges say it is, and only they can say what the rules for its validity are.

A more explicit entrenchment device would be a requirement for some special legislative processes, or majorities (or a confirmatory referendum) for conflicting legislation. As Brazier notes, "this arrangement would be binding in honour only" because of Parliamentary sovereignty [*op cit* p.132]. Lord Scarman has suggested that the House of Lords be given the right of absolute veto, under a new Parliament Act, over bills intending to amend or repeal that Act, any Act incorporating the European Convention, and other 'constitutional' Acts.¹⁰⁴

VII Bills of Rights

Many aspects of the debate over a Bill of Rights for the UK, such as entrenchment, have already been discussed in this Paper. This section simply seeks to provide a general overview of the debate, especially in the context of the European Convention of Human Rights.

A. Arguments pro and con

As much of the debate tends to be driven by supporters of change, it is relatively rare to find balanced consideration of the argument for and against the adoption of some form of Bill of Rights for the UK. One such summary of the arguments by a proponent is contained in Professor Zander's *A Bill of Rights?*, as its contents page neatly demonstrates.¹⁰⁵

2. The Arguments for a Bill of Rights Considered

To bring the United Kingdom into line with most of the rest of the world including the Commonwealth

The procedure for the enforcement of human rights in Strasburg is too slow

The absence of adequate machinery for the enforcement of human rights in Britain means that "dirty laundry" is washed unnecessarily abroad to the detriment of Britain's good name

A Bill of Rights is a flexible and adaptable tool

A Bill of Rights is an opportunity for developing law and practice beyond what would be likely to occur if left to the executive and the legislature,

A Bill of Rights may assist a willing Minister to achieve needed reforms

A Bill of Rights places the power of action where it belongs with those who claim to be aggrieved

¹⁰⁴ "Bill of Rights and law reform" in R Holme and M Elliot (eds) *1688-1988: Time for a new constitution*, pp109-110. See also his 1992 Sovereignty Lecture, *Why Britain needs a written constitution*

¹⁰⁵ 3rd ed., 1985, ppvii-viii. See also, for example, *A people's charter: Liberty's Bill of Rights*, 1991, pp8-13

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A Bill of Rights is a major educative force

A Bill of Rights would be needed if there is any significant measure of devolution of legislative powers to regional assemblies

3. The Arguments against a Bill of Rights Considered

A Bill of Rights is an "un-British" way of doing things

A Bill of Rights is not needed-human rights are adequately protected in Britain

A Bill of Rights is suitable for a primitive or unsophisticated system of law but is not appropriate to a modern, complex society

A Bill of Rights is too powerful a tool to be entrusted to judges and is incompatible with democratic principles especially where the government of the day is to the left of centre
English judges are too executive or Establishment minded to be entrusted with a Bill of Rights

Bills of Rights are only as good as those who interpret them and our judges are not equipped for the task

A Bill of Rights would "politicise" the judges

A Bill of Rights needs to be "entrenched" and would thereby restrict Parliament's freedom to legislate in the light of prevailing circumstances whatever they may happen to be

A Bill of Rights would lead to multiplicity of actions

A Bill of Rights would require an elaborate machinery to enforce it

A Bill of Rights would encourage "troublemakers"

A Bill of Rights is not needed-devices short of that would suffice

The time is not ripe for a Bill of Rights

Having a Bill of Rights would achieve little or nothing

A generally recognised convenient examination of both sides of the issue is the 1978 report of the House of Lords *Select Committee on a Bill of Rights*, which contains the following useful summary, which is worth reprinting in full:¹⁰⁶

The Arguments For and Against

32. The Committee summarise in this paragraph the most important arguments (as they see it) put to them in favour of a Bill of Rights.

- (a) The individual citizen might be better off, and could not be worse off, if the European Convention were made part of United Kingdom law, since in the event of conflict between the Convention and other provisions of United Kingdom law whichever was more favourable to the plaintiff would prevail.
- (b) Embodying the Convention in our domestic law would provide the individual citizen with a positive and public declaration of the rights guaranteed him, thus complementing the United Kingdom's traditionally "negative" definition of his common law rights. This would have special value at the present time for the many individuals and groups who tend to feel impotent in the face of the size and complexity of the public authorities which seem to dominate their lives.
- (c) Although when the United Kingdom acceded to the Convention, and thus allowed the right of individual petition to the Court at Strasbourg, it was believed that our law

¹⁰⁶ HL 176, 1977-78 - footnotes omitted

had nothing to fear from any appeal to the Articles of the Convention, a number of doubts have emerged since that time. Experience has shown that there are a number of areas where the British subject must at present take the long road to Strasbourg as a court of first instance as Golder did, since the domestic law provides no remedy in the courts of the United Kingdom.

