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REFORMING AN UNWRITTEN CONSTITUTION? EXPLORING CHANGES IN THE UNITED KINGDOM, 1997–2010

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Abstract. *This article considers the major constitutional reforms which have taken place in the United Kingdom during the period of government by the Labour Party, 1997–2010. Within the context of the UK's unwritten constitution, the article first considers how 'constitutional' law can be identified when compared with a written constitution, such as that of the Republic of Lithuania. The article then analyses the major reforms which have taken place since 1997, the political reasons behind them, the processes of reform and their impact on the constitution. The four areas examined—reform of the House of Lords; the enactment of the Human Rights Act 1998; devolution; and the changes to the judiciary in the Constitutional Reform Act 2005—have all had a significant impact on the way in which the UK is governed. The article argues that these are all welcome developments, but that in many cases they are incomplete. In the absence of the likelihood of a future written constitution for the UK, sustained efforts by future governments are needed by to ensure that the reforms fulfil their aim of modernizing the democratic system.*

Keywords: *United Kingdom, constitution, reform, Labour Party, democracy, human rights, devolution, House of Lords*

Introduction

How is it possible to reform a constitution, when that constitution is not readily identifiable? The United Kingdom (UK) is a well-known exception to the global constitutional horizon: it is a long-established, stable democratic country but neither its stability nor democratic traditions owe a great deal to the enshrining of rights, powers and responsibilities in a formal, written constitution. Rather, the task of any comparative constitutional lawyer when looking at the UK is first to establish what type of ‘law’ can count as ‘constitutional law’. The task is not straightforward. However, adopting a wide perspective of what can be considered as constitutional, the UK arrangements are revealed to be both rich and varied. Identifying and analysing changes and reforms brings similar challenges but also offers opportunities to consider a vastly different constitutional model to the one in place in most contemporary European states.

For observers of the workings of the UK constitution, the change of national government in May 2010 was notable for two important reasons. First, the outgoing Labour Government was replaced by a coalition Government composed of the Conservative Party and the Liberal Democrat Party. Coalition governments are an extremely rare occurrence in the UK, where one-party government (alternating between Labour and the Conservatives as the main left and right-wing parties respectively) is the norm. Second, the election brought to end 13 years of government by the Labour Party under the leadership of, first, Tony Blair (1997-2007) followed by Gordon Brown (2007-2010). Aside from the expected political considerations of a new Government taking charge, the election brought a (partial) close to a chapter of express and extensive constitutional reforms which the Labour Party had embarked upon taking office.

It is an opportune moment, therefore, to critically examine the reforms, both complete and incomplete, which have taken place within the UK’s constitutional arrangements and to consider possible future developments. In a comparative context, it is hoped that this will demonstrate how substantive constitutional reforms have not only taken place in countries in Central and Eastern Europe in recent years, but also within the Western liberal tradition. As one of the largest members of both the European Union and the Council of Europe, the UK constitutional experience has much to offer the continuing constitutional debates, both in countries undergoing constitutional transformation and at the wider, European level. The purpose of this article is to help inform these debates through a critical analysis of some of the major constitutional developments which have taken place in recent years in the UK. It is hoped that the analysis demonstrates that fundamental discussions about the place and role of constitutional law are alive and well in the UK in the twenty-first century.

After contextualizing the reforms within the nature of the UK’s constitution and explaining the motivation behind the reforms, the following analysis considers some of the main changes which have been brought about since 1997, placing each in the context of the UK’s constitutional traditions. The ongoing and unfinished nature of constitutional reforms, which has also characterized the work undertaken during recent years, is also

brought out as well as the reforms that are likely to occupy the constitutional reform agenda in the years to come.

1. The Peculiar Nature of the UK Constitution

There is no single document which encapsulates the Constitution of the UK. Rather, speaking of the ‘UK constitution’ points to an undefined yet expansive range of written laws, case-law jurisprudence, unwritten practices, conventions and principles. All have legal effects to varying extents (though these are not always enforceable), and their history and development can stretch back many centuries. The UK does indeed have a constitution, but the parameters for analysis need to be widened in order to see what contributes to our understanding of the constitution and how it works in practice. This methodology has an effect on the understandings of related terms of constitutionality, constitutionalism and constitution-building when discussing the case of the UK. As Barnett suggests, ‘constitutionalism’, as a means by which the legitimacy of public action can be measured, is a better conceptual and practical indicator of how the UK’s largely unwritten arrangements can be evaluated.¹ The approach adopted here is rather to look at the substantive nature of the reforms which have taken place in the UK which would in other states necessitate changes to (written) constitutions.

Acts of Parliament, which hold the highest legal authority in the UK, must be applied by the Courts, but Acts do not in themselves cover all of the UK’s constitutional features. A compendium of all Acts of Parliament in force would not in itself satisfy the scholar or citizen who is attempting to understand the multi-levelled² nature of the UK constitution. Although some Acts (including those analysed below) can be recognized as being more ‘constitutional’ in character than others due to their content, there are no Acts which are specially protected within the legal regime—any Act can be repealed according to the normal Parliamentary procedures. Constitutional changes brought about through Acts of Parliament lie at the heart of the analysis in this paper, but it should be borne in mind that such reforms are not immune from future changes.

What are the most important or visible features of a constitution? A brief look at the articles of the Constitution of the Republic of Lithuania in the first chapter ‘The State of Lithuania’ is a useful comparator to structure the presentation of the contemporary constitutional reforms in the UK. Articles 1-17 of the Constitution are the type of provisions defining the core features of a state: specifying where sovereignty lies, placing limits on the exercise of political power, confirming territorial integrity and the symbols of the state.

Very little of the content of these articles finds direct expression through Acts of Parliament in the UK. In terms of the fundamental political basis of the state,³ the UK can

1 Barnett, H. *Constitutional and Administrative Law*. 7th ed. Abingdon: Routledge, 2009, p. 5–6.

2 Bamforth, N.; Leyland, P. (eds). *Public Law in a Multi-Layered Constitution*. Oxford: Hart, 2003.

3 In the case of Lithuania, according to the very first Article of the Constitution, the State is ‘an independent and democratic republic’.

be accurately described as a constitutional monarchy, though this is not expressly stated as such in national law. Similarly, in contrast to Articles 14, 15 and 16 of the Lithuanian constitution, there are no legal provisions which define the national language,⁴ nor the flag,⁵ anthem⁶ or other symbols of the state. One might also point to the importance of these symbols in giving a document a specific *constitutional* character. This has been a point made at both national and EU level.⁷ Rather, the constitutional symbols associated with the UK have a *de facto* character which are either associated with the Monarch, as Sovereign, or have simply become established through long-standing practice.

The lack of precise definition and ease of finding such symbols is indicative of wider problems one encounters when attempting to understand how political power, even at the highest level, is exercised in the UK. The reigning Monarch is the Head of State and the Crown sits at the head of the executive, legislature and judiciary. The Queen's full title (which was of her own choosing) is, 'Elizabeth II by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith'.⁸ Her roles and powers are not comprehensively defined in Acts of Parliament—nor are the powers which are exercised by the Government on her behalf.⁹ The use of 'State' as a technical term itself is similarly not well developed in UK constitutional law.¹⁰ By contrast, the rules constituting the line of succession to the throne are defined in the Act of Settlement 1700.

4 English is, of course, the *de facto* national language. The Welsh Language Act 1993 states that Welsh and English should be treated on the basis of equality 'in the conduct of public business and the administration of justice in Wales'. Scots Gaelic has a similar status according to the Gaelic Language (Scotland) Act 2005 as passed by the Scottish Parliament. Knowledge of the English language is now one of the requirements for settlement and naturalization under the UK immigration and citizenship law.

