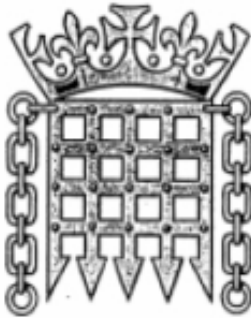


Taming of Power:

A discourse on British “constitution”



*The Badge of
the House of Lords and the House of Commons
as heretofore borne and used
and authorized to be borne and used
by Her Majesty The Queen.*

Fred Nash

Introduced by Peter Hennessy

Taming of Power:

A discourse on British “constitution”

Fred Nash

Notes on the text

The “Taming of Power” was completed by the late Dr Fred Nash shortly before his untimely death in summer 2002. Formerly of the Politics Department at the University of Southampton, where he was honorary fellow in politics, Dr Nash spent many years teaching, researching and writing in the fields of political science, philosophy and British politics: his previous publications include *Meta-imperialism: A study in political science*, published in 1994 by Avebury Press, Aldershot (ISBN 1856286940).

The result of many years of committed research, “Taming of Power” represents what Fred considered to be his most important scholarly contribution to the field of British political science, and is published here almost entirely in the form in which he completed it (aside from the inclusion of a basic index). Certain sections towards the end necessarily reflect the specific circumstances of the time period in which they were written, but while the detail of policy initiatives or government decisions may have moved on since Fred completed the text, the theoretical and conceptual underpinnings of his arguments remain valid, and hence these sections are included as concluded in 2002.

As it stands, the material is clearly too long to be economically viable for any academic publisher. In 2003, the work was accepted for publication by Imprint Academic as part of their specialist Politics and Culture output, subject to revision to a more manageable size. While an expert editor was identified to undertake this task, it soon became clear that this process would not just have been very demanding in terms of his specialist time, but also ran the unavoidable risk of disrupting the flow of the arguments presented. Therefore, it has been decided simply to “self-publish” the work as is, in the hope that it contributes to scholarly debates of these issues, which was, in the final analysis, Fred's over-riding objective. With that in mind, this text is available for distribution without charge.

I am very grateful to Professor Peter Hennessey (for his introduction to the text) and Dr Peter Catterall (both of the School of History, Queen Mary, University of London) for his support of this project generally, and to Keith Sutherland of Imprint Academic, Exeter.

Meri Nash, London, autumn 2011.

Published in the United Kingdom, 2011

Copyright © Dr Fred Nash, 2002, all rights reserved.
Printed and bound by Imprint, www.imprint.co.uk/digital

The rights of Dr Fred Nash to be identified as the author of this work
has been asserted by him in accordance with the
Copyright, Designs and Patents Act 1988.

Introduction by Professor Peter Hennessy

Fred Nash possessed a marvellously sharp eye and a truly penetrating mind which he applied mercilessly to the often baffling topography of the British constitution. He could never understand why we Brits are so casual and complacent about our governing arrangements.

Fred's mission was to make us talk about our constitution, to think about it, sharpen it up. TAMING OF POWER is his posthumous bequest to us.

It is written in Fred's highly distinctive voice – a voice I knew well and relished greatly when we both attended the Twentieth Century British History Seminar at the Institute of Historical Research.

I miss Fred's mind and voice, and I'm hugely pleased that both are captured so vividly within these pages.

Peter Hennessy

Lord Hennessy of Nympsfield, FBA
Attlee Professor of Contemporary British History
School of History
Queen Mary
University of London

Acknowledgements

In the preparation of this study, I have collected far too many debts that I cannot repay. It was unfortunate that the long process of preparing this text – with research beginning in earnest in 1989, and writing of the text stretching back to 1995 – coincided with a period of serious illness which caused many disruptions and re-starts. Without the help and support of our wonderful National Health Service, this text simply could not have become a reality. But in this, I also owe much too much to Lia Meri Burani – Mrs. Nash – who nursed me through many difficult times and gave me much support thereafter. I cannot repay either debt.

I am grateful to the Department of Politics at the University of Southampton, for facilitating a fellowship that gave me continued access to the academic world. The material for this research was not all easily available: I am indebted to the British Library, the Library of Political and Economic Science, especially the Archive Section, the Bodleian, and, indeed, the Hartley Library at the University of Southampton for providing access to important texts. Finally, I am grateful to Mrs. H. Mawson for her help with translations from Latin for Appendix 4.

In a different vein, I also owe much to many students who over the years suffered my courses on British Government, for they heard the arguments of this text in the raw: I hope they benefited as much from my nattering as I did in thinking aloud with them.

Fred Nash, London, June 2002

This text is dedicated to the memory of two dear friends
and intellectual soul-mates:

James G. (Jim) Bulpitt (1937-1999)

and

Liam P. O'Sullivan (1937-2001)

Preface

This text is part of what had originally been conceived as a larger volume on the study of British government and constitution. In the event, that project proved too big to manage in the circumstances. The result is that substantive arguments about British government and constitution appear in this volume, and that arguments concerning the problems of the study of this system of government – the problem of fragmented disciplines – are not fully or systematically considered here. In this study, I deal with fragmentation only in the Introduction and point the direction towards the idea of a unified theory approach, hoping that enough is said therein to make the point.

As the chapter titles show, the substantive arguments do not correspond to the sort of headings normally found in texts on British government and constitution. There is hardly any discussion of the working system, or extended analysis of problematic notions such as the “theory” of the mandate, conventions of the constitution etc. Indeed, there is no room here for topics that seem to exercise many academics and others alike, such as the largely vacuous “debate” and analysis of “Britishness”. On the contrary, the emphasis is on constitutional theory arguments, which leads one to take a rather dim view of the approach that encourages us to define the British constitution in terms that do not make much sense, and proceed to describe *it*, “the British constitution”. On the other hand, purposefully avoiding this pitfall leads to a focus on the more important concepts that any study of the constitution ought to deal with: the meaning of sovereignty, how to understand notions such as the idea of a historically-received system of government and how to draw arguments about its legitimacy from such an obscure idea, and so on. This naturally makes for a more focused theoretical analysis, which pays dividends in that much that is taken for granted is revealed, crying out for change and reform.

The argument as it unfolded – and I confess to some surprise, for what comes out of this study is actually somewhat different from what I thought I would say on the subject, especially on sovereignty, common law, monarchy and peerage – naturally led to the sort of emphatic views that tend to penetrate the surface of the argument, especially in Chapters Four, Five and Seven. The focal point of the study is to argue for a Constitution that corresponds to, and satisfies, the basic requirements of a constitutional system of government. But the object of the exercise is not to inform – this is *not* yet another text on British government – or to persuade or push a pet project for reform of this or that institution, but to invite and hopefully encourage thinking and discourse.

CONTENTS

Introduction	12
Chapter One A British Constitution?	40
What is in a word?	40
An <i>excursus</i> on sovereignty	65
Constitutionalism in a sovereign state	72
Do we have a constitution?	87
Chapter Two Approaching the British Case	107
A “Valetudinarian” system?	107
Managing the historical dimension	117
Grand Schemes	128
British history periods	138
A revisionist perspective	150
Chapter Three The foundations of the British System	154
Continuity and change	154
Historical obstinacy	163
The transition from constitutionalism to sovereignty	187
A Theoretical Interlude on problems of Co-Sovereignty	239
Chapter Four British Government 1	247
The First Revolution: sovereignty of parliament	247
An inconclusive Settlement	248
Thoughtful doubts: Bolingbroke and Burke	260
Thoughtful doubts: William Blackstone	277
Thoughtless certainty: Dicey and after	285
The chimera of sovereignty of parliament	302
Chapter Five British Government 2	315
The Second Revolution: Neo-Tudor style of government	315
Parliament	319
Political executive and nationally organised political parties	336
The Lords, and the Neo-Tudor style of government	353
Guarding the system?	372
Chapter Six The Character of British polity	403
Particularism	403
The centre perspective	423
Terms of government discourse	436
Chapter Seven British Government and the Idea of Constitution	453
The relevance of a Constitution for the UK	453
An <i>excursus</i> on Common law and judges	460
The need for a constitution	479
A new style of government	494
Appendix 1: Medieval and Modern conceptions of law	500
Appendix 2: Contrast between “1215” and “1603”	503
Appendix 3: Thoburn and Others v Sunderland City Council and Others	504
Appendix 4: A writ of 1295	510
Bibliography	512
Index	529

Introduction

“I have taken all knowledge to be my province” (Francis Bacon, 1592)

There are three points of focus in this study: first, problems presented by the fact of fragmented disciplines; second, the need to understand the terms of discourse of this system (and of its study); and, third, substantive arguments about the nature of the system and how it may be understood when the approach is not *via* fragmented disciplines. The first is an important background matter addressed almost wholly in this Introduction; the second and third are the undifferentiated focus of the substantive chapters that follow.

Rising above fragmented disciplines concerned with the study of the British system enables us to bring into the purview and examine the marginal space inhabited by the many myths about this system. This requires a broad-brush and self-reflexive approach, which may pay dividends if it is engaged in the right spirit and for the right reasons. The object of the exercise is not to attack or defend any one “discipline”, or privilege any concept and method, but to examine how their coming together – which is not the collation of discrete disciplines, or the creation of a new one, but can only be an epiphany – removes cobwebs and reveals meaning, or, more to the point, the want of it.

An examination of the claim of each discipline to offer the proper approach to the study of the “constitution”, or to be the custodian of the mantra necessary for divining the system’s real meaning, reveals the extent to which they are inherently complementary and necessary to one another. As a matter of fact, seen this way, they appear so much of a piece that any claim to distinctive academic status is futile and detrimental to achieving the shared objective they all cherish. But this means expanding the world of our intellectual exercise and academic domain by rising above any single discipline and embracing “cognate” disciplines – such as History, Political Science, and Constitutional Law. The first benefit of so doing is the discovery of the extent to which, taken separately, each is unsatisfactory. Seeing the bigger picture, the parts no longer suffice or satisfy.

Furthermore, fragmentation and inter-textuality have combined to force the study of government off the agenda. But government and the nature of the system – for some, the “constitution” – cannot be ignored for long. Recent “failings” have made this abundantly clear, and, rapidly, the “constitution” (also the “State”) was “brought” back on to the agenda with attention sharply focused upon necessary and desirable “reforms”. This caught many in the academic world by surprise, especially when the extent of the neglect was revealed by the sheer absence of clear and definitive answers about this “constitution”. More importantly, attempts to come to grips with the problem ended in the frustration of the discovery that this word does not have any concrete meaning in the British case. This led to the “rediscovery” that constitutional studies here are not the same as elsewhere, which elicited two responses: for some, it simply and finally revealed the nakedness of the Emperor, while for others it was a call for comparative analysis. But both these responses fall far short of the mark. For, bringing the “constitution” back can only mean bringing the historical dimension back. To understand the British system, the England/UK dimension must first be understood, while paying close attention to English/British particularism; and whereas this must be done within a long historical context, particularism especially is not a matter of history, but importantly one of disposition and attitude. It has been said that the insubstantial (*qua* memorial, not trans-substantiated) nature and character of common law was its most effective protection against usurpation by would-be absolutists; *mutatis mutandis*, there is no mechanism for reform of the system and (apparently) there is no need for one because the core of this system of government, like common law in the 16th century, is so insubstantial, so very bereft of established positive principles, that its greatest defence against rash or wholesale reform is that reform schemes all end in conceptual muddle. Devolution under the Labour government of 1974-9, the farce of a Mayor for London and other places from 1997, and reform of the Lords are cases in point: the enactment of Stage One of the latter was at the expense of conceptual clarity and created an oddity, in the process raising some fundamental questions about the rôle and future of the second chamber that are

very difficult to put to bed. That this odd House is still the only bulwark against possible tyranny of the majority is an interesting but very British question. Devolution to Scotland, Wales and again to Northern Ireland has proved institutionally more successful, but the first two raised further difficulties, for in their own way, each is seen to be incomplete. Of course, British particularism has to be contextualised within English/British/UK history. Unfortunately, for most, this particularism is understood only in terms and within the larger context of European history, where it is seen as a divergence from common historical origins, and is promptly re-labelled exceptionalism, implying a norm somewhere. Particularism (even when wrongly understood as exceptionalism) calls for an explanation: although it is an ever-present topic throughout the text, it is addressed in some detail in Chapter Six.

The shift in the 1960s from a historical focus on government to one on politics and policy invited, if not actually injected, a fiercely political dimension into the study of the British system: the political science of British government was – and remains – heavily politicised, so much so that those who refuse to acknowledge this political dimension are, in effect, marginalised. It was only to be expected that renewed interest in the study of the “constitution” would also be politicised, in a more or less partisan way. The appearance of many pressure-group type organisations, often in the form of a “Think Tank”, is perfect testimony to the broadly partisan/political interest with which the idea of constitutional reform was pursued. The rôle of Demos as the *alter ego* of the Labour administration of 1997 in thinking the unthinkable (which the government could not be seen to be doing; one also thinks of the National Health Service, the Policy Unit and the Conservative administration of the early 1980s) is testimony to the complicated nature of the problems to which the particularism of this insubstantial system tends to give rise. The apparently dispassionate approach and evidently gentle disarming style of the Constitution Unit (based at University College London) is only an inviting integument for the harsh fact that there is no unbiased approach. Equally, the political bias of a few academics with persistent interest in the study of the British “constitution” also became apparent as they, too, contributed to this

“debate”. This is altogether unfortunate, for the study of government ought to be, and often is, far more sedate than that of policy, party ideology, political behaviour, or “politics” as such – what William Connolly called “the sphere of the unsettled”.¹ There is a definite need to de-politicise the study of government by subjecting partisan passion to a strong dose of academic reason. It was altogether sobering to hear one conservative, and somewhat fiercely English, academic colleague confess that he learnt much about the British system from an on-going conversation with a younger Marxist colleague: whether the compliment was ever returned is a different question. In truth, every discipline needs to be intellectually “re-skilled” if the proper study of British government and its supposed “constitution” is to be reclaimed: this amounts to a call for a degree of retrenchment.

Fragmentation and inter-textuality naturally breed subject tribalism, which leads, almost inexorably, to claims to “expertise” – often disguised and presented in terms of the over-worked but hollowed description “scholar”. Claims to expertise may well be appropriate in some sciences, but in the range of disciplines touched upon in this study (including constitutional law), it is hard to see how such a claim can have any meaning. Indeed, a claim to expertise in any social science discipline is pernicious, if not positively dangerous: there can be no expertise that, as such, is the preserve of a *clerisy*; Social Work Studies, both as an academic discipline and practice, is simply the most obvious example. We ought to demarcate social from other sciences by intended and possible outcome, on the one hand, and effective relevance to human life, on the other, rather than by the defunct but still paradigmatic science-based criteria of concept and method. One must hasten to add that this ought not to be construed to mean that concept and method are not important, but that contrary to the tendency in the sciences to breed expertise, social science invites – or at least, it should invite – a tendency to scholarship. But scholarship cannot recognise boundaries, and, therefore, such a call – necessarily an argument against fragmentation – can simply not be misunderstood as a call to a “multi-” or “interdisciplinary” approach.

¹ W. E. Connolly *The Terms of Political Discourse*, 1973, p. 227

Rather, it issues into an invitation to think in terms of a British studies approach – a veritable union of disciplines in the person of the analyst. However, the nature of such a union is not self-evident and, for that reason, does not recommend itself. Some subject-disciplines are more “obviously” relevant than others, and there is a real danger of drift. This point can be made in two, different, ways.

Firstly, one can see this in terms of the inherent problems with any attempt to create a *via media*. “What has become” may be characterised as progress to the best possible but only in the rather narrow sense that it represents a contemporary and, presumably, on-going consensus.² To go against such a consensus requires an intensely self-reflexive and self-conscious effort: reform is not an easy, so to say, natural process. It is probably more for this, rather than any other reason that *via media* is apparently never a perfect blend of its constituent parts. One can make this argument in the context of religion and religious reform starting with Henry VIII, and especially under Elizabeth I.³ However, there is a contemporary example from outside politics: the so-called “Third Stream” in music that seeks to bring classical and jazz styles and traditions together has not produced a mix that is both and at the same time neither, but one in which jazz elements predominate. This may be so because the movement is rather novel, but nevertheless, extrapolating, it may be inferred that a mix in our area of concern may also entail domination of the field by one discipline, probably constitutional (and political) history.

Secondly, assuming that it is possible to avoid such predominance, one then runs into a different difficulty. Because the nature of such a novel approach is not clearly established, it is possible, if not actually likely that the analyst will be lured, in effect ensnared, by the perceptible clarity if not the romance of historical cases, especially constitutional history, or, for that matter, the apparent certainty of constitutional law, or take refuge in the woolly generality of political science. The tendency to history is already very strong for a number of fairly obvious reasons:

² cf. Rorty on the view that progress is a movement towards a contemporary consensus. R. Rorty (Ed) *The Linguistic Turn*, 1967, p. 2.

³ A much neglected topic, *via media* is often briefly discussed in various aspects, especially, of 16th century England. See A. B. Ferguson ‘The Tudor Commonwealth and the sense of change’ in *The Journal of British Studies*, 3/1, 1963, pp. 11-35.

all knowledge is pre-eminently historical, this much is clear. But this claim does not amount to the further claim that history is all that is needed. The nature of the blend between the historical and the contemporary, and, in its essence, the theoretical dimension of any given subject is not obvious, and is more difficult to see in our subject area than in some others. Suffice here to say this: it is likely that one becomes mesmerised by the evident solidity of historical facts as well as the romance of historical episodes, and in the process neglects the other dimensions necessary for a proper understanding of the whole. If so, one is also likely to take the historical for an explanation of the contemporary – “what is” in the sense of what it has become – at the expense of the theoretical, and make the serious mistake of rendering the necessary and relevant theory implicit. That this may produce, so to say, an “Esher-esque” conception of the British system is obvious, but Esher was not the last to do this: many contemporary analysts, on reflection, can be seen to be doing precisely what Reginald B. Brett, Viscount Esher, did in the Edwardian era. But if his influence was rather private and – to the chagrin of the government of the day – worked on Edward VII with greater impact than we would readily accept, yet he understood the limitations of his understanding as (historical) forces that could maintain the purity of the system, and was constrained by that knowledge. Latter-day Esher-esque arguments are increasingly in the public domain, influence political judgement, especially of the electorate, and colour the view of the system in a way that is not clear and obvious to the unsuspecting public: one has only to look at the premiership of the good-natured and decent John Major to see how often his time in office was examined, analysed and judged in comparison to that of Stanley Baldwin; in 1995, there were twenty such articles in *The Times* alone. The problem is that such “comparisons” were in terms of a preferred theory of premiership that was never stated, but without which the putative comparison would have been simply meaningless.

But other forces also militate against the development of a British Studies approach; these include the institutionalisation of fragmented knowledge, the “self”-interest of universities as “economic” units in an increasingly competitive

“market”, the pernicious effects of intellectually bankrupt schemes such as Research Assessment and Teaching Quality exercises, and, not least, the primarily commercial interests of some publishers – a kind of grey press, what Calvert once called “the exigencies of commercial publishing”.⁴ The upshot is that, in general, there are too many “experts” producing too much “research” who make little or no contribution, but are published in any one of a number of peer-reviewed academic journals with such a narrow focus that literature search is a sick joke.⁵ Proliferation of universities and university courses, and the resultant increase in the student intake, has also had a bad effect: one has to wonder just how many social science graduates any society can usefully absorb. At any rate, the result has been the devaluation of social science courses: truly soft options (understood as those that do not portend a profession), they are no more than vehicles for a “university education” – a new and now necessary modern “rite of passage” feeding hopeful graduates onto the job market and/or further training, but hardly a serious initiation into scholarship. The further possibility of creating one’s own degree course by picking and choosing from a menu-like list of self-contained, necessarily self-enclosed but hollowed-out and packaged semester-subjects is the next logical step in this dire process. As it is, increasingly, graduates have no real familiarity with the historical literature, and University courses no longer engage but *teach*. Knowledge is now textbook-based; the longer-term implications for scholarship a couple of generations down the line do not bear thinking about. Although the question of the extent of public funding of such a process of producing graduates is a different matter, one rather suspects that the withdrawal of totally-funded university education will have a salutary impact and sobering effect upon some social science courses and not a few departments, but that in itself will not encourage scholarship. Be that how it may, it is not for nothing that the largely American practice of holding a “relevant” doctorate as minimum qualification necessary for academic appointments has become prevalent in UK: we are a long way from the days when a John Locke or

⁴ H. Calvert *Constitutional Law in Northern Ireland*, 1968, p. 1

⁵ A sociologist remarked in the mid-late 1990s that he was sick and tired of receiving doctoral proposals on “relevant” rather than academically interesting topics.

Jeremy Bentham would qualify from Oxford at the ripe old age of sixteen or, as did William Blackstone, at eighteen, and promptly obtain a “studentship” or, as was the case until not so long ago, obtain a position, for university teachers had only a first degree and that was enough.

Alas, there is more to be said. Most of our “governors” (be they politicians or higher civil servants) are the product of this fragmented system, and carry their understanding not only into the process of governing, but also that of reforming and perpetuating/renewing this system of government. It is surprising, but also a fact, that although from the early Middle Ages, lawyers have had the greatest impact upon the development of this system of government (Edward Coke surmised somewhere that the “Unlearned parliament” – 6th of Henry IV, 1404, so-called because lawyers were excluded from it – was not only the least productive, but that it did not produce good laws!), their rôle, and the rôle of the teaching of various social science disciplines, including constitutional law, has yet to be problematised, examined, and conceptualised. An even more odd, and rather disturbing, fact, is that while a fair amount about the general manner and different stages of the current selection of “fast-track” recruits into the Civil Service is known, we are not allowed to examine the final and finer stages of the process and the psychological profiling that takes place. Yet fast-track civil servants – from all manner of academic disciplines – are as important as are judges and our high-profile politicians: what they carry with them and how they think about government and this “constitution” is supremely important, even more so when it is considered that while the system is and remains impersonal, nevertheless not only is “ownership” located at the top, but the higher echelons of the Civil Service *are* its effective custodians. Moreover, the filtering process of promotion whereby only a few rise to the top echelon in the Civil Service has had the tendency to foster, encourage and emphasise certain types of views about the system and its future. Without putting too fine a point on it, this must mean that bold-thinking is discouraged. At this stage, we need not even mention the problem that so animated Gordon Hewart.⁶

⁶ Gordon Hewart (Lord Hewart of Bury) *The New Despotism*, London 1929

We owe it to ourselves to take the study of the “constitution” and government in the UK more seriously and to facilitate scholarship in the subject: would that there were an “Institute for British Studies”. That said, scholarship cannot be measured by the “kilo-yard” of publication: nor is the measure of a scholar the amount of money one is paid, the university degrees one has collected, the reputation one is accorded, “honorary doctorates”, professorial titles, being called a “scholar” by colleagues, still less elevation to the peerage in political recognition of academic achievement. Even less relevant to the true worth of a piece of research and publication is the incidence of citation. Academics are not free from passion, their work is not “objective” or “neutral”, but this does not mean that it ought to be political in a partisan sense: scholarship serves the higher purpose of the pursuit of truth in the service of human life or it serves none.⁷ Being concerned with the *truth* of organising principles and working concepts in this manner of government, and, therefore, with the nature of how as a people we are governed, it is also deeply concerned with the language of its practice. But, in all cases, scholarship is singularly ill-suited to any kind of validation – especially from arcane processes of peer review – and, truly, scholars are not much interested.

The text that follows is born of frustration with the academic study of British constitution and government. But this point is likely to be misconstrued: this frustration issues from explicit and implicit claims by practitioners of each discipline that their findings are conclusions in terms of which we can know and understand this system. To be sure, we are faced with a difficult, finely poised issue: a de-fragmented social science remains in need of the detailed account of the historian, the theorist, the analyst of the working-system (which, for some, means political science), the findings of contemporary historians, political journalists, lawyers on the finer workings of the legal system and recent developments and changes in “constitutional” law etc. In this more restricted sense, there are some definitive studies in these fields that stand above all others, important markers of the nature of the subject and the manner in which it has *so far* been understood. In one sense, invoking Francis Bacon once again,

⁷ The point is that fragmented social sciences are in their very nature prevented from serving this higher purpose.

we need them, for they are the giants upon whose shoulders we must stand if we are to see further.⁸ But this notion harbours a complicated difficulty.

Discrete disciplines are so precisely because they are demarcated and defined by their own boundary arguments. But this does not mean that the fruits of the labour of its practitioners are readily *accessible* to others. In other words, there may be inherent problems with attempts to access and reap the benefit of the analysis in another discipline. These problems are of two kinds.

Firstly, it may well be that the language of the analysis is esoteric, and that its findings and conclusions are not presented or presentable in any natural language. Presenting an argument in English does not make it accessible: the need for much else besides remains untouched (especially a command of the basic concepts of the discipline in question). But, then, no one ought to imagine that having the command of the means of one discipline, one is, *ipso facto*, then able to understand arguments in every other, albeit cognate, discipline. Secondly, this difficulty is compounded by the fact that often there is a need for specialised skills beyond the technical language of a discipline before one can begin to feel that the arguments in question are available, let alone *accessible*. To properly understand democracy, it is necessary to delve deep into the history of the Church and its government; to begin to understand sovereignty, religion and its history (especially the Judeo-Christian tradition) needs to be examined in some detail and with some care. But scholarship in Medieval History often deals with texts and materials in Medieval Latin, without making any concession to the fact that practitioners from other cognate interested disciplines may need and wish to access and understand arguments in Medieval History.

Ullmann's *The Medieval Idea of Law as represented by Luca de Penna* is a prime example, while Albert B. White's *Self-Government at the King's Command* offers a lesser case of this difficulty. The example of Ullmann is particularly instructive, in that he pointedly refuses to translate the numerous quotations, on the basis that it is not just the words but also the manner of expression and style

⁸ Famously, "If I have seen further it is by standing on the shoulders of giants." Issac Newton to Robert Hooke, 5 February 1676, in H. W. Turnbull (Ed) *Correspondence of Isaac Newton*. vol. 1, 1959, p. 4

of language that impart meaning (pp. IX-X): this of course simply means denying access to those excluded by their lack of Latin and, in effect, sets Ullmann up as the authority on what he argues. But he also argues that all proffered truths must be tested and that none can or ought to be accepted on authority (p. 22). Putting these two claims together, it becomes clear that this discipline is for the *cognoscenti* only, akin to the claim that Plato and Aristotle are accessible only to those who can read their texts in the original.

One need not delve far into the bowels of Medieval History to see the exclusionary and fragmentary nature of such an approach, but it need not be so; increasingly, Old English texts are now available in modern form, a fact that has very much enriched study of the subject. One does not deny that there are issues here: nuance can easily become blurred in translation, especially when the text is heavily modernised and put in the language of contemporary practice. Much care is needed in reading John of Salisbury, Bracton, Fortescue, even Thomas Smith, but the exercise is, if time consuming, nevertheless very rewarding. Yet we find that contemporary specialists (historians or political scientists) in foreign political systems are at least as guilty of this exclusionary process as our Medieval specialists: often, words are presented as untranslatable, and are therefore used in their original form: *Weltanschauung* and *Sonderweg*⁹ come to mind; proper names are one thing, but concepts are simply a different matter. Amidst all this exclusionary activity, the modesty of Kantorowicz offers a refreshing change. He apologises for, so to say, invading the territory of “sister subjects” and excuses himself for the inevitable mistakes and shortcomings that result.¹⁰ But, Kantorowicz also confines Latin quotations to the footnotes, and although he uses many stock Latin phrases (which are now part of the general vocabulary of social science), his arguments are both available and accessible.

The point is that technical as well as other languages can serve as particularly

⁹ Not only are we expected to understand the German *Sonderweg* in their terms, but also apparently it is *de rigueur* to apply it to other instances. In the introduction to a compendium on the British system, written in English and printed in the UK, the author (a German) insists on using the word *Sonderweg* to describe what some would call British exceptionalism. See the Introduction in P. P. Catterall, W. Kaiser and U. Walton-Jordan (Eds) *Reforming the Constitution*, 2000.

¹⁰ E. K. Kantorowicz *The King's Two Bodies*, reprinted 1997, p. XIX

effective barriers to cross-disciplinary understanding. Language is truly a most exclusionary force, and a wonderfully effective instrument of fragmenting social science into disciplines, creating social *sciences*, and policing its boundaries. Yet invoking dead languages (Latin and Norman French in law, now happily discarded) is not the only linguistic barrier to better understanding. Lawyers, especially the judiciary, are guilty of a high crime in this respect: one need only read the often unnecessarily lengthy, if not convoluted, judgement¹¹ of this or that Court to see how a *clerisy* maintains barriers: of all the things in the world, in a society that prides itself on its overriding principle of Rule of Law, its laws and legal judgements *should* be crystal clear; but they are not. That said; the point is that whereas we need to learn the (less esoteric technical) language of many subjects, it is crucially important that we avoid speaking exclusively, even largely in the idiom of any one of them. What is common between them all is nuanced natural language in its full glory, and only this can be the meaningful idiom of a true social science.

There is a clear need for specialised research, but unless the fruits of research can be and are made available and accessible to others in cognate subject areas, they might as well not be carried out at all. Moreover, in a condition of defragmented social science, such specifically focused analyses can be fruitful only when they are located within a larger “unified” context, for the meaning of the whole can only come from the larger view, without which some pretty serious questions can simply not be articulated. The apparent circularity in this argument is intentional, and is intended as emphasis. For a larger view cannot be the simple outcome of “using”, juxtaposing, even seeking to synthesise, the findings of different disciplines but of their incorporation into the larger vision and

¹¹ It may be argued that lengthy, convoluted judgements are necessary because they convey the reason of the argument and block routes to other conclusions, without which the judgement may be suspect or open to challenge. There is something in this, but such a retort does not amount to a fatal response. Judgements that run into well over a hundred pages are not uncommon, characteristically written in the short-hand language of lawyers, which is where the trouble starts, as it makes the law and judiciary the preserve of the lawyer - famously, one must ask a lawyer to know what one's rights are: plainly this is not on, for either the law and rights belong to the ordinary person, or they are irrelevant.