- (d) The Commission and Court at Strasbourg were not established as a "court of first instance", but rather as a "court of appeal" to which the citizen can have recourse only when domestic procedures have been exhausted. Although there is no obligation on a Member State to incorporate the Convention, the Strasbourg Court has said that the intention of the drafters of the Convention that the rights set out should be directly secured to anyone within the jurisdiction of the contracting States finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law. The United Kingdom is at present the only signatory which neither has a charter of fundamental human rights nor has incorporated the Convention into domestic law. So long as the Convention remains only an international treaty and forms no part of United Kingdom law, it suffers from the disadvantage of being both remote and expensive. Moreover the United Kingdom is exposed to unflattering world publicity. Our compliance with the Convention can already be tested judicially at Strasbourg. There is no reason to suppose that our own courts are not equally capable of determining these issues. Any uncertainty there may be about the impact of the Convention on our domestic law already exists and can be argued out at Strasbourg. Why not in the Strand ?
- (e) An Act incorporating the Convention would not be an alternative to the continued exercise by Parliament of its traditional sovereignty, but would complement other Acts by which Parliament may wish to make law affecting human rights, including any amendment of the law that Parliament thinks desirable in the light of a United Kingdom court decision. Meanwhile, however, the Convention, if embodied in our domestic law, would, in Lord Scarman's words, "freshen up the principles of the common law" and when read with the common law would "provide the judges with a revised body of legal principle upon which they could go on slowly developing the law, case by case, as they have been doing for centuries", without waiting until the opportunity for legislation occurred.
- (f) Our membership of the European Economic Community reinforces the value of the European Convention on Human Rights and makes it the more desirable that United Kingdom citizens should become increasingly aware of the European dimension. It is therefore all the more important that our legal system and jurisprudence should be developed as part of the European Community and not in splendid isolation.
- (g) The Act would constitute a framework of human rights guaranteed throughout the United Kingdom and this would have special value if Scottish and Welsh Assemblies are established with powers devolved from Westminster, to ensure the exercise of such powers (e.g. those respecting local government and education) by the Assemblies with due regard to the United Kingdom's international commitments under the Convention. Significance is attached to the unanimous recommendation of the Northern Ireland Standing Advisory Commission on Human Rights favouring the incorporation of the Convention into legislation applying to the whole of the United Kingdom. This the Northern Ireland Commission believed to be in the long-term interests of that province.

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- (h) The incorporating Act, though not limiting Parliamentary sovereignty, would nevertheless be a continuing reminder to legislators of the international commitment undertaken when the United Kingdom government ratified the Convention. Indeed, the Convention seems likely to have far more practical effect on legislators, administrators, the executive, the judiciary and individual citizens as well as legislators if it ceases to be only an international treaty obligation and becomes an integral part of the United Kingdom law, guaranteeing the citizen specific minimum rights enforceable in the first instance in the United Kingdom courts.

33. The Committee now summarise in this paragraph the arguments against a Bill of Rights which seem to them to be the most important.

(i) Incorporation of the Convention would be to graft on to the existing law an Act of Parliament in a form totally at variance with any existing legislation and indeed incompatible with such legislation. Hitherto, it has been an accepted feature of our constitution that Parliament legislates in a specific form and that it is the role of the courts to interpret such legislation. Incorporation of the Convention would, for the first time, open up wide areas in which legislative policy on such matters as race relations, freedom of speech, freedom of the press, privacy, education and forms of punishment would be effectively handed over to the judiciary. All these are matters which our constitution has hitherto reposed in the hands of the legislature.

(ii) Nor is it right to say that the role the courts would have under a Bill of Rights would be no more than the kind of role they have always had under the common law. Under the common law the courts have developed legal principles slowly and empirically, from case to case. Under a Bill of Rights they would start with principles of the widest generality and would have a free hand to decide how those principles operated in the cases that came before them.

(iii) Parliament has on numerous occasions shown its readiness to intervene in new areas where fresh social problems have arisen, and it is better for Parliament to enact detailed legislation as it has done, for instance, on such matters as race relations and sex discrimination, rather than to look to the unelected judges to develop both the policy on such matters and the way in which it should be dealt with.

(iv) So far as possible, the law should be clear and certain, whereas if the European Convention, framed as it is in broad and general terms capable of a variety of interpretations, were to become part of our domestic law, it would introduce a substantial and wide-ranging element of uncertainty into our law. (The same would be true of a Bill not based on the European Convention because it is in the nature of any Bill of Rights to be framed in the same sort of way as the Convention.) Individuals and companies would no longer be able to obtain confident advice as to what their rights, powers, obligations and liabilities were. That in itself would be a price too high to pay for flexibility-and answers the point that the individual citizen could not on any footing be worse off with a Bill of Rights. The uncertainty thus brought into our law would itself afford opportunity for exploiting endless challenges in the courts or before any tribunal to the validity of the existing laws. No one would know where he stood until each question had been tested afresh, and the least that can be said is that there is the prospects of a very great extension of litigation in the courts.