5 The Union Flag (more commonly referred to as the Union Jack, though technically this is only thought to be the correct term when flown from a ship) dates in its current form from 1801. It has come to be regarded as the national flag through practice. Although statements in Parliament have been made to the effect that it is to be regarded as the national flag, there is no legislation on this point. A Conservative Member of Parliament, Andrew Rosindell, proposed the Union Flag Bill during the 2007-8 Parliamentary session. The aim of the Bill was '[T]o define the Union flag of the United Kingdom of Great Britain and Northern Ireland; to make provision about the display and flying of the Union flag; and for connected purposes'. However, the Bill did not reach the debating stage (second reading) of the Parliamentary process.

6 The national anthem, 'God Save The Queen/King' has become so through practice. Scottish, Welsh and Northern Irish sporting teams have separate anthems which are played during events or matches.

7 The importance of symbols in the construction of an EU constitution is discussed further in Vaicaitis, V. *European constitutionalism v. reformed constitution for Europe*. *Jurisprudencija*. 2010, 1(119): 69–83.

8 The Royal Titles Act 1953 c. 9 allows for different titles to be defined for use in each of the other 15 Commonwealth States of which she is also Head of State, which include Australia, Canada, Jamaica and New Zealand.

9 Leyland, P. *The Constitution of the United Kingdom*. Oxford: Hart, 2007, p. 70–74.

10 According to Neil MacCormick, this is largely for historical reasons relating to the gradual 'evolutionary process of development of the modern United Kingdom out of an English feudal monarchy that moved sharply toward royal absolutism under the Tudor monarchs of the sixteenth century ... Establishment of limited monarchy in what might be best be called a "polity of estates", or *Ständestaat*, came about through the pro-parliamentary *coup d'état* that was the "Glorious Revolution" of 1688-9.' MacCormick, N. *Questioning Sovereignty*. Oxford: Oxford University Press, 1999, p. 28–9.

The Monarch has important roles which go beyond the tasks of a figurehead or symbol of the state: choosing the Prime Minister is perhaps one of the most important. Even this though is defined through practice or ‘convention’, the leader of the largest party in the House of Commons has always been invited by the Monarch to become Prime Minister, and so this is the expected outcome after elections to the House of Commons. During the 1997–2010 period under scrutiny in this article, the resignation of Tony Blair as Prime Minister on 27 June 2007 did not trigger elections. Gordon Brown, as the new leader of the Labour Party, continued to command a clear majority of the members of the House of Commons. He was therefore invited by the Queen to become Prime Minister—thus an example of a constitutional practice which effectively defines who governs the country with no authoritative text to set out the principles or procedures.¹¹

In a similar vein, the UK cannot be characterized easily as either a unitary state,¹² nor a federation, confederation or collection of autonomous communities.¹³ Scottish constitutional lawyers are right to point out that characterizing the UK’s constitutional history as largely ‘unbroken’ (and thus explaining why a written constitution has never come about through revolution, occupation by a foreign power, defeat in war, etc.) is a rather England-centric view and does not take into account the break with the past marked by the Act of Union 1707 for Scotland.¹⁴ Through the Act of Union 1707 between England and Scotland, the powers of the Scottish Parliament were transferred to the Parliament at Westminster. The Scottish legal system remains distinct from that of England—but the Act of Union does not define the nature of the UK *per se*. Instead, we must look to its contemporary structure—which draws heavily on reforms enacted since 1997—to understand if the UK can be seen as something akin to a federation (or at least, moving towards a federal-type of structure), or something else entirely.

The absence of a written constitution means that there is no legal text which, theoretically or otherwise, sits at the top of the legal hierarchy in UK law. Similarly, no Act enjoys special legal protection by the imposition of a special reform process, as one expects to find in a written constitution regarding the provisions of the constitution as the expression of the most fundamental law in force.¹⁵ Although one may lament the absence of a mechanism to protect the most fundamental aspects of the legal system, the power of Parliament to enact any Act it wishes without recourse to a special procedure ‘provides a remarkably flexible and efficient instrument for achieving constitutional reform’.¹⁶

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- 11 For more on this point, see Turpin, C.; Tomkins, A. *British Government and the Constitution*. 6th ed. Cambridge: Cambridge University Press, 2007, p. 356–362.
- 12 Cf. Constitution of the Republic of Lithuania, Article 10.
- 13 Such as in Spain. See the provisions of the Constitution of the Kingdom of Spain, Articles 143–158.
- 14 MacCormick, N., *supra* note 10, p. 58.
- 15 Cf. Constitution of the Republic of Lithuania, Articles 147–9.
- 16 Bradley, A. The Sovereignty of Parliament – Form or Substance? In Jowell, J.; Oliver, D. (eds.). *The Changing Constitution*. 5th ed. Oxford: Oxford University Press, 2004, p. 39. Recognition of the doctrine of the Sovereignty of Parliament—‘Parliament has the right to make or unmake any law whatsoever’—is due to the work of A. V. Dicey, in his *Introduction to the Study of the Law of the Constitution*, first published in 1885. 10th ed. London: Macmillan, 1959.

The accepted doctrine is that Acts of Parliament, i.e. those passed by the House of Commons (lower house), House of Lords (upper house) and granted Royal Assent by the reigning Monarch, have the highest form of legal authority. Furthermore, there are no formal limits placed on what an Act of Parliament may contain—and the Courts are bound to respect and apply them. The highest court, the Supreme Court (formerly the House of Lords, in its judicial capacity)¹⁷ cannot ‘disapply’ any law and cannot receive or consider questions on the ‘constitutionality’ of Acts since it has no benchmark against which they can be tested. ‘Unconstitutional’ has no precise meaning because it can never be fully clear what is ‘constitutional’ behaviour and what is not.¹⁸

In theory, all Acts of Parliament have equal legal value, although some clearly have a more ‘constitutional’ content than others. The Human Rights Act 1998, Scotland Act 1998, Government of Wales Act 1998 and Constitutional Reform Act 2005 are all examined below as important statutes having brought about major constitutional changes—though important as they are, their legal status is as equally valid as any of the other Bills granted Royal Assent each year (usually between 20 and 50).¹⁹ Any of these can be changed, or repealed, by the passing of another Act—and it is not possible to ‘protect’ Acts by requiring a special safeguarding procedure, such as one is likely to find in a written constitution.²⁰

As a dualist system, international treaties (which are signed by the Crown) have no direct legal force in the domestic legal system.²¹ The primacy of EU law over national law has been accepted, though this situation was resolved by judicial decision-making, and only some years after the UK became a member of the (then) European Economic Community.²² A constitutional amendment in the style adopted by Lithuania²³ was the-

17 The creation of the Supreme Court is discussed below.

18 Bradley, A. W.; Ewing, K. D. *Constitutional and Administrative Law*. 14th ed. Harlow: Pearson, 2007, p. 26.

19 House of Commons, Department of Information Services. Bills Gaining Royal Assent by Session 1948–2008. In *Parliamentary Information List* [interactive]. 2009, SN/PC/02264 [accessed 03-06-2010]. <<http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02264.pdf>>.

20 Cf Constitution of the Republic of Lithuania, Articles 147–9.

21 The traditional position is exemplified by the case Court of Appeal case of *Rustomjee v. R* (187) 2 QBD 67 at p. 74: ‘as in making the treaty, so in performing the treaty, [the Queen] is beyond the control of municipal law, and her acts are not to be examined in her own courts’. Quoted from Loveland, I. *Constitutional Law, Administrative Law, and Human Rights*. 4th ed. Oxford: Oxford University Press, 2006, p. 691. This can be contrasted with monist systems, which generally provide for the inclusion of treaties/international law within the domestic legal hierarchy. See, for example, Constitution of the Republic of Lithuania, Article 138–3: ‘International treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania’.

22 Although beyond the scope of this article, the relationship between UK law and EC/EU law was considered in the leading case of *R v. Secretary of State for Transport, ex parte Factortame* (no. 2) [1991] 1 AC 603. According to Lord Bridge in that case, at paras 658–659: ‘If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.’ For further discussion, see Craig, P. *Britain in the European Union*. In Jowell, J.; Oliver, D. (eds.). *The Changing Constitution*. 6th ed. Oxford: Oxford University Press, 2007, p. 84–107.