“intellectual digestion” in a comprehensive British Studies context.¹² Indeed, it must be said, an appeal for the much-beloved multidisciplinary approach is an indubitable sign that scholarship in that subject is yet to come: scholars cross boundaries at will, with a characteristic absence of self-consciousness about it, which also means without care, for subject-boundary is an intellectually limiting artefact alien to them. This conception is, admittedly, in sharp contrast to the well-established view that concept and method define the core of an academic discipline. Perhaps in the present condition of the *academe*, they still do, and this debilitating condition is much encouraged by the bankrupt, arcane processes of research assessment exercises, but truth is not the preserve or function of any one discipline; rather the search for truth characterises the academic approach, and is a defining feature of it. It is thus that the preferred approach should be to find the method in the concepts *in* the analysis, then separate, conceptualise, examine its credentials (involving appeals to logic and the philosophical method) and re-apply it to the “arguments” as an important test of its coherence and truth-validity of its conclusion – except, one must hasten to add, even that is far from enough.

Whereas in this study, I fully echo Horesham Cox when he said that

[a]fter careful inquiry, I have been unable to discover any book in which the modern principles of the British Constitution are systematically discussed and elucidated by reference to the actual state and numerous institutions of our Government.

The need for such a work was, perhaps, never more apparent than at the present time, when political measures engage more general dispassionate attention than they have received heretofore...¹³

¹² There are a few examples of successful combining of more than one discipline. Economic History and Economics are truly indispensable areas of consideration for any serious understanding of aspects of policy; this much is beyond doubt. This does not invite an economic theory of politics (or democracy); rather a command of these two disciplines as part of the preparation for the analysis and examination of policy. Jim Bulpitt, in his ‘The Discipline of New Democracy: Mrs. Thatcher’s Domestic Statecraft’ (*Political Studies* 1986, 34/1, pp. 19-39), demonstrates well and underlines the importance of a good grounding in Keynesian consensus and monetarism to an examination of the fortunes of Conservative Party in the late 1970s and especially the early 1980s. It may be added that Jim Bulpitt uses “statecraft” in a figurative sense here.

¹³ H Cox *The British Commonwealth*, 1854, Introduction, p. xx. It must be said that the tenor of political arguments at the time – dominated as it was by the issue of electoral reform – was far from “dispassionate”.

this study is not conceived, as was his, as a remedy, but as an attempt to dispel myths about it. It is a long answer to questions such as: “How are the fragmented disciplines in fact linked together? What would a British Studies unified theory approach yield? Must we really live a life of servitude to received concepts (such as sovereignty, the State, or the blinding mantra of the 20th century: democracy) which, upon examination, evaporate into elusive and slippery claims, and when they are eventually dissected, turn out to be vacuous, or worse, even paradoxical? Precisely in what sense is “historically sanctioned” meaningful, such that we must live by its precepts? What would the product of de-fragmented social science look like? Can it be done?”

A further point of frustration is that not only does much get lost in the space in-between disciplines, but the filtering process of, and in, each discipline also excludes certain types of arguments, or areas of study. Thus, for instance, “*mezzanine level institutions*” of government, an ill-understood but distinct feature of the British system, are all but completely ignored; thus corporatism is understood in terms of policy, evoking the pithy picture of “beer and sandwiches”. But this is by no means all that one may say about it.¹⁴ In an important sense, fragmented disciplines pose questions appropriate to their concept and method, and disallow others. Questions on the same topic posed in various cognate disciplines are to that measure different, and are likely to lead to answers that satisfy the requirements of the discipline in question. The problem is that these answers fit together like the mismatched pieces of more than one jigsaw, but the futility of such an enterprise is not obvious because there is no larger single picture available to enable us to see that in combining mismatched pieces, even when the cut and shape fits, a whole picture does not arise. The contention here

¹⁴ The problem of “*mezzanine level institutions*” breaks the surface every now and again, but is hardly presented or understood in these terms. Two instances of this are the reform of the legal system and the rôle of the legal profession in that process in 1998/9, and more recently arguments about the rôle of the medical bodies, such as the British Medical Association, and the problem of registering and controlling members of the medical profession in 1999-2000. The issue of “*mezzanine level institutions*” is not addressed here; it requires, and indeed deserves, a separate and pointed study.

is that in a de-fragmented discipline – such as the unified theory approach¹⁵ – the questions posed would be at a sufficiently high level of generality such that their import would encompass the cognate disciplines. Questions thus posed will require a fresh look with the possibility of a different kind of answer. While the essence of this claim is clear in the contrast between the different perspectives of political science and constitutional law, it is actually well marked by the starkly different answer that unified theory yields, as is also the case with the treatment of representation and delegation of power. In many ways, representation is a rather crucial, well-nigh pivotal feature of the story in this study, and will be examined in some detail. Indeed, a sharp focus upon the *constitutional* meaning and import of representation and its base-line argument, delegation, tends to lead away from the heretofore general discussion of the topic in “linguistic” and “philosophical”¹⁶ terms that predictably and swiftly shift the focus of attention to the problematic topic of democracy.¹⁷ Ordinarily almost every analysis of representation rapidly becomes a discussion of democracy and representative government, but it need not. No doubt discounting democracy in this study as a central topic and marginalising it to such an extent that it is not even accorded a separate section will attract comment and criticism. But, from a constitutional theory perspective, democracy is not a central or focal topic; as a system of government, it is, ultimately, a derived conception, its meaning and import dependent upon the concepts to which it, *qua* a system, gives effect.

The product of a de-fragmented approach is, almost by definition, harder to read, but that is no argument for seeking to simplify it, which is also to change it. What is social science *for*, if it is not to examine and expose in a reasonably comprehensive manner the salient features and concepts that inform and organise that part of our world of existence which we share in common with others, such that the truth of such concepts can be instructive, instrumental even,

¹⁵ A further dimension to this claim is that unified theory is connected with the desideratum of unified science. See chapter 10 in S. Harding *The science question in feminism*, 1986.

¹⁶ Such as the reputedly standard-setting analysis by Hanna F. Pitkin (*The Concept of Democracy*, 1967), or A. H. Birch *Representation* (1971). Incidentally, Birch, despite claims to the contrary, does not deviate much from Pitkin's approach

¹⁷ Such as David Judge's *Representation*, 1999.

in liberating its members – us – from the shackles of prejudice and ignorant application of supposedly “universal” and “true” principles, and from debilitating effects of pseudo-science which plague human existence in the form of historicism, legalism, and “ideologism”? Indeed, any social science that serves to perpetuate an *ism* is, *per force*, political, a *pseudo* science, and very much part of the problem.¹⁸ On the other hand, to realise that the vision of any one discipline is limited is also to know how limiting each is. Such an outcome is bracing and liberating: scepticism about the findings of each fragmented discipline will prevent the propagation of its findings as social science “truths”; and if the truth is, as Hegel understood it so well, in the whole, or as Rousseau had it “... is not truth one?”¹⁹, then it is the whole as a whole that must be known and understood. This is only possible if and when the gaze is shifted from the narrow window of any one discipline – through which we see the world altogether darkly – and see the world of human existence and lived life. If by this, some understand an implied argument that state/system-centred social science is very much part of the problem, then they have caught the drift of the argument well.

But this also means that the unified theory approach is eccentric, as it were, out of step. Two points must be made about this. Firstly, in being out of step one does not confront the world, but, nevertheless, accepts it. This means that one moves in the same direction, as do the others, but seeks to develop a self-conscious and reflexive concern with social science – including historical – construction of that “direction” and tradition of thought and its intended destination. The out-of-step social scientist applying an eccentric approach

¹⁸ This is actually a much larger issue than it might at first appear, with a number of dimensions. Dedicated to the truth, we must first find it. But knowing the truth is a highly contentious claim: the truth is never “neutral”. Arguably one must then confine oneself to saying what is good and what is not about it, which lands one in the realm of theory. Yet, the good is in no need of praise: it is difficult, for instance, to read E. Barker’s 1947 volume *The Character of England* without embarrassment and discomfort. To praise is probably to be complacent about what may not be right with the system. One may feel a little less so when reading George Santayana’s *Soliloquies in England, and later soliloquies* (1922) in part because it is praise from an “outsider”, albeit one who adopted this country. Even so, it may still not be possible to assuage the feeling that such an approach may hide a multitude of sins. So the focus shifts to “problems”.

¹⁹ G. W. F. Hegel *The Phenomenology of Mind*, second edition, 1949, pp. 144-145; J. J. Rousseau *Emile*, 1974, p. 260

means to get there but *via* a different route. Secondly, in being out of step one may see matters in a different perspective or see different matters, for one is liable, so to speak, to step on things others miss. This amounts to a more forceful and pointed interrogation of the concepts within a theoretical nexus, which can, often does, raise serious questions about their coherence and applicability. As a part of this, one must problematise the craft of history, its concepts and episodes as necessary tools of the historian.

It is necessarily the case that an eccentric analysis is not inter-textually validated. Indeed, it is part of the contention that some leading texts and theories are part of the problem, and as such cannot be part of the solution. In this study, contributions, symbolically from John of Salisbury and Fortescue to Dicey and Bagehot (odd that we usually stop with the last two; even more odd that these two 19th century figures have remained 20th century closures, and there are no liberators on the horizon for the twenty-first century) and a good few since, are treated as the proper subject of examination rather than source of insight or part of the explanation. Their understanding of the subject must be problematised if we are to understand, and perhaps accept, the plausibility and verity of their arguments and, more to the point, the applicability of their analysis. To expand this point, such texts, indeed any major text, must be treated as one does a potential piece of historical evidence: they have to be examined and analysed before one decides what value they may have as a piece of evidence. It is all the more important to do this in respect of texts that have set the standards by which we understand this system.

Moreover, the style of writing in this study is also eccentric in that each argument is pushed to the limit, such that often the end picture in each case may appear over-drawn or exaggerated. This idea is far from an adaptation of the idea of “hard cases” in law; indeed, they are fundamentally different. The latter refers to a situation in which the existing rules of law do not provide a sufficiently clear answer to a legal problem such that it becomes incumbent upon the judge to exercise discretion, whereas the former is an attempt to tease out the inherent intimations and the “true” demarcations of an idea or concept.

In an important sense, the true meaning of an idea can only be seen in its proclivity and intimations, revealed when the point is exaggerated. This does not mean that ideas are generally, or even often, applied in their exaggerated form. Indeed not. But the main concern in this study is to understand the concepts and ideas that form the descriptive and explanatory apparatus of the study of the British system, which requires an identification of the tendency of each idea concerned. This may appear a moot point, but, on reflection, it is clear that it has a significant practical resonance, especially in the British system. It may be objected that the history of this system is abundant testimony to the fact that its concepts and working principles have not been applied in their extreme and exaggerated form, and when evidently an issue, have been modified. In large measure, this is so. However, this fortuitous condition is the outcome of the historical tendency in the system that privileges a certain socio-economic “class” and puts its “good chaps” in charge, as well as a more important, though far more difficult notion, namely the “character” of the English and their inherent desire not to be governed. But both these points are features of the system that are difficult to examine.²⁰ However, the importance of “good chaps” theory is revealed when, in the hands of “others”, the true bearing of the institutions and arrangements of power come to the fore to the surprised disbelief, if not also the chagrin, of many: a case in point is the story of British government in the 1980s, and increasingly also the Labour government of 1997.

It may be thought that such sharp focus upon concepts is misplaced in the study of the British system of government and structure of power. But, apart from the claim that we are more likely to get the true bearings of a concept when we see it in an exaggerated – not quite caricatured – form, there is a further good reason for focusing so sharply upon concepts. Every action is a concept or idea applied, whether the actor knows it or not: that much is clear. Equally clearly, every sophisticated – indeed even not so sophisticated – system can be reduced

²⁰ In view of the fact that there is no such “people” as “the English”, it is patently difficult to argue that they have an identifiable character, let alone that it has remained relatively constant throughout the ages. Yet, against all odds, this seems to be the case. This point is examined and argued in *infra* chapter 5.

to bare concepts, which is to say abstracted, although it is often more difficult to do this in relation to the British system than elsewhere.²¹ That, too, is a mundane point in little need of elucidation. However, some concepts, often elevated into “theories” and “doctrines”, are assigned such an important rôle in the working system that they must be recognised as “hinge” concepts: while not foundational, nevertheless, they have come to occupy an important place in the rhetoric of the system such that withdrawing them will seriously damage the working of the system, if not make it collapse under the weight of its incongruence. The idea or the theory of the mandate is one such hinge concept. The point is this: because often these concepts give (new) meaning to (older) practices, we are in duty bound to expose them and their intimations. If they hold, then the system is truly of a certain type; if they do not, then the reality of the system is out of step with its proclaimed meaning. Notice that often the rôle of imparting new meaning and, as it were, adjusting the working system to the reality of the times and justifying its new practices is assigned to “the conventions of the constitution”. But hinge concepts are not conventions, although there is, in principle, no reason why a hinge principle may not inform a convention. As a further aside, one ought to make the rather obvious point that, generally speaking and in the vast majority of cases, concepts *etc.* are not inherently right or wrong, good or bad, but that such judgements apply to the use made of them. The search for meaning is one thing; the meaning of the doctrine of the mandate can be laid bare in altogether simple terms. The related problem of the use made of a concept, though predicated upon its meaning, focuses rather upon the question of the promise of the concept within the system and, no less, whether that promise can and ought to be cashed: thus, the expectation that an administration, upon the defeat of a measure in

²¹ This is the essence of the claim that this system is not systematised: its parts do not easily sit together in conceptual harmony, more often than not because various parts were introduced without due regard to their fit with other parts. However, there is no indubitable evidence to support this view; the system does not pull in clearly different directions. Put differently, at a systems level, this structure of power has an air of coherence about it, even though there are apparent incongruities in specific cases; in other words, the systematic nature of the whole does not bear close examination. That said; the system also harbours principles – such as that of implied repeal – that, in a sense, automatically ensure a sense of general coherence. One may also see this argument in terms of the “integrity” rule of interpretation of laws, although there are limits to this claim.

Parliament (probably in the Lords) will include that notion in its manifesto for the forthcoming general elections, thereby to by-pass the next Parliament, is a case in point. But also notice that there is a large but simply silent assumption that because a policy proposal has been included in a party programme upon which the electorate has pronounced, the government has a *right against parliament* to give effect to it. To the extent that this seems to empower the electorate, the latter is bound to agree with it; but does it? Here, the hinge doctrine of the mandate has been extended and used to legitimate legislation and silence Parliament in the process. But actually it has also been extended to silence the electorate and general public. An academic study, thoroughly enthused by the notion of truth, must have the exposition of this kind of situation as a major part of its concern, and must give its judgement without fear or favour.

Given that inter-textual validation is not relevant to an eccentric approach, what is the basis of truth validity of its arguments? This entails further more focused questions, specifically: how can one be even relatively sure that the true provenance, meaning and implications of an idea or concept have been revealed? In part the argument is that the direction of thought and the *locus* of ideas is defined, *qua* determined, by the necessary inter-relationship between a given past and some theory mediated by the analyst; as it were, the cusp of such an inter-relationship points the direction for the subject. Furthermore, it is only in pushing an idea to the limit that one can discover the boundaries of its meaningfulness: in going beyond its meaning one comes to know the range of focused meaning for each concept. In the process – akin to the mechanical procedure for finding the correct range and point of focus in a manual focus camera, which involves going into and out of focus and then back again – one comes to be at ease with the meaning and implications of the concept in question. Indeed, the fact that one has gone too far and has had to return to within the range of meaning of the concept means that one may be reasonably sure that important nuance and significant implication have not been left out of account.²² But this raises a further and rather important point, also with stylistic

²² To a considerable extent, how we understand the meaning of a concept depends upon our conception of its (linguistic) anatomy: this much is obviously true. However, what is

implications. For, in so focusing we do not arrive at a fixed understanding: this process does not yield definitions, and the resultant understanding cannot be so reduced. Terms of (government) discourse are not words, but clusters of words: this rather means that the true meaning of each cluster is to be found in arguments about and within the open-texture of the principles and concepts involved and invoked: at the core these ideas are rather starkly clear, but it is at the edges that we begin to see the outline of their demarcation and important nuance. On this view, the distilled essence of an idea is the function of a cluster of words, where essential meaning is revealed when we use more than one word in a given description whereby focused meaning is divulged by the element they share. Incidentally, this idea goes some way to explain the evident elasticity of some of the more important concepts.

The rejection of fragmented disciplines outlined above is not entirely new or unique. In mid-19th century, in the face of the increasing complexity of human activity and society, we see the beginnings of the argument against the compartmentalisation of human activity and how each compartment may be understood: for instance, Ruskin's *Unto This Last* is distinctly an argument against the separation of economic activity into a discrete field, and, as it were, the creation of *homo economicus*. If others wrote less pointedly in this vein, the general tendency was to react against the process of differentiation and its attending processes of examining and understanding it. Barker is very clear on this:²³ at a time when new social science disciplines were rapidly emerging, he considered that no "discipline" could solely or even primarily explain the reason and value of society because each such study is one-sided and misleading. Thus, for Barker, one had to study the State as the moral product of "men" (*sic*). Of

said here about discovering the true provenance of a concept is not the same as how we may understand its meaning. According to Michael Freeden, two components determine the specificity of a concept. An "inimitable component", which is the basis of stability of its meaning; and "non-random but variable" components, which define the concept as such (M. Freeden *Ideologies and Political Theory*, 1996, pp. 64-5). The area of focus indicated here operates within and, so to say, maps the outer-limits of the "non-random but variable" range.

²³ E. Barker *Political Thought in England from Herbert Spencer to the present day*, 1919, especially pp 13-18 and also 159-160

course, he did not articulate the vision of a unified social science, but showed dislike of the drift towards what are here called fragmented disciplines. Clearly Barker's point must be contextualised: he wrote *before* many now familiar social science disciplines became established as separate University departments.

Coming at the notion from a different angle and from within the discipline of International Relations, Susan Strange objects²⁴ to and rejects fragmented disciplines, *per force* social sciences, and questions some of the fundamental assumptions of discrete disciplines, especially Political Science, Economics and International Relations. Of course, the focus of her attention is the primacy that "Realists" accord the "state" in International Relations. Rejecting this primacy, she argues that the state is in retreat, and the apparently enlarged reach and increased activity of the state is, in fact, counterbalanced by qualitative decline in the authority of the state, whereas in some matters power is not diffused at all. This is not quite the outrageous claim some may think: changing capitalism has had an inevitable knock-on effect on the nature of the "state form" that has been the expression of its political aspect. But her further point is that the loss of effective power over certain – so to say, traditionally important – matters has directed the gaze and attention of governments to peripheral and marginal matters, thus creating the illusion of the intrusion and the importance of government everywhere and the apparent paradox of its increased reach and further activity. It follows that, for Susan Strange, contemporary international political economy explanations inadequately describe and diagnose the changing nature of the state-system. Clearly this claim raises a rather serious epistemological issue, but, in view of the focused purpose of this Introduction, we must side-step that argument. That said, she goes on to suggest that the evidence for this inadequacy is to be found in a "string of vague and woolly" words such as "globalisation", "interdependence" and "global governance". She protests that politics is larger than what politicians do, and that to understand politics one must pay serious attention to other activities that have an implication in this direction. For Strange, this entails the important implication that politics

²⁴ Her objections are clearly stated in the broad summation of her arguments in *The Retreat of the State, the Diffusion of Power in the World Economy*, 1996

cannot be adequately explained in terms of political science or, for that matter, international politics in terms of International Politics/Relations. The state, she contends, is not always at the centre of the stage, and this recognition necessarily subverts the supposed exclusivity of 'disciplines'. For her, the solution is altogether rather obvious: all this only spells the need for a multi-disciplinary approach; she would say good-bye to International Relations as a discipline because our times "no longer allow us the comfort of separatist specialisation".

Susan Strange was obviously animated by deep concern with the inadequacy of social science concepts, and with the fact that words seem to do duty in place of meaningful concepts. One is bound thoroughly to share that view; but it does not follow that the answer is an inter-disciplinary approach, albeit that she also speaks of "true synthesis".²⁵

As a matter of fact, of late, the tendency has been towards such an approach, whether of *compendia* of chapters from across disciplines,²⁶ collaborative work involving more than one discipline²⁷ or simply inter-disciplinary analyses.²⁸

²⁵ This is comparable to John Dearlove's "sceptical synthesis" ('Globalisation and the study of British Politics' in *Politics*, 20/2, May 2000, p. 116); but both notions suffer from the same defect. There is of course a different sense of "synthesis" which both authors may well have had in mind. It may be argued that the transformation of History of Ideas into History of Meaning, the ultimate effect of analysts taking the Linguistic Turn, would, in so far as they are all concerned with language as the medium of meaning, require the integration of cognate disciplines. But on this reading, the cognate disciplines do not disappear, nor the tensions and divisions between them abate, for the specific "linguistic turn" taken may overlap with traditional divisions. The interesting effect is to create "a new framework of questions", within an "integrated concept of history" no less. See W. J. Bouwsma 'Intellectual History in the 1980s: from History of Ideas to History of Meaning' in *Journal of Interdisciplinary History*, 12 (Autumn 1981), pp. 279-290. It has to be said that Bouwsma would like to see a closer link between history and philosophy whereby both are enriched, and each help the other better to understand where they may have gone astray, nor is he unhappy that we no longer need Intellectual History, not because the subject is dead but because we are all now Intellectual Historians. See also J. E. Toews 'Intellectual History after Linguistic Turn: the Autonomy of meaning and the Irreducibility of Experience' (review article) in *American Historical Review* 92/4, Oct 1987, pp. 879-82.

²⁶ Such as the *Contemporary Britain* annual reviews published by the Institute of Contemporary British History, and, to a far lesser extent, the Macmillan *Developments in British Politics* series. A rather good example of such a compendium is P. P. Catterall, W. Kaiser and U. Walton-Jordan (Eds) *Reforming the Constitution: Debates in 20th Century Britain*, 2000.

²⁷ Such as J. Dearlove and P. Saunders *Introduction to British Politics*, 1991.

²⁸ Such as Martin Loughlin's *Public Law and Political Theory*, 1992, and his *Sword and Scales*, 2000. See also M Cox, T Dunne and K Booth 'Empires, Systems and States: Great Transformations in International Politics' in *Review of International Studies Special*

Clearly the first type does not even begin to pretend a synthesis, and, to that extent, the claim of each discipline is simply preserved intact: each discipline provides an answer within the bounds of that discipline to a question also posed with reference to the terms of that discipline. Whether a *compendia* approach actually contributes to better analysis and is instrumental in achieving a focused understanding of the system in question – the British structure of power – remains a non-question, for in seeking to answer that question, one begs every epistemological question worth posing about the problem of multiple-disciplines focused on one subject area.

However, the second and third types exhibit significant problems. Here, the outcome is somewhat uncertain if not also formless, but reading it with care one can see its character, *viz.* the predominance of one discipline and its concepts over the other. Dearlove's and Saunders' *Introduction to British Politics* is a good example of this type: although they sought hard to focus on power and see it in all its ramifications, rather than define it in terms of a discipline or an ideology, in the event, they did not manage to avoid either. In some cases, the imbalance between the treatment offered and analysis presented of the two (or more) disciplines is simply so great, and the resultant treatment of the disciplines involved so divergent in quality and insight, that the primary discipline of the author/analyst stands out in the better treatment of the subject from its perspective. The work of Martin Loughlin is different: in his *Sword and Scales*, he taps into and draws upon, *inter alia*, law, history of political ideas, political and constitutional history, and no less, political science, but treats each as a complete and separate whole and discusses the findings of each separately. The consequence is that, for all practical intents and purposes, he merely juxtaposes findings of different disciplines. Apart from other difficulties, Loughlin's study does not issue into any rounded argument even on the ostensible major focus of his book, *viz.* the relationship between law and politics, let alone offering any new insight into the nature of this relationship, or providing a pointer to further

Issue, volume 27, December 2001. It is not clear that the attempt to end the estrangement between history and international relations has succeeded, and that a better understanding of the idea of the State has arisen as a result.

theoretical discourse. Consequently, the outcome is not so much uncertain as misleading, especially when offered as an introductory text to the uninitiated, and plainly inadequate to the *cognoscenti*.

The argument is that an inter-disciplinary approach in the social *sciences* is not at all what it is claimed to be: indeed, not even the least expectations of its advocates are generally fulfilled. However, the problem runs deeper than that; to conclude, as does Susan Strange, a generally good diagnosis with such a limited and limiting prognosis is, in effect, to invite a question that remains rather difficult to answer convincingly: if concepts in any one discipline are “inadequate”, why should a combination of concepts from different disciplines, even their synthesis, prove any less so?²⁹ Surely it is only reasonable to expect that in such a situation inadequacy will be compounded in the form of a geometric, not the simpler arithmetic, progression. One must wonder why, like a Liberal in love, Susan Strange is reluctant to go far enough:³⁰ surely, the prognosis ought to point to a (*different*) *conceptual approach to concepts*. There are other aspects of her stance one would wish to question. Strange has a rather limited notion and view of political science, and seems to work with an apparently naïve distinction between the subjective and objective. Furthermore, it is not clear that the “empirical” part of her work actually supports the normative side; or perhaps she has not quite conceptualised her approach. Above all, it is not clear that she has clarified to her own satisfaction what social science is *for*, and what rôle it *ought* to play in the drama of organised human life. But, for all that, she shows healthy scepticism about fragmented social *sciences* – even though her exclusions of Economic History and Geography are not completely unproblematical. Incidentally, it is a rather sad condition of fragmented social sciences that the question of what they are *for* and what rôle they ought to play is now simply absent from their active agenda: that this, in an important sense, makes them without roots is rather too obvious to need further emphasis. One rather suspects

²⁹ While there are many inter-disciplinary studies on this subject, we are mostly no better informed as a result, so it would appear, because such studies suffer from serious problems and defects of their own – the contributions of some such texts are examined and discussed in, *infra*, chapter 2.

³⁰ To paraphrase Bernard Crick *Political Theory and Practice*, 1971, p. 60

that this is one question that fell into the space between disciplines long ago.

Rejecting the State, government and politics as the only or primary framework and focus of analysis, and, indeed, accepting the notion of the retreat of the state, nevertheless, cannot amount to and does not entail the inevitable diminution of “the state” and government to the point of their irrelevance, but rather serve to underline the verity of the claim that they still matter. In a sense, because governments have become more intrusive, even if only in Susan Strange’s account of it, there are further and stronger reasons for paying attention to them. But the argument cuts deeper than that: within living memory (of some), “reform” used to mean further government intervention and regulation, now it means retrenchment and cutting back³¹ on matters heretofore accepted as the legitimate concern of the centre.³² We have come a long way from the 18th century “voluntary idea” to the late 20th century resurrection of the difficult 19th century idea of “civil society”, while the 20th century was marked by enthusiastic expansion of state activity and later its equally enthusiastic retrenchment. Was Emerson right when he said that “there is nothing new and nothing true, and nothing matters”?³³ But the State matters, government matters, and politics matter.³⁴ Equally, the Constitution and, in the absence of one, whatever is of the “constitutional” order and constitutive of legitimate power made available to the government of the day, matters more than most may be disposed to accept.

Our object in the construction of the state, said Plato, is the greatest happiness of the whole, not that of any one part, and this can be achieved if the

³¹ S. Strange *The Retreat of the State*, 1996, pp. xi-xii. Interestingly, Barker suggests that circa 1864 the general tendency was to distrust paternalistic government, while by 1914 belief in the State was the orthodoxy. See E. Barker *Political Thought in England from Herbert Spencer to the present day*, 1915, p. 23.

³² Clearly there is a further “political” *qua* judgemental dimension to this – e.g. see the implied distinction between “real” and “phoney” reform in Stephen Haeseler, Letters to the Editor, *The Times*, 9 May 2000 – but that is not an issue here.

³³ N. J. Figgis *Studies in Political Thought from Gerson to Grotius*, 1916, p. 1

³⁴ See J. Dearlove ‘Globalisation and the study of British Politics’ in *Politics*, 20/2, May 2000, pp. 111-117. Incidentally Dearlove suggests (p. 116) that the British state is now one among a number of layers from local to the global: but this was always so; it is just that, of late, institutional and political relations between these layers have undergone a rather radical shift. More generally, we must still contemplate Barker’s point that “Human consciousness postulates liberty; liberty involves rights: rights demand the State.” E. Barker *Political Thought in England from Herbert Spencer to the present day*, 1915, p. 32.

State is only the sphere of justice, or, as for Aristotle, justice is the bond of humans in states.³⁵ Government, said Burke, is a contrivance of human wisdom to provide for human wants, or as it was for Fortescue: “the king is given for the kingdom, not the kingdom for the king”. And it was Halifax who warned against partisan government, and readily defended the Trimmer as the only stable and stabilising element; he sought to prevent catastrophic action and favoured a condition of lived life in which shades of opinion could be tolerated. But Halifax, like Burke after him, also realised that there is a limit beyond which State action and/or toleration are no longer virtues. They both wanted to know how to recognise that which they ought to preserve, and why they should do so.