To take only one example, the introduction of Article 10 of the European Convention into our domestic law would introduce serious doubts into such important areas of the law as those relating to defamation and contempt of court, and official secrets.

(v) It is fallacious to suggest, as some witnesses suggested, that to make the Convention part of our domestic law would simply to be give to our judges the same sort of role, in relation to the Convention, as is played by the judges in Strasbourg. There is a great difference between the Commission or the Court at Strasbourg from time to time measuring our domestic law against the yardstick of the Convention, and the United Kingdom courts applying the Convention as an instrument of our domestic law. As a set of principles of domestic law, the Convention would have a life of its own quite independent of its international existence. The Convention could then be invoked daily in our Courts and they would constantly have to give decisions on it without any guidance from the jurisprudence at Strasbourg (where the number of cases adjudicated is very limited). Moreover, our Courts would be free to give the Convention a wider effect than was required by such Strasbourg jurisprudence as was available. In doing so they would be acting quite consistently with our international obligations.

(vi) The present situation in the United Kingdom is in accord with the original philosophy of the European Convention. The Convention was intended to lay down minimum standards of human rights which it was assumed would be in accord with the spirit of all the legal systems of the signatories to the Convention. It was always contemplated, as in fact has proved to be the case, that from time to time there would be conflicts between the domestic laws of the signatory states and the Convention, and for this reason the Convention set up machinery by way of the European Commission and the European Court to deal with such cases. Such conflicts have inevitably arisen in all signatory states, whether or not the Convention is part of their domestic law. It is in accordance with the spirit of the Convention that, when it emerges that there is such a conflict in the case of the United Kingdom, this should be put right.

Where necessary this can be done by legislation, but often the deficiency will call for no more than a change of administrative regulation or instructions. But it is no more unflattering to this country than it is to any other signatory of the Convention if the kind of dispute contemplated by the drafters of the Convention from time to time goes to Strasbourg for argument; and it is not the case, as some of the witnesses assumed, that relatively more cases have gone to the Commission from the United Kingdom than from other countries.

(vii) Even on the most unfavourable view of the extent to which United Kingdom law at present falls short of the standards of the Convention there are no more than a few marginal situations where the incorporation of a Bill of Rights might bestow a remedy where present law does not do so. They have mainly related to privacy and the conduct of the prison services. As to privacy, this has already been the subject of a thorough investigation by the Younger Committee, which made various suggestions for reform but came down against a general law of privacy. As to the conduct of the prison services, there has been one case so far, the *Golder* case, where a complaint has succeeded, and where the matter was dealt with by a change in the relevant regulations. The Committee are aware that there are several other cases now before the Commission but cannot properly comment on these.

(viii) There is no reason for supposing that the Government, and Parliament, are likely to proceed in ignorance of the country's international commitments; and indeed the Committee were given examples of proposals which had been modified by the Government in their preliminary stage to take account of our commitments under the European Convention. It is not realistic to fear that there is any risk of this country-whether at Westminster or in a devolved assembly -legislating in "splendid isolation" and without regard to the treaty provisions by which we are bound. The effect of incorporating the Convention into United Kingdom law in the event of devolution to Scotland would be to introduce similar

uncertainties into the operation of any legislation emanating from the Scottish Assembly to those injected into the law of the United Kingdom generally.

(ix) It is felt that adequate weight is not given in the Report of the Northern Ireland Standing Advisory Commission to the arguments against incorporation from the point of view of its effect on the legal system as a whole; and that the argument that what is good for Northern Ireland must be good for the United Kingdom as a whole is unproven.

34. The two foregoing paragraphs briefly summarise the main arguments for and against a Bill of Rights which were reviewed by the Committee. Much has been written in the various publications but the Committee hope that they have picked out those arguments which will seem to the House to be the most important. Which of the arguments have the greater force, as has already been indicated, is a question on which the Committee are irreconcilably divided.