23 Albi, A. *EU Enlargement and the Constitutions of Central and Eastern Europe*. Cambridge: Cambridge University Press, 2005, p. 99–101.

refore not possible for practical or theoretical reasons, even though the principle of the primacy of Community law (as it was) had already been laid down by the European Court of Justice in the case of *Costa v. ENEL*²⁴ as early as 1964—and thus well before the UK’s eventual membership in 1973.

Against this background of constitutional exceptionalism, it is unsurprising that calls have been made over the years for the UK to adopt a written constitution as other common law systems have done. Various non-governmental organizations have even made suggestions as to what a written UK constitution should look like.²⁵ Political parties have on occasion suggested that a written constitution might strengthen (or renew) the democratic process in the UK and some consider the eventual drafting of a written Constitution as a desirable goal.²⁶ It was even reported that Gordon Brown was considering the merits of having a written Constitution for the UK upon taking office in 2007,²⁷ and the possibility was mooted by the Lord Chancellor before the Justice Committee of the House of Commons in 2008.²⁸ This was not acted upon—and can partly be explained by the lack of consensus over whether a written constitution is really needed. Arguments over whether to adopt a written constitution do not sit at the forefront of the minds of most of the British electorate: national elections campaigns focus more on employment, education, social welfare, health, financial issues and (to a lesser extent) foreign policy than constitutional renewal. Nevertheless, the reforms which are analysed below formed part of a comprehensive programme of reform and modernization to the very nature of the UK’s democratic system of governance when the Labour Party came to power in 1997 and have become visible features of the renewed constitutional horizon in the country.

2. The Labour Party’s Constitutional Reform Agenda 1997–2010

On 1 May 1997, the election of the Labour Party under the leadership of Tony Blair brought to an end 18 years of government by the Conservative Party.²⁹ The party won 418 seats out of 659 in the House of Commons—the largest margin the party had ever

24 Case 6/64, *Costa v. ENEL* [1964] ECR 585.

25 For example, Institute for Public Policy Research, *Draft Constitution of the United Kingdom*. London: IPPR, 1991.

26 The third largest party in the House of Commons, the Liberal Democrats, have long supported the enactment of a written constitution.

27 Grice, A. Brown may bring in a written constitution [interactive]. *The Independent*. 11 May 2007 [accessed 04-06-2010]. <<http://www.independent.co.uk/news/uk/politics/brown-may-bring-in-written-constitution-448337.html>>.

28 House of Commons. Constitutional Reform and Renewal, *Oral Evidence taken before the Justice Committee on 14 July 2009*, question 59-62 [interactive]. [accessed 04-06-2010]. <<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/uc923-i/uc92302.htm>>.

29 Margaret Thatcher was Prime Minister 1979-1990, followed by John Major 1990-1997. Under the leadership of Tony Blair, the Labour Party was known as ‘New Labour’ in order to signify its renewed identity and direction.

achieved.³⁰ This considerable majority allowed the party to put in place a programme of reform for constitutional issues, some of which had been Labour Party policy for a long period.

The 1997 election manifesto of the Labour Party did not explicitly use the words ‘constitutional reform’ but rather a collection of measures until the promise ‘We will clean up politics’, with a criticism of the lack of such reforms proposed or undertaken by the Conservatives whilst in office.³¹ This section contained the following four aims: to end the hereditary principle in the House of Lords; to devolve power in Scotland and Wales and to elect mayors for London and other cities; to guarantee human rights.³²

Of course, given the expansive nature of what can be termed ‘constitutional’ in the UK sense, these are not the only reforms which took place during the period under examination which can be seen to have constitutional implications. It is possible to consider other pieces of legislation, such as the evolving process of EU integration which has required legislation at national level—including the ratification of the Accession Treaty covering Lithuania’s entry to the EU.³³ There are also evolving practices, such as the growth in public–private bodies and involvement of the private sector, which have important consequences for the state of the UK’s constitution but which do not necessarily stem from legislation. However, this article focuses on the main changes which have taken place through the passing of legislation pursuant to the manifesto promises identified above. In addition, two reforms which emerged whilst the Labour Party were in office—the creation of the Supreme Court and the reform of the post of the Lord Chancellor—are also examined.

3. Parliamentary Reform: the House of Lords

The UK, in common with other large states in Western Europe, has a bicameral Parliament. The House of Commons (the lower house) is directly elected by all eligible citizens (including citizens of Ireland and Commonwealth countries resident in the UK) and its composition and voting procedures are comprehensively set out in various pieces of legislation.³⁴ The House of Lords (the upper house), by contrast, is a completely unelected body and a ‘constitutional anachronism’.³⁵ Traditionally, the function of the Lords was to advise the Monarch; however, over successive centuries and the advent of gradual enfranchisement of the population, the Commons eventually took over as the

30 House of Commons, Research Paper 01/38 (2001) [interactive]. [accessed 03-06-10]. <<http://www.parliament.uk/documents/commons/lib/research/rp2001/rp01-038.pdf>>.

31 Labour Party Manifesto 1997 [interactive]. [accessed 03-06-10]. <<http://www.bbc.co.uk/election97/background/parties/manlab/labman.html>>.

32 *Ibid.*

33 European Union (Accessions) Act 2003.

34 Principally, the Representation of the People Acts 1983, 1985 and 2000; Parliamentary Constituencies Act 1986; and Political Parties, Elections and Referendums Act 2000.

35 Oliver, D. The ‘Modernization’ of the United Kingdom Parliament? In Jowell, J.; Oliver, D. (eds.). *The Changing Constitution*. 6th ed. Oxford: Oxford University Press, 2007, p. 174.

dominant House.³⁶ In the modern sense, the primary role of the House of Lords is to scrutinize and debate all legislation. Needless to say, this is a role which has developed over time and is not contained or defined by statute.

Until the reform process took effect, the composition of the House of Lords was dominated by two groups of ‘Lords temporal’: hereditary peers and life peers. Hereditary peers inherited their titles, which were related to land ownership, from their fathers (or, exceptionally, their mothers). Life peers are appointed by the Prime Minister to sit in the House of Lords for the duration of their lifetime but the title and right to sit did not pass to descendants. The system of life peerages was introduced by the Life Peerages Act 1958 as a means of redressing the political balance of the House and this has also allowed more women and ethnic minorities to be appointed to the House. The ‘Lords Spiritual’ is the other category of members of the House of Lords: 26 of the most senior Bishops of the (protestant) Church of England. Unlike many continental European systems, including Lithuania,³⁷ there is no separation of church and state in the UK.

It is axiomatic that given most peers in the House of Lords inherited their title from their land-owning ancestors; the House overwhelmingly leaned towards the right-wing—although membership of any particular party is not a pre-requisite of membership of the Lords.³⁸ Official Labour Party policy has long since been to change the composition of the Lords, but its tentative efforts to reform the House when in government in the 1960s and 70s came to nothing.³⁹ For this reason, it is unsurprising that the reform of the Lords found its place in the election manifesto of the Labour Party—though they had moved away from their position of the abolishment of the House which was briefly held in the 1970s.⁴⁰

The problem facing the Government in 1997, and continuing to face the Government of today, is how to reform the House. If it were that the House was not only seen as outdated in its composition but that it served no usual purpose, then the impetus to reform would perhaps be stronger. However, in a curious way despite its unelected nature, it can be characterized as a ‘constitutional watchdog’, often working in a non-political way in making the Government and the House of Commons reconsider ill-conceived or badly-drafted legislation.⁴¹ Therefore, despite the wholly undemocratic nature of the

36 In practice, this means that during the passage of legislation, if the two Houses cannot agree on the text of a Bill, the House of Commons may engage a procedure laid down in the Parliament Acts 1911 and 1949 whereby the House of Lords, having twice rejected a text, is bypassed. The Bill then goes directly to the Monarch to receive the Royal Assent and become legally-enforceable. This procedure has been used sparingly—only four times since 1949 (the last time was the Hunting Act 2004). More information is available in: Kelly, R. *The Parliament Acts*. London: Library of the House of Commons [interactive]. 2007, SN/PC/675 [accessed 03-06-10]. <<http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-00675.pdf>>.