What is missing from the long line of the study of human society and its institutions is what may be called the Constitutional Theory Approach. While there is certainly a long tradition of the study of the British system *qua* the British “constitution”, there is certainly no tradition of the study of this or any other constitution as such. We are ill-equipped for such an enterprise due to a lack of a body of concepts and approaches and, no less, moral arguments about the nature of the beast and what may or may not be appropriate to it. Indeed, as argued here, the construction of theories about government remains in the frozen oppressive grip of religious thought. It is little noticed that the prayer offered just before the inauguration of a new President in the United States of America still alludes to a largely medieval conception of the leader as “God’s” chosen but put into office by “men” to “rule” over them. On the other hand, far too little attention has been paid to the abiding influence of the history of the government of the Church and the constitutional thought and debate attached to it.

It is necessary to examine the meaning of the British “constitution” and system of government and how it may be studied within our recognised limitations but with reference to some “truths” held to be fundamental – deeply embedded in and

³⁵ But of late, the tendency has been to fall back upon *raison d’etat* and, in effect, argue that the State can do no wrong and, when necessary, wrap it in virtue (this last point is attributed to a French prisoner on the Saint Laurent du Maroni when the penal colony was closed and the whole episode shelved). The essence of the point is that the State is “only the sphere” within which justice is possible, not that the State is the font of justice such that it can never be unjust.

indeed constitutive of European consciousness since the early Greeks. But such truths, if they are not structured in such a way so as to have longer-term effects, will be irrelevant palliatives. A constitution incorporates and binds certain concepts into a larger conception that gives rise to and sustains a system of government. I emphasise that this statement is nowhere near a definition (*qua* an Aristotelian end-statement): it would be plainly wrong and conceptually misleading to begin with a definition; when we are in a position to understand a definition we shall also know that we no longer need it.

It remains to make one more point. The validity of critical comments in the ensuing chapters derive from the coherence of the supporting arguments, but the measure of that criticism is to be found elsewhere. It is easy to criticise, but more difficult to be critical on the basis of reasoned argument. But, given that even the best human construct is, for that reason, less than perfect, it is always possible to be critical, unreasonably and perhaps even wantonly. That will not do; academic enquiry must be for its own sake in order to serve “truth” as we understand it, which may serve one of two purposes. It may lead to the conclusion that what we have is not good enough, but that there is no available alternative. But as Burke understood so well:

[Y]ou know by the faults they find what are their ideas of the alteration.³⁶

Critical argument should be buttressed by providing a measure for it in the form of a view of what a better system would look like, including a statement of its more important features. For what it may be worth, I offer a view of my “constitutional nirvana” in the concluding chapter.

³⁶ E. Burke ‘Speech on a Motion in the House of Commons. 7th May 1782’, in F. H. Willis (Ed) *The Works of Edmund Burke*, Volume 3, p. 352.

Chapter One: A British constitution?

What is in a word?

The 'constitution' most fortunately is become the word ... as much a favourite as 'Liberty, Property, and No Excise' ... ever was.³⁷

The word "constitution" as a noun meaning a specific type of settlement – from the Latin *constituere* (verb), and *constitutio* (noun) – does not come into currency until relatively recently.³⁸ Both as verb and noun, its first use is thought to occur in Hobbes, and from early 17th century "constitution" is also used to mean the way in which something is made up, the "composition of" some physical object or process, including the human body. But a process of transference of meaning occurs and this phrase is applied to social and political institutions and processes; examples include its use to describe the setting up of a tribunal, or when used in the sense "as constituted".³⁹ By late 18th century, the "constitution" was pretty well an established description of the British system. According to Tom Paine – who often portrayed the British system in exaggerated terms – this was so because the revolutions of that century had made the previously standard phrases (such as universal supremacy or the omnipotence of parliament) appear anti-historical, indeed anti-progressive, and dangerous.⁴⁰ However that may be, the word "constitution" – with the prefix "balanced"⁴¹ – had wide currency in that century as

³⁷ Lord Sheffield, quoted in D. Donald *The Age of Caricature*, 1996, p. 153

³⁸ According to Hammond, between 1660 and 1689, the word "constitution" meant "settled government" (*Bodies politic and their governments*, 1915, pp. 446-7). He suggests that this was a new word, as there is no trace of it in debates in parliaments of 1640 and 1641, where, had it been known, it would have been used, but the phrase "settled government" is used, though occasionally – according to the report of speeches, published in 1641 – only once. On the other hand, Halifax used the word "constitution" a number of times in his 'The Character of a Trimmer' (1685).

³⁹ As in "... constitutional fragility of ministerial power..." in *Edinburgh Review*, volume XIV, July 1809, p. 289. There is also Burke's very metaphorical use: "...the constitution of the mind..." in 'Speech on a Motion in the House of Commons. 7th May 1782,' *The Works of Edmund Burke*, 1906, vol 3, p. 355, or "... man is by his constitution a religious animal" in 'Reflections on the Revolution in France', E. Burke, *The Works*, 1801, vol 5, p. 224

⁴⁰ Tom Paine 'Rights of Man' in *Selected Works of Tom Paine*, 1948, pp. 172 & 215.

⁴¹ S. Pargellis 'The Theory of Balanced Constitution' in Conyers Read (Ed) *The Constitution Reconsidered*, 1938, pp. 37-49. One must consider the continuing influence of mechanical views of the social world, even late into the 18th century.

a proper description of the system, and was used in defence of it,⁴² but always in its “composition of” sense. This is also the sense in which the Greeks used the word. But caution is certainly prescribed here: it is true that in *The Athenian Constitution*, *Nicomachean Ethics* and *Categories* Aristotle used it in this broad sense, just as Cicero did in *Cato* and, more pointedly, in his *Laelius* (“...the frame of his moral constitution...”),⁴³ and there is similar meaning in Plato’s *Republic* and *Gorgias*, yet it must be borne in mind that in the *Laws* Plato seemed to use it in a different sense: i.e. “...the constitution under which he lives... – which could mean the government, but this meaning is not absolutely clear – and further on when he actually makes a distinction between office and laws to be administered:

[L]et us suppose that there are two parts in the constitution of a state – one, the creation of offices, the other, the laws which are assigned to them to administer.⁴⁴

But Plato locates this within a broader text where he distinguishes between that which is stronger and more permanent and that which is not.

At some point during the 18th century, this noun suffered a linguistic turn⁴⁵ and assumed new meaning.⁴⁶ The distinguishing mark of this new meaning (conveying the sense of *reipublicæ ratio*) is that a Constitution must stipulate a set of rules that are accorded a protected position, placing them beyond and above ordinary rules, that is to say, beyond politics and the ambit of the ordinary

⁴² As in Archibald S. Foord *His Majesty's Opposition 1714-1830*, 1964, p. 147.

⁴³ Screen 19 : 88 in *Greek Philosophers™* CD-ROM v4.3, 1991-5 World Library Inc

⁴⁴ Plato ‘The Laws’ in *Greek Philosophers™* CD-ROM v4.3, 1991-5 World Library Inc, Screen 201: 611

⁴⁵ This is linguistic turn in the sense of a shift from the morphology of idea to the history of meaning. See W. J. Bouwsma ‘Intellectual History in the 1980s: from History of Ideas to History of Meaning’ in *Journal of Interdisciplinary History*, 12 (Autumn 1981), pp. 279-291, and J. E. Toews ‘Intellectual History after Linguistic Turn: the Autonomy of meaning and the Irreducibility of Experience’ (a review article) in *American Historical Review*, 92/4, October 1987, pp. 879-907. However we must distinguish this from linguistic turn as defined by Bergmann, i.e. the need to talk about language in order to talk about it. See R. Rorty ‘Introduction’ in R. Rorty (Ed) *The Linguistic Turn*, 1967, especially p. 8.

⁴⁶ We must note and set aside the one exception to all this: for S. T. Coleridge, only the idea of the constitution matters, but he could never get the meaning of this *idea* across in ordinary language; he even thought of the Constitution as an idea arising out of the idea of the State! (*On the Constitution of the Church and the State according to the idea of each*, 1972). We can bracket Coleridge’s thought-provoking contribution, for his account in no way helps any meaningful theoretical or even historical analysis of the topic that is the subject of this study.

political and judicial processes, beyond the working system. However, a mere hierarchy of rules is not enough: the primary rules (i.e. rules of the constitution) must limit (secondary/derived) powers of institutions and major political/governmental agents and actors. It is common wisdom to say that to define is to limit: but one can also define in a way that makes nonsense of any limitation implied by, for instance, declaring in the body of the Constitution unlimited powers for this or that institution or organ, or, for that matter, creating or securing an office for life for an incumbent President. The point is that, precisely because of the powerful rôle that a Constitution plays in a system, its form can be used to render it an instrument of rule, whereas the point of creating a Constitution is to ensure that government is according to rules and principles stipulated in it, to limit authority and the ambit of power of the government as a whole and of its institutions or organs separately. Put differently, a Constitution is quintessentially the instrument of 'the people' whereby they create and maintain a system of government for themselves. This claim has many implications, examined in the course of this chapter.

The turn in the meaning of this word has been the source of much confusion, especially for constitutional lawyers, inviting a good deal of well-intentioned 'sophistry' by many concerned except that the object of the exercise was never to deceive, but to explain the British case in a good light. Other words and phrases, too, have undergone significant changes in their meaning, in some cases assuming the completely opposite meaning. But they are still used and the change in the meaning remains concealed. The problem is that in all cases this kind of usage also changes the meaning of other aspects of the system, and influences our understanding of it as a whole. Much the same can be said about "constitutionalism", which also suffers an equally, if not more profound change in meaning which remains largely unnoticed. Importantly, there is a significant shift of meaning in the substitution of "king-in-parliament" for "king in parliament" that must be identified and examined (in a later chapter). In a sense, there is a need to remain extra-sensitive to shifts in the meaning of words used to describe the system precisely because of its apparent continuity and, therefore, the apparent

absence of important, if not fundamental change in its nature and structure of power. The absence of marked discontinuity, calling forth a new and clearly differentiated vocabulary, means that we must look for real change in nuance: using the same set of words can mask real change; the history of the word “law” is a case in point.

Moreover, the ‘constitution’ meaning of this word ought not to be associated with any one event: on the contrary, such an event, like the American Constitution, is the result and not the source of this kind of thought. Indeed, as J. H. Burns⁴⁷ demonstrates (for a different purpose), there are significant similarities between Bolingbroke, representing the last of an older view, and Thomas Paine, as the first of the more modern view, on this sense of the word: truly, the proper history of this word remains to be written.

A Constitution,⁴⁸ embodied in a document, is often produced after a revolution, marking reconstruction after the collapse of authority; in response to necessary (peaceful) change as a result of the breakdown in an existing régime; in the wake of secession or as part of the formation of a new political entity; but it is always the symbol of a new beginning. It may indicate an imagined and probably disastrous “Year Zero” in the political life of a people, now making *another attempt*, and starting the count from year 1 *anno humanæ salutis (ahs)*. It is thought to exemplify the political organisation of a people however defined, its spirit and ethos, and, no less, its institutions. It is a “contract”, *said* to be that of the people amongst themselves,⁴⁹ now speaking in one voice, and agreeing to act

⁴⁷ J. H. Burns ‘Bolingbroke and the concept of Constitutional Government’ in *Political Studies*, 10/4, 1962, pp. 264-276.

⁴⁸ There is a general affinity between this view and that of Philip Allott in his ‘The Courts and Parliament: Who Whom’ in *Cambridge Law Journal*, 38/1, 1979, pp. 79-80.

⁴⁹ It is sheer nonsense to speak of this as a contract between the government and governed, as in P. Madgwick and D. Woodhouse *The Law and the Politics of the Constitution in the UK*, 1994, p. 7. In a régime based upon a constitution, the government is the resultant entity, not a prior one. Paine knew as much, and was clear about it (*The Selected Works of Tom Paine*, 1948, pp. 126 and 211). This point is further underlined by the observation that every seven years a Constituent Assembly would revise the constitution of the state of Pennsylvania (*Ibid*, pp. 209-210.) However, this idea was not incorporated into the articles of Confederation (article 13 of the 1781 text in Bryce *The American Commonwealth*, 1893, vol 1, p. 695), or that of the US Constitution in 1788 (*Ibid*, p. 705, Article 5 – albeit that “The Congress, on application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments,...”).

in a given manner. It ordains and organises, and brooks no dissent; it is a wishful substitute for a settled manner of attending to needs in common. It fills the evident *lacuna* of an identifiable historical time for a given people:⁵⁰ it truncates a desired manner of acting into a statement of principles indicating how to act. It is the dry bones of a political morality and is, as such, invested with some “fetish” power: a Constitution is the nearest some can come to *real* (political) history.⁵¹ Moreover, in the era of modernity, it is the means of cutting short a possible but uncertain historical time and experience, and importing the distilled principle of “good practice” into a world in which those principles do not have a natural home. And it has supposed advantages: if it does not suit, it can be changed, and how it may be changed is also stipulated; it is, as it were, the very essence of “enlightened modernity” and the symbol of self-determined political identity. And it appears to be an exportable item: if the 18th century only produced a few albeit trailblazing examples, the 19th century was a veritable period of “...epidemic constitution-making...”⁵² A “good” constitution, always a “democratic” one, has since become the highest prize for the stragglers of this world, for whom political

⁵⁰ That such an enterprise is folly was already evident to Hegel, who considered that the constitution of a given nation depends on “the general character and the development of its self-consciousness”. This rather meant that seeking to give a constitution *a priori* to a nation “would be a happy thought overlooking precisely that factor in a constitution which makes it more than an *ens rationis*. Hence every nation has the constitution appropriate to it and suitable for it”. *Philosophy of Right*, translated by T. M. Knox, section 274 and Addition. This of course echoes Montesquieu: “... the government most comfortable to nature is that which best agrees with the humour and disposition of the people in whose favour it is established.” *The Spirit of the Laws*, translated by T. Nugent, Book 1, section 3. It must be said that this idea has a possible root, albeit in a complex form, in Christian thought: based on the biblical notion (Romans 13/1) that “Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God” it may be argued that a bad king is king for all that, and probably a punishment from God: they have the government they deserve.

⁵¹ The tone of these remarks may be taken to mean that the preferred disposition is necessarily historical and conservative. But *real* history and an established manner of doing things is not the exclusive preserve of the conservative disposition. The caricature of a non-conservative, depicted as one for whom time is irrelevant, and received wisdom only a set of ideas to be dismissed in favour of rationally-deduced principles of action is just that; an exaggerated caricature. They must both function within a sense of *real time*, sense of history and an established manner of doing things. They differ in what they are inclined to preserve and why.

⁵² Carl Becker ‘Afterthoughts on Constitutions’ in Conyers Read (Ed) *The Constitution Reconsidered*, 1938, p. 389.

life is an idealised “democracy”, or it is nothing. But a Constitution is, eminently, an instrument, and may be put to good or bad use. And because it is the supposed voice of the “body politic” – at this point it is customary, but not really essential, to speak of Anderson’s “imagined nation”, but if it is necessary, then John Austin’s much earlier “imagined community” is preferable,⁵³ bearing in mind that there is something of this in John of Salisbury’s⁵⁴ idea of the “psychological bond of society” – it is also the highest authority, and the only voice, eloquently enunciating a “noble lie”, but a lie for all that. Opposition to one’s Constitution (one suspects this is the only meaningful sense of treason in the modern age) is, in itself, an act of Constitution-making, and is, in that sense, outside the Constitution and its rules, therefore by definition, beyond the embodied political realm: but a Constitution is also defensive of the condition of its own conditionality. It is the most perfect instrument in the hands of the politically unscrupulous, and is often used as an instrument of oppression, even in the land of the free. In an important sense, a Constitution is one way of restraining a people, and especially rulers not given to moderation.

Furthermore, a court of some sort protects a Constitution, and courts only administer law. A (codified) Constitution is actually recognised as supreme law, though this is a mistake, for it is the very condition of legitimacy for law. It is a common mistake to assume that a Constitution is, in fact, the “source”⁵⁵ of legitimacy: where there is a Constitution, the source can only be the symbolic “people”. And because a Constitution is supremely the *condition* of legitimacy, it must institute rule of law. We are so conditioned by preference for government of law and not of men, and our consciousness is so deeply imbued with the desire

⁵³ J. Austin *Lectures on Jurisprudence*, 1885, p. 264.

⁵⁴ He begins with an assumption of community but does not examine it in any detail. (See book IV: the Prince and the Law). However, Dickinson, in his introduction to the text, argues that Salisbury conceives society as an interdependent body, characterised by the need for psychological unity, exhibiting a bond of common feeling. pp. xxi-xxii. *The Statesman’s Book of John of Salisbury. Being the 4th, 5th, 6th, and selections from 7th and 8th of the Policraticus*, 1963 edition.

⁵⁵ For one example, see D. Castiglione, ‘The Constitution in Historical Perspective. The Political theory of the Constitution’ in *Political Studies*, Special Issue 1996, volume 44, number 3, edited by R. Bellamy and D. Castiglione, on ‘Constitutionalism in Transformation: European and Theoretical Perspectives’, p. 419.

for freedom – which means not being dependent upon the will of another – that we find it hard even to think about a claim such as that “Between arbitrary power and rule of law there is no middle way”;⁵⁶ dutifully we nod in approval. Of course there is not; yet this has nothing to say on the quality of freedom or of the law: for laws can be very oppressive, and the idea of rule of law a most effective means of oppression, unless they are both defined and restrained by a Constitution.

Clearly the idea of a Constitution has no relevance to British government, yet this is not an arbitrary system. British arrangements are regulated by law, and while such a statute law or common law decision remains in place, the arrangement is protected and privileged. But since in this system, there are no classes of laws and any law may be changed in the ordinary way, legislation does not entrench: there is nothing above ordinary law.⁵⁷ On the other hand, we are likely to find a better candidate for a protected class of ideas in the conventional and the historical. In any given period, some matters are beyond (simple) change, and to that extent they are evidently entrenched, even though there is nothing to prevent a deliberate reform of an institution, idea or practice thus protected. Here *entrench* means no more than unthinkable in the circumstances. But the circumstances are not static, and when the period under examination is extended, it is clear that nothing is beyond change, and there is nothing that has not been changed if only in substance at some point – indeed, the longer the historical span, the less permanent the institutions appear. But this change in substance has to be understood against the further rather important fact that the British system is also characterised by an incredible degree of apparent continuity of “mummified letter” and “fossilised manner and form” of practice.⁵⁸

The absence of more than one class of laws⁵⁹ has much exercised constitutional lawyers, on which three related points may be made. Firstly, this is

⁵⁶ Lord Simonds ‘Law’, in E. Barker (Ed) *The Character of England*, 1947, p. 135.

⁵⁷ See *infra* Chapter Seven, *excursus on common law and judges*. See also *Thoburn & others v. Sunderland City Council & others* (Case number CO/3308/2001, 18 February 2002). The relevant section of this judgement is reprinted in Appendix 3.

⁵⁸ See *infra* Chapter Three, ‘Historical Obstinacy’.

⁵⁹ That is to say, given that common law has no co-equal or privileged status, European Union legislation and other treaty commitments (like the European Convention on Human Rights) all remain at the mercy of an Act of Parliament.

not how it has always been: for a long time, there was a hierarchy of laws, at the apex of which stood the Law of God or Nature. Secondly, the view in which no law is beyond the reach of ordinary legislation dissolves the constitutional issue of entrenchment and fundamental laws into arguments about the powers of parliament and the concept of sovereignty. But, thirdly, this may already be a return to a new era of more than one class of laws: there is a somewhat qualified obligation to conform to and abide by the European Convention on Human Rights, now enshrined in British law; and since 1972, there are laws from the European Union (in its various historical guises) that are presumed to take priority in cases of conflict with UK statutes. But in all cases, statute law supremacy is preserved intact.

There is much that is commendable in the history of English government, not only in and of itself over a long period (and in terms of leading ideas of the time) but also in comparison with government elsewhere in the modern world. More than that, much that has since become the mainstay of good limited government, many institutions now ineluctably associated with that, and, no less, ideas about the nature of a free people (and society) emanate from the history of English politics and government. Indeed, as argued below in Chapter Three, England was the home of constitutionalism long before the word had currency or the idea conceptualised,⁶⁰ and the idea of rule of law took practical roots here, not elsewhere, even if its practice often left something to be desired. It is always abhorrent to criticise the past of a people in view of the characteristics of new ideas and contemporary practices (especially when they are developed elsewhere); and it is equally abhorrent to (re-)write history *exclusively* from the perspective of the practical present.

If the idea of a Constitution is not relevant to the study of British government and yet our system is not one of arbitrary rule, then they are the exception that probes the rule; but does it also mean a need to accept the received view of this system of government and concentrate our efforts on reforming its working

⁶⁰ In many ways, legality was used as a substitute for constitutionality and constitutionalism: see D. L. Keir *The Constitutional History of Modern Britain since 1485*. 1938, ninth edition 1969, p. 30, and the last chapter in R. Britnell *The Closing of the Middle Ages?* 1997.

arrangements? If the idea of a Constitution is not relevant to how we approach it now, is it also not relevant to its future?

It is a main contention in this study that, although Britain does not have an obviously arbitrary system of rule, firstly, the potential for it is very clearly present in this system of government, and, secondly, the present working system actually approximates a qualified sense of arbitrary rule. That this has not yet collapsed into full-blown arbitrary rule is due to the political genius of this people (but see *infra* Chapter Six, section 1) in creating a system of government by talk; and because the system has functioned in a certain way, constrained by a certain view of the nature of power and of British society, not because of the proper working of safeguards against it. In other words, structure of power and institutional pre-conditions necessary for arbitrary rule have for long been in place here but the system has not collapsed into one of an overtly arbitrary rule because of the general disposition to govern by peaceful and reasonable means, and because of the obstinacy of this people in persisting to ask “why”. However, there is no way of preventing covert arbitrary rule – the exercise of arbitrary power draped in the mantle of attorney⁶¹ and adorned with legality – when it is presented within the existing framework and described in terms of the existing historically legitimated working system. It is a contention here that the working system is one of covert arbitrary rule; it is equally an argument here that it helps but not at all to dismiss the system as an “ancien régime”:⁶² such emotional shorthand judgement is too dismissive of English/British contributions to the theory and practice of modern government. Equally, it is not really feasible to defend this system as is – the defence of the UK Union by the Conservative Party at the 1997 general election is the nearest available to such an attempt, and, for fairly obvious reasons, they failed to make a good case.

There are a number of good reasons to take a critical view of the British

⁶¹ See R. F. V. Heuston *Essays in Constitutional Law*, second edition, 1964, p. 1

⁶² Andrew Gamble habitually uses the phrase “ancien régime” to describe the unreformed British system. For one example, see his ‘The British ancien régime’ in H. Kastendick and R. Stinshoff (Eds) *Changing conceptions of constitutional government*, 1994. But in a review article (‘Divided, different, but not a disaster’ in *The Times Higher Educational Supplement*, 4 January 2002), he hopefully averred that recent measures of reform have broken the mould of ancien régime.

system from within its own history. Firstly, it does not matter that others do as they do; the question is “How must we proceed?” Some may wish to argue that (abstract social and political) ideas are universal; but ideas need a context and a *raison d'être* that can only be found and must needs be located within a given historical culture⁶³: alien ideas cannot be successfully grafted onto an existing political culture, and political culture is not something that can be packaged, imported or exported and grafted to a different society. And this particularity applies with even greater force to political (indeed all social) practices. A better view of this system will not arise, nor improvements identified, by comparing it with other systems or peoples.

Secondly, in taking a critical look at this system, we need not dismiss English/British experience but must work with it. Probably the best argument for so doing is that ‘the Constitution’ meaning of this word is historically related to the English/ British experience: ideas inherent in the practice of constitutionalism, so much a feature of the struggle for limited government in England, eventuate into the basic idea of a Constitution, enshrining limited government. In other words, ‘the constitution’ meaning of this word is not alien to the British experience. However, *pace* the chapters to follow, (*substantive*) constitutionalism is no longer a relevant concept, and the claim of “limited government” is almost a misnomer when applied to the present British system. The remedy is a Constitution, and there is no need to yield to fears about the form this idea has taken and the history of its application.

Under the present conditions, the word “constitution” can only be used metaphorically in the British context. But a metaphor is not just a word or phrase to be used as one pleases: unless there is essential meaning entailed in its proper use, it cannot be used as a metaphor for anything. But this rule is not strictly observed in the rhetoric of politics. In ‘Three-nation Toryism’,⁶⁴ Rees-Mogg speaks of the ship of the constitution (itself an interesting mixed metaphor) which

⁶³ See my “A Discourse on “Universality”: Being an Account of the Particularity of its Relativity”. Paper given at the MCIS Seminars on Globalisation, University of Southampton. 9th March 1995.

⁶⁴ *The Times*, 31 July 1997, p. 18

was pushed out to sea in 1832, before Tony Blair pushed it out again – evidently without it ever having reached any harbour in the meantime. One cannot possibly continue to read Rees-Mogg’s article if one *thinks* about the concept implied in the word “constitution”, for soon it becomes obvious that he is using it in a totally denuded sense. One is not so much disturbed by such confusion in a newspaper article (although for the proponents of democracy, this is an important matter in its own right) than one is by the evident fact that his “contribution” did not provoke any objections. Either it was not taken seriously, or the readers did not see the problem. The disturbing suspicion is that the latter is more likely to be the case: and it means we are deadened to the terms of government discourse. One can easily multiply these examples by a hundred or more simply from the exchanges on the “constitutional” implications of the two devolution measures of 1997.⁶⁵

It may be thought unfair to focus on examples from the world of journalism and that of politics; after all, they are not contributions to the study of the subject and must be seen for what they are: partisan rhetoric.⁶⁶ But to bracket the partisan language of politics is to miss the point. It is precisely because meaning is often created in use⁶⁷ that an extended (presumably, in the first instance, in a metaphorical sense, but in the process stretching the concept it expresses) use of words and concepts may lead to a different understanding. But what is not clear is that this idea can be enlarged to mean that the way a word is used modifies the concept with which it is associated: at best, the concept is thereby extended, which may also lead to confusion. Lest this should be misunderstood, the point is not to argue against concept displacement, or slippage, but to suggest that *complex* concepts are not created in usage. For the use of words with such an extended meaning to describe this system of government will, more likely than not, present a *different* picture and represent or lead to a *different* understanding.

⁶⁵ For one example in which a leading politician speaks in a medley of category mistakes, see the letter to the Editor from Lord Chancellor, Lord Irvine, in *The Times*, 13 July 1997.

⁶⁶ One must hasten to exclude from this generalisation the work of the serious and well-informed commentators, of whom, alas, there are too few.

⁶⁷ Often this is how slang words come into currency; one might even extend this notion to the idea of inter-textual sense of some ideas. The 1997 additional volume of the *Oxford English Dictionary* is testimony to the point, also underlining the fact that the criterion of inclusion is the use, not the coining, of a word.

The result is not to *change* the system, but to disguise its *real* process whereby it operates, thereby to mislead: the structure of power is not what anyone may say it is, but a reasoned demonstration of its potential for a certain type of action, and what it actually does. The added difficulty is that politicians, functioning within this confusing nexus, conceive and give effect to measures of reform based on nothing more substantial than the general principles of the working system.

Some academic contributions are not much better. Just what does it mean to say a "... Constitution based on convention as a method for ensuring accountability..."⁶⁸ when a Constitution based on convention is all but a contradiction in terms? Take a different example: it is very hard to garner from the text what Jennifer Carter means by "constitution" and "constitutional" in her otherwise interesting contribution.⁶⁹ One effective test to divine meaning in such cases, as in most similar cases, is to apply a modified form of Ockham's razor: delete the supposedly focal word from the sentence and examine the difference in meaning between the modified and original sense. In the case in point there is often hardly any difference. This is because, in the British case, "constitution" refers to a distilled view of the working system⁷⁰ such that deleting it does not remove an independent set of ideas and concepts against which to understand and measure practice. Moreover, on the occasions when deleting this word makes a difference, it is not clear and no indication is given as to precisely what it means (especially when by historians in relation to a given period), and whether the concepts thus deleted had currency at the time, and, if so, what they meant. Furthermore, the broad/narrow innovation,⁷¹ which has served so well to silence many questions about the British system for so long, has also spawned a further

⁶⁸ M. Flinders 'Shifting the Balance? Parliament, the Executive and the British Constitution' in *Political Studies* 50/1, 2002, p. 25.

⁶⁹ J. Carter 'The Revolution and the Constitution' in G. Homes (Ed) *Britain after the Glorious Revolution*, 1969, pp. 39-57.

⁷⁰ In a way this is the core problem with the meaning of "constitutional theory" in the British context: M. Francis with J. Marrow's 'After the Ancient Constitution: Political Theory and English Constitutional writings 1765-1832' (in *History of Political Thought*, 9/2, Summer 1988, pp. 283-302) is a good demonstration of the extent to which even the supposedly leading theoretical texts on the British system are merely a shadow of the practice of the government in this country.

⁷¹ Such as in K. C. Wheare *Modern Constitutions*, 1952, *passim*, but especially chapters 1 & 9, reflected in most textbooks.

difficulty. The characteristics of the narrow sense are relatively clear; but the quest for the characteristics of the broad has brought forth misleading classificatory categories. Practically in every study, the “British constitution” – necessarily understood in the broad sense of that term – is described as unwritten, flexible, and historic. These tags are meant to convey something significant about the subject, but what do they mean?

The dichotomies in the normally accepted classifications⁷² fall into two groups: the first deals with the features of the constitution as such (e.g. written/unwritten, flexible/rigid), and the second focuses on the features of the political system that a constitution harbours (presidential/parliamentary, monarchic/republican, unitary/federal). This distinction is often not recognised, which leads to much confusion; for often, an account of this “constitution” is no more than an examination of the features of the working system. This may simply reflect the fact that the political system, actually politics, is of greater interest than is the constitutional system, even to academics. One pernicious consequence of this neglect is that a “constitutional system” is presumed rather than understood, and is, in the process, reduced to a handful of categories. Furthermore, the contribution that these classificatory categories make is not clear. For instance, the infamous written/unwritten and flexible/rigid tell us absolutely nothing worth knowing.⁷³ Indeed, these categories are not miscible and cannot be used to form a matrix; a written/flexible constitution is as much a monstrosity as would be an unwritten/rigid one: in both cases, the second feature nullifies the essence of the first and, in effect, simply over-writes its importance making the first redundant. Furthermore, to categorise any system as unwritten⁷⁴ and, by definition, also

⁷² For a brief and informative survey of the many classificatory schemes see Leslie Wolf-Phillips, *Comparative Constitutions*, 1972.