B. Content: The European Convention¹⁰⁷

Many supporters of a Bill of Rights favour incorporation, with or without amendment of the European Convention on Human Rights, as a way of minimising or avoiding potentially protracted, controversial and time-consuming argument on the content of a Bill. One of the main reasons why 'left-wing' politicians and parties tended to be against Bills of Rights was that such measures appeared to embody an almost totally individualistic rather than collectivist approach to rights. While such opponents would not have denied the importance of the major recognised rights and liberties - freedom of speech, assembly, religion and so on - they would wish similar weight to be given to more 'socio-economic' rights such as the rights to employment, health provision, education, housing etc.. The pressure points of this debate mirror socio-political developments in the last 200 years with the traditional common law rights of personal property and contract coming under pressure from state intervention and regulation and from collective action particularly through trade unions. Thus legal arguments in European as well as domestic courts on, for example, the 'right' of people to join or not join a trade union, or the 'right' of the State to take private property, especially by nationalisation legislation, with or without 'fair' compensation, have crystallised the concerns of both sides. In recent years many opponents of a rights-based jurisprudence, in the face, in particular, of the trade union and law and order legislation of the 1970s and 1980s, have been reassessing their belief in an 'immunities' rather than 'positive rights' basis for the legal protection of what they regard as fundamental liberties and entitlements.

As Turpin notes "the arguments on this question have revealed that opposing political views may be reflected in different conceptions of a Bill of Rights. There are those who see it as providing ammunition against legislation associated with the aims of one or other political party.... But a Bill of Rights, if it is to be successful, must rest on a broad consensus that certain rights transcend political differences and are to be defended against governments of every colour. The quest for a 'neutral' but effective Bill of Rights leads many to favour the

¹⁰⁷ See generally on the Convention, Research Paper 94/10, *International Human Rights Conventions*, 18.1.94, Section III A

incorporation into English law of the European Convention for the Protection of Human Rights and Fundamental Freedoms".¹⁰⁸ The European Convention has formed the basis of many of the Parliamentary bills introduced in the last 20 years seeking to enact a Bill of Rights, and other draft Bills of Rights published by parties and pressure groups.¹⁰⁹

The European Convention has become, in recent years, an established part of domestic jurisprudence although it is not *incorporated* into domestic law. That is, it remains a matter of international law which UK courts cannot apply directly in domestic issues.¹¹⁰ For example, Sir Thomas Bingham, then Master of the Rolls, argued for the incorporation of the European Convention in his 1993 Denning Lecture.¹¹¹ Lord Irvine of Lairg, the Shadow Lord Chancellor, in his Lords debate on the constitutional role of the judiciary on 5 June 1996 gave as an example of his concern about the public involvement of the judiciary in debate on controversial issues, the fact that "many judges, including the noble and learned Lords, Lord Bingham and Lord Taylor, have publicly called for incorporation of the European Convention on Human Rights".¹¹² The Lord Chancellor, in his response, considered the role of EU jurisprudence in domestic law and then turned to the Convention¹¹³ [c.1312]:

Of course, the European Court of Human Rights is a different tribunal. Its judgments are not directly binding in domestic law in this country. They are binding in international law as a convention commitment and Parliament considers what should be done. It may or may not alter the law according to what it considers is required in the light of the judgments of that particular court.

It is, perhaps, significant that the Court of Appeal, including Sir Thomas Bingham MR, held in the recent 'gays in the military' case that, in the words of the *Administrative Law Reports* case-note, "although the Ministry's policy appeared to infringe the appellants' rights under art. 8 of the European Convention on Human Rights, disputes arising from the interpretation and application of the Convention fall to be determined by the European Court of Human Rights, not the English courts".¹¹⁴

As already noted, both the main Opposition parties are in favour of incorporation of the Convention. Labour would include a provision that other laws are to be interpreted consistently with it unless expressly otherwise, but because it regarded it as "inadequate and outdated" they propose an all-party commission to draft a UK Bill of Rights with a more permanent form of entrenchment. The Liberal Democrats support, in addition to incorporation of the Convention, the adoption of a UK written constitution. Conservative opposition rests,

¹⁰⁸ C Turpin, *British government and the constitution*, 3rd ed., 1995, p.547, Presumably the same people would favour incorporation into other UK jurisdictions

¹⁰⁹ See generally Lord Lester of Herne Hill, "European human rights and the British constitution", chap. 2 of J Jowell and D Oliver, *The changing constitution*, 3rd ed., 1994

¹¹⁰ See Research Paper 94/10, *op cit*, Section III A5

¹¹¹ "The European Convention on Human Rights: time to incorporate" (1993) 109 *Law Quarterly Review* 390-400

¹¹² HL Deb vol 572 c.1258, 5.6.96

¹¹³ See also his recent speech to the Citizenship Foundation, 8.7.96

¹¹⁴ *R v Admiralty Board ex p Lustig-Prean* (1996) 8 *Admin LR* 29, 29-30

in the argument of the party chairman, Brian Mawhinney, in February 1996, on the belief that the present right of individual petition to the European Court of Human Rights, and British Governments' acceptance of all its judgments, is sufficient protection, whereas "incorporation into UK law would be a fundamental constitutional change. The case against the codification of rights is profound. It is supremely arrogant of one generation to assume that its views should away the wisdom of past generations and bind those unborn for decades to come".¹¹⁵

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