37 Cf. Constitution of the Republic of Lithuania, Article 43.

38 Although many members of the Lords are members of the main political parties, a great proportion pre- and post-reform Lords are independents and known as ‘cross-benchers’.

39 Shell, D. Labour and the House of Lords: a case study in constitutional reform. *Parliamentary Affairs*. 2000, 53: 290–310, 291.

40 *Ibid.*

41 Oliver, D., *supra* note 35, p. 177.

way in which the Lords take their seats, the work of the House is often praised for the way in which it scrutinizes legislation and wider policy developments. For example, the European Union Committee and Science and Technology Committee of the Lords regularly publish insightful and comprehensive reports on the impact of EU legislation in the UK and developments relating to science and technology.⁴² Through the system of Life Peerages, the House has gained many members who have made their name through achievements in business, science, academia, culture and other areas in addition to politics. Calls for the House of Lords to be abolished altogether are very rare and perhaps a reflection of the need for a second chamber to keep a ‘check’ on lower house, in the absence of limitations on its power provided by a written Constitution.

The task of reforming the Lords was therefore to make it more democratic, without jeopardizing the substantive work it does or the way in which it conducts its business.⁴³ The reform introduced by the Government in 1997 was therefore to remove the largest group of Lords—the hereditary peers. The House of Lords Bill was passed in 1999, by both Houses (but with, as expected, significant opposition in the Lords) and fulfilled the manifesto commitment to end ‘the right of hereditary peers to sit and vote in the House of Lords’.⁴⁴ Instead of abolishing all 750 peers, 92 were retained in the House as a transitional measure. Their right to sit in the House will not pass to their descendents.

As the 1997 manifesto made clear, the House of Lords Act was aimed to be merely the first stage of a constitutional reform process to make a more modern, democratic House. The second stage, that is to say the completion of the reform process and composition of a new House, has been much more problematic and remains incomplete. As Bogdanor notes, ‘[t]he current, predominantly appointed, House of Lords thus lives in a curious kind of limbo, stigmatised as an interim institution and threatened with imminent extinction, yet continuing to perform the functions of a second chamber, with genuine, if limited, legislative powers’.⁴⁵

During repeated attempts in the 2000s, Parliament has been unable to decide whether the House should be appointed, elected or a combination of both. Following the entry into force of the House of Lords Act 1999, the Government published a White Paper, *The House of Lords – Completing the Reform*,⁴⁶ based on the findings of a Royal Commission report, *A House for the Future*.⁴⁷ The proposed solution for a mixed House of elected and appointed members (the latter by both an independent authority and by

42 See, for example, the following reports: House of Lords Science and Technology Committee, Personal Internet and Security – Report [interactive]. 2007, HL Paper 165-I [accessed 03-06-2010]. <<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldstech/165/165i.pdf>>; House of Lords European Union Committee, Co-decision and National Parliamentary Security [interactive]. 2009, HL Paper 125 [accessed 03-06-2010]. <<http://www.publications.parliament.uk/pa/ld200809/ldselect/lducom/125/125.pdf>>.

43 See Phillipson, G. “The greatest quango of them all”, “a rival chamber” or “a hybrid nonsense”? Solving the second chamber paradox. *Public Law*. 2004, 7: 352–379.

44 Labour Party Manifesto 1997 [interactive]. [accessed 03-06-2010]. <<http://www.bbc.co.uk/election97/background/parties/manlab/labman.html>>.

45 Bogdanor, V. *The New British Constitution*. Oxford: Hart, 2009, p. 145.

46 Cm 5291, 2001.

47 Cm 4534, 2000.

political parties based on their strength in the House of Commons) was heavily criticized on all sides of the political spectrum and was dropped. As well as the appointed/elected issue, the *means* to elect or appoint members, i.e. by what election system or which body should have responsibility to appoint, was revealed to be an equally divisive issue.

Intrinsically linked to these debates is the desire to not to re-open the political battle with the House of Commons, which is generally regarded as having been settled in the early part of the twentieth century. The suggestion is that by giving the House of Lords democratic legitimacy, a power struggle with the Commons might once again be created with the risk of instability or deadlock in the system. An overly ‘political’ second chamber is regarded as best avoided, but the question of how to do this through the election of representatives is a fraught one. In March 2007, both the House of Lords and the House of Commons held free votes (i.e. the political parties did not instruct their members on how to vote) on options to reform of the Lords. The Lords opted for a fully appointed House, whilst the Commons preferred a wholly or mainly elected second chamber. The Government brought forward another White Paper for debate,⁴⁸ the title of which (*An Elected Second Chamber*) demonstrated that reform should follow the view of the House of Commons as the elected chamber. The Government did not officially propose legislation before leaving office in May 2010, which brought an end to this long chapter of unsatisfactory and incomplete reform.

The Conservative Party Manifesto 2010 contained a commitment to follow-up on this proposal and ‘work to build a consensus for a mainly-elected second chamber to replace the current House of Lords, recognising that an efficient and effective second chamber should play an important role in our democracy and requires both legitimacy and public confidence’.⁴⁹ The Liberal Democrats, who entered Government as the junior partner in a coalition with the Conservatives in May 2010, went further in their election manifesto and called for a ‘fully-elected second chamber with considerably fewer members than the current House’.⁵⁰ Since both parties entering Government effectively inherited this incomplete reform, it will be their responsibility to take the reform process forward, though, in spite of the importance of one of the core organs of the state, it is unlikely to occupy a major part of the Government’s initial legislative programme. The decade-long attempts at reform mean that there is likely to be little appetite to take on this reform wholeheartedly by a new Government.

4. Guaranteeing Human Rights

The UK lays claim to some of the key tenets of the Western liberal tradition and the concept of the legal recognition and enforcement of rights. The writ of *habeas corpus* is

48 Lord Chancellor and Secretary of State for Justice, *An Elected Second Chamber*, Cm 7438, 2008.

49 Conservative Party Manifesto 2010 [interactive]. [accessed 03-06-2010] <http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf>, 67.

50 Liberal Democrat Party Manifesto 2010 [interactive]. [accessed 03-06-2010] <http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf>, 88.

a case in point.⁵¹ Until recently, however, it was difficult to positively identify or assert many fundamental rights in Court because of a lack of legal authority emanating from Parliament. The Bill of Rights 1689 which followed the Glorious Revolution was an important constitutional milestone, but despite its name, the text of the Bill does not generally address individual rights but moreover the rights/responsibilities of the reigning Monarch and of Parliament.⁵² The UK has signed and ratified many international conventions with the aim of protecting fundamental rights, but as stated earlier, as pieces of international law these cannot be enforced in domestic law unless their content has been placed within an Act of Parliament.

The European Convention on Human Rights (ECHR) binds the UK in international law but until 1998 had not been incorporated within an Act of Parliament and was therefore enforceable by the Courts. That said, the ECHR had some influence in cases where there was legal ambiguity.⁵³ But any attempt to enforce rights found in the ECHR (as an international convention) in the courts would be bound to be unsuccessful, unless there was something in the case-law based common law which could be recognized and enforced by the Court.⁵⁴ Even if a common law right was found and relied upon, the courts would not be able to give this precedence over a clear provision in an Act of Parliament. The Courts were also often unwilling to interfere with the decisions of public bodies when claims explicitly relating to breaches of rights were raised.⁵⁵ The judiciary has been criticized for showing too much deference to executive decision-making, especially in the area of human rights.⁵⁶

The UK was instrumental in drafting the text of the ECHR and was the first state to ratify the Convention. Individuals have been available to the European Court of Human Rights (ECtHR) in Strasbourg since 1966.⁵⁷ The lack of enforcement of rights within the UK courts was demonstrated to be particularly striking when one considers that recourse to the ECtHR was available after the exhaustion of domestic remedies. As a result of the lack of available means for the Courts to recognize and enforce fundamental rights at the domestic level, a number of high profile cases involving the UK were settled by the ECtHR. Cases involving the UK as a respondent state have been amongst the most numerous—over 200 judgments of the ECtHR have found the UK to be in breach of one or more Convention rights.⁵⁸ For claimants, the implications of asserting ECHR

51 Sharpe, R. J. *The Law of Habeas Corpus*. 2nd ed. Oxford: Oxford University Press, 1989.

52 For example, according to the Bill of Rights 1689 Articles 4 and 6, taxation without Parliamentary authority is unlawful and the King may not maintain his own private army.