⁷³ Indeed, some are less than useless: as Wolf-Phillips notes, the “Monarchical/Republican” category does not mean very much, for each component of this category is capable of further important differentiation”. *Comparative Constitutions*, 1972, p. 36.

⁷⁴ “Written” is either shorthand for codified, or has no bearing on anything whatever. If, on the other hand, written actually means “written down”, then its import is even more dubious. For instance, in the British case, a glance at any one constitutional law textbook demonstrates the number of statutes that have a “constitution of” bearing of some significance. Rodney Brazier’s *Ministers of the Crown* (1996) demonstrates the same point in relation to a more specific aspect of the system. Of course, all statutes are written, but none is codified – in some supreme sense protected against change in the ordinary

flexible means almost nothing in the face of the fact that parts of this system, say, parliament, have a presence and claim to permanence such that abolishing them is simply unthinkable: as a matter of fact, it cannot be done *within* the terms of the working system.⁷⁵ It is equally interesting that it might be impossible to abolish the Monarchy within the terms of this working system, even though there is enough historical evidence to indicate that the Crown is Parliamentary. Meanwhile, other features that may even have a lofty and legal presence (such as the Act of Union with Scotland) can be changed by a simple Act of Parliament, but only when it is politically desirable. It is now thought that devolution is here to stay, but the relevant legislation is not protected: equally it would be possible to repeal the 1972 legislation and place the United Kingdom *legally* outside the framework of the European system, but leaving the European Union is thought to be politically impossible. Life Peerage is statute based and can be removed or its terms modified by a simple Act of Parliament, but for some restricting membership promised for life is simply unthinkable, and a serious breach of promise. Oddly here the unwritten is rigid and the written is flexible!⁷⁶ Attempts to negotiate a meaning around this kind of categorisation only serve to underline the irrelevance of the categories: one wonders what meaning to take from, say, Michael Foley's idea that the British constitution should be seen as unassembled and uncodified,

way. Leslie Wolf-Phillips prefers "uncodified" in place of "unwritten" (*Constitutions of Modern States*, 1968, pp. xi-xii and 182-3, also *Comparative Constitutions*, 1972, pp. 10-13, 27, and 32-33). See also his 'How 'unwritten' is the 'unwritten' constitution?' in *Local Government Chronicle*, 14 March 1975, pp. 266-267.

⁷⁵ Some have resorted to the incredible ideas of "constitutional suicide". For others, the solution is probably more akin to that of cutting the Gordian knot, although it must be said that this latter was not a solution in terms of the issues, but a brutal disposal of the problem.

⁷⁶ Kenneth Wheare, too, expressed serious misgivings about the limited value of classificatory schemes, and what they could contribute to understanding. *Modern Constitution*, 1962, p. 44. However, he was also of the view that a number of tags about one system define it in shorthand form. Uncharacteristically, he thought of this as "discovering" something significant about the system, not actually describing what we already knew about it. For those who do not know the system but know the general meaning of the tags, such a description offers a framework for a future understanding; but this also means that the tags are thereby privileged. Our concern here has been to ask about the provenance and meaningfulness of these tags, and more generally to attempt to reduce the complexity of political life to the simplicity of categories.

a “disaggregated” one.⁷⁷ If this judgement is correct, it remains to ask precisely what work does such a description do? What advantage is to be had from it? Given that such a play with words cannot reveal anything about the system that is not already know, the value of so doing is not clear. Incidentally, this is not to argue against the didactic relevance of categorising, classifying, and associated process of model building, in short, of comparative analysis⁷⁸ within the confine of its relevance and use for the purposes. But the didactic is only a means to an end; its devices are gambits in the process of initiating the novice into an *understanding*. Should one, at the end, still speak in the language of the didactic device then, plainly, understanding has not been achieved. Put differently, those who understand will have no use for such devices, and that is right: only when we know can we define, but at that point we no longer need a definition. This is very much akin to the claim that those who understand a Plato, or a Hegel, or such like, naturally do not speak in quotations from, or, for that matter, through a Plato and such like.⁷⁹

We are caught, as it were, in the inter-play between the evidently contradictory claims, on the one hand, that in the beginning was the word,⁸⁰ and, on the other, that it was the deed.⁸¹ Of course, in making a new start, the word

⁷⁷ M. Foley *The Silence of Constitutions*, 1989, pp. 6, 92, 98, and 130. The problem with Michael Foley’s work is that he plays around with names and seeks to account for the unaccountable, in a sense trying to prove a negative. Some might find such treatment stimulating, but that is a matter of taste: unfortunately his text does not add to our understanding of the system; nor does it help matters to argue that the (British) constitution is essentially what is done, the system as it works. *Ibid*, chapter 2, especially pp. 32-34.

⁷⁸ There is serious argument against the meaningfulness of these devices, which defines their didactic relevance and ambit. I for one remain highly sceptical of the relevance of the comparative method to the study of British government. See my ‘Political Science and the Study of British Government and Politics’ in I. Hampsher-Monk and J. Stanyer (Eds) *Contemporary Political Studies 1996*.

⁷⁹ This is not to deny the importance of the need to know what such people have said, in what circumstances, and to what effect. Dangers arise when they are taken as more than this: merely because such and such said this or that does not establish a point, far less its validity, except that we are bound by rules governing intellectual debt, and acknowledgement of provenance of ideas.

⁸⁰ The Gospel according to John 1.1.

⁸¹ Goethe, *Faust* (lines 1224-1237) - ‘Tis written:
 “In the beginning was the Word!”
 Here now I’m balked! Who’ll put me in accord?
 It is impossible. The *Word* so high to prize,

(always with a huge baggage) comes first; but this has hardly been the case with the English, whose practice became the patrimony of the British, and of the later manifestations of this system of rule. Here the deed came first: England is the Mother of Parliaments. Does this mean that the British system can only be studied and understood historically? So it would seem. For instance, Foord's otherwise classic, if not unique, study of institutionalised political opposition in England is largely historical, to such a degree that one may reasonably interpret his comment on political theory as disdainful and essentially dismissive, in truth an irrelevant after-thought. For Foord, 1688 established the basic conditions in which institutionalised opposition *could* develop and 1714 brought forth further ancillary conditions, including relative peace. Moreover, the Act of Union brought new elements to the English parliament, and the Septennial Act stabilised the life-cycle of Parliaments, which, together with the preoccupation of the first two Georges with the affairs of Hanover, left British politicians greater freedom and room to manoeuvre. Foord defines periods on the basis of some identifiable contribution that an event has made to the development of constitutional opposition, and then highlights it as a feature and defining element in its history, that is, the story of its becoming. However, such a historical account does not add up to an understanding of what this new element is, and what its rôle may be in the system. But then from the perspective of the historian the theoretical question does not arise. In fact Foord commits himself to a rather specific view of theory:

... while politicians abhorred opposition in theory, they gradually developed the institution in practice. The concept of 'His Majesty's Opposition', as is so often true in political theory, was the rationalisation of an existing fact.⁸²

I must translate it otherwise
If I am rightly by the Spirit taught.
'Tis written: In the beginning was the *Thought!*
Consider well that line, the first you see,
That your may write too hastily!
Is it then *Thought* that works, creative, hour by hour?
Thus should it stand: In the beginning was the *Power!*
Yet even when I write this word, I falter,
For something warns me, this too I shall alter.
The Spirit's helping me! I see now what I need
And write assured: In the beginning was the *Deed.*"

⁸² Archibald S. Foord *His Majesty's Opposition 1714-1830*, 1964, quotation from p. 7, and

Foord is not alone in this. No lesser historian than Carl Becker, for instance, made much the same mistake and pushed much the same point as Foord, when, speaking of the English as a people, he said

[t]he English if hard pressed will admit that they have a constitution, but they prefer not to know precisely what it is... A sly people, the English, but a practical people. A practical people, and therefore extremely subtle theorists – after the event: Jesuits lost to the theological, but gained for the political realm.⁸³

Becker went on to suggest that the true meaning of the English constitution is revealed only when they are forced to examine it in the face of the need for a new interpretation; in other words, at moments of crisis. Incidentally, it has to be said that Becker is quite wrong in his view of the way the English/British have theorised on their “constitution”: the enduring texts of the British system – from Bracton to Grey and beyond – are hardly the products of moments of crisis. Some of Burke’s work was clearly related to the course of events, and may be seen in this light, but only if one stretches Becker’s point somewhat. It may well be that historians, only too often concerned with crisis and change, see a flurry of intellectual activity and much increased output during such periods, but are not aware of the true theoretical contribution of such studies. The 17th century was a period of intense theoretical argument about the nature of English government, but it is hardly the case that the settlement owed much to that torrent of political outpouring. Similarly, there was a burgeoning literature on the crisis of British government and its constitution since the early 1970s, if not a little earlier, but the political nature of the literature is such that it is not at all clear what longer-term impact any of it will have.

Both Foord and Becker miss the point about theory. Historical government is not about the rationalisation of what is, far less a means of constitutional crisis control, whereby the meaning of what is about to be discarded is brought to the fore. Admittedly there are many aspects of the British system that have developed in practice before they were considered in theoretical terms, but the issue is that

the more general points from pp. 7-11.

⁸³ Carl Becker ‘Afterthoughts on Constitutions’ in Conyers Read (Ed) *The Constitution Reconsidered*, 1938, p. 388.

the latter only begin, and eventually end with a view of the former, while, in the process, a great deal more than any historical account can bear is brought out. The resultant generalisations may or may not fit the facts, but are likely to become part of the filter through which the historical dimension is understood. For example, Foord admits to two beneficial functions of “Constitutional Opposition”, namely the protection of minority rights, and an attempt to provide an alternative government. But these are in fact theoretical rather than historical points, and Foord can only have taken this back into the construction of his historical account. A mere rationalisation of existing fact – no matter how dressed up in guise of theory – cannot contribute to any understanding of what is already historically understood. The burden of the point is that while historical government (rather than historical politics) is clearly necessary, it is hardly sufficient: the proper study of this subject sits at the cusp of history and theory in the form of a critical view from within its history but in view of certain theoretical arguments not alien to it.

Precisely when Britain needed a Constitution, the political élite failed the people; and the apparent absence of the need for such an instrument since has only served to underline the claim that Britain is different, and the idea of a Constitution alien to British experience and psyche. Yet, in practice many changes with the characteristics of a Constitution have been introduced. Membership of the European Union and submission to the European Charter of Human Rights are obvious examples, even if in both cases the *form* adopted serves to preserve intact the core concept of the British system, *viz.* Sovereignty of Parliament. While there is still no Constitutional Court, in two senses, the practice has changed: the Judicial Committee of the Privy Council is the final Court in devolution cases; and the administration of the Human Rights Act 1998 involves the High Court declaring an incompatibility between United Kingdom legislation and the provisions of the said Act. Typically, the latter practice enables a purpose to be served and a function fulfilled without affecting the claimed nature of the system: Supremacy of Parliament, and the Supremacy of statute law continues intact. It does not take much analysis and long study to come to the view that the idea of sovereignty of an institution – in our case, that of the

King/Queen *regnant*-in-Parliament is the core of the problem: a Constitution cannot establish sovereignty of any institution or organ in any given system, not even self-declare the sovereignty of the Constitution, for the fact of a Constitution stands for the sovereignty of the people.

It may be objected that this claim to the sovereignty of the people is bogus. No people has ever acted, or can ever act in the pre-political capacity of constitution-making; indeed, to define a people that may be capable of so acting is in itself perhaps the most important step in the process of “state building” and requires the assertion of authority. Yet, the idea of ‘We, The People’ is neither risible nor difficult to accept. More than that, we also give a rather odd construction to this phrase: ‘The People’ *qua* the Constitution-maker assumes a timeless, faceless character; it is ever-present for as long as *their* Constitution is in force; who the people are may change, but the abstract ‘the people’ remains the sovereign body.

The importance of ‘We, The People’ is symbolic in two ways: it asserts the authorship and ownership of the Constitution whereby a system of government is created, and thus also its ownership of the government as its servant. And it thereby self-asserts as the only Sovereign within that system: the Constitution does not, as it cannot, create or contain a sovereign authority within it.

Such a clearly theoretical assertion of the pre-political but elemental sovereignty of the people changes the picture. This sense of the sovereignty of the people is not, even in the remotest sense, comparable to the idea of the electorate as the “political sovereign” and the legislature as the “law-making sovereign”. This dual conception is indeed infantile,⁸⁴ especially when one considers the clear fact that the present “legal sovereign” is capable – actually is the only body so capable – legally to define and re-define the composition of the political sovereign, even if only by regulating the vote; altering the frequency of elections, which is their moment of sovereignty; postponing elections if need be; and stipulating the manner in which the political sovereign may exercise their electoral choice – thankfully the franchise (not a grant from parliament, but in an important sense was prior to it) is still a privilege, not an obligation. It may well be

⁸⁴ See the *Excursus on sovereignty* in this chapter.

argued that the legal sovereign does not have free reign in tampering with the electorate beyond a certain minimal level, but that is a political not constitutional argument, which leads to the rather important consequence that sanctions against such tampering are necessarily *political*, not legal, let alone constitutional, and that, therefore, the privilege is not enforceable as a matter of primary (pre-legal) right.

Why is it so important to assert such largely theoretical claims? After all, without a Constitution, the system of British government is not obviously oppressive and Britons remain largely a free people. Much can be made of that claim. But this system has a vocabulary and rhetoric of politics and government that do not correspond with its structure of power, the place of the individual “citizen” in it (since 1981, but this only confers the right of abode; otherwise Britons remain “subjects”), its “composition of”-sense of “British constitution”, and its increasingly intricate involvement with the European system, not to mention the distinctly archaic nature of the judiciary. Surely, these are reasons enough to revise its structure of power and re-constitute it along more rational lines.

It is part of the burden of the argument in Chapter Three below that the history of British government can be read as a series of plateaux, marking the descent of the location of exercise of (claimed sovereign) power. In the history of the development of democracy, this peaceful process is no doubt a good feature, but for present purposes the significant point is that the nature and foundations of power have not changed, but instead this “ultimate” power has been “handed” from one body to another, by and large retaining its other worldly form. Whatever gloss this or that politician, analyst or commentator may wish to place upon it, the view that the system is still based upon a descending conception of power is inescapable: ours is a top-heavy system in more than one sense.

The 18th century stands for a major shift in European consciousness: the Renaissance and Reformation are important staging posts to the Enlightenment, since when there have been intellectual, technological, industrial, economic, social, political revolutions in quick succession or in overlapping stages, resulting in a disenchanted world where everything that was ever solid has melted into air.

Animals are no longer prosecuted and punished, but have rights; people grow up into individuality and refuse to take their identity from the family or state, and religion seems to have fallen by the wayside, and so on. The descending view of power, never meaningful anyway, is now a complete oddity and simply unacceptable.

Other features of our society have also changed. It seems hardly possible for anyone to write today as did Balfour in his “Introduction to Bagehot” in 1928, *viz.* that this system works as it does because it is what it is, no multiplicity of parties representing any fundamental divide. Moreover, he also considered that should party divides prove too much, an (electoral) change of administration would deliver a revolution under the guise of constitutional procedure. But this was only a safety device: for the alternative cabinet (in the Opposition) has never differed about the foundations of the society. In other words, that this system is what it is because it presupposes, and finds a people so fundamentally at one that they can safely afford to bicker, and they are so sure of their own moderation that they are not disturbed by the never-ending din of *political* conflict: “May it always be so”.⁸⁵ For Balfour, it was important to study temperament and character, and he identified the English character as a people that goad loyalties and are moved by them; naturally inclined to liberty and respect for law, they are of good humour, tolerating foul play to an extent but repelled by corruption; distrustful of extremes, they are always ready to compromise, and, on top of this, they do not suffer any profound divisions. Whether this ever was the case is not the issue; one can hardly say as much about Britain today. And if a successful political system is one that is essentially in tune with its society, then we must conclude that important adjustments in the political system are indicated. In other words, the changed nature of British society provides reason enough for us to consider it imperative – somewhat urgently – to re-construct the system on the basis of rational considerations within historical understanding; incidentally, this is not quite the same as the buzz-phrase of reform with the grain.

The burden of the point is that a political system, with the foundations of its

⁸⁵ A. J. Balfour ‘Introduction’ in Bagehot, *English Constitution*, 1928, pp. xxiii-xxiv.

discourse firmly rooted in a descending conception of power, is simply not relevant any more. Royalty, deference, pomp and ceremony, and the like, find little resonance with an ever-increasing number of people,⁸⁶ and *noblesse oblige* is only of romantic interest. Our system is in need of fundamental reform, specifically to create a limited executive, and spell out the necessary limitations of the powers of parliament, and to put the judiciary firmly in its proper subordinate place. Moreover, we can do this from within English/British history: a close reading of the history of government in this country will reveal its good principles that have long since been expelled from the practice of British government and are now found distilled in the idea of a Constitution. This means that in reforming according to these principles we are, in essence, only re-constructing our system according to its better principles, long since buried in the over-powering myth of the Revolution Settlement. Such a reconstruction requires that we understand the meaning of pre-1688 constitutionalism, and take a closer look at the meaning of Revolution Settlement.

In part, the argument is that the idea of a Constitution is not alien to the British, and that idea has significant affinities with the history of British government, but has been kept at bay because the Revolution Settlement set the course of British government on a different path. Does this amount to the claim that we have historically misunderstood the demands of a Constitution, have mistakenly considered it alien to the British tradition, and have, therefore, resisted the lure of the idea of a Constitution? Precisely how this misunderstanding, if that is what it is, has come about is a different question: and probably the fact that the initial instances of devising a Constitution were associated with major political upheavals – that of the American and the French revolutions – has a great deal to do with this. Perhaps, at least in good part, this misunderstanding is due to limited reading of the eloquent rhetoric of Burke. Whatever the historical causes, it is difficult to come to terms with the possibility of setting up a Constitution worth the name. Yet the important failings of the working system are systemic, not operational, and that requires a constitutional theory examination of its principles.

⁸⁶ See G. Sampson *An End to Allegiance*, London, 1984, for a general examination of these changes.

There are other instances in the history of British government where the change in the meaning and usage of a word has had an ill effect upon our understanding of the system. In closing this section, a few brief examples will suffice.

Sometime in the 17th century, the meaning of the “three estates” changed: its original proper meaning was to identify the Estate of the King’s realm, namely the Lords Spiritual, Lords Temporal, and Commons. But, for reasons that remain obscure, the two elements of the Lords were lumped together and the king became an estate of the realm. The significance of this shift is historical, and lost upon the modern mind. But, briefly, it gestures towards the idea that the king (the government) is an independent and inherent element in the make-up of this system. This makes it possible to speak of a “constitution” as a contract between the king and people, or, for that matter, to speak of the “original” contract. This mode of discourse undermines the significance of the sovereignty of the people, and is a spur to the rather odd view that the government is party to the British “constitution” (see *infra*, Do we have a constitution?).

The important shift in the meaning of “king in parliament” belongs in a later chapter. Suffice it here to consider the fortunes of the phrase “Mother of Parliaments”, originally that John Bright, of as far as one can determine:

“[w]e may be proud... that England is the ancient country of Parliaments. We have had here, scarcely with an intermission, Parliaments meeting constantly for six hundred years; and doubtless there was something of Parliament even before the Conquest. England is the mother of Parliaments.”⁸⁷

For Bright, this was not so much a historical, as a cultural and “constitutional” matter. The disposition of the English, he thought, was to representative institutions and the English took with them, wherever they went, the foundations of representation.⁸⁸ On the other hand, representation – and this of course means the vote⁸⁹ – was a right under the British constitution, but this point splits into two.

⁸⁷ Speech in Birmingham, 18 January 1865 in J. E. T. Rogers (Ed) *Speeches on questions of public policy by Rt. Hon. John Bright MP*, 1869, p. 333.

⁸⁸ Speech in Manchester, 10 December 1858 in J. E. T. Rogers (Ed) *op. cit.* p 300.

⁸⁹ He equated the (common law) paying of scot and lot to the right to vote. Speech in Manchester, 10 December 1858 in J. E. T. Rogers (Ed) *op. cit.* p. 299.

Firstly, Bright considered the pre-1867 Commons a travesty of the constitution, for it was distinctly unrepresentative, which meant that the object of reform had to be to restore this constitution in its fullness and with all its freedoms to the people.⁹⁰ Such reform would mean an extended franchise: he favoured household suffrage with few and limited conditions, even lodger franchise, but vacillated on female franchise. Having argued against it in 1858, he voted for it (with J. S. Mill) but by 1871 regretted it as a mistake and remained opposed to it. He argued that it would not be of any significant benefit; that the opinion in the country was not yet ready for it; and that female franchise might also raise the question of eligibility for membership in the Commons, fearing that it would damage the transaction of business in parliament.⁹¹ Secondly, the constitutional side of his view was not only that the vote was an acknowledged right,⁹² but that a properly representative Commons was the only guarantee of freedom,⁹³ and that representation of all classes was essential if their interests were to be served: he equated the vote with justice for the poor, and thought that the rich were in no need of reform, as Britain was a pleasant land for them!⁹⁴ But equally importantly (even if the significance of this point is generally lost in the mist of history of government in this country) he argued that no representative was ever empowered to cut off the influence of the constituents, make fundamental changes to the constitution, and vary, alter or overthrow the practices of so many centuries.⁹⁵

It is unfortunate that Bright did not leave a reasoned account of his view, and it is not possible to construct a coherent account from his speeches. We cannot be certain that he was prepared to accept a less than fully “democratic “ franchise because he judged that that was the best he could get, or because, like most Liberals at the time, he did not trust full-fledged electoral democracy. Equally, while he praised English representative institutions, he did not wish to innovate,

⁹⁰ Speeches in London, 4 December 1866, and in Birmingham, 27 August 1866, in J. E. T. Rogers (Ed) *op. cit.* pp. 394 and 377.

⁹¹ G. M. Trevelyan *The Life of John Bright*, 1925, pp. 372 and 380.

⁹² Speech in London, 4 December 1866, in J. E. T. Rogers (Ed) *op. cit.* p 396.

⁹³ Speech in Birmingham, 18 January 1865, in J. E. T. Rogers (Ed) *op. cit.* p. 338.

⁹⁴ Speech in Glasgow, 16 October 1866 in J. E. T. Rogers (Ed) *op. cit.*

⁹⁵ Speech in the House of Commons, 8 August 1867, in J. E. T. Rogers (Ed) *op. cit.*

and apparently did not see the development of parliament as an innovation. He dismissed experience elsewhere as a guide, yet he was prepared to borrow successful practices from elsewhere in order to avoid experimenting in this country. But, it is beyond any doubt that for him representative institutions in this country were not the result of design, but emerged as they did because of the disposition of the English. Ronald Butt expresses the same sentiment, although he does not mention John Bright:

“... a narrow institutional... view of parliament can give the impression that our political attitudes have been entirely created by Parliament whereas (although Parliament has fostered their growth) it might be equally true to say that our political attitudes have created Parliament.”⁹⁶

This rich cultural sense is lost when, for instance, Peter Shore speaks of “... Westminster Parliament, the Mother of Parliaments...”⁹⁷ There is an extended sense in which this may be true: after all, even as Bright admitted, parliament at Westminster was the instrument of granting parliaments to Canada and other Dominions, and later, in the process of the dissolution of the Empire, to former colonies. But this is a far cry from the sense in which Bright used the phrase: his emphasis was upon English political disposition, and in that sense, parliament was (only) a derived institution. More than that, the fact that he considered the powers of representatives to be *inherently* limited also points to the primacy that he wished to accord to the cultural preconditions of that institution. By shifting the focus to the rôle and position of parliament at Westminster, the orientation of the argument is simply changed, discarding the rich, multi-layered discourse that belongs in the history of government in England. But, then, increasingly this phrase is used to highlight the failings of parliament at Westminster, and as part of an attempt to draw lessons for reform of this parliament from elsewhere, presaging a shift from the historical to the comparative. However, the Queen used this phrase in her jubilee speech to Parliament with a sense of approbation when she praised the work done in “... this, the mother of Parliaments,...”; but then perhaps it would be somewhat difficult for the queen to think of England as the

⁹⁶ R. Butt *The Power of Parliament*. Constable, 1967, p. 2

⁹⁷ In K. Sutherland (Ed) *The Rape of The Constitution?* Imprint, 2000, p. 307.

Mother of Parliaments.⁹⁸

Clearly this kind of displacement and slippage is not innocent. For instance, Anthony King quotes Rudyard Kipling: “And what should they know of England who only England know”⁹⁹ and goes on to claim that Kipling was “righter than he knew, for it is impossible to understand the politics of any country without some knowledge ... of a few others.” On the face of it, this is what Kipling appears to be saying, but actually he is not. For his point is that ‘Little-Englanders’ cannot know the full glory of the English achievement: and to know this one must look at England beyond the seas. He calls upon the winds of the world to give answer, and they testify to the greatness of the English achievement, each wind in turn calling for more dedication and service. The answer to “what do they know...” is not “Nothing”, but an injunction that they should find out not about other countries but about their own.¹⁰⁰

From this out-of-context quotation, King infers an injunction for comparative analysis, which any analysis of the ‘The English Flag’ shows is unwarranted. Yet, the quotation appears to enlist the support of an apparently independent objective injunction that we should learn about others in order to learn about ourselves. Apart from the fact that misusing quotations is always a problem and probes academic integrity, this misuse also inverts the basic idea intended just as much as that of Bright’s point. For, again, this leads away from a sharp historical focus upon England and the English to a comparative one, resulting in confusion.

An excursus on sovereignty

The *sine qua non* of sovereignty is the assertion of the independence of one’s will. It is equally a primary but analytical condition that sovereignty can only be asserted, never granted or given, indeed, not even acknowledged, although

⁹⁸ Speech at Westminster Hall on 30 April 2002, in *The Times*, 1 May 2002, p. 4.

⁹⁹ From ‘The English Flag’ in R. Kipling *Rudyard Kipling’s Verse*, 1940, and A. King *Does the United Kingdom still have a constitution?* 2001, p. 6; the quotation is from pp. 6-7. That to understand we need a comparative perspective is of course not at all the simple point it appears to be, for comparative analysis is necessarily predicated upon well-grounded historical analysis.

¹⁰⁰ See P. Keating *Kipling. The Poet*, 1994, pp. 85-7 and 103-4.

recognising it, as an attribute of another, poses no problem.

Sovereignty is thought to have two faces. The description “Sovereign State” correctly asserts the independence of the will of one virtual person in its external aspect. However, this is a far cry from the further assertion that acting in the name of the State, a government can impart legitimacy to institutions or actions at the international level. The phrase “Sovereign State” has, at best, only a negative meaning in that it excludes the jurisdiction and the writ of any other, an external power within a defined territorial area. That having been said, can sovereignty have any real meaning in its internal aspect?

The agent asserting sovereignty in its external aspect is the government at the time in power, acting in the name of the whole. However, within the State, government is only a derived and entirely subordinate entity, empowered to act for the benefit of the whole; and, given the rhetoric of democracy, on a mandate granted by an electoral majority. Importantly it suffers from a significant handicap: it is in power for the duration, but for some or even most of it, it may not enjoy the support of the majority of the electorate. It necessarily follows that it – the government – may not, as it cannot, claim the “independence of will” attribute of sovereignty. Its “will” is derived and its actions are subject to the tribunal of the ‘the people’ *via* the actions of the electorate, and, in the interim, subject to the judgement of the institutional agent of ‘the people’, namely parliament. But parliament, too, suffers from the same handicap.

Sovereignty of the State in its internal aspect is a category mistake: within the State, sovereignty is *meta* the political system and can only be that of ‘the people’, with parliament as the highest law-making body within the system. And if ‘the people’ should “disapprove” of a piece of legislation, they elect the next parliament to change it: hence the utmost significance of the rule that no Parliament can bind its successor. This rule is generally misunderstood and presented in the sense of the difficulties associated with the mechanisms of binding a sovereign parliament. But this is a spurious argument and an irrelevant claim on behalf of parliament, and actually stops short of the real argument on behalf of ‘the people’: the point is to understand the idea of rolling sovereignty as

the negation of any fetter upon the will of 'the people' as expressed by the electorate. On this view, then, parliament is not bound by the decisions of any preceding parliament, or subject to any control and influence from the outside – such as the judiciary or, indeed, any group or individual who may wish to do so – *because it is the highest subordinate institution of the people and, for that reason, no organ of government can assert any authority over it*, and for that very reason, i.e. that it is *subordinate*, it is inherently limited. However, this limitation is only *upwards*, in relation to 'the people', not *downwards*, in relation to any other institution of government, *viz.* the judiciary and the executive: within the system of government parliament is the highest authority, invested with omnipotent powers. We have lost sight of this rather simple but important fact, mostly because in considering the origins of parliament we have always seen it as the creature of the king, or, arguably, as a representative institution, but never questioned the meaning of either.¹⁰¹ This has been the source of much irrelevant argument (often in the form of Constitutional Law logic-chopping), political mischief (*viz.* the elevation of parliament to a position in the system it does not and cannot have), and *quasi*-academic sophistry and misconception with untoward consequences (as in Dicey's two sovereignties).