53 See the decision of the Court of Appeal in *Derbyshire County Council v. Times Newspapers* [1992] QB 770.

54 *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696

55 See, for example, *R v. Secretary of State for Defence, ex parte Smith* [1996] QB 517.

56 Allan, T. R. S. Human rights and judicial review: a critique of 'due deference'. *Cambridge Law Journal*. 2006, 65(3): 671–695. But see the critique of Allan's views by Kavanagh, A. Defending deference in public law and constitutional theory. *Law Quarterly Review*. 2010, 126(2): 222–250.

57 At the time, a state needed to make an optional declaration under the ECHR to allow individuals the right to petition the Court. Since 1998, this is no longer the case.

58 Lester, A.; Beattie, K. Human Rights and the British Constitution. In Jowell, J.; Oliver, D. (eds.). *The Changing Constitution*. 6th ed. Oxford: Oxford University Press, 2007, p. 64.

rights meant a lengthy and expensive journey through domestic courts before taking the case to Strasbourg and waiting several years for the judgment of the ECtHR. However, judgments which have found the UK to be in breach have resulted in Parliament making changes to domestic law.⁵⁹ Constitutionally, since Parliament cannot be bound by any other body or institution, it is not required to make such changes to legislation, but it has always done so. The situation where the UK agrees in international law to be bound to respect certain rights, but not to allow these to be enforced in the domestic legal system, was a further example of a constitutional anachronism which had begun to attract increasing calls to alter.⁶⁰

One of the genuinely revolutionary changes to the UK's constitutional law horizon was brought in soon after the Labour Party took power. A White Paper issued after the 1997 election, *Rights Brought Home* alongside the Human Rights Bill highlighted the UK's contribution to the development of fundamental human rights across the globe but lamented the lack of sufficient legal protection at the domestic level.⁶¹

The Bill became the Human Rights Act (HRA) 1998 when passed by Parliament and entered into force in 2000. It allowed, for the first time, a statutory basis upon which fundamental human rights can be enforced in the courts. It effectively places the rights contained in the ECHR into domestic law. The Courts are obliged to interpret all legislation (whether passed before or after the HRA) in a way which is consistent with the Convention rights, as far as it is possible to do so.⁶² All public authorities are obliged to respect the Convention rights⁶³ and claims can now be brought against public authorities in domestic courts for alleged breaches.⁶⁴

What the HRA does *not* do, however, is to sit at the top of the legal hierarchy. If the Courts are faced an Act which cannot be read in conformity with the Convention rights (whether or not that Act was passed before or after the HRA) then the only thing the Courts may do is to make a 'declaration of incompatibility'.⁶⁵ This mechanism carries no legal force but is designed to alert Parliament to the piece of legislation which does not respect Convention rights. A fast-track reform to the legislation under a special procedure laid down in section 10 of the HRA may be used. But if Parliament wishes

59 These include the Contempt of Court Act 1981, Interception of Communications Act 1985, Regulation of Investigatory Powers Act 2000 and Homosexual Offences (Northern Ireland) Order 1982. For a more detailed analysis, see Lester, A.; Beattie, K., *supra* note 58, p. 64.

60 Bogdanor, V., *supra* note 45, p. 59.

61 Rights Brought Home: The Human Rights Bill, 1997, Cm 3782. The White Paper was based on a pre-election consultation paper by the Labour Party: Straw, J.; Boateng, P. Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law, 1997, EHRLR 71.

62 Human Rights Act 1998, section 3.

63 Human Rights Act 1998, section 6.

64 Human Rights Act 1998, section 7.

65 Human Rights Act 1998, section 4 (2). There are, on average, between one and five declarations of incapability made each year. As noted by the Parliamentary Human Rights Joint Committee's Fifteenth Report, *Enhancing Parliament's role in relation to human rights judgments*, information on the exact number of declarations made and the steps taken to rectify them, is not readily available. The Report was issued on 9 March 2010 and is available online: <<http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/8502.htm>>.

to keep the legislation as it is, despite the finding of a breach of a Convention right by the Courts, it may do so. The Courts may not of course declare this to be ‘unconstitutional’. The effect of making a declaration is designed to be a political, rather than a legal, one.⁶⁶

Over the ten year period since the HRA came into effect, reaction to it has been rather mixed. As expected, the Courts have dealt with many cases invoking alleged breaches of rights, and have found public authorities to have breached these rights in many areas covered by the ECHR. The Courts have also issued declarations of incompatibility in key areas, perhaps most notably in the case *A and Others v. Home Secretary*⁶⁷ where sections of the Anti-terrorism, Crime and Security Act 2001 which allowed for the indefinite detention of foreign citizens suspected of involvement with ‘international terrorism’, were found to have breached Articles 5 and 14 of the Convention.

As a legal tool, the HRA has been extremely important in developing a system of the protection of rights in domestic courts, which has never been done so explicitly before. However, the evaluation of the effect of the HRA cannot be limited to analysis of the relevant case-law, since the original aim of incorporating the Convention was to enhance a rights-based culture amongst the population as part of a renewal of the constitutional order. Creating a culture of rights has been more difficult to achieve amongst a population who are only slowly getting accustomed to this kind of legal tool. Much of the population of the UK remain sceptical of the need for the protection of human rights in this way, and (wrongly) associate the HRA and ECHR with legislation and obligations emanating from membership of the EU, which brings related issues of scepticism. The HRA has been characterized (or rather, demonized) in some quarters of the press as a means by which those ‘undeserving’ of rights can take advantage of the Act: terrorism suspects, radical preachers, illegal immigrants, criminals and prisoners, etc. What is often missing from this portrayal of the Act is the availability of rights to all and that it has been successfully put to use by ‘ordinary’ people too.

It must also be borne in mind that the HRA came into force just before the 9/11 attacks in the United States and since that time, for much of the first decade of the 2000s, the legislative agenda of the Government has been orientated towards the prevention of terrorism and the promotion of ‘security’.⁶⁸ As such, the Labour Government became increasingly critical of the interpretation of the HRA by the judiciary, especially when issues of terrorism are concerned. For some, this has had the effect of undermining the HRA as ‘arguably the greatest constitutional reform in the UK of the twentieth century’.⁶⁹ In a separate development, the extent to which the Labour Government’s commitment to enshrining a culture of rights was shown to reach its limits when it opted out of

66 Tomkins, A. *Public Law*. Oxford: Oxford University Press, 2003, p. 122.

67 [2004] UKHL 56

68 For analysis of the legislation introduced soon after the 9/11 attacks at the relationship with the Human Rights Act, see Ewing, K. D. The futility of the Human Rights Act. *Public Law*. 2004, 4: 829–852, 836–839.

69 Lester, A., Beattie, K., *supra* note 58, p. 81.

the Charter of Fundamental Rights of the European Union in the Treaty of Lisbon, a move followed by Poland and the Czech Republic.⁷⁰

The political debate over how useful or necessary the HRA is in the contemporary British society resonates strongly with the very concept of the purpose of constitutional law too. The Conservative Party opposed the introduction of the HRA, believing that the judge-made rights developed under the Common Law were sufficient in UK law. In recent years, the leader of the Conservative Party (and now Prime Minister) David Cameron shifted his party's position to recognizing the benefits of the HRA in certain areas. But, in a speech delivered in 1996, he spoke of the lack of ability the UK authorities have to deal with issues of crime, terrorism and immigration.⁷¹ His proposed solution is one of replacing the HRA with a British Bill of Rights, though remaining a signatory of the ECHR and allowing for recourse to the ECtHR. The content and workings of his idea of a British Bill of Rights is less clear. Emphasis has been placed on the need for responsibilities of citizens to sit alongside the rights to be enjoyed, but it is difficult to see how this works in practice. What appears to be behind the motivation for a specifically British Bill is the dual fear of the impact on society of both immigration and terrorism (the latter assumed to be associated with foreign nationals). This might explain the concluding comment in his 1996 speech that 'a well-drafted and enduring Bill of Rights can make it easier to achieve the acceptance by every citizen in Britain of the rights of every other inhabitant of these islands'.⁷² The Conservative Party Manifesto 2010 affirmed the desire to replace the HRA with a British Bill of Rights as part of a selection of measures aiming to '[r]estore our civil liberties'.⁷³

In constitutional terms, despite its importance in guaranteeing fundamental human rights, the HRA is a statutory Act of Parliament like any other, and the Act can be repealed or amended as such. The HRA therefore demonstrates both continuity and change in the UK's constitutional arrangements. On the one hand, it has provided the judiciary with the important means to protect individual rights and freedoms in a way which was previously impossible. It has brought the UK much closer to the system of rights protection in European neighbours, especially since the rights are drawn directly from a shared conception of European rights under the ECHR. There should be a lesser need for claimants to go to Strasbourg because of a lack of legal ability to have alleged breaches heard effectively at the domestic level. However, it still cannot be said that the protection of human rights matches up to the levels of protection afforded by a constitutional text which sits at the pinnacle of the domestic legal hierarchy. The HRA is, within the constitutional theme of flexibility, subject to change, and Parliament remains able

70 Protocol (no. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom and Declaration 53 by the Czech Republic on the Charter of Fundamental Rights of the European Union, attached to Annex II of the Treaty on European Union.

71 Cameron, D. Balancing Freedom and Security – A Modern British Bill of Rights, Speech to the Centre for Policy Studies [interactive]. 26 June 1996 [accessed 03-06-10]. <<http://www.guardian.co.uk/politics/2006/jun/26/conservatives.constitution>>.

72 *Ibid.*

73 Conservative Party Manifesto 2010 [interactive]. [accessed 03-06-10]. <http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf>, 79.

to create legislation which infringes these rights if it so wishes. The advent of a British Bill of Rights will undoubtedly take some time if the aim is to even more fundamentally change the way in which rights protection works in the UK.

5. 'Devolution'

The United Kingdom of Great Britain and Northern Ireland, to give the country its full title, was traditionally understood to be a highly centralized, unitary entity.⁷⁴ Following the reforms introduced during the 1997-2010 period, it is now much more difficult to accurately employ this characterization. Rather, the UK defies common or legal categorization as a unitary state, (con)federation or collection of autonomous regions. The UK is made up of four constituent nations: England (population: 51.5 million), Scotland (5 million), Wales (3 million) and Northern Ireland (1.7 million). The Act of Union with Scotland, as already mentioned, dissolved the Scottish Parliament and transferred its power to Westminster in 1707.⁷⁵ Wales had been integrated within the English legal system much earlier. The British Crown retained control over the six counties of Ireland after the rest of the island became independent from British rule in 1921. The Northern Irish Parliament, which had the power to pass legislation, operated from 1921 until 1972,⁷⁶ when direct rule from London was imposed because of the troubled political situation and ensuing violence.

Attempts were made in the 1970s to 'devolve' power away from Westminster to elected bodies in Scotland and Wales under the previous Labour Governments, following a rise in both Scottish and Welsh calls for policy-making more closely related to the specific needs of each nation. 'Devolution' appeared as the term most appropriate to describe the delegation of central powers to different parts of the UK without transferring sovereignty.⁷⁷ However, the proposals for devolution in Scotland and Wales brought forward in 1979 were not successful—referenda (which are not often used in the UK) were held in Scotland and Wales but neither fulfilled the conditions for the legislation to pass.⁷⁸

During the years of Conservative Government 1979-1990, demands for devolution grew but the Thatcher and Major Governments were unwilling to consider introducing proposals for elected institutions outside Westminster.⁷⁹ The issue resurfaced in the Labour Party's 1997 election manifesto and represented the continued ambition of the Party for a less-centralized system of government in the UK. During the 1997 election, the Labour Party capitalized on the strong opposition to Conservative Government in

74 Munro, C. R. *Studies in Constitutional Law*. London: Butterworths, 1987, p. 19.

75 For a detailed historical analysis, see Scott, P. *1707: the Union of Scotland and England*. Edinburgh: Chambers, 1979.

76 Government of Ireland Act 1920.

77 Munro, C. R., *supra* note 74, p. 22.

78 The referendum in Wales was rejected by a 'no' vote of 78%, whilst in Scotland the 'yes' vote had a narrow majority but the minimum 40% turnout level required by the proposed legislation was not reached.

79 Bogdanor, V., *supra* note 45, p. 90–91.

both Scotland and Wales. Proposals were put forward, and passed by Parliament, for a directly elected Parliament in Scotland and a National Assembly for Wales soon after the election. In a different manner than the abortive attempts at devolution in 1979, the proposals were put to referenda in Scotland and Wales respectively *before* the Bills were brought before Parliament. Both referenda returned ‘yes’ votes and legislation was subsequently passed. The Belfast (‘Good Friday’) Agreement 1998⁸⁰ between the Governments of the UK and Ireland and most political parties in Northern Ireland foresaw the establishment of a permanent peaceful solution in Northern Ireland and detailed the framework for devolved government in Belfast.⁸¹ The manifesto commitment to devolution appeared to have been fulfilled within the first two years of the Labour Government’s term in office.

The new structure is successful in that it fulfils a need to devolve decision-making to parts of the UK where decisions are taken more closely to those populations. For constitutional lawyers, however, the difficulty is in understanding what this means for the constitution as a UK—and there are important questions which remain unanswered. The Scotland Act 1998 and the Government of Wales Act 1998 re-establish a Parliament in Edinburgh and create a National Assembly for Wales in Cardiff. The Northern Ireland Assembly was created by the Northern Ireland Act 1999, though the troubled political situation has meant that the Assembly has been suspended several times (the longest period being October 2002 – May 2007) because of a lack of agreement on ‘power-sharing’ between the representatives of the different communities. It should also be noted that the devolved bodies do not have power of certain ‘reserved’ areas such as immigration, nationality, defence or foreign affairs policies.

As the difference in their names suggests, the powers which the different devolved institutions enjoy are not identical. Rather, the constitutional process of devolution has been asymmetrical. The Scottish Parliament has more extensive powers than the counterpart Assemblies in Wales⁸² and Northern Ireland, and although it has the ability to legislate, this law does not have the same character as Acts of Parliament passed at Westminster. The Northern Ireland Assembly has, since April 2010, powers relating to police and justice which are substantially different to those in Scotland and Wales.

During the process of devolution, the continuing and absolute sovereignty of the United Kingdom Parliament at Westminster was underlined—at the discussion stage and within the legislation. It should not therefore be taken that the (re)establishment of devolved institutions suggests that there has been a transfer of sovereignty. Similarly, the sovereignty of the UK Parliament means that it alone retains the power to amend or repeal the Acts which have founded the modern devolved institutions. The UK Par-

80 The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland, 10 April 1998, 1998, Cm 3883.

81 McCrudden, C. Northern Ireland and the British Constitution since the Belfast Agreement. In Jowell, J.; Oliver, D. (eds.). *The Changing Constitution*. 6th ed. Oxford: Oxford University Press, 2007, p. 228.

82 A further Act, the Government of Wales Act 2006 extends the powers devolved and foresees the eventual devolution of primary (i.e. legislative) powers. But the powers remain less extensive than those of the Scottish Parliament.

liament is unlikely to abolish the institutions, save in grave circumstances, but in legal terms it would be easy to do.