Dicey's attempt to tell it as it was (actually as he thought he found it, but in articulating it he also created it) entails at least two complications. Firstly, by offering what appear to be theoretical arguments, it invites us complacently to accept "what is" and almost implies that we have willed it to be so. Secondly, by so misconstruing and misinterpreting the system, he actually helps to change it. Of course, the problem is not with Dicey: he understood what he did and offered his thoughts within the confines of Law. The real problem (*pace* Bogdanor's defence and portrayal of Dicey as a less than Whig reformer¹⁰²) is with those who

¹⁰¹ A case in point is the detailed and, in its own right, interesting, examination of the topic by J. Goldworthy (*The Sovereignty of Parliament*, 1999); but he has naught to say on sovereignty.

¹⁰² V. Bogdanor *Politics and the Constitution*, 1996, 'Introduction: Exorcising the ghost of Dicey'. His 'less than Whig' claim is based upon the notion that Dicey does not accept parliament as the sovereign power in the strictest sense, but he does not make a convincing case. See also the All Souls Seminar papers on 'Dicey and the Constitution' in *Public Law*, Winter 1985, pp. 587-723, and I. Harden & N. Lewis *The Noble Lie. The*

have fallen for his simplistic explanations. The latter is an issue because his views have 'determined' the content and teaching of constitutional law and, less directly, the teaching of British government, thereby contributing to the creation of a mindset for many who then have come into positions of authority and influence, and have acted on his precepts. His influence has not been benign or limited in time: the understanding he proposed became the essential background against which the 20th century system was viewed, understood, and reformed.

That it is misleading, if not actually pernicious to speak of sovereignty of parliament is evident from what has been said already. Undeniably parliament is the institution historically "invested" with the authority to legislate, but this is, and has always been an inherently limited authority. The Scottish view, questioning sovereignty of parliament in Great Britain, is based on a different and largely problematical set of historical arguments, i.e. the 'The Celtic view' of the notion of sovereignty of parliament (which is not discussed in this study, but for some brief references, see *infra* Chapter Six, section 2), whereas the "New View"¹⁰³ only serves to push the issue back one stage without resolving its inherent difficulties. No one has explicitly recognised the inherent limitation of the authority of parliament, but John Bright came close to it when, at one point in the debate on electoral reform in 1867, he cautioned the House of Commons to suspend their law-making proceedings and await the consideration of the issue in the constituencies affected. Parliament, he said, did not have the 'moral' authority to make fundamental changes in the system.¹⁰⁴

Is the electorate (*qua* 'the people') sovereign? Most analysts would reflect Dicey and accept his views. However, this is not quite the uncomplicated idea and claim that it may appear. As argued in this study,¹⁰⁵ there is no linear succession

British constitution and the rule of law, 1988.

¹⁰³ See R. F. V. Heuston *Essays in Constitutional Law* 1964, especially chapter 1

¹⁰⁴ Speech, House of Commons, 8 August 1867, in J. E. T. Rogers (Ed) *Speeches on questions of public policy by Rt. Hon. John Bright, MP*. Macmillan, 1869; also see G. M. Trevelyan *The Life of John Bright*, 1925, especially p. 379. Local referenda held by the 1997 and 2001 governments of 1997 to discover whether there was local support for creating an elected Mayor in London (see *The Times*, 20 October 2001, p. 18), and later elsewhere, come close to this idea.

¹⁰⁵ *Infra*, Chapter Three, section 3, and this Chapter, section 1

of stages in the development of a people into community, a nation, then, by a deliberate act of will, creating a Constitution and instituting government for it. Yet, these must be separated as discrete elements, almost as stages in order properly to analyse their properties and the relationship between them, and assert the theoretically important superiority of the claims of one over the other.

A 'people' has to be told that it is "a people" before it is one! Enigmatic? Not at all: state building begins at the point when a leader gathers a populous around himself, and the idea of a state comes to the fore when the writ of such a leader runs throughout the geographic area where "his" people reside. But this also means rules and regulations, possibly primitive form of laws and so on. There is no such entity as 'the people' without *some* government – of whatever sort and complexity. This leads to a second, more involved, but important consideration: precisely who are the people? At any given time, there are concrete numbers of people under a government: this is the reified people, but it is not 'the people'. The former is a defined portion of the latter, and the latter, while it too has concrete reality at any given time – the enfranchised plus the disenfranchised – remains only a virtual, never an actual entity. The meaning of this is rather simple: the electorate can be identified and counted, the whole population under a given rule can also be so identified and counted: members of both groups are born, live and die, but not 'the people'. Its membership changes from day to day, but that does not affect or alter the meaning of 'the people'. This leads to a rather crucial third consideration: no single manifestation of 'the people' can bind 'the people'. The abstract 'the people' is and remains sovereign in the sense that, irrespective of all else, it retains, intact and inviolable, its independence of will. Government is for its benefit, and it is the only entity capable of acting at will, but any concrete manifestation of this abstract entity takes us back to the two preceding considerations. The line of argument is and must remain circular; and this circularity is of supreme importance. For it is in this loop that we find the only meaningful claim to sovereign power. Even a deliberate settlement made at any one time is decidedly not binding upon the next manifestation of 'the people', although it must be considered binding for those who made it if for no other

reason than the fact that otherwise there would be no incentive for societal and longer term action, and if only to give meaning to Hobbes's claim that it is a condition of civil society that promises be kept: some regularity is necessary, and keeping faith with the deliberate settlement in the name of (hardly ever by) 'the people' provides the first and the most important underpinning for any civil society worthy of the name. But we must distance this argument from, and protect it against, the polluting effect of Locke's view that it is a necessary part of placing ourselves in civil society that we must divest ourselves of our natural liberties. 'The people' is forever at liberty to change its mind, and each generation – the current manifestation and reification of 'the people' – has the inalienable and *natural* (i.e. not generated or granted by any human intervention) *right* to pronounce upon the received settlement (be it historically sanctioned one or according to a Constitution) and alter it at will, except that it can never act as an entity: we are still within the circular argument, and there is no escape from it.

Many interesting and important notions and claims flow from this line of argument. Suffice here to mention and briefly examine one. In a system, such as that of the UK, which has a historically settled one, where no one has ever sanctioned the system as such and no mechanism is provided for testing and sanctioning it, we are told that each general election is a referendum upon the system; or participation in the system by way of voting or collecting the benefits provided by the government, carrying a British passport, and so on, amount to tacit approval of the system. This is a powerful myth which must be dispelled, for it is misleading and also highly suspect.

The born and bred – members of the concrete population and the reification of the abstract 'the people' – come before the real government, although as real people they are born under an existing system of rule. The view that to the extent that they chose to stay means that they have given tacit consent is sheer nonsense, actually reverses the order of priority between the people and the government/state, and assumes and trades on the false assumption that they have a choice. Clearly as members of 'the people' they take priority over the (rights? of) government of the day. The government is for them, and not the other

way around: the government, if it has concrete reality, should simply dissolve when ‘the people’ question its authority and legitimacy, or feel that they want a different system. The Constitution and the government is theirs to make; but once again, we are back in the circular loop.

This tension is characteristic of this kind of thought. For example, Oakeshott recognises that we are born into a state; that this is a matter of chance, not choice; and because we have not associated freely, we cannot dissociate freely from it.¹⁰⁶ Further, he recognises that at birth we enter into an inheritance, making us a debtor to the community, rather than to any one,¹⁰⁷ and further observes that it is only a poor moralist who invents rules of morality, for one must take from the world around him.¹⁰⁸ Yet, he does not dismiss out of hand any attempt to change what we have inherited: if he considers “anarchism” a muddled response, he only fears that the outcome of trying to turn the state into paradise may turn it into hell. For Oakeshott, European political consciousness is constituted in a tension between irreconcilable poles, resulting in an incoherence that can admit of no resolution: this, he suggests, is what we need to understand, rather than attempt to make it coherent and intelligible,¹⁰⁹ even though he is clear that no modern European state has ever been of the character of an association for a common purpose.

It may appear plausible to argue that if this is so for the born and bred, it is not the case with in-migrants, what Oakeshott calls the “volunteers”¹¹⁰: they have chosen to be here and become part of this nation, and have applied to become a member of ‘the people’. They alone are expected to take an oath of allegiance, hence the claim that they have given active consent. That is to say, they are bound by the rules of this system, and have nothing further to say. This is also silly gibberish: once members, they are on a par with the ‘born and bred’ in that they are all part of the same, ‘the people’, and that is that: in naturalising they

¹⁰⁶ M. Oakeshott *On Human Conduct*, 1975, pp. 156, 217 and 313-4.

¹⁰⁷ M. Oakeshott ‘The masses in representative democracy’ in *Rationalism in Politics and other essays*, 1991, pp. 375-6

¹⁰⁸ M. Oakeshott *Hobbes on Civil Association*, 1975, p. 78

¹⁰⁹ M. Oakeshott *On Human Conduct*, 1975, pp. 319-320

¹¹⁰ *Ibid*, footnote 1 on p. 314.

become a member of ‘the people’, not of the state or the country. This one can say with no fear of contradiction even though there is something odd about an obviously previously alien people demonstrating outside parliament or whatever *against* the system. For some the obvious retort might be “if you did not like it, you should not have applied to become a national and now that you have you ought not to go against it”. But this is only the obvious reaction: thoughtful reaction would shy from such ill-founded retort. Incidentally, becoming a member of the ‘the people’ has significant implications, such as the need to speak their common language, and subscribe to its general ethos – and in time share their sense of patriotism.

Sovereignty can have but one meaning: the independent will of the owners of the political system, the very masters of the government.

Constitutionalism in a Sovereign State

“Constitutional” means rule according to a political constitution (circa 1765) and, in that sense, it stands for rule according to law, that is to say *legitimus*. It is related to the Latin meaning of “to constitute”, from *con* and *statuere*. The latter means “to stand”, “to place”, and leads to “Statutes”, which in its now obsolete sense referred to a law or decree made by a “sovereign”, but which, in late Middle English, was used to mean an ordinance or decree of God. It bears pointing out that law in the senses of *ius* originally meant “right” – whence also “just” and “justice”. Thus by extension, constitutional must needs also mean according to what is right.

In contemporary parlance – roughly from mid-19th century – “constitutional” and “constitutionalism” have been closely linked, so much so that J. H. Burns all but refuses to distinguish between them, although he confuses the issue when he claims that a constitutional statement describes a pattern already well established.¹¹¹ The essential linguistic difference between the two arises out of the fact that in constitutionalism we are concerned with *adherence* to (constitutional)

¹¹¹ J. H. Burns ‘Bolingbroke and the concept of Constitutional Government’ in *Political Studies*, 10/4, 1962, pp. 265 and 266.

principles (this usage dates back to circa 1871), whereas constitutional stands for rule according to a “constitution”.

It can be inferred that “constitutional legitimacy” is, strictly speaking, an unnecessary repetition, a pleonastic phrase but one that has gained currency as a common mistake. However, this phrase is not quite the tautology it ought to be for two reasons. Firstly, because “constitutional” can derive its essential meaning from either the “constitution of” or “the constitution” root meaning of the word, further specification is often necessary if confusion is to be avoided. But, secondly, at least in Britain, constitutional legitimacy is claimed to derive from other-than-a-legal source, such as rules of political morality, conventions etc.

The presence of a (codified) Constitution¹¹² serves to denude constitutionalism of a major part of its conceptual content, for in such a condition constitutionalism consists in conformity to the provisions of the Constitution, whatever they may be. Yet, a Constitution that does not limit authority is not worth the name: and an unqualified sense of a “Constitution”, presenting a façade of legitimacy is of no practical or theoretical interest. The point is that a (proper) Constitution ought so to denude constitutionalism: it is a defining mark of a Constitution that it should render constitutionalism in its proper and full sense redundant. Seemingly, entering this claim invites an obvious and unavoidable circularity. But this circularity serves to reveal the reason for it, *viz.* that in such a condition it is no longer *necessary* to invoke constitutionalism in its full sense in order to limit authority: that objective is achieved by the fact and in the provisions of the Constitution. A (proper) Constitution is only applied constitutionalism, and the word “Constitution” is inherently qualified by two silent adjectives “derived” and therefore “limited”. This consideration, then, leads to the view that the use of “constitutionalism” with reference to such a system can only make sense if we accept the proposition that this word has suffered a linguistic turn in the sense of having undergone a change in its practical and (late) modern meaning, and is now used in a limited sense. The danger in not recognising this turn is that in using the word we may actually mean more than it is capable of supplying in such

¹¹² “Codified Constitution” is a redundant phrase and common mistake, often used to distinguish it from an unwritten constitution.

a condition, and we may be misled into admitting the word “Constitution” in an unqualified sense.

To assert sovereignty for and within the political system is to negate the larger substantive meaning of constitutionalism, *viz.* limitation of authority. Thus, despite obvious and important differences, the case of a Sovereign State without a constitution is not all that different from that of a State with a Constitution. In both cases constitutionalism is reduced from a *substantive* and only secondarily *procedural* sense to a merely *procedural* one, but for rather different reasons. We are faced with an interesting paradox: in one case *substantive* constitutionalism is made redundant because it is inherent in a “Constitution” and is, in virtue of the fact, already invoked and applied, whereas in the other it is negated because sovereign power (*qua* illimitable authority) is claimed and asserted by a given “institution” or “organ”. Yet they share the outcome in that they only allow constitutionalism in the sense of *procedural* control. The very essence of identifying the emergence of the Sovereign State as the defining characteristic of (late) modern age is no other than the completion of a transition best encapsulated in the changed meaning of the word “constitutionalism”. What is more, this turn is not associated with the result of late 18th century developments, but goes back to the late 17th century.

The subject of *substantive* constitutionalism was the claim that temporal power, thought to have derived from an otherworldly source, was subject to the Law of God or Nature. Moreover, the wielder of this temporal power was further thought to be subject to the existing laws of the people over whom it claimed authority and purported to rule: the law was above both the king and the people, and the king was only a law-finder. The highest temporal authority – as much as the highest spiritual authority – was thought incapable of legislating and directing affairs on matters and in ways contrary to the Law of God/Nature. That is to say, their freedom to govern was limited. However, the manner in which they governed was largely of secondary importance, but gradually principles and rules were developed and applied, including the all-important rules of natural justice or equity. Very slowly the development of procedural remedies against the

king/executive displaced the remedies of rebellion and tyrannicide. Meanwhile, the law-finding function was more rapidly supplemented and displaced by the law-making function. The outcome was to place an increasingly heavy burden on the meaning of constitutionalism.

Reformation had two important longer-term effects. The first was the secularisation of politics and government, realised in its fullness only in 1688 when certain questions were settled, apparently once for all. And perhaps the most significant feature of this settlement was to establish beyond any doubt the idea that a State can and should decide all its policies and rules of conduct according to its own lights. One effect of this line of thought was to remove all restraints from the State, and crown *raison d'état* as sufficient reason for action. The second, issuing from the first, reduced and confined constitutionalism to arguments about the application of rules whereby governance was conducted and government organs functioned. The word remained; its meaning and use was changed: this is the linguistic turn in constitutionalism involving a shift of focus from the *substance* of authority and *procedures* relevant to it, to an exclusive focus on *procedure whereby authority is exercised*.

Given the arguments in the preceding *excursus*, we do not expect to find any example of a nation/state making a Constitution, but at the same time, we also accept the *idea* that a Constitution is, for all that, the expression of the voice of 'the people'. This enables us to accept two related points: that sovereignty is that of 'the people', and that the government they institute is defined by their Constitution and is granted only limited powers.

But such an account does not apply to England. Three facts stand out in the history of government in England. Firstly, governmental power came from above: it was a gift from God, to be sure, for the good of the people. The king was invested with this power, but appointment to that office remained an earthly affair. Secondly, that later on, this sovereign power was re-located in "king in parliament". And thirdly, that the abstract description 'the people' gradually came to replace the limited "political nation", involving ever growing expansion ultimately to include everyone in the land. Furthermore, especially since the

second Reform Act, the electorate element of 'the people' is recognised to have the last say in the selection of representatives to Parliament, which, now as Queen-in-Parliament, has this sovereign power; and this is the essence of the contemporary idea of the political sovereignty of the people. The upshot is that since Revolution Settlement, sovereignty has been claimed as *the* attribute of king/queen *regnant* in parliament. We must, therefore, ask: "how was this claim to sovereignty power made good?" We must further enquire about who wielded it at various stages in the history of government in England and later, and seek to find out who owned it.

Initially sovereignty was thought of as an attribute of Divine power entrusted to the king for the benefit of the people. At this stage, the answer to the "how" question is "simple obedience to the will and law of God", "who" is now the king, and "whose" is that of God! But fast-forward to late medieval period and a somewhat different picture emerges, mostly in that the answer to the who question is different: now it is argued that the king is most powerful in his parliament, just as it was claimed earlier that the Pope in Council was greater than the Pope.¹¹³ Thus who is now King in Parliament, and whose is now diluted to include the nation but only *via* its representatives.¹¹⁴ Fast-forward again to 1688 and different answers appear: the how question is answered by the idea of the King-in-Parliament; the who is simply parliament, but when used in a generic sense this word is understood to include the King or Queen *regnant*; and the identity of whose evokes the abstract answer "that of the nation", although not as such, rather the nation in its political presence, in parliament, better still that of the House of Commons.¹¹⁵

However, one is still at a loss: the above shorthand answers to the how

¹¹³ B. Tierney *Foundations of the Conciliar Theory*, 1955, p. 54.

¹¹⁴ *Ibid*, pp.47-49 and 52. *Quod omnibus tangit ab omnibus indicetur*" (that which touches is to be decided by all) which is given in council which is the assembly of the whole of the church: its decisions are universal for only the whole is unerring.

¹¹⁵ Another fast-forward brings us to the Neo-Tudor period: King-in Parliament still exists although more in the form of the government-in-Commons; the "who" questions receive a split answer: parliament has legal sovereignty (i.e. power to make laws) and each nation wields political sovereignty; while the "whose" questions receives the ambiguous answer "the people".

question are unsatisfactory. The contemporary view, as explained in a leading textbook on Constitutional Law¹¹⁶ briefly discusses landmark stages from Henry VI to 1688, cites Bodin, Hobbes, Blackstone and John Austin as authorities, and boldly defines “the nature of parliamentary supremacy” to mean that parliament *can* pass laws on any topic, affecting any person, and that there are no fundamental laws that it cannot repeal or reform in the ordinary way – except perhaps that it cannot shed or modify its own supremacy! Supremacy of parliament is thought to be a legal concept, but it is also more than that: it is the result of political history and is accorded general recognition; in short, it is also a political (but not a constitutional) concept. But we are still very much in the dark about how sovereignty is asserted and accepted. Consulting texts on constitutional history and politics are equally un-illuminating, so are International Relations analysis.¹¹⁷ Are we to accept that there is no answer? That sovereignty is historically asserted and generally accepted, and that is that? In an important sense, caution is needed here: people do not obey authority and accept rules and regulation on the calculated basis of political theory arguments; that is not the nature of lived life, and one must be thankful that it is not. But accepting authority thus asserted, and all the baggage that such an assertion may carry does not justify the assertion or the authority. The concern here is not with lived life, but with conceptual meaning. And it is in that vein that the nature of such assertions must be questioned. In this case, it is not enough to say that sovereignty is asserted and accepted and that is that: it is possible to argue the case somewhat differently.

The alternative to the absence of the noble lie of the conjoined agreement of

¹¹⁶ O. Hood Phillips and P. Jackson *O. Hood Phillips' Constitutional and Administrative Law*, 1987, pp. 41-51.

¹¹⁷ Unfortunately political scientists hardly venture back far enough in time even to begin to articulate this type of question, and it can hardly arise in International Relations, for that fragmented discipline begins with the concept of sovereignty. However, David Williams recognises that the Treaty of Westphalia did not create the idea of sovereign state but recognised the institutionalisation of the process of the fragmentation of sovereignty, enabling a multiplicity of sovereignties to exist. He demonstrates that the journey of sovereignty from the lofty idea of God to his Vicar, to the State, continues down to the people, but questions as to “why and wherefore” do not seem to arise for him. D. Williams ‘Aid and Sovereignty: *quasi*-states and the international financial institutions’ in *Review of International Studies* 26/4, October 2000, pp. 557-573, especially pp. 560-1.

all to make a Constitution and to define the limited powers of government, thereby truly asserting the sovereignty of one and all, is the resort to force. Clearly this country was never conquered or subdued; on the contrary, its many invaders adopted English forms of government and generally said they would, and in good part tried to, keep faith with English laws and customs.

For the answer to the question: “how was the assertion of sovereignty established and enforced in England”, it is necessary to look to the history of the law of Treason. This may appear surprising and may naturally be tinged with disbelief especially when, looking at the two extremes of the history of the law of Treason – symbolically 1371 and the 1990s and some landmarks in-between – we find that the abiding preoccupation of the relevant measures (i.e. ignoring the contingent *minutiæ* of specific periods) was the protection of the King/Queen, the line of succession, preventing the undermining of the authority of the same, preventing the disruption of his/her government, and so on. In more recent times, the protection of the law of Treason was extended to the State, its authority and integrity. Broadly, Treason is understood as breaking faith and withdrawing allegiance due to the sovereign King/Queen *regnant*, later also the State, with its correlative of protection.¹¹⁸

At least since 1322, ‘parliament’ has been involved in regulating the succession, even though the first statutory provision concerning the succession only dates from 1406 (7, Henry IV, c. 2). Elizabeth’s claim to the succession was both hereditary and parliamentary as a result of 35, H VIII, c. 1. That is to say, an

¹¹⁸ The earliest statute thought to declare the common law on the subject is that of 25 Edward III. 3, c. 2, which lists seven crimes: imagining the death of the king; levying war against the king; siding with the enemy; making counterfeit copies of the Great and the Privy Seals; minting (printing) false money; violating the wife of the king, his eldest daughter, or the wife of his eldest son; and slaying the Chancellor. See T. P. Taswell-Langmead, *English Constitutional History from the Teutonic conquest to the present time*, tenth edition by T.F.T. Plucknett, 1946, p. 573. Conspiracy to levy war was added later (13, Elizabeth I, c.1) and repeated in subsequent ages (e.g. 13, C II, c. 1, and 36, G III, c. 7). Petty Treason disappeared under the Tudors, leaving only High Treason. See A. F. Pollard *The Evolution of Parliament*, 1968, pp. 173 and 228. Under Henry VIII, the law of Treason was extended to protect the king’s royal supremacy (26, H VIII, c. 1) and his position as the head of the church (26 H VIII, c. 3). The Marian interlude proved only a short-lived deviation. High Treason was and remains a capital offence, although currently most offences are classified as Treason-Felony, and are punishable by imprisonment.

alteration in the line of succession was no longer possible without statutory provision: Elizabeth underlined the probity of this by her Act of Treason of 1571 (13, Elizabeth I, c. 1). It is significant to note that by 1688 title to the Crown was, in effect, only parliamentary.

How does this brief discussion of the history of the law of Treason and the matter of succession help with the question at hand, namely, “How was sovereignty asserted and accepted?” Embedded in this is the further question: “How is the sovereignty of parliament asserted and accepted?”

The first question is answered rather simply: the acceptance of the sovereign authority (of God) that the king exercised was exacted on pain of death through the instrumentality of the law: at the nod of the prince, “men bow their necks and for the most part offer their heads to the axe to be struck off...”; indeed, the prince is the only one who can shed blood blamelessly.¹¹⁹

To answer the second question, a further argument is needed. The crucial argument in this regard hinges on Elizabeth’s Act of Treason, and of an Act concerning the Papal Bull, both of 1571. These Acts were passed in response to the papal Bull *Regnans in Excelsis*, whereby Elizabeth was excommunicated and deposed. The first statute (13, Elizabeth I, c. 1) made it an act of Treason to affirm the Queen as heretic, usurper *etc*, or that the common law – unless changed – ought not to bind the right of the Crown, or that the Queen *regnant* with the authority of parliament may not determine the succession. It was also an act of Treason to affirm, in whatever form, in the lifetime of the Queen that a named person was or ought to be heir to the throne. The second statute (13, Elizabeth I, c. 2) declared as High Treason any action that would propagate the Papal Bull, or reconcile one of her subjects to the Roman church. These two Acts were clearly intended to protect the succession, but in the process, the protection of the law of Treason was extended also to parliament: questioning the authority of parliament and the lawfulness and the authority of the Queen would bring the full force of the charge of High Treason upon the culprit, on pain of death. This interpretation, based upon G. R. Elton’s view, is superior to, for instance, that of Taswell-

¹¹⁹ *The Statesman’s Book of John of Salisbury. Being the 4th, 5th, 6th, and selections from 7th and 8th of the Policraticus. Op. cit. p. 4*

Langmead who claims that parliament's authority was so weak that it stood in need of protection.¹²⁰

An objection may be raised that this argument falters because, all said and done, it is still parliament that *via* an Act declares its own omni-competence. Two points are relevant here. First, this is not on the same level as, say, the Resolution of the House of Commons, January 1649, stating that whatever is “declared for law, by the Commons, in Parliament assembled” had the force of law and that “all the people of this nation are concluded thereby”.¹²¹ Such a self-declaration is distinctly suspect. The Elizabethan legislation at least conforms to the accepted ‘manner and form’ of legislation: a Bill approved by parliament is made into an Act of Parliament when Royal Assent is given. The second point follows from this: Acts of Treason that protected the Crown *etc*, conforming as they did to the accepted ‘manner and form’ at the time current, have as an equal claim to validity as any other legislation. Not only was the 1571 Act not exceptional, it was not even promulgated in any way out of the ordinary. Granted that it was a measure of supreme importance, yet, as has always been the case in the English system (and beyond), the legislative procedures are the same for any and all legislation. But more than this can be said. At two turning points in the history of English government, significant changes were introduced without the apparent probity of an Act of Parliament. In 1660, the ‘Convention’ determined the course of events, declared itself a parliament, and thought it prudent to retrospectively confirm the Acts of the ‘Convention’ by a later parliament that was called according to the accepted procedures. On the other hand, in 1688 the Convention declared itself a parliament and continued to sit (1, W&M, session 1, 1) but in its second session the ‘Declaration of Rights’ (whereby the Crown had been settled upon William and Mary, who in that capacity were a necessary component of parliament) was recited and confirmed (1, W&M, session 2, 2). In the absence of a Constitution to determine claims to authority whereby significant

¹²⁰ G. R. Elton *The Parliament of England*, 1986, p. 355, and T. P. Taswell-Langmead, *English Constitutional History from the Teutonic conquest to the present time*, tenth edition by T.F.T. Plucknett, 1946, pp. 562-3.

¹²¹ See J. P. Kenyon *The Stuart Constitution*, 1966, p. 324

decisions may be made, we are faced with inexplicable instances, the probity of which we normally do not examine too closely. In 1660 and again in 1688, one institution that did not have a clear claim to the authority it purported to exercise determined important issues. Had 1660 and again 1688 been instances of élite settlement – creating a new order out of the chaos of a breach and collapse of authority – we would have had to take a different view of the matter, and argue the case for the legitimacy or otherwise of the settlement in a different vein. But in both cases legitimacy was sought from within the existing working system, in terms of which both bodies were decidedly defective. At least the Elizabethan Acts do not suffer from any such defects. Moreover, since 1352, the authority of an Act of Parliament has been used to protect the person of the king, his authority, and his realm – ‘the country’: but such Acts required and received the king’s consent. They are not, for that reason, discounted. This reasoning also applies to using the authority of parliament with the consent of the king/queen *regnant* to protect the authority of parliament, and we ought not to discount the outcome merely because the participation of parliament was necessary in the making of such an Act. Legitimacy – the constitutional probity of the case – is granted by the inter-institutional nature of the decision (see in *infra* Chapter Three).

Having said that much, a note of theoretical dissent is indicated here. On any count, the subject matter of an Act of Treason is a constitutional matter of the first order. But king and parliament, in protecting their authority, were acting in their conjoined institutional self-interest against dissent, on pain of death. The extended argument here is that protecting king and parliament was essential to the protection of the subjects: but the “subjects” had naught to say on this, for the rather simple reason that they did not own the system. On the other hand, it is simply impossible to argue for the authority to impose capital punishment on the basis of asserted sovereignty of this or that institution or organ. Far from it: that authority belongs to those who own the system (the authors of its Constitution): in view of the *excursus* above, capital punishment is legitimate only when it is explicitly authorised in the Constitution.

We may thus answer the how question better than before, and may even enhance this broad interpretation with examples and cases from the rich history of politics in England. Rebellions failed or were defeated¹²² and it is true that in a sense the English over the centuries simply accepted and went along with the system of government as it developed. But none of these are supporting arguments, let alone any proof of the probity of the claim to sovereign power. Indeed they raise question to answer and problems that must be examined. Alas, even the better answer offered here is yet unsatisfactory, especially in the light of constitutional theory arguments: just when did ‘the people’ ever properly consent to this system of rule and its principles? Is participation in the processes of government and at elections enough? Precisely, what does it mean to say that silent consent, in the absence of certain important conditions, is enough? It is not enough to say that ‘the people’ have not rejected the system: that merely begs the question.¹²³

Thus, whereas a state with a Constitution and a sovereign State without one both denude constitutionalism of its larger meaning, they are not actually on a par with each other. Asserting sovereignty is one thing; arguing that it is historically justified and established is something quite different and, in fact, an impossible case to argue. No self-established earthly authority, or authority claimed from an imaginary deity, especially when that authority is said to include within its purview

¹²² A defeated rebellion does not in itself mean the eradication of its causes or the reconciliation of the disaffected: it does not, as it cannot, amount to the restoration of legitimacy and recognition of supremacy of parliament, or whatever at the time claims sovereignty. We must be careful not to read any such into the defeat of a rebellion; equally importantly, the fact that rebels are then subjected to the authority they may have questioned and rejected, and suffer punishment at their hands, does not imply the legitimacy of that authority.

¹²³ This is rather an important issue that admits of no final resolution. Clearly active consent to create a government from nothing is simply unknown. But consent, as the basis of obedience, is so important in modern political theory that, although a fiction, it is always invoked. There are of course many glosses on this: for example Blackstone (*The Sovereignty of the Laws*, 1973, pp. 34-5) re-defined “original contract” as the weakness of mankind that keeps it together in society; it is understood and implied in the very act of associating together, from which Blackstone deduces “principles; viz... that the whole should protect its parts (guard its rights), and that the parts should obey the whole (submit to the laws of the community). Many, including Bentham and Hume, took issue with the idea of consent: the former rejected it because it had never happened, and the latter thought habit was the basis of obedience.

the power to dispense with human life, is ever justified and legitimated without the direct and positive consent of those who are to be subject to it.

Sovereignty of King/Queen-in-Parliament has a disturbing religious/spiritual hue, shrouded in the mist of religious time,¹²⁴ and is a claim to legitimacy of the power that came from the application of law of God and/or Nature passed, *via* the King to 'King in Parliament', to 'King-in-Parliament', although this process took over five centuries. Yet the clear effect of claiming such power is to place the claim and power beyond question: and to that measure, nullify *substantive* constitutionalism and reduce it to a concern with *procedures* for the exercise of such powers that the sovereign body would grant. In effect, this means a move from a constitutional to an institutional perspective,¹²⁵ from a second order concern to a first order concern. That being the case, perhaps it was no accident that the theory of separation of powers appeared roughly at this time, which has been used to shape and been incorporated into more than one Constitution, and the theory persists even today.

Since the early 18th century, constitutionalism has been identified with the idea of separation of powers: it is in this sense that M. J. C. Vile associates the two.¹²⁶ However, this theory has never been relevant to the British case. Instead, we started off with a largely formless shape of government in 1688, then moved on to the fusion of powers between the executive and legislature (which Walter Bagehot found such an important element of the system)¹²⁷ and a largely separate and independent (i.e. free of political and parliamentary interference) judiciary since 1701. In detailing the history of fusion of powers, we must go back to Revolution Settlement and the Regency Act of 1706, but for the separation of powers, we must look at the Act of Settlement 1701.

It is customary to look at two provisions of the Act of Settlement (12 and 13 W

¹²⁴ See my 'Medievalism of the Modern: the Non-Rational as the organising principle of the state', unpublished paper given at Southampton/Frankfurt link seminars, Goethe University, Frankfurt, 1-5 September 1998.

¹²⁵ It is often difficult to distinguish between the constitutional and institutional in writings on the British system. For example, see G. Peele 'New Structure, Old Politics?' in K. Sutherland (Ed) *The Rape of The Constitution?* Imprint, 2000.

¹²⁶ M. J. C. Vile *Constitutionalism and the Separation of Powers*, 1967.

¹²⁷ W Bagehot *The English Constitution*, new edition, 1872.

III, c. 2). Article 3/6 prohibited holders of office of profit under the Crown from membership of the Commons. It is generally accepted that the effect of section 6¹²⁸ would have been to separate the executive and legislature. But the wording of the Act does not warrant this conclusion: it prohibited membership in the Commons, not parliament as such; had the section not been modified (4 and 5, Anne, c. 20), the expected trajectory of its terms would have been to shift the locus of government to the Lords. But this conclusion is generally not drawn, one suspects, due to the influence of Whig historiography, which focuses narrowly upon what has come about and tracing its linear antecedents.¹²⁹ Section 7 of the same article created an independent judiciary by providing that judges hold office during good behaviour (*quandim se bene gesserint*), that their salaries be determined in parliament, and that they could only be dismissed upon the address of both Houses of parliament. Thus, separation of powers amounts to the presence of an independent judiciary, even if the institutional fact of an independent judiciary is no guarantee of how it will behave (the history of the judiciary in the 1960s is instructive in this regard). But this also means that not even a diluted sense of constitutionalism so closely associated with separation of powers applies to the British system. At any rate, in the 18th century the system was characterised as ‘balanced constitution’. This description of the ruling idea of the age was soon displaced by a new theory to accommodate recent changes, duly found in the idea of the Liberal, and then the Liberal Democratic ‘constitution’ with emphasis upon parliamentary government.¹³⁰

¹²⁸ This section was modified many times, but the requirement was eventually abolished in 1936: 16 and 17, GV, c 19.

¹²⁹ In the same vein, some think that the effect of Article 3, section 5, stipulating a rôle for the Privy Council in policy and administration, would have been to preclude the development of cabinet government. See T. P. Taswell-Langmead, *English Constitutional History from the Teutonic conquest to the present time*, tenth edition by T.F.T. Plucknett, 1946, p. 686. This section was completely repealed in the Act of Regency 1706 (4 and 5, Anne. C. 20). However, it is hard to credit such a claim, especially in view of later developments and the almost generic link between the cabinet as it developed and the Privy Council. Membership of the Privy Council is still the only institutional device whereby members of the government are able to tender advice to the Crown: newly appointed members of the government take the Oath of Allegiance in the Privy Council: this Oath is an essential predicate of their being commissioned; they must become Privy Councillors.

¹³⁰ See H. G. Grey (Third Earl) *Parliamentary Government considered with reference to a Reform of Parliament*, 1864.

The focus on separation of powers as a primary concept testifies both to a slippage from the real issue of constitutionalism, and an undefined focus upon that of government. In allowing it, we shift our analytical focus from a concern with the nature and limitation of powers made available to “the constituted authority”, to a focus upon the procedural probity of making and administering the rules, or in adjudicating upon them. Understandably concern with the structure of the government is important, but, in the nature of things, it really is only a secondary concern. It might be thought that in Britain such a distinction is not important; moreover, it is one that is not so easily made. After all, the idea of a “British constitution” other than the history of British government is hardly meaningful. In a circular manner, only too often the idea of a “constitution” vanishes, and becomes completely invisible, so to say, transparent, such that any attempt to focus upon it merely focuses our gaze upon the government.¹³¹ What is more, this slippage is ordinarily not highlighted, much less examined. This is all the more surprising as with us it spells the conflation of “the constitution” with “the government” leading to the circularity mentioned earlier.

But, more than that, the practice of *substantive* constitutionalism functions at the highest rather than at the institutionalised level of constituted authority. This fact marks a rather significant difference between the understanding of this notion before and after the “advent” of the sovereign state. Indeed, as is argued in the preceding section, the practical and effective sense of constitutionalism was contra-posed to the claims of focused authority, later to be identified as the sovereign power of the state, the king or whatever: *substantive* constitutionalism is simply incompatible with, and is well-nigh antithetical to sovereign power. But this is not how the issue is generally understood. Constitutionalism is now seen as a central part of the modern lexicon of government in the sovereign state. As one result, the level at which this idea applies is no longer the highest, and is now located well within the defined institutional structure of government, and has to do with constituted authority and defined powers. Whereas before its effect was to declare that none had total, supreme power, and that in many respects the

¹³¹ Examples include I. Budge (*et al*) *The New British Politics*, 2001, and Philip Norton in W. Jones (ed) *et al Politics UK*, fourth edition, 2001.

exercise even of power otherwise recognised to belong to one institution still required the effective co-operation of another for it to be employed and properly applied, in its later sense it is applied in a condition in which unlimited power *qua* the sovereignty of the state is not in doubt, thus power is not limited, but the way it is applied and employed is controlled – this distinction can be expressed in the form of the opposition between taming of power to taming of politics.¹³²

Separation of powers as the form of “constitutionalism”, relevant to, and historically associated with, the form of government in a sovereign State, is the feature of *an* era, albeit one that is not yet over. But such a compound of conflation and elision does rather serious disservice to the idea of constitutionalism, whereby its meaning, thinned and stretched, is identified with the *form* and the operationally relevant rules of the idea of separation of powers. In so doing, we are prevented from raising larger questions, including one concerned with the sense in which it may be meaningful to think of constitutionalism before the era of the sovereign State. This, too, is surprising, for, under all conditions, “constitutionalism” and “sovereignty” make rather strange bedfellows. More than that, not only is sovereignty as it is generally understood a difficult conceptual and historical problem, but the idea of sovereignty is the very negation of the idea of limit. Yet, the contradiction involved in the juxtaposing of these two ideas is hardly noticed; the need for a centre of power is assumed, and instead, and far more readily, arguments in sovereignty are reduced to questions about who has it, whereby constitutionalism becomes ineluctably associated with the kind of argument that Vile has advanced, and, in a more superficial sense, also with Dicey’s view that it is found in the obedience of the government to the will of the nation as expressed through Parliament.¹³³ Strangely this view may make some gestures in the direction of some of the ideas examined in the *excursus* above, but that lead is not pursued and instead it serves to shift the

¹³² Taming of power refers to the creation of a condition in which politics no longer kills, and instead peace-like activity becomes the standard *modus operandi* of a people. Giovanni Sartori ‘How Far Can Free Democracy Travel?’ in *Journal of Democracy* 6/3, July 1985, pp 104-5.

¹³³ A. V. Dicey *An Introduction to the study of the Law of the Constitution*, ninth edition, 1939, p. 455.

focus to the questions “What is parliament?”

Do we have a constitution?

In England it is not difficult to perceive that everything has a Constitution, except the Nation.¹³⁴

The phrase “the British constitution” has meaning only in the “composition of” sense of the word “constitution”, and the account under that rubric is that of the working system. But the use of this phrase is also confusing, and necessitates drawing the often-convoluted linguistic distinction between the broad and the narrow sense of the word, and much else besides. The phrase ‘British system of government’, used by preference in this study, also refers to the working system but without the disadvantages.

Because in the UK, there is no a Constitution we are doomed to start without the benefit of a clear starting point that provides an implicit but, for all that, important indication of *substantive* constitutionalism, and a broad “theoretical” *qua* generalised map of the political system. The fact of a Constitution means that for now and the foreseeable future some fundamental questions are authoritatively answered in a certain way. Therefore, constitutional studies tend to focus upon specifics, the (working) implications of the rules enunciated in the Constitution, and procedural probity. A further implication is that because under such conditions probity is almost wholly a legal matter – application of rules and adjudication in disputed cases, *etc.* – a Constitution spawns (constitutional) Law administered in a limited hierarchy of specialist courts, with a “final/supreme Court” at its apex. This tends to mean that the academic study of the Constitution is quintessentially the preserve of the Faculty or Department of Law: political scientists tend to show limited interest in it.

A Constitution is meaningful and relevant if it contributes to, and conditions, a certain type of “practice”: it must foreshadow and foresay *substantive* “constitutionalism” and entail *procedural* probity and legality, or it is nothing; for a constitution is what it does. It is the condition of “good practice” in limited

¹³⁴ Tom Paine ‘Rights of Man’ in *The Selected Works of Tom Paine. Op. cit.* p. 213.

government and must lead to it. But this argument does not work in reverse: in itself, the fact of good practice cannot mean the out-of-sight presence of a Constitution, for good practice may be the result of other forces at work, such as the *noblesse oblige* dedication of good chaps to work the system with fairness and probity. A Constitution is an “objective” statement of what constitutes the conditions of good practice, and adds a certain type of *legal* to the ordinary (democratic) *political* ways of ensuring that political servants of the people adhere to it.

But this is not so in Britain. Almost every study of the British system seems to be an exercise in finding “the British constitution” and discovering its meaning. In this sense, the quest for a constitution is everywhere, but these efforts cannot be rewarded because the object is something that in the present British context is, at best, a category mistake. Of course, the quest for the theoretical meaning and underpinnings of the working system is not irrelevant, but the problem is that because we make the unspecified assumption that every working political system is the expression of its constitutional arrangements, we enslave ourselves to the rather meaningless idea that, whatever its shape or form, we have a constitution. This can be described, maybe facetiously, as the Alice Condition: “Everything’s got a moral, if you can only find it”.¹³⁵ Every system has a constitution, and one has only to find it. On this view, we have a system of government that implies a constitution, rather than a constitution that creates government and stipulates its structure and powers. The relationship is reversed: from changes in the practice of government, we make our way to changes in the meaning of the British “constitution”. In other words: government is primary, and the constitution an entirely secondary and derived consideration; to quote Burke, though out of context, it is a vestment that accommodates itself to the body. In effect, as argued in the previous section, this means that the “British constitution” is simply transparent, and each time we try to look at it, we only see British government. This approach has consequences: firstly, that we are doomed forever to intellectually “grope” for the constitution, but secondly that constitutional theory is

¹³⁵ Lewis Carroll *Alice’s Adventures in Wonderland*, Chapter 9

dependent on and is derived from a “theory” of government. Such an approach invites further comment.

It is a *dictum* of the present system that the King or Queen remains above politics. Can this justify the claim that there is a “branch of our unwritten constitution which enjoins the Royal Family to remain outside political debate”?¹³⁶ This *dictum*, no more than a century old, is only a necessary part of the present form of the system, this *modus operandi*: we may speak of a historically understood principle, but we are not justified to speak of “our unwritten constitution”, far less a “branch” of it. A retort to this objection would, no doubt, invoke the rather intriguing idea of a “living constitution”.¹³⁷ But the latter is still an allusion to the claim that this “constitution” – of course, on this view there must be one – changes as the practice of government changes. One is apt to take kindly to the idea that no one should live according to the relics of a morality long gone, but this does not mean that we can actually give rational construction to the idea of a “living constitution”: the claim that a constitution may derive from and depend upon the practice of government, is really a simple case of putting the cart before the horse. Not to wonder about the relevance and value of such a “constitution” is odd and paradoxical.

If this account of studies of the British system is even broadly correct, we must wonder why we ought to bother with it at all. What advantage is there in looking for such a constitution, and what rôle would it play if we found it? What possible “work” can such a derived and dependent set of ideas do? What is the point of distilling its principles and isolating its concepts into induced (empirical) generalisations, which, by definition, can be no guide to how the system ought to work? Frankly, if government is primary, there is no need to bother with the constitution. But, as matters stand, well nigh every study of the system shows a pre-occupation with the need to identify and explain “the British constitution”, which means that almost every such study must start with a definition of the

¹³⁶ Letter from Nigel de Gruchy to the editor, *The Times*, 25 June 1997

¹³⁷ One example of this claim is that of B. Harrison *The Transformation of British Politics 1860-1995*, 1996, pp. 431-2, in which he claims the need for history to operate a living constitution. Incidentally, p. 356 of that text is a wonderful example of the confusion between “the constitution” and “constitution of”.

constitution.

The need to define a constitution in order to give an account of what the author proposes as the British constitution is symptomatic of the fact that there is no clear starting point. Indeed, the array of definitions shows the inherent limitation of this approach: there are not too many *different* ways in which one can successfully define a constitution. Most analysts take Hood Phillips's definition

... a system of laws, customs and conventions which define the composition and powers of organs of the State and regulate the relations of the various State organs to one another and to the private citizen¹³⁸

in a generic sense, and subscribe to it or a version of it.¹³⁹ Indeed, we may go further and recall Ivor Jennings¹⁴⁰ who thought that we had the kind and range of institutions and processes that any constituent assembly drafting a Constitution would have to include in it. As a matter of fact, despite the differences in the wording of one's preferred definition, all authors end up examining the same range of institutions and practices, and differ in placing greater or lesser emphasis upon this or that idea, institution or practice, and the choice of what they would criticise. This consideration helps articulate a rather important point that normally is not raised; namely, that in considering the question "Do we have a constitution?", we are not wondering whether we have the institutions of government or, for that matter, a system of rule that any constitution worthy of the

¹³⁸ O. Hood Phillips *Constitutional and Administrative Law*, 1962, pp. 7-8. He distinguishes between the abstract sense of constitution (here quoted) and its concrete form, which refers to a "document in which the most important laws of the Constitution are authoritatively ordained." This is a rather weak gesture in the direction of the claim that the constitution is a legal document and a matter of law', a claim against which I have vehemently argued in this study.

¹³⁹ Such as D. Judge *The Parliamentary*, 1993; G. Peele *Governing the UK*, 1995; I. Budge (*et al*), *op. cit.* chapter 6, and W. Jones (Ed) *et al*, *op. cit.* 2001. F. F. Ridley considers it as nothing less than the whole system of government of a country, and the collection of rules – written and unwritten – that regulate the government ('There is no British constitution: a dangerous case of the Emperor's clothes' in *Parliamentary Affairs*, 1988, number 41, pp. 340-361), even if some are keen to add a rider to the effect that it is more than an assemblage of laws. Thus, for H. R. G. Greaves (*The British Constitution*, 1938, p. 1), it is "society in its political aspect", while V. Bogdanor (*Politics and the Constitution*, 1996, p. 19) calls it a political constitution, and Nevil Johnson, who distinguishes between the political and constitutional order, insists that the British constitution is nothing other than the unbroken continuity of the political habits of the English/British (*In Search of the Constitution*, 1977, p. 30).

¹⁴⁰ W. I. Jennings *The Law and the Constitution*, 1959

name would institute, but whether this system exhibits features that are and must remain prior to the institutions of government and the system rule, and to that measure are always above it. On the basis of this reading, one must take exception to Jennings's view that to claim that we have no constitution is a "trite observation":¹⁴¹ it is trite if all we can say is that we do not have a piece of paper called the Constitution.

Would that the problem was that simple: for some, such as F. F. Ridley,¹⁴² the fact that there are no rules that are fixed in a constitution means that there is no constitution, and that is that; but Alan Beattie considers this view a hyperbole,¹⁴³ which, one must suppose, is the intellectual equivalent of "terminological inexactitude". Beattie argues that there is an important difference between "ineffective" rules (of conduct) that insufficiently restrain, and the claim that in the absence of effective rules, we have no constitution.

On this view, then, there is *something*; but this also means that the question stands: does it amount to a *constitution*? Or have we – as Alan Beattie appears to have done – confused the ways and means of governing with the rules and prescriptions of a constitution? It is clear that attempts to examine the situation in terms of the broader meaning of the idea of "constitution" lead nowhere: in this enterprise we are, as it were, in a state of perpetual motion, searching for the Snark. And it is a characteristic of the Snark that the nature of the beast ("For the Snark was a Boojum, you see") and its location remain unknown: apparently, no one quite knows *what* to look for and where; but must beware for *it* may be next to you. Which again evokes Jennings's contention that this system changes historically rather than theoretically, but he fails to recognise that a hard distinction between history *qua* fact and theory leaves both incomprehensible. Like the Snark, the British constitution may be before our eyes, but how to recognise it?

Evidently the thought that seeking to infer a constitution from the practice of

¹⁴¹ W. I. Jennings *Cabinet Government*, 1959, Chapter 1.

¹⁴² F. F. Ridley 'There is no British Constitution' in *Parliamentary Affairs*, July 1988, volume 41, pp. 340-361.

¹⁴³ A. Beattie 'Conservatives, Consensus and the Constitution' in *LSE Quarterly*, Summer 1989, volume 3, number 2, p. 143.

government is misconceived does not occur to the historically minded. Equally, for the conceptually minded, the thought that the underlying principles of this system may in fact not resemble constitutional principles, does not occur either. So, we are doomed to examine political history¹⁴⁴ and sometimes also history of government, and make forays into the *minutiæ* of common law¹⁴⁵ and the story of parliament, looking for some “sign” that will help reveal the meaning of this

¹⁴⁴ “If John Griffith and Peter Clarke are right and the British constitution *is* what happens, and what happens is primarily determined by *politic*, historical reconstruction is the key” (P. Hennessy *The Hidden Wiring*, 1995, Introduction, *passim*, quotation: p. 28). But the British constitution is not “what happens”, nor is it what the government decides to do: both these descriptions (the second from I. Budge (*et al*) 2001, *op. cit.* p. 182) mislead. Even in this system, those working it seek principles to indicate how the next should happen. But this determination is not arbitrary: there is an underlying historically understood if also conceptually manipulated view of how the next should happen, and to the extent that there is this kind of anticipated rule, there is a kind of anticipated regularity, yet this does not amount to a constitution in the proper functional sense of that term. That Hennessy’s “golden triangle” should be at the very centre of ensuring that a possible contingent situation in the working system is anticipated and catered for is not a surprise: we expect as much, and indeed can see a good deal of such activity during the Edwardian period. See: M. V. Brett (Ed) *Journal and Letters of Reginald, Viscount Esher*. Volume 2, 1934.

¹⁴⁵ Lawyers tend to agree with Heuston’s assertion – at best a dubious assumption – that a constitution is a legal document, and it is a matter of law (R. F. V. Heuston *Essays in Constitutional Law*, 1964, chapter 1). This has significant consequences, and, importantly, because it also includes the claim that under a condition of an unwritten system, parliament is legally unlimited, it contributes much to the development of the conceptual trap that will not allow significant change because it makes all reform a matter of activity within the system. But we know that this idea was never legally established: the answer comes in the form of an interpretation of the history of common law: common law, it is said, has affirmed the sovereignty of parliament, and because only judges can declare the law, they also declare the extent and powers of parliament. (J. Goldworthy *The Sovereignty of Parliament*, 1999, pp. 4-5). But common lawyers have a view of the system that beggars belief: for instance, according to Lord Kingsland “... to incorporate the European Convention on Human Rights into our constitution should be looked at with deep suspicion. ... I do not believe that it is necessary because our guarantees are already underlined by the common law as interpreted by the courts.” (Lords Debate, Lords Debates, *Hansard*, 5th Series, volume 573, column 1491). Common law as the higher law from which principles are derived runs into serious conceptual difficulties, as does the idea of sovereignty of parliament without any prior rules to establish it as fact. The point is that legal rules require prior rules according to which their legality can be established. This regression eventually goes outside of the realm of law, and often lawyers refer to historical fact or simply postulate a pre-legal notion. But this does not help, for we have no rules of recognition for the significant relationships that this kind of legal argument offers. H. L. A. Hart comes to the rescue: in the necessary absence of rules of recognition concerning sovereignty, and therefore also absence of a rule of recognition concerning sovereignty of parliament, it is established by the consensual recognition of the fact by the senior officials of all the branches of government. This means that the concept is simply

system, and which we can thenceforward use as its abstract idea. Often this means that many come to the study of British government with a distorted picture of what they have seen elsewhere, and look for signs of it in the practices of this government, or identify its features as relics in a partisan history. That this, in a way, both “tribalises” and politicises the study of British government and, therefore, makes its findings contentious, is another matter: as was argued earlier in this chapter, we do not need to look outside of this country for relevant arguments. And not looking elsewhere also removes the defensive retort that each political system is embedded in a political culture from which it cannot be divorced, invoking all the problems associated with attempts at meaningful trans-cultural studies.

Do we have a constitution? Clearly not as *others* know it. Does it mean that this system is one of arbitrary rule? No, not obviously so. This is a system of government stiffened by the skeletal fossils of institutional form, ruling ideas and manners of practices that have attached to it over the centuries, but its long history is also distinguished by the innovation of many ideas, practices and institutions: the first constitutional monarchy, the first parliamentary régime, the first with an extended franchise, and an increasingly fair and free system of elections etc. Most of these English/British achievements are now the *sine qua non* of any “modern” Constitution and system of government. Moreover, this is a system that has obviously not collapsed such that we have had to start afresh,

accepted in the absence without the need for any argument to establish its validity: it amounts to a comity of belief. (H. L. A. Hart *The Concept of Law*, 1994, especially chapter 6). Hart is not the only one to refer to this notion: indeed, there are shades of it in William Blackstone too (*The Sovereignty of the Laws*, *Op. cit.* p. 66.). Given the distance in time between them, we can understand Blackstone’s historically contextualised argument, but it is well nigh impossible to understand and accept Hart’s philosophy of law arguments. However, not all lawyers make such absurd claims: it is very clear to J. W. Salmond that sovereignty is not a legal concept. Indeed, he argues that the State and its constitution are both pre-legal; they are prior to law, and are matters of fact as far as the law is concerned. No statute, he argued, could confer sovereignty upon parliament, and the validity of an Act of Parliament is not a matter of law, although what is law depends upon what the judges say in the sense that an enactment not recognised by them is not law – perhaps it is better to say that the courts will not enforce them. This latter point needs considerable deconstruction, and is not quite the absurdity that it might appear. Refreshingly, J. W. Salmond also took the view that a parliament has powers during the term for which it was elected, not beyond, even if it extends its own term while still sitting (*Jurisprudence*, 1924, pp. 150-170, and 529-530).

with a Constitution. The longest continuous régime, having accommodated much change without a marked break, yet it is also the one system that does not have the obvious mark of modernity, namely, a Constitution.¹⁴⁶ This system is evidently “puzzling” even to its long-reigning monarch.¹⁴⁷

Two (related) features of the British system invite critical comment and raise fears of constitutional nakedness. The first is the idea of the sovereignty (legal supremacy etc) of parliament which, as argued before, is incompatible with *substantive* constitutionalism. The second feature is the fact that *procedural* constitutionalism functions *below* the level of parliament, at which level, only political forces operate. It is a common claim that the “law and convention” of parliament is a defining part of the “British constitution”, but this must not be taken very seriously because each House decides its own law and convention. Our constitutional nakedness is described by and is the *alter ego* of the idea of sovereignty of parliament which, as articulated by Dicey, is taken as the organising concept of this system.

As the arguments heretofore show, sovereignty of parliament is an odd idea: that some in the past have accepted a hollow idea is not reason enough to consider it hallowed and to continue to accept it as meaningful. It is simply not possible to give a rational construction to the idea of sovereignty of parliament without making rather large assumptions. Admittedly, every concept is based upon some assumptions, but the bigger and more far-reaching the assumptions, the less meaningful and useful the concept. However, the point is not to beat a dead horse but to understand the nature of our constitutional nakedness. The self-consciousness of this nakedness is best captured in the displacement of Burke’s flexible metaphor of the vestment with the less flexible, but not rigid, metaphor of the corset. But precisely what is displaced?

For Burke¹⁴⁸ the prescriptive nature of the system and of rights, and the

¹⁴⁶ Allott considers that the 19th century may have much to answer for in contributing to the “unfortunate simplification” that equates a Constitution with successful revolution and desirable change. P. Allott ‘The Theory of the British Constitution’ in H. Gross and R. Harrison *Jurisprudence: Cambridge Essays*, 1992, pp. 173-4.

¹⁴⁷ Comment reported in Peter Hennessy *Hidden Wiring*, 1995, p. 31

¹⁴⁸ Mostly as per his ‘Reflections upon the Revolution in France.’

accumulated wisdom of the ages, was a severe restraint upon the system. Whatever was understood to be prescriptive – and this included the House of Commons and the concept of representation – was fundamental and beyond the power of any one or even the whole nation to change. Burke derided the idea of “Rights of Man”, yet in a wonderfully evocative passage, he argued “if civil society be made for the advantage of man, all the advantages for which it is made become his rights”, and after listing many such rights, he argued “if civil society be the offspring of convention, that convention must be its law”.¹⁴⁹

Leaving aside the point that when it suited, Burke tended to work with a rather hazy idea of “time out of mind” and that, therefore, some of his prescriptive arguments remain historically suspect, it is yet important to emphasise that, in a sense, Burke used these ideas as a way of fixing the nature of the system. But the rigidity intended was limited: he would allow for necessary change, essentially to restore the system to what the prescriptive framework indicated – not to a golden past – and to bring forth adjustments in the system of government in response to the changing conditions.¹⁵⁰ In other words, Burke looked for an element of rigidity in the historical and prescriptive nature of the system: the vestment idea describes the close proximity, so to say, between the “nature of society” and its “constitutional form”, underpinning the capacity of this system of government incrementally but only when necessary to adjust while preserving its fundamental nature.

The elemental idea of the corset does not in principle very much differ from this: here, too, the idea is to restrain, if not in order to preserve the nature of the system then, at least, the way in which the power of institutions are used. The significance of this change is one of emphasis, made necessary, *inter alia*, by the elevation of the powers of one institution above all the others. The conditions necessary for sovereignty of parliament date back to 1688, but the proclivities of this idea did not become apparent and are not established in the practices of

¹⁴⁹ *Ibid* in *The Works. op. cit.* volume 5, pp. 170 and 171

¹⁵⁰ We see the implications of this view in later centuries: Bright would not have dissociated himself from this conception, and it can be seen as the background to the Conservative Party view of the nature of constitutional reform during the 1997 election. We can also see the apparent influence of Burke’s understanding in Philip Allott’s views.

government till much later.¹⁵¹ Moreover, political conditions changed beyond anything Burke could have imagined: the leitmotif of the “political nation” and ‘the people’ come to the fore here. The development of political democracy helped reconfigure the shape of the political system beyond anything Burke, or the most reform-minded, well into the 19th century, could have anticipated. These changes have made possible what I have called ‘systemic corruption’, intensifying the need for Constitutional restraint.

At any rate, it is no longer meaningful to invoke and appeal to the prescriptive history – no matter how illusory – that so animated Burke and which he considered the patrimony of the British. *Pace* arguments about the historical make-up of the English as a ‘people’, for the social make-up of this country has changed in an un-historical way such that it is no longer possible to speak of a shared history for all its people. Equally, this change is not yet sufficiently old to have allowed for the development of meaningful shared history for the new social make-up of the people. Perhaps because that development is still in its early stages, expecting in-migrants to understand and subscribe to the existing culture and accept its existing shared history is justified, thus allowing for slow-fused change to work.¹⁵² Meanwhile, we suffer from the effects of a fundamental fault of liberal thought that has so far accommodated the in-comers rather than invited and expected them to conform. In such a condition, prescription and appeal to history become progressively less potent, especially so as symbols of cultures previously alien here become visible landmarks. Indeed, in Burkean terms, this change amounts to a change in the nature of the system, inviting and implying the need for a Constitution.

Those who seek the corset effect of a Constitution¹⁵³ must in one form or

¹⁵¹ As late as the third quarter of the 19th century, sovereignty of parliament was not *the* organising concept of the system. It is instructive to contrast Hearn’s account (*The government of England*, 1887) with Dicey in his *An Introduction to the study of the Law of the Constitution*, 1885, eighth edition, 1915.

¹⁵² *The Times*, 17 October 2001, p. 17: ‘Immigrants get citizenship classes.’

¹⁵³ Many do so, even if they do not use these terms. Johnson does so explicitly (N. Johnson *In Search of the Constitution*, 1977, p. 34 and final chapter). Equally, to say that the constitution is what the government decides to do (I. Budge (*et al*) *op. cit.* p. 182) is not a description but a severe criticism of the system, appealing to the desirable implications of the corset effect to set limits. F. F. Ridley’s view that without fixed rules there is no

another confront the idea of sovereignty of parliament. And to the extent that they do not reject this idea, they find themselves in severe difficulties when they attempt plausibly to argue for the possibility of creating the corset effect. Indeed, one must go one step further: it is pernicious to talk of constitutional reform since 1997 because the tinkering left both the essential problem untouched, and emphasised the centrality of parliament in making further changes of this kind: recall the way in which the law-making functions of parliament almost inevitably led to the claim of sovereignty of parliament. From within the terms of discourse of sovereignty of parliament, it is simply not possible to successfully argue for the development and imposition of limitations upon precisely that element that is the necessary vehicle of change *and* the object of change. In attempting this, we simply set a trap for ourselves and become entangled in logic chopping of the most delicious kind.¹⁵⁴

The problem is this: the desirable objective of sharing power (as the solution to this nakedness) would mean either some distribution of power that is quintessentially exercised by institutions other than parliament, or an attempt to create more levels of government (from the European Union to regions and local government, plus provisions for referenda) such that each level is, in a sense, a check upon the other. Both these reforms took place, albeit piecemeal, at different rates and to effects that left many dissatisfied, for two reasons: firstly, the vehicle of change is still the core of the problem, and ultimately it cannot change itself so as to divest itself of even the theoretical and potential power to undo the change. But more than that, all this will still be an exercise in the type of authority that is part of the problem: it will not amount to a settlement that will provide a meaningful intendment for our nakedness. Sharing power is not enough.

Some have expressed hopes for ways that could bring about meaningful change. Lawyers speak of a change in the attitude of the judges, but, as Ridley ably demonstrates, that line of argument simply pushes the difficulty back one

constitution ('There is no British constitution: a dangerous case of the Emperor's clothes' in *Parliamentary Affairs*, 1988, number 41, pp. 340-361) also places him in this camp.

¹⁵⁴ For one example, see G. Winterton 'The British Grundnorm: Parliamentary Supremacy re-examined' in *Law Quarterly Review*, 1976, volume 92, pp. 591-617.

stage. Indeed, he goes on to argue that this parliament does not derive from the people and it is time we started afresh with a real constitution.¹⁵⁵ Johnson suggests¹⁵⁶ the need for a re-definition of our constitutional principles, and identifies two ways in which this could come about. First, the government could set up a special commission to undertake a work of analysis, and tease out the problems and set out desirable constitutional relationships, upon which the government will then act. The expected outcome will be a series of measures but with some coherence. This would be a long and complex process, and would require a change of attitude on the part of many, and is of course predicated upon the willingness of the government of the day to initiate and fund such a process. However, as argued later (*infra*, Chapter Five), the prospects of success for this approach are rather limited, and the outcome will almost certainly be less than acceptable.

On the other hand, all this could also be done by interested people and institutions; in other words, unofficially, hoping that the outcome will influence the right people. And Johnson avers that parliament should be involved if for no other reason than to prepare itself for any change that might affect it, but the experience of the Royal Commission on the Reform of the House of Lords (discussed in *infra* Chapter Five) is not encouraging. Meanwhile, the Labour governments of 1997 and 2001 felt no inhibitions in instituting changes that lacked coherence and did not amount to a new settlement. On the other hand, many unofficial bodies, such as Charter 88, the Institute of Economics Affairs, Centre for Policy Studies, Demos and others, have devoted time and effort to this issue, but their publications essentially line library shelves: such bodies are likely to produce better schemes of reform, perhaps even a scheme of *real* reform, but would the government of the day accept them?

Increasingly the more serious analysts, whether arguing from a point of

¹⁵⁵ F. F. Ridley 'There is no British constitution: a dangerous case of the Emperor's clothes' in *Parliamentary Affairs*, 1988, number 41, pp. 345, and 360-1. He does not specify how this ought to be done, but earlier in the article he looks at the idea of a constituent assembly, and also says that this is not the only way that others have managed it.

¹⁵⁶ N. Johnson *In Search of the Constitution*, 1977, pp. 230-233. See also R. Brazier *Constitutional Reform*, 1991.

principle, awakening to the fact,¹⁵⁷ or even making the false discovery that we had a constitution but it is not there any longer because of recent changes,¹⁵⁸ agree upon our constitutional nakedness and express the desire for change.¹⁵⁹ But it appears that two issues dominate this debate, and serve to make finding a solution that much more difficult. First, most analysts desiring change look for effective change from within the working system. Second, in so doing they miss the opportunity of interrogating the concepts with which they are, in effect,

¹⁵⁷ 'What her decade (1979-1990) will have shown is that we have lived in a fool's paradise before she came to power, thinking that we had a fine constitution, only to discover that we have had no real constitution at all.' F. F. Ridley 'What happened to the constitution under Mrs. Thatcher?' in B. Jones & L. Robins *Two Decades in British Politics*, 1992, p. 128.

¹⁵⁸ A. King *Does the United Kingdom still have a constitution?*, 2001, p. 100.

¹⁵⁹ There are exceptions. For instance, Allott is highly critical of the system as it is, but apparently cannot advocate what he calls a "legal constitution" in so many words. The very enigmatic ending to his equally enigmatic article (P. Allott 'The Theory of the British Constitution' in H. Gross and R. Harrison *Jurisprudence: Cambridge Essays*, 1992, pp. 173-205) - in which the overpowering influence of Burke is writ large - suggests that we have to make the constitution magical in order to make the monarchy constitutional, that the British communicate with themselves through fantasy. Yet he heaps layer upon layer of fantasy about British society and constitution to such an extent that one wonders how any of it relates to lived life and the working of the system. In a more informative sense, in another essay (P. Allott 'The Courts and Parliament: Who Whom?' in *Cambridge Law Journal*, 38/1, 1979, pp. 79-117) Allott speaks of the hypostatic existence of the British constitution, and describes the idea of sovereignty of parliament as "local superstructure", evidently not only in terms of place, but also time. This is so for three reasons: its advocates have taken an inadequate view of achievements before 1660, a distorted view of 1688, and allowed British constitutional theory to be distorted by arguments about sovereignty. The latter point is also complex: it refers to his interpretation of the way in which sovereignty theory penetrated English thought, but it is not at all clear what he means by "British constitutional theory". He suggests that it is both more abstract and also more practical than other systems, its content being notably purposive and radically affected by the facts of the constitution, calling forth local and temporary superstructures to explain and justify it. But he also admits that his thinking is moving in the direction of the "New View" (associated with Heuston, *op. cit.*) but goes beyond it, *inter alia*, towards Hearn's views (W. E. Hearn, second edition, 1887). But Hearn offers a common lawyer view of the system that at least in one respect - namely the rôle he assigns to parliament, *viz.* sovereignty of parliament and its indirect control of all other organs, pp. 547-8 - would contradict Allott's view of the desired balance. However, Allott gives examples of fundamental laws that can be changed only by agreement among the supreme organs of the constitution, *viz.* parliament, the executive and the courts. Moreover, he considers that these organs are in some sort of balance "with each having only the degree of power allowed by common conception" and none with exclusive superiority over the others. Even when allowing for the fact that this article was published in 1979, his conclusions remain highly enigmatic. Allott's solution - as per his 1992 article, p. 205 - is for British society to reconstitute itself "within the integral societies of Europe and the whole human race", whatever that may mean.

working.

The internal logic of the idea of sovereignty of parliament does not allow for change that materially affects the powers of parliament, or admit of mechanisms to define its authority. The idea of changing the relationship between the judiciary and sovereign legislature by inviting and accepting a new judicial mind-set invites the same sort of negative comments and raises unanswerable questions that one has to examine in seeking to understand the provenance and the meaning of sovereignty of parliament.

But who is to make a new constitution? Seeking an answer to this question leads to a confrontation with another antediluvian, largely religious idea, which (for reasons that are unclear) persist even today. The religious idea of an original contract¹⁶⁰ persists in much the same way that the religious connotation and sense of sovereignty has persisted without conceptual change. In line with the changing nature of government, and with the recognition of the office of the king as a holy one, we see the transference of the religious idea of original contract to that of the (original) contract between the king and people, the breach of which was part of the mythology for the justification of 1688. It was indeed clear to George Lawson that power was from God even if *his* king was 'elected' by the people.¹⁶¹ This idea undergoes further mutation, such that some can speak of the contract between the government and the governed, if not in so many words, then at least implicitly in so far as they see the constitution as a means of regulating the relations between the governors and governed.

Implicitly, the government (be it that of the king or a political government) is accorded an identity separate from that of the people, and the two are deemed necessary before a multitude becomes a people and a community: "... by safety of the people we must understand the safety of the whole commonwealth... both of governors and of governed."¹⁶² While we can at least historically and theoretically understand the necessary mediation of a "political" element to

¹⁶⁰ Tindale reflects this point well in his first discourse. M. Tindale *Four Discourses*, 1709 reprint. The religious origins can be seen, for instance, in Exodus 19, and Deuteronomy.

¹⁶¹ G. Lawson *Politica: sacra et civilis*, 1992, especially pp. 42-48. However, we must not enquire too deeply about election by the people.

¹⁶² A. Sharp *Political ideas of the English civil wars 1641-1649*, 1983, p. 44

transform a multitude into a people and community, there are serious conceptual difficulties with the essentially religious idea that government is a separate entity.

The pernicious implications of such ideas penetrate modern thought about constitutions, such that often they are seen as regulating not only the structure of government, but also the relationship between the governors and governed.¹⁶³ This is implicitly present in Nevil Johnson's proposed method of creating a new constitution in so far as he makes the government of the day and, significantly, also the parliament of the day, a party to the change. Of course, setting up a constituent assembly charged with recommending a constitution is a practical possibility, but in the absence of a serious breakdown of the system of government or overwhelming dissatisfaction with it, the constitution remains a non-issue for the people: it does not exercise public imagination and stirs passions only in the few. Ridley would probably choose the instrument of a constituent assembly, but appears to have ignored the question of how such a new constitution might be instituted.¹⁶⁴ If it is done from within the existing system, as Nevil Johnson wishes to do, we will again run into logic-chopping difficulties in trying to establish the limitation of the authority of parliament. We are clearly caught in a conceptual trap: to be effective, a constitution must be created from outside of the working system.

But this requires that the issue of the constitution is taken more seriously than to accept simplistic definitions: definitions are always a problem and hardly ever a contribution to a solution or even to reach an understanding, and it is especially so in this regard, for the simple reason that they all seem to have taken their cue from precisely the kind of history that, it is argued here, is part of the problem. To wit, Anthony King opens the first of his Hamlyn lectures with a definition that, evoking Hood Phillips's view, postulates the rôle of the constitution as regulating the relations between the organs of government, and between the government and the governed; but in the last lecture, he avers that this view is inadequate, and evoking Machiavelli's view of human nature, argues that constitutions are

¹⁶³ A. King *Does the United Kingdom still have a constitution?* *Op. cit.* p. 1

¹⁶⁴ F. F. Ridley 'There is no British constitution: a dangerous case of the Emperor's clothes' in *Parliamentary Affairs*, 1988, number 41, pp. 340-361, *passim*

neither good or bad, laudable or deplorable, they merely exist. Then, inexplicably relying upon the *Oxford English Dictionary* (volume 3, p. 790), King culls one definition from Lord Chesterfield and one from Bolingbroke. By the first, he means to establish the limitation of the authority of the king – so constrained that he could not become a tyrant or a despot – preparing the ground for his subsequent claim that we *had* a constitution; and by the second, he means to establish the claim that a constitution must have fixed principles of reason so that it will hang together.¹⁶⁵ But this misses an important point: the quotation in the *Oxford English Dictionary* is selective, missing the phrase “directed to certain fixed objects of public good” and these are the object of fixed principles of reason.¹⁶⁶ Thus, King’s interpretation of the meaning and rôle of fixed principles of reason, to the effect that a constitution must hang together and be capable of rational elucidation, is, at best, only hopeful. However, Bolingbroke ends his definition with a reference to the community and their agreement: this is a far more enigmatic and important point, leading away from the thrust of King’s approach, for it makes any constitution the instrument of the people.¹⁶⁷

Part of the argument so far has been that the idea of “historically established and sanctioned constitution” cannot and does not stand the test of reason. However, the system has not collapsed and so created the opportunity or need for a Constitution to be established. As George Lawson understood it, subjects *qua* subjects cannot change the system, but if government is “dissolved” (by which he appeared to mean if its form was changed or the succession failed), then community as a community would be all that its left, free from any and all obligations, not hindered by any reason to choose any one form of government:¹⁶⁸ that is to say, free to create the government it would wish. Are we, then, also

¹⁶⁵ A. King *Does the United Kingdom still have a constitution? Op. cit.* lecture 4 (but specifically pp. 1, 79, 80 and 100). King’s argument that the British had a constitution but that it has now been destroyed is not convincing: this system exhibited distinct characteristics of constitutionalism – portending a proto-constitution – but all that was destroyed in 1688. There has never been a constitutional system, only regular government. See *infra* chapters 3 and 4, and in part 5.

¹⁶⁶ Letter X of his ‘Dissertation Upon Parties’ in Bolingbroke *Political Writings*, 1997, p. 88

¹⁶⁷ Some of Bolingbroke’s views are examined in *infra* Chapter Four.

¹⁶⁸ G. Lawson *Politica: sacra et civilis*, 1992, p. 48

caught in a historical trap, simply powerless in the absence of such a collapse? The arguments of this chapter tend to negate that we are caught in either a conceptual or a historical trap by pointing out that we are actually looking at a mirage of a constitutional system but through a glass wall, and our efforts to get there amount to pushing at this wall. Whereas, in fact, if we were to look behind us, we see that the way to the nirvana of constitutionalism has always been there. In other words, all we need to do is, first and foremost, interrogate the concepts we are expected to work with.

As the arguments of the *excursus* above show, it is simple folly to accept that an institution or organ of government can ever have the attribute of sovereign power. That we have been historically conditioned to accept a mistaken, actually a nonsense, theory is simply no reason to go on with it. Parliament, or to give it the full title, queen-in-parliament, is simply not sovereign. As a matter of fact, there is a strand in the historical literature that argues this point, albeit in relation to the claim that sovereign power does not belong in there but resides elsewhere, either because of the primacy of common law, or the fact that parliament was called as an instrument of the king and by the king, and so on. Interesting though this kind of literature is – and we shall examine some of it – we need not bother with it for the purpose in hand.

The focus of our quest is whether our system is characterised by the attribute of limited authority. And the argument (but this will be discussed below in Chapter Three) is that we had the absence of unlimited authority, and to that measure the attributes of limited power *before* 1688: co-sovereignty, prone to corruption though it was, nevertheless served to prevent any one part of the system from claiming unlimited authority. The Revolution Settlement changed all that and made it possible for one institution/organ to claim the attribute of sovereignty, and for this to become established as historical fact. It destroyed constitutionalism, and there is no other way of restoring it by but the means of a constituting instrument: we, the people, need a Constitution whereby we can dispose of this folly and historical mistake.

When we interrogate the terms and concepts needed to describe and

examine the working system, rather than apply them (as per Oakeshott's injunction that one cannot assert and examine a concept at the same time), we soon discover that they are not quite what they purport to be: if we cannot convincingly argue the meaning of parliamentary sovereignty, we are not bound by its logic in seeking to understand the system in its terms, or abide by it in seeking to change it. But the benefit from such an approach would be to force us to think of appropriate concepts that can be applied. We have come a long way from the time when one could only say that sovereignty was an attribute of God, and that the people are mere subjects; or from when it was possible to argue that all power and laws were from God, that princes reflected this majesty on earth, that the people recognised it by submitting to the axe-man, and that princes could shed blood blamelessly.¹⁶⁹

Equally importantly, we have come a long way from the time when most people were illiterate, mesmerised by religion and too taken with defunct and meaningless concepts and ideas: thus, we can hardly accept H. L. A. Hart's claim that in complex society:

... it would be absurd to think of the mass population, however law-abiding, as having any clear realisation of the rules specifying the qualification of a continually changing body of persons entitled to legislate.¹⁷⁰

We can do little better than to recall Burke, when he said that government is a human contrivance for the good of the people. We need to reject the nonsense that parliament can 'make or unmake' any law, and begin with the notion that it is an instrument of the people, a derived instrument, and by definition it cannot have authority upon certain matters, such as the way the people send their representatives to it, the (fixed) frequency with which they wish to renew their parliament, the powers that they are prepared to assign to various organs, as they have defined them, the inordinate levels of pay for public servants (the queen, ministers, MPs, judges and civil servants, to name just a few) paid out of *their* funds (while they preside over a two-nation entity in which one is increasingly impoverished) etc. In short, every change that would affect the

¹⁶⁹ *The Statesman's Book of John of Salisbury*, *op. cit.* pp. 4-8

¹⁷⁰ H. L. A. Hart *The Concept of Law*, 1994, p. 60

configuration of the constitution as a whole (for example, devolution) would require the approval of the whole of the people. And the guarantee will be found in the requirement that any such change be with the approval of the owners of the constitution, 'the people': this means that any change the government of the day proposes and the parliament of the day approves, can only have effect after a general election in which these various measures are individually and separately presented and the electorate votes upon each.¹⁷¹ Will this make elections a more complicated affair? Certainly, but, pray, recall the omelette and eggs argument.

But, how can all this be done? Detailed mechanisms are not important at this point, although there are only a limited number of ways in which such a change can be achieved. Besides, because this is not the creation of a totally new constitution, mechanisms necessary for that are not needed. The focus must be on presenting a series of choices on individual items to the electorate, then examining the idea approved for coherence, and presenting a whole case for their approval at another referendum. In this process, the government can only be the instrument of holding the referendum, but neither the organs of government, parliament, judges or political parties can have any special say in the matter. The necessary élite for the purpose must be a collection of individuals, probably benefiting from the advice of some theorists. How are they to be appointed? Certainly not by the government, or any of its agencies: perhaps they can be locally elected to meet as "the commissioners of the people" for the purpose.

Of course, such an instrument does not create a system of government, for a Constitution is simply the dry bones of the structure of power as instituted by the people. Translating it into a working system requires that the terms of the constitution be supplemented with enacted rules and much else besides – including the collection over time of unwritten rules of conduct – in other words, that totality of rules and regulations that most commentators mistakenly define as a constitution. Enough has been said to make the point that on this view we have a very British proto-constitution, as examined in *infra* Chapter Three, but have

¹⁷¹ For some thoughts on a new style of British government, see *infra* Chapter Seven.

never recognised or bothered to articulate it. We must now turn to the next stage in the argument, namely an examination of the historical and theoretical perspectives.

Chapter Two: Approaching the British Case

A “valetudinarian” system?

The burden of the argument has been that it is a mistake to reject the idea of a Constitution, to the development of which the English/British experience has contributed much. It is a mistake to believe that the “universal” idea of a Constitution (concerned with creating, elevating and sanctifying fundamental principles) is not relevant to analysis of the British case. The idea of a Constitution is often rejected on the basis of the claim that the British have not suffered a crisis or breakdown, and so have not needed to make a fresh start where such an idea could be applied. On the contrary, the British case is seen and presented as the evident continuation of a historically-understood style of “settled government”. Thus, if essential ideas in and about a Constitution are universal, they are so only within the ambit of their relativity: the British case is the exception that probes the rule.¹⁷²

Clearly, as matters stand, the idea of a constitution, *qua* the statement of a continuous and timeless present, is not a relevant starting point for the study of the British system, and speaking of the “British constitution” simply begs the question. Yet, the literature, especially the inevitably partisan literature of reform, is replete with references to the constitution as though the idea was universal and applicable to any political system. The contention here is not that current approaches are faulty, or the analysts are at fault. Of course, tribalisation (including tribalisation within most disciplines) is open to criticism, and bringing the tribes together (in a so-called inter-disciplinary approach) will not cure the ill. But implicit tribalism is rife: contemporary literature on British government is judged in terms of the separate parameters of each discipline and, naturally, also

¹⁷² This exceptionalism can also be seen in the larger history of the British Empire. Not even the former “white” Dominions, largely populated by people of Anglo-Saxon descent, have managed to ward off the evil of having to create a constitution, even if embodied in nothing more “constitutional” than an Act of British Parliament. On the other hand, it is instructive to note that the British system – in its incarnation into the Westminster Model – was grafted onto societies that did not share the Anglo-Saxon culture, and has tended to collapse. The curious and interesting exception here is that of the Caribbean countries, where the system with its recognisably British pomp and ceremony is still intact.

in terms of the extent to which it makes a contribution to re-creating and advancing that discipline. That much said, within the limitations inherent in tribalism, the literature is often very logical, clear, frequently tempting and apparently convincing. But, for all that, at least so far as the study of the British system – *qua* the “constitution” – is concerned, these contributions answer the wrong question. The literature is not wrong, the question is misconceived. Moreover, the rejection of the idea of a Constitution introduces confusion into the study of this system of government, and leaves us at the mercy of a range of views at one extreme of which is the claim that this *it* is beyond reasonable human comprehension, and at the other that it is so much a part of the practicality of this form of government that to ask about the reason of it betrays a lack of understanding.

Richard Crossman was convinced that this “constitution”, a medley of traditions, statutes and institutions integrated by an intrinsic obedience to “the rules of the game”, is impossible to analyse and so, therefore, beyond comprehension.¹⁷³ Moreover, the “British constitution” never was, nor can it ever be, systematised. His point was not so much to identify its attributes, but to argue that it was in need of a complete overhaul. Hobbes is finally dead; we need a new philosophy: the system is a hotchpotch; we need a new one.

Crossman’s account is presented as a considered judgement, concluding in the view that, for reasons stated, this system is in need of change. Such a judgement has two necessary elements: it requires that Crossman should examine and evaluate the system. Without an examination of the subject, there can be no judgement, only an opinion: this means that Crossman must have analysed and examined precisely that which he tells us cannot be analysed, else he could not even have described it as a medley of traditions, institutions and so forth. This being so, his reason for calling for change could not have been that it could not be analysed, but rather that it was not to his satisfaction.

One rather suspects that Michael Foley¹⁷⁴ will take issue with at least one

¹⁷³ Richard H. S. Crossman ‘The Theory and Practice of British Freedom’ in *Planning for Freedom*, 1964, pp. 3-31, especially p. 19

¹⁷⁴ Michael Foley, *The Silence of Constitutions*, 1989

aspect of Crossman's understanding of the British system. The system is not so much an impossible medley, but one that is based upon and contains many gaps and abeyances, as such simply unfathomable. Moreover, they are so for good reason: they maintain the unsettlement necessary if the system is to retain its flexibility and accommodate necessary change as and when it happens, even to allow it to ride out constitutional crisis. More than that, even in the wake of such a crisis, the stability of the system can only be maintained, so to say, guaranteed, if the gaps are not filled and the abeyances are left unfathomed. That is to say, the settlement contains and manages an unsettled, i.e. unresolved, view of aspects of the systems, whether based upon a Constitution or not. Incidentally, true to his claim that such abeyances will not survive into print, his study does not shed light into the gaps, and abeyances remain as unknown as before. Foley's study is either an act of huge statesmanship – i.e. he has seen the abeyances, but resists the temptation to divulge – or a haunted-house type theory and simply irrelevant. The alternative is to see it as an attempt to explain the enigma that is the British system: a medley, a historically received hotchpotch, but one that has been more stable than any other, and has apparently also presided over much glory and success. But this would impart a rather theological character to his study: explaining the wonder of God depends on gaps and abeyances in what we know, and in accepting on faith the fact of those gaps and abeyances, as Foley seems to claim in the study of the British system. Yet, the difficult, even if logic-chopping, question remains: to know that we cannot know is already to know what it is that we may not know; thus, the claim is plain social science nonsense. In a sense, this is too close for comfort to the related notion that there are a few who "know" the system, and have seen its real ghost, but cannot and will not divulge the real meaning of the British constitution: the result is interesting and intriguing "Private Information" references (in almost every publication by Peter Hennessy), supporting what are otherwise not outlandish statements about the way the system works. At best, what we have suspected for long is confirmed, but, alas, no new insight is on offer. The "constitution" and its obviously friendly ghost remain out of sight. All this feeds into the rather difficult notion that we can only

know this system historically. The square is, as it were, circled, in that such an idea of the system is less than useless unless we can infer from it how to manage the next symbolic, or cyclical event, or unexpected crisis. However, change is not managed according to the template of previous instances, for each case is historically different. In the absence of proper rules, the system is managed according to the implicit theories of a handful of people in key positions in government.

For some, the medley and the unfathomable nature of the system is a much-prized aspect. It is, so to say, proof positive that “what is” is the result of unplanned change, rather than that of deliberate human action. This points to the rôle of Providence and the hand of God:¹⁷⁵ the supreme example of such a deeply conservative disposition is that of Burke, and more recently Oakeshott.¹⁷⁶ It must also be said that such an attitude is also much beloved of the double-dyed Conservative, but this is no reflection upon Burke or Oakeshott.

It is a characteristic of this attitude that the origins or lineage of ideas should not be clear: the farther back in time one goes, the more rapidly memory fades, one might say, as in a geometrical progression, such that one does not have to go very far before everything is clouded in the mystery of timeless time. An appeal to “antient” or “Gothic” constitutions, and the freedom of the forefathers is an integral part of this language, which, to perplex Marx, makes a re-appearance as farce, now in the form of the “historic” constitution so beloved of some academics.

Naturally such a constitution is not to be found in any one document, nor can it ever be described in full and with ease – oddly the most enduring constitution, that of the USA, is also the shortest and most general, leaving room for

¹⁷⁵ Why God’s handiwork should be any more “perfect” than that of man is not clear. Of course “God” is only a metaphor for an “as it happened” history, underlining the claim that the whole was not the creation of any one generation or group. However, there is enough reason to believe that plan and design are not to be found in God’s handiwork, even that which is supposed to have been made in “its” own image, namely us. See George G. Williams *Plan & Purpose in Nature*, 1966.

¹⁷⁶ The greater affinity of Oakeshott to Burke is much overshadowed by his more apparent and public reputation of a Hegelian bent of mind. The remarks in this section “speak to” the body of the thought of Burke and of Oakeshott.

adjustment by way of judicial interpretation. Moreover, writing it down will, almost in the fashion of the fear that some had of photography in its early days, capture the soul of the subject. But in writing it down, much is lost, for what is captured is not the soul, but only an arrested view of it, a frozen picture, re-calling a shade of Foley's "meaningful gaps". And since it is a central feature of the broadly conservative approach that one cannot reduce experience to rules of conduct and laws of behaviour, far less capture the essence of a disposition without destroying its essential character, any attempt to produce an explanatory account is futile and the outcome will be useless. The lexicon of such a disposition includes words such as "prescription", "presumption", "experience", "example", "patrimony", and "expediency", leading to "prejudice", though some would include and emphasise "organic": indeed, these words rather neatly describe the essential aspect of Burke's thought.¹⁷⁷ On his view, we do not make society or its political system, but receive it as our patrimony,¹⁷⁸ as a timeless whole, including claims and rights which have been gradually established over centuries, to which we must attend, preserve and pass onto the coming generation.¹⁷⁹ It is a whole in which past, present, and future have a timeless presence. This "whole inheritance" is the patrimony of every generation, with which no generation is entitled to interfere. There is no procedure that can allow for changing *our* "patrimony", this "entailed" relations of power, in short, "our provident constitution".¹⁸⁰ Importantly this means that the government is not empowered to change the constitution¹⁸¹ within which it

¹⁷⁷ Would Burke own to such a notion? Possibly; and if so, it would probably be "expediency", though much qualified such that it did not mean mindless doing which would necessarily privilege some ill-understood sense of rationality and rationalism.

¹⁷⁸ 'Reflections on the Revolution in France' in *The Works of the Right Honourable Edmund Burke*, 1801, volume 5, p. 126. For Oakeshott, this point is made positively in the idea that we are born into an inheritance, and negatively in the idea that only a poor moralist invents rules of conduct. Michael Oakeshott *On Human Conduct*, 1975, pp. 375-6 and 78.

¹⁷⁹ For Burke, civil society is for the advantage of its members, and all these advantages become their rights, provide they are reasonable and beneficial. 'Reflections on the Revolution in France' in *The Works of the Right Honourable Edmund Burke*, 1801, volume 5, pp. 170, 171, and 177

¹⁸⁰ 'Reflections on the Revolution in France', *Ibid*, p. 244

¹⁸¹ Exactly what is "constitutional" is an important question: for instance, his "economical reforms" are such that many today would not hesitate to designate them as constitutional reform. There is an apparent slippage here in the use of the word "constitution": for Burke, much that many would not call constitutional was, in fact, primarily constitutional; one thinks of his idea of the social structure of society and its necessary stratification, for it

must function – this patrimony is not owned by one generation, much less any one government, to do with as they will.

However, this is the extent of the fossilisation that Burke will allow. Indeed, as Buckle makes plain, Burke's conservatism is to be distinguished from the attitude of those for whom an old practice is, for that reason, good, even if it is slavery.¹⁸² Far from it; Burke reformed or agitated for much reform.¹⁸³ For Burke, government is a human contrivance for the good of the people,¹⁸⁴ or it is nothing. But this is government, not the constitution. Moreover, exactly how the good of the people is to be determined may appear simple, but it is actually a complicated and complicating issue. Burke makes it crystal clear that while *their* good is not to be decided for *them*, they are not in a position to declare their wishes and issue instructions, or mandate MPs, for the latter must retain the freedom to take the larger view of what is at issue, rather than pursue narrow or local interests or follow schemes of visionary politicians: but this is balanced by the claim that the politicians are auxiliaries, not task-masters.¹⁸⁵ This privileges expediency as the primary test of everything, including reform. But there are limits: for instance, Burke distinguishes between society and government, and subjects the latter to a received set of principles of action, the success of which is demonstrated in the fact that the people are thriving. This entails the further notion that reform is always of government, not of that which determines and governs the government.

For Burke, asking "is there a constitution?" only shows that one does not understand: a society receives its institutions and must make use of them for the good of the people, making any and all necessary changes, but taking care not to destroy the patrimony of the next generation. Moreover, this whole is prescriptive,

was precisely this larger question that determined the nature of the political system. It is in this, rather than the political/instrumental, sense that Burke uses the word "constitution".

¹⁸² H. T. Buckle *History of Civilisation in England*, 1857, vol 1, pp. 373-4, and 360-1.

¹⁸³ Buckle provides a brief list, *Ibid*, pp. 374-7.

¹⁸⁴ For instance in his 'Speech on a Bill for shortening the duration of Parliaments' in *The Works of Edmund Burke*, 1906, vol 3, p. 339. This idea is central to Burke's thought and appears in one form or another in many of his speeches: see his 'Letter to the Sheriff of Bristol on the affairs of America', 'Speech to the electors of Bristol on his being declared...' 3rd November 1774, and 'Speech at the Guildhall, in Bristol, previous to the late elections...' in 1780.

¹⁸⁵ 'Letter to the Sheriff of Bristol on the affairs of America' in *Burke Works*, 12 volumes, 1899, vol 2, pp. 225-230, and 'Speech on the plan for Economical Reform' in *Ibid.*, p. 362.

that is, it is “immemorial” and “customary”,¹⁸⁶ and that is all that there is to it. It is worth quoting his words:

... our constitution is a prescriptive constitution; it is a constitution whose sole authority, is that it has existed time out of mind.... Your king, [etc.] ... are all prescriptive; ... Prescription is the most solid of all titles, not only to property, but, which is to secure that property, to government. They harmonise with each other, and give mutual aid to one another. It is accompanied with another ground of authority... presumption. It is presumption in favour of any settled scheme of government and against any untried project, that a nation has long existed and flourished under it. It is a better presumption even of the *choice* of a nation, far better than any sudden and temporary arrangement by actual election. Because a nation is not an idea only of local extent and individual momentary aggregation, but it is an idea of continuity which extends in time as well as in numbers and in space. And this is choice not of one day, or one set of people, not a tumultuary and giddy choice; it is a deliberate election of ages and of generations; it is a constitution made by what is ten thousand times better than choice, it is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil and social habitudes of the people, which disclose themselves in a long space of time. It is a vestment, which accommodates itself to the body.¹⁸⁷

Importantly, presumption is not blind prejudice, and for Burke, there is wisdom in such a constitution precisely because it is not the result of the effort of an individual or a multitude, but that of the species, which “when time is given to it, as species, it always acts right”: this is historical *qua* natural selection long before Darwin or Spencer.

On such a reading, not only is the idea of an abstract constitution separate from a society and people simply unthinkable, but the notion that any one generation may know its wisdom and be able to change it is also monstrous. For

¹⁸⁶ This is not altogether an empty claim, but has a historical background. For instance, ‘... by the statute of *Quo Warranto* of 1290 Edward I agreed that those who could prove that they had enjoyed their franchise continuously since ...1189, [the date of time out of legal memory] had a prescriptive right to them.’ A. L. Poole *From Doomsday Book to Magna Carta 1087-1216*, 1955, p. 685. This point is discussed further in M. Powicke *The 13th Century 1216-1307*, 1953, pp. 376-8.

¹⁸⁷ Burke ‘On a Motion Made in the House of Commons, the 7th of May, 1782, for a Committee to Enquire into the State of Representation of the Commons in Parliament’, *The Works of Edmund Burke*, 1906, vol 3, pp. 354-355. This is a rather concise statement of Burke’s view of British constitution. But his views can also be garnered from his numerous speeches and tracts. However, such shorthand statements do him no justice, for it is a feature of his complex manner of thinking that it cannot be reduced to brief statements, even in his own hand.

many critics, it is but a short step from this to the caricature (so beautifully painted by Dickens) that this constitution is a favour from God, bestowed by providence upon the English, whereas other nations are doomed, and must do as they do.¹⁸⁸ Importantly, there is an ever-shorter step from Burke to Oakeshott, and his understanding of “experience” and powerful rejection of rationalism as the basis for human political action. But none of this leads to the view, often ascribed to Burke,¹⁸⁹ that the system is so fragile that it must not be touched, else it will fall apart. Burke thought the constitution in such equipoise that touching one aspect of it would have unexpected consequences elsewhere: this prescribes caution.¹⁹⁰ Yet, he was keen to reform the government: one need only examine his argument for, and the extent of reform he proposed, in his “economical reforms”. For Burke, and his like, reform is not for its own sake, nor is it reform of everything and anything that we may wish, but measured, in small doses, and, at any rate, when necessary but always in time so that it can be done in “cold blood.”¹⁹¹ On this view, then, the system is not tottering on the brink of disaster and prone to collapse if touched, but that no one generation is in a position to touch it root and branch without destroying much – even if that generation had a right to do so.

It is clear that the idea of a constitution, whether as “timeless present” or “timeless time”, even of a “fantasy” and “hypostatic” kind,¹⁹² is a problem for and in the study of the British system. It has to be said that the necessary singularity of the British case is not a matter for regret, far less for adulation, but one of historical fact that we must face if we are to be reasonably sure that we have rightly understood the course of English-cum-UK history. In doing so, we shall identify the *prima causa* that informs that history and the present structure of

¹⁸⁸ Charles Dickens ‘Podsnappery’, chapter XI in *Our Mutual Friend*, 1923, p.126

¹⁸⁹ For example, in John MacCunn *The Political Philosophy of Burke*, 1913, chapter V, ‘Conservatism’; or F. P. Canavan s.j. *The Political Reason of Edmund Burke*, 1960, chapter VI, ‘The Political Order’, especially p. 166

¹⁹⁰ ‘Thoughts on the causes of the present discontent’ in E. Burke *The Works*, 1801, vol 2, p. 323

¹⁹¹ ‘Speech in presenting to the House of Commons a plan for the better security of the independence of Parliament, and the economical reforms of the Civil and other establishments’, 11 February 1780, in E. Burke *The Works*, 1899, pp. 265-364

¹⁹² P. Allott ‘The Courts and Parliament: Who Whom?’ in *Cambridge Law Journal*, 38/1, 1979, p. 88

power, and is the basis of the system of government so many are so keen to reform, as if that was the panacea. As J. J. Park argues, there is always great danger in complacent neglect, but greater danger in reform when understanding of the system is faulty. This places the emphasis in seeking to understand the system – “the constitution” – on the theoretical.¹⁹³ But as is clear, we do not have a ready-made theoretical starting point, nor can we construct a theory from history, much less rely upon some partial generalisation as a guide to interrogating the relevant history.¹⁹⁴

It may be thought that this line of argument serves to hide a weakness. If there is a *prima causa* in British history relevant to the system today, *per force*, that idea is also present in any account of the system at any one time, including a contemporary history account or comments on current affairs. This being so, we can get to it from any one account: hence the claim – by Justice Laws – that if there are fundamental rights, *there must be* fundamental laws.¹⁹⁵

This argument is in principle akin to the claim that God is ever-present in nature as we see it, and that, therefore, we may see God in any aspect of nature. But even here, God has first to be postulated before God can be seen in every aspect of nature. Clearly in the case of God, never seen, there is little problem; that which is not may be seen anywhere, but this is also very convenient, for negative does not admit of proof. In other words, we defy the law of sense when we seek the larger concept from a limited account: for only when we know an “it” as a non-ephemeral concept can we see its presence in an episode as necessary rather than contingent. The question therefore hinges on how we can know about this “it”. For, as implicit in this study, an intellectual effort is needed to override the

¹⁹³ There is an issue of what constitutes theory. Burke, famous for his “expediency” and preference for the practical nevertheless declared: “I do not vilify theory and speculation—no, because that would be to vilify reason itself. *Neque decipitur ratio, neque decipit unquam*. [Let neither reason – or theory – be deceived, nor ever let it deceive.] No, whenever I speak against theory, I mean always a weak, erroneous, fallacious, unfounded, or imperfect theory; and one of the ways of discovering that it is a false theory, is by comparing it with practice. [Translation added] ‘On a Motion Made in the House of Commons, the 7th of May, 1782, for a Committee to Enquire into the State of Representation of the Commons in Parliament’, *The Works of Edmund Burke*, 1906, vol 3, p. 357

¹⁹⁴ *Ibid.*

¹⁹⁵ See *Infra* Appendix 3. Emphasis added.

limitations of the fragmented disciplines and see the subject in one. Abstract theory, no matter how elegant, is always a problem. On the other hand, constitutional history fails because either it is the amorphous story of a long period (hence only the story of a sequence of shorter episodes), or it deals in a focused way with short specific periods from which it is folly to generalise, and at any rate such a generalisation only applies within its limitations. It may be thought that (were it possible to make meaningful inductive generalisations from historical accounts) when we get the same or similar answers from a number of episodes, we may be reasonably sure that we have a more widely applicable account, amounting to a theory. Of course, obtaining the same generalisation independently and from genuinely independent analysis of several episodes is a methodological nightmare presenting insurmountable problems. Fatal flaws notwithstanding, in its nature, such a “finding” remains at the mercy of the next significant counter-example, and possible “falsification”. Furthermore, the question “at what stage can one be reasonably sure so as to recommend the findings as basis for other-regarding action” is extremely complicated, *inter alia* raising questions about the place of social science and the rôle of social scientists. An important extension of this argument has to do with the advisory rôle of scientists in government and their contribution to policy-making, and, no less, the larger question of the social responsibility of science. On this latter point, one can only register distaste for the actual irresponsibility of science, especially of the socially-blind variety that is pursued for its own sake.

The necessary failure of such an attempt further underlines the verity of the claim that we can only seek meaning in the inter-play between the historical and theoretical, and must check such an understanding for coherence in terms of theoretical considerations, and for relevance in terms of the contribution it makes to explaining various historical episodes, and the interpretation of the political system. That here we run headlong into the argument about circularity – namely, that the evident usefulness of such findings is determined by the fact that the findings are related to the episodes being thereby explained – is unavoidable. However, the larger the historical sample and the ambit of generality of the theory,

the lower the probability that our findings present only a tautology. Attempting such an inter-play, we are immediately confronted with the essential but thorny problem of how to manage the historical time, and where to seek meaning.

However, anticipating some of the arguments yet to be given, we must re-visit Burke in closing this section. The distinction he drew between the presumed historical constitution and the real government – importantly also present in Bolingbroke (*infra* Chapter Four) – has gradually been whittled away. It is in practice now impossible to make this distinction, especially under the Neo-Tudor style of government. It is here that the valetudinarian nature of the system emerges with a vengeance, such that reforming any aspect of the system at its core, the entire system will change. We shall re-visit this in *infra* Chapter Five.

Managing the historical dimension

Clearly short periods, say of the duration of one or more government or parliament, or the longer ones of a reign, even that of a dynasty, cannot be the unit of historical time for present purpose. These are chunks of historical time identified as periods in respect of specific features (an electoral cycle, the duration of a ministry, or a reign)¹⁹⁶ rather than of the story each may purport to tell. Such specific, often pointed episodes – the only way in which a narrative story can be told – take their identity from and are, in terms of the study of history, located within a well established general historical scheme.

In this scheme, a Year Zero is assumed but periodisation does not begin with it; the period since is divided into three unequal segments of historical time: Antiquity, the Middle Ages, and the Modern era. Here the “Middle Ages”, from the fall of Rome to the end of the Renaissance – broadly 500 to 1500 – is simply that which falls in between the “Ancients” and “Modern”. In political, or, better, geopolitical sense, 1492-6, the discovery of the new world, is normally taken to signify the closing of the Middle Ages.

¹⁹⁶ One reign may contain many administrations; for Elizabeth II the tally was ten prime ministers by 2002. But a reign might actually be contained within the duration of one ministry, such as that of Edward VIII. Incidentally, the collapse of the expectation of the dawn of a new Elizabethan Age well demonstrates the truth that an age, if at all, can only be defined in retrospect.

By all appearances, this “scheme” is a 16th century development, although the consciousness of the *historically* ancient can only issue from the influence of religious knowledge and the re-discovery of Aristotle. But the question of historical distance remains curiously absent from the work of medieval scholars, such as John of Salisbury: apparently, Caxton was the first to use “Ancient” in 1490, and in 1538 “Antiquity” was used to mean the “Ancients”: it was only in 1605 that Francis Bacon used “Ancient” in contradistinction to “Medieval” and “Modern”, although it would be a mistake to read into this the self-sufficient idea of a three-fold division.¹⁹⁷ Importantly the idea of “legal memory”¹⁹⁸ served to recognise the continuing relevance of a bygone age and to refuse to locate it in a linear historical dimension. Indeed, it is most unlikely that there was an awareness of the need for any periodic recurring unit of calculation of historical time other than contingent episodes: while a “thousand years” appears as a recurring theme in the Bible, Bede used only a cumulative sequence of dates in the chronological summary to his book.¹⁹⁹ As Marwick points out, even the concept of a century had no meaning until after the Renaissance.²⁰⁰ Presumably it was the approach of the thousandth year that triggered a millennial consciousness, unlike the recent millenarian consciousness where religion is all but conspicuous by its evident absence.²⁰¹ It is probably more accurate to say that, even as late as the 17th century, “ancient” and “modern” were used (as did Hobbes, Filmer, and Locke) as no more than undefined but contrasting categories. Burke’s extensive use of *antient* or *Gothic constitution* is a rather special category and does not help with

¹⁹⁷ Bacon rather confuses matters by his distinction between *memorials*, *perfect histories*, and *antiquities*, and a further division of *just* or *perfect history* into *chronicles*, *lives*, and *narratives*. Still, it is only “History of Times, I mean Civil History”, as he puts it, that is divided into “*antiquities* of the world”, the “*middle part*” and “after them histories which may be likewise called by the name of *modern history*.” Francis Bacon *The Advancement of Learning*, 1605, edited by G. W. Kitchin in 1861, no date of publication, pp. 73-75.

¹⁹⁸ Set at 1189, Statute of Westminster I, 1275; at the time not a great deal longer than actual living memory.

¹⁹⁹ Bede *Ecclesiastical History of the English People*, revised edition 1990, pp. 325-8

²⁰⁰ A. Marwick *The Nature of History*, 1971, p. 170. While “century” comes from the Latin *cento* (a hundred), and *centuria* was used to mean a hundred years in Italian, in Latin *secolo* (from *seculum*, the span of one generation) is used, and “forever” is rendered *in secula seculorum* (in a century of centuries).

²⁰¹ ‘Public fail to connect year 2000 with Christ’, *The Times*, 14 March 1998, p. 18

the more general question. However, if Burke was not much influenced by the theories of history associated with enlightenment thought, such considerations fed into the growing consciousness of the need for socio-political change: it was only in the French Revolution that *ancien régime* in a qualitative-judgmental, not historical, sense was introduced into the discourse of politics in Europe. But this does not entail the further notion that, with it, they recognised the idea of *qualitatively* discrete periods as part of a linear conception of history. After all, on this view perfection – no longer a golden past, or heavenly incarnation – was only a future within reach and, given human reason and resources, actually in sight!

This increasing awareness of an “ancient” world and condition was not matched by an awareness of a more recent counterpart to it. In the 16th century, as indeed at the time of Cicero (*modo; modus*), “modern”²⁰² meant the now and contemporary, for instance as Shakespeare used it. It follows that the use of “modern” in this sense could not entail the category of “Modern History” as such: Francis Bacon notwithstanding, Bolingbroke is thought to be the first to use that expression in 1735. Inadvertently, J. R. Green²⁰³ demonstrates the point rather well: accepting that for us the Modern begins in 1688, he can yet not write an account of “Modern England” beginning in 1688, but only in 1742!

By late 19th century, the place of a few dates as natural points of historical and analytical break were well established, probably under the influence of Bishop William Stubbs: as Boase put it, whereas England in 1485 was distinctly feudal in character, by 1603 it had become the “England which we know”.²⁰⁴ That said, Maitland (contemporary to Bishop Stubbs but at Cambridge, whose background was not exclusively in history but included study at Lincoln’s Inn - he was called to the Bar in 1876) purposefully ignored the expected

²⁰² From modern (1500 on) Latin adjective *modernus*, meaning “in the manner of the present”. Etymologically this word derives from the Old Latin adverb *modo*, meaning “the present, now”, further from the Old Latin noun *modus*, meaning “standard, manner, a rule”. There is a suspicion that *modernus* may have a longer history with currency in Late Latin (200-600).

²⁰³ John R. Green *A Short History of the English People*, new edition, 1888

²⁰⁴ I am grateful to Peter Slee, University of Huddersfield, for this point. Dr. Slee also makes the point that this notion harbours an ambiguity: it is not clear whether 1485 was a constitutional historian’s or a pedagogic distinction.

historical/chronological divisions: in his lectures, he examined feudalism and paid some attention to the nature of medieval statutes, but was not concerned to differentiate a specifically modern perspective. More than that, he distinguished five periods in the study of English constitutional history, but did not follow the expected “standard” scheme and choice of dates. He argued, firstly, that a moment of crisis is not the best point at which to examine the constitution and, secondly that, important though some dates are (as 1399 and 1485) nevertheless it is better to view the system from more than one angle. Indeed, because he saw an internal consistency in the period from the death of Edward I to that of Henry VII, he treated 1307 to 1509 as one period, dominated by the story of relations between king and parliament. He repeated this preference for an unorthodox date in the choice of the next period, for him marked by the “quiet accession of Charles I”, on the basis of the argument that if the Tudor “New Monarchy” stands in clear distinction to that of the Lancastrian period, matters of substance do not conveniently change with a dynasty. Rather, by choosing a date well into the Stuart monarchy, he meant to emphasise the continuity of much else essential to the study of this system of government: thus, his next period begins with the “quiet accession of Queen Anne”.²⁰⁵ Richard Britnell, in relating the closing of the Middle Ages to specific events and dynastic crisis, is, in principle, closer to Maitland than to the catastrophists, despite some obvious differences; he focuses on the period from 1471 to 1529 as one of transition. If the first date is defensible in terms of a second new start (Edward IV seizing the throne for the second and last time from Henry VI, marking the end of the crisis of succession), the second date (marking the initial meeting of the Reformation Parliament) is not so obvious; even less so is the fact that it also marked the dismissal of Cardinal Wolsey.²⁰⁶ This demonstrates rather well the contingent nature of the extent to which significant meaning for purposes of a given study may coincide with the idea of an already defined unit of historical time.

It may well be that the convenience of adhering to fixed dates, especially

²⁰⁵ F.W. Maitland *The Constitutional History of England*, 1908, respectively pp. 141-164, 165, 226-236, 237, and 281.

²⁰⁶ R. Britnell *The Closing of the Middle Ages?* 1997, Introduction and chapter 1

when coupled with a sense of belonging associated with conformity, is probably too much to resist: thus 1399, 1485 and, indeed, 1688, are often used as cut-off points without question. To take just one example, L.E.A. Jolliffe ends his study of Medieval England in 1485 without the least concern to examine the choice of the date for the beginning or end of his chosen period.²⁰⁷ This absence of concern speaks volumes about how deeply entrenched such a scheme had become. Keir brings the story up to date in the next volume on the “Modern” period “since 1485”, concluding with a chapter that is at best a contribution to contemporary history.²⁰⁸ Yet, remarkably, Keir refutes the idea that the Tudor period was a new era, and rejects the notion of “New Monarchy”. Recognising that properly speaking, the “New Monarchy” begins with the Yorkists, not Henry Tudor, he avers that not only 1485, but also the idea of “New Monarchy” have only political rather than constitutional importance, and, by implication, that neither can serve as mark of distinction between two periods. But he does more, for he also argues for continuity rather than catastrophic break as the organising principle of English history: the beginning of the Tudor régime, he suggests, is neither a break nor does it amount to constitutional innovation; it is a successful attempt to make “institutions yield their proper results”. If, to coin a phrase, it was government of the king by the king – or by a trusted and favourite Chancellor – it did not yet involve the repudiation of the constitutional tradition of the English state. In other words, that kingly government of the early Tudors did really no more than make apparent the relations of power actually inherent in the system as they inherited it: the danger, according to Keir, was not so much that the king would be too strong and overshadow the other institutions, but that, like Lancastrian sovereigns, he would be too weak! At any rate, on this view what the king did was by virtue of legal authority that indubitably was his. Keir’s point is not that there were no fundamental, but only contingent changes, touching and affecting the way the system worked, rather than the system as such. This distinction between the political and the constitutional enables him to assert that aristocratic and church

²⁰⁷ J. E. A. Jolliffe *The Constitutional History of Medieval England from the English settlement to 1485*, second edition 1947

²⁰⁸ D. L. Keir *The Constitutional History of Modern Britain since 1485*, ninth edition 1969

power was in decay in the later medieval pre-Tudor period without exposing his argument to the charge of inconsistency.²⁰⁹ This, of course, begs the question of what can amount to constitutional change under the British system. However, taking these two books together, one is at loss to know in what way 1485 separates the Medieval from the Modern. In an important sense, for Keir, Modern English history begins some time after 1660, but does not come into its own until the 19th century. Thus if Jolliffe was content not to raise the issue, Keir is concerned to disclaim catastrophic theory without also disputing and seeking to change the periodisation scheme involved. In a sense even more curious is the fact that there is no explanation or discussion of the scheme and the reasons for the period treated in each of the fifteen volumes of Oxford History of England.²¹⁰ Almost every date used is, similarly to 1485, an obvious marker, albeit that some are less so, such as 1086 for the Domesday Book, or the Spanish Armada in 1558; however, 1870 is specially problematical in this series since it is not related to English-UK history, but to events on the continent. Clearly the scheme used is, albeit implicitly, based on the catastrophic theory of delimitation of periods.²¹¹ Although widely used, with little conceptual argument about it, nevertheless the fragmentation of history is not the only way possible: after all, Maitland's

²⁰⁹ *Ibid.*, pp. 6, 45 and 47. There is much to be said for the substance of Keir's argument: after all it is perfectly possible, probably it is the only good way to proceed, to explain British government in the 1980s in exactly these terms. That said; his political-constitutional distinction is somewhat more difficult to sustain.

²¹⁰ Some expected and a few unorthodox dates mark these volumes: 1399, 1485, and 1603 are there, but so is 1558, 1660 and 1714.

²¹¹ This approach is still current: for Foley, the constitution reveals its true nature under moments of crisis – when its abeyances are threatened with disclosure, and possibly change – rather than when at rest, as it were under normal conditions (M. Foley *The Silence of Constitutions*, 1989, pp. 18-20). For analytical purposes, conditions of crisis are clearly preferable, but they may harbour a problem in disguising the working of the system at repose. The system of the 1980s was exactly that of the 1970s, yet the political differences between the two decades are simply vast. In both, there were periods of crisis and repose: which are we to take as representative to be used as an example demonstrating the reality of the structure of power and the working system? The complexity of the implications of so doing become apparent when one considers that it is often on the basis of such specific episodes and short periods that party policy is formulated: one need only consider the arguments about Lords reform in the Labour Party from late 1960s to the present, and the way in which much that is party experience and party prejudice fed into, and determined, Labour *government* policy in 1997 and beyond.

apparently “eccentric” scheme, if not also Seeley’s “great events” approach,²¹² and, indeed, Taswell-Langmead’s lack of any one dominant scheme²¹³ point in exactly the opposite direction. Incidentally, despite, perhaps because, of this absence, Taswell-Langmead gives even fewer hostages to fortune in the manner in which he manages the long historical period in a mix of thematic and narrative chapters. Either way, constitutional history appears and is presented as a number of accounts of discrete shorter periods.

Given that an explicit or implicit choice of a historical period is a prerequisite for any social science account, we must be clear about the properties and character of the idea of “periods”. The necessity and the apparently obvious ease with which a period is identified as the outcome of any research serves to hide the fact that we have actually started with some category of periods. While some historical events are incontrovertible facts, how they are understood as historical facts and the rôle they play in a particular story are not forgone conclusions. This fairly obvious point masks a very complex issue: the character of most events in a chosen period will present a different picture when considered in a different historical time-scale. A period is far from an innocent starting point or the simple historical backdrop of some analysis. At worst, it encapsulates some explanatory schema; at best and in its least malign form, by “forcing” our gaze upon certain events rather than others, it directs our attention to and makes more likely, if not inevitable, a certain type of explanation. The importance of periodisation is more real than apparent, and we ought to focus sharply upon its properties and character.

In so doing, a number of nagging issues arise: is there a generally valid scheme of *qualitative* Medieval-Modern distinction, and if so, what are its irreducibly distinctive features; does it, even if only broadly, apply to the British case? Either way, what are the implications of the answer to this question for the study of the British system? In what way should the history of the British system be managed? These issues raise the further and more complicated but general

²¹² Sir John Seeley *The Expansion of England*, 1895, p. 21-2

²¹³ *English Constitutional History from the Teutonic conquest to the present time*, tenth edition by T.F.T. Plucknett, 1946

question of the necessary *differentia* distinguishing one period from the next: is the dawn of a new era a palpable change, or a matter of judgement by historians?

One must ask, how is the significance of an event perceived at the time? For instance, in our era of instantaneous communication, much is made of “historical” *qua* history-making quality and nature of this or that event. But nearly in all cases a lapse of even a few days shows the utter unimportance of the event and its not-epoch-making nature and implications. It is doubtful that such over-reaction is entirely due to the lack of time to reflect, although that must be an important factor; so is proclivity to sensationalism in a disenchanted world, further fuelled by the general perception of the fragility of economic and socio-political systems and no doubt heightened by fear generated by the evidently unanchored meaning and purpose of life. But truly momentous events, portending substantive change and the advent of the new, are often hardly dramatic at all. If so, just how is the newness of the new identified and its import understood?²¹⁴ Moreover, even the “real” importance of an otherwise evidently momentous event is not always apparent: Pearl Harbour clearly marked an important turning point in the course of the Second World War, but, as Churchill is reported to have said, its *significance* was only revealed in the fall of Singapore. But in the study of the British system, if there have been many “Pearl Harbours”, there have been practically no corresponding “fall of Singapore” cases. That being so, one has to repeat the question: how is change and the new perceived and understood? This is made even more complicated by the fact that historical events are not self-enclosed and delimited facts, but porous clusters of decisions, actions and reactions: how those close to an event understand it and gauge its importance, which determines their response, has a significance beyond its apparent relevance. But as Seeley saw it, contemporaries judge great events wrongly and it is the job of the historian to correct it!²¹⁵ Quite; yet this is still a simplification, for each episode is determined contingently. This is the very centre of the argument

²¹⁴This is far from a simple question: see my ‘With Eyes To See What Is New’. Unpublished paper given at Frankfurt/Southampton Seminars, Riezlern/Kleinwalsertal, Austria, August/September 1994.

²¹⁵ Sir John Seeley *The Expansion of England*, pp. 165

about the craft of history: a historian must relate how contingent cases come to pass, but must also create the framework within which to understand the significance of the events, else we shall have no narrative worth reading. Is periodisation, as a matter of fact, only a feature of, and meaningful in, the interpretation by a historian? All said and done, a historian is, in the apt words of Blaas, “a prophet after the event” who “looks ahead in retrospect”.²¹⁶ This is not an indictment of history or historians, far from it: necessary criticism of Whig historiography has to be laced and moderated with a broader understanding of the inherent limitations and the inevitable character of historical account. We must be clear about what can be the subject of historical analysis, what is involved in constructing a raw account of it, and what an historical account would look like, before a particular school of historiography can be castigated for deviation and exaggeration.

A number of implications flow from such a consideration. By looking ahead in retrospect but in relation to a question that is in some fashion inherently related to the episode in question – again the problem of prior knowledge without which a relevant question cannot be formulated arises – the historian identifies a period from the chunk of historical time available and renders an account of it. But just as political theorists have a partisan preference for this or that ideology, and political scientists may be much taken with this or that style of politics and form of government, so, too, can the historian be in the service of something else, almost certainly some partisan *desideratum*. It is said that a philosopher who does not believe is not one: but surely this refers only to the belief in the possibility of philosophical knowledge, not the ultimate verity of any one perspective, which by direct implication must mean no more philosophy: it might well be that only a true sceptic can be a true philosopher, for a philosophical account, too, argues a point of view. Thus, given that there is no neutral social science, there is yet no justification for biased historiography. It is in this sense that, for instance, Whig historiography presents a serious problem. A mix of its three features of anachronism, finalism and continuity is indeed necessary for any historical

²¹⁶ P. B. M. Blass *Continuity and Anachronism*, 1978, pp. 269 and 31

account to be produced: importantly, there can be no *historical* account unless and until there is a closure of some sort,²¹⁷ for the account of a particular set of events that continue to have contemporary presence in the contingency of events is, to that measure, subject to change. More than that, historical consciousness, too, is predicated upon discontinuity. Clearly this puts a rather significant premium upon the meaning of discontinuity and probes that of continuity. But discontinuity does not mean a complete utter closure, only an identifiable shift in the salience of an idea or the importance of an event, while recognising that it is not “the end”. It is instructive to contrast the contents and treatment of the subject matter of the first section of the last chapter in the third and the ninth editions of Keir’