Constitutionally speaking, there is also the issue of England. No devolution has taken place to England: the dominant rationale is that given its size and population, an English Parliament would have to be almost the same size as the Parliament at Westminster. Arguments for an English Parliament have therefore been seen as marginal and weak.⁸³ The original aim of the Labour Government in 1997 was a two-stage reform: devolution to Scotland, Wales and (if the political situation so allowed) Northern Ireland, followed by the regions of England. The Government of London Act 1999 successfully created an Assembly and elected Mayor for London. Elsewhere in England, regionally elected assemblies have not been created. The Regional Assemblies (Referendums) Act 2003 foresaw the creation of English assemblies after successive referenda in each region. The first referendum was held in the north-east region of England—the result was a resounding ‘no’ and all subsequent plans for regional devolution in England were dropped. It appeared that strong regional identities in parts of England did not translate to a desire to have another tier of government at the regional level.

The Conservative-Liberal Democrat coalition Government elected in May 2010 has made no specific commitments to revisit these issues. Given the Conservative Party’s traditional underlining of the importance of the Union between the constituent parts of the UK, this is not surprising. Support for existing devolution structures was stressed in the Conservative Manifesto 2010, though the reforms brought about by Labour were termed as amounting to ‘constitutional vandalism’.⁸⁴ Regional devolution in England was shown to gather scant public support, and so attention on ‘cleaning up politics’ (which appears as a goal in the Conservative Manifesto as it did in the Labour Manifesto of 1997)⁸⁵ has been focused on other aspects of public administration, such as the expenses regime for Parliamentarians. What we are left with, therefore, is a complex and asymmetrical constitutional make-up of the United Kingdom. This is reflected at both national and local level, where the administration of local government differs widely. The legacy of the Labour Government 1997–2010 may be considered successful in terms of fulfilling the desire to make the UK a less centralized system of government, though understanding the constitutional picture has become even more difficult.

6. Judicial Reform: the Lord Chancellor and the Supreme Court

The final constitutional reform under examination here relates to the organization and working of the judiciary. Unlike the reforms analysed above, a comprehensive reform of the judicial system was not an original intention of the Labour Party upon taking

83 Bogdanor, V., *supra* note 45, p. 93.

84 Conservative Party Manifesto 2010 [interactive]. [accessed 03-06-10]. <http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf>, p. 83.

85 *Ibid.*, p. 65.

office in 1997. Rather, the need for reform emerged on the legislative agenda somewhat later and was motivated by a combination of factors, including a reaction to an increasingly fractious relationship between the judiciary and the executive, rather than a long thought-out process of reforms on the part of the Government whilst in opposition.⁸⁶

To general surprise, in 2003 the Government embarked on a comprehensive reform of the highest levels of the court system and judiciary. The eventual reforms were contained in the Constitutional Reform Act 2005: an unusual statute in the sense that it acknowledges the existence of the Constitution in its title, but also because it makes the most express changes to some institutions ever seen. This section focuses on two reforms: the redefinition of the role of the Lord Chancellor, and the creation of the Supreme Court.

The post of Lord Chancellor, dating back to at least the eleventh century, occupied a very curious place in the UK constitution—in essence straddling the three branches of government. The Lord Chancellor was the head of the judiciary and could sit as a judge; chaired Parliamentary debates as the speaker of the House of Lords and was also a high-level member of the executive. Typically of the UK constitution, the actual workings of this role were defined by long-standing (and unwritten) practices—in effect, the role was not as much as an affront to the doctrine of the separation of powers at it suggests (though Bogdanor refers to it as a ‘spectacular denial’ of the doctrine)⁸⁷, but demonstrating this to be so was becoming increasingly problematic. There was a clear perception of a risk that judicial appointments could be influenced by the political process.⁸⁸

Unsurprisingly, the confusing political-legal-judicial role of the Lord Chancellor had long since gained criticism from outside the UK, and particularly from the Council of Europe. The argument that combining the roles in one individual was essentially anti-democratic became more acute with the advent of the HRA into national law: Article 6 of the ECHR requires that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. In a 2003 Resolution proposed to the Parliamentary Assembly following a report to the Legal Affairs and Human Rights Committee, the *Rapporteur* found that ‘constitutional arrangements concerning the Lord Chancellor’s Office are unique in Europe and, to my opinion, do not satisfy the requirement of the separation of the judicial function from that of the executive’.⁸⁹ The UK government, faced with the embarrassing prospect of international criticism of a basic feature of its institutional structure, initiated the reforms which eventually led to the Constitutional Reform Act 2005.⁹⁰ Following this move, the report by the Council of Europe’s Commissioner for Human Rights in 2004 did not discuss the proposed changes to the role of the Lord Chancellor, but no doubt

86 Beatson, J. Reforming an unwritten constitution. *Law Quarterly Review*. 2010, 126(1): 48–71.

87 Bogdanor, V., *supra* note 45, p. 66.

88 *Ibid.*

89 Council of Europe Committee on Legal Affairs and Human Rights, Report - Office of the Lord Chancellor in the constitutional system of the United Kingdom, 2003, Doc. 9798, para 30.

90 Smith, R. Constitutional reform, the Lord Chancellor, and human rights: the battle of form and substance. *Journal of Law and Society*. 2005, 32(1): 187–201, 190.

had this in mind when noting that ‘the ironing out of certain well-known anomalies is perhaps not unwelcome’.⁹¹

Since the Constitutional Reform Act 2005, the Lord Chancellor is no longer the head of the judiciary and cannot sit as a judge.⁹² He is, however, responsible for upholding and defending the independence of the judiciary.⁹³ He also continues to have a political role, as a member of the Cabinet, but his role in appointing members of the judiciary has been greatly reduced by the creation of an independent Judicial Appointments Commission.⁹⁴ The reform therefore has maintained the traditions associated with the role but strengthened its working to ensure that the separation of powers is not merely a theory but a demonstrable working practice. This can only be a welcome reform to the UK’s constitutional arrangements, both to the UK population as well as internationally.

A related change brought about by the Constitutional Reform Act 2005 concerned another anachronism in the UK’s constitution. Previously, the highest court in the UK was officially known as the Appellate Committee of the House of Lords, more commonly simply referred to as the House of Lords. As a judicial organ, the twelve appointed ‘Law Lords’ (more fully, the Lords of Appeal in Ordinary)⁹⁵ heard the highest cases from all parts of the UK.⁹⁶ They were also members of the (Parliamentary) House of Lords, though, according to unwritten constitutional conventions, they did not vote or take overtly ‘political’ stance on issues being debated. Their role could, as Leyland has suggested, be said to be that of consultants than politicians when in Parliament, particularly on issues relating to the reform of the legal profession, human rights and criminal justice.⁹⁷ As the highest court, however, cases were heard in a committee room of the Parliament. This lack of physical separation of two branches of power did little to suggest that the UK was in a particularly strong position to share its democratic experience with countries in transition, including those in Central and Eastern Europe—an anachronism that was also mentioned in the 2003 Council of Europe report on the UK.⁹⁸

The Supreme Court of the United Kingdom was created in the Constitutional Reform Act 2005 and officially began its duties on 1 October 2009.⁹⁹ Of course, in the popular imagination, the existence of a ‘Supreme Court’ conjures images of the Supreme Court of the U.S., striking down laws which are unconstitutional and acting as the public defender of the constitution. The reform in the UK was not designed to bring about such a change, to fundamentally re-position the court within the legal hierarchy nor to upset the balance of the different branches of power too radically. Rather, the

91 Council of Europe, ‘Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom 4- 12 November 2004’, CommDH (2005) 6

92 This role is now fulfilled by the Lord Chief Justice: Constitutional Reform Act 2005 section 7 (1).

93 Constitutional Reform Act 2005 section 3 (1) and (6).

94 Constitutional Reform Act 2005, section 61 *et seq.*

95 Appellate Jurisdiction Act 1876.

96 Only civil cases from Scotland were heard in the House of Lords.

97 Leyland, P., *supra* note 9, p. 56.

98 Council of Europe Committee on Legal Affairs and Human Rights, Report - Office of the Lord Chancellor in the constitutional system of the United Kingdom, 2003, Doc. 9798, para 6 (ii).

99 Constitutional Reform Act 2005, sections 23–60.

change was more symbolic: the dedication of a separate building (Middlesex Guildhall, opposite the Parliament at Westminster) for the highest justices of the land to hear the most important, high-level cases is a means by which the doctrine of the separation of powers can be seen to be at work. This also involved changing the title of the Law Lords, who are now known as ‘judges of the Supreme Court’. Of course, this is a constitutional reform—but only insofar as the system now physically embodies the doctrine more visibly. It is still not the case that the Supreme Court has taken on the functions of a ‘Constitutional Court’ in the sense given by Articles 102, 105 and 107 of the Lithuanian Constitution. Rather, it is more important to demonstrate here what this reform did *not* entail, rather than what it did.

Conclusions

As Bogdanor has written, ‘[i]t is scarcely an exaggeration to suggest that a new constitution is in the process of being created before our eyes’.¹⁰⁰ There can be little doubt that the changes which have taken place during the Labour Party’s period in office have fundamentally altered the way in which the United Kingdom is governed. The opportunity, after many years in opposition, was taken by the Government of Tony Blair to reassess our understanding of constitutional government, and in many cases to take on the challenge of reforming institutions, structures and practices which had remained substantially unchanged for many years—in some cases for several centuries.

However, that is not to say that the reform have been an unmitigated success. Rather, the reform of the Parliamentary House of Lords in particular has been only partly achieved, and it seems that any future settlement may be done in a rather piecemeal fashion. The risk associated with major, yet incremental reform in this way is that it may subvert the original intention—the composition of the House is only marginally less democratic than before 1997. This situation cannot remain, but it seems that bearing in mind the difficulties with completing the second-stage of reform since 1999, the end result may be a piecemeal solution which is largely unsatisfactory to all.

The HRA and devolution can be seen as successes, if measured against the original aims pursued, but they can perhaps also themselves be characterized as processes rather than constitutional settlements. Whether the HRA remains as the constitutional cornerstone to which it was intended depends on a large extent as to what proposals are made to replace it. It would seem unlikely, from a political perspective, that the Act would be repealed with nothing to replace it, though it may be that a replacement which attempts to focus on responsibilities as well as rights may have less legal effect than has been suggested. Devolution can also be understood a process, and as the (re)established devolved bodies in Scotland, Wales and Northern Ireland become accustomed to their respective powers, and relations with central Government, it may eventually become apparently what kind of constitutional settlement the UK has arrived at. The issue of what devolution is possible to, or within, England will also remain.

100 Bogdanor, V., *supra* note 45, p. 5.

These are issues which are likely to occupy the agenda of the new Government, to a greater or lesser extent, for the foreseeable future. It is also likely that other significant changes to the UK's system of governance will also be undertaken. The most likely is a change to the election system for the House of Commons—the motivation for this can be explained by the coalition agreement between the Conservatives and the Liberal Democrats, since the latter have argued for the adoption of a fairer (in terms of the allocation of seats according to the proportion of votes cast) election system. The comparative constitutional lawyer is likely to find many issues of interest occurring within the UK in the coming years. However, it is far less likely that the prospect of a written constitution for the UK will be extensively discussed within the new Government. The task in trying to understand where the limits of what can be understood as 'constitutional law' in the UK will remain a challenging one.

References

- Albi, A. *EU Enlargement and the Constitutions of Central and Eastern Europe*. Cambridge: Cambridge University Press, 2005.
- Allan, T. R. S. Human rights and judicial review: a critique of 'due deference'. *Cambridge Law Journal*. 2006, 65(3): 671–695.
- Bamforth, N.; Leyland, P. (eds.). *Public Law in a Multi-Layered Constitution*. Oxford: Hart, 2003.
- Barnett, H. *Constitutional and Administrative Law*. 7th ed. Abingdon: Routledge, 2009.
- Beatson, J. Reforming an unwritten constitution. *Law Quarterly Review*. 2010, 126(1): 48–71.
- Bogdanor, V. *The New British Constitution*. Oxford: Hart, 2009.
- Bradley, A. W.; Ewing, K. D. *Constitutional and Administrative Law*. 14th ed. Harlow: Pearson, 2007.
- Dicey, A. V. *Introduction to the Study of the Law of the Constitution*. 10th ed. London: Macmillan, 1959.
- Ewing, K. D. The futility of the Human Rights Act. *Public Law*. 2004, 4: 829–852.
- Jowell, J.; Oliver, D. *The Changing Constitution*. 5th and 6th ed. Oxford: Oxford University Press, 2004, 2007.
- Kavanagh, A. Defending deference in public law and constitutional theory. *Law Quarterly Review*. 2010, 126(2): 222–250.
- Leyland, P. *The Constitution of the United Kingdom*. Oxford: Hart, 2007.
- Loveland, I. *Constitutional Law, Administrative Law, and Human Rights*. 4th ed. Oxford: Oxford University Press, 2006.
- MacCormick, N. *Questioning Sovereignty*. Oxford: Oxford University Press, 1999.
- Munro, C. R. *Studies in Constitutional Law*. London: Butterworths, 1987.
- Phillipson, G. "The greatest quango of them all", "a rival chamber" or "a hybrid nonsense"? Solving the second chamber paradox. *Public Law*. 2004, 7: 352–379.
- Scott, P. *1707: the Union of Scotland and England*. Edinburgh: Chambers, 1979.
- Sharpe, R. J. *The Law of Habeas Corpus*, 2nd ed. Oxford: Oxford University Press, 1989.
- Shell, D. Labour and the House of Lords: a case study in constitutional reform. *Parliamentary Affairs*. 2000, 53: 290–310.
- Tomkins, A. *Public Law*. Oxford: Oxford University Press, 2003.
- Turpin, C.; Tomkins, A. *British Government and the Constitution*. 6th ed. Cambridge: Cambridge University Press, 2007.
- Vaicaitis, V. European constitutionalism v. reformed constitution for Europe. *Jurisprudencija*. 2010, 1(119): 69–83.

NERAŠYTOS KONSTITUCIJOS REFORMA: POKYČIAI JUNGTTINĖJE KARALYSTĖJE 1997–2010 METAIS

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Santrauka. Šiame straipsnyje autorius aptaria pagrindines Jungtinės Karalystės (toliau tekste – JK) konstitucines reformas, įgyvendintas 1997–2010 m. valdant Leiboristų partijai. Nagrinėdamas nerašytą JK konstituciją autorius svarsto, kaip palyginus su rašytine konstitucija, pavyzdžiui, tokia kaip Lietuvos Respublikos, galėtų būti nustatyta „konstitucinė“ teisė. Analizuojamos pagrindinės reformos, įgyvendintos nuo 1997 m., už jų slypinčios politinės priežastys, reformos procesai ir jų poveikis Konstitucijai. Keturios straipsnyje analizuojamos sritys – Lordų rūmų reforma, 1998 m. Žmogaus teisių akto priėmimas, valdžios decentralizavimas ir teismų santvarkos pokyčiai, numatyti 2005 m. Konstitucinės reformos akte, – labai veikia JK valdymą. Straipsnyje teigiama, jog visa tai yra sveikintinas, tačiau daugeliu atvejų nepakankamas vystymasis. Kai nėra tikimybės, jog JK ateityje turės rašytinę konstituciją, ilgalaikės būsimųjų vyriausybių pastangos yra būtinos, kad būtų užtikrintas reformų tikslas – modernizuoti demokratinę sistemą – įgyvendinimas.

Reikšminiai žodžiai: Jungtinė Karalystė, Konstitucija, reforma, Leiboristų partija, demokratija, žmogaus teisės, decentralizavimas, Lordų rūmai.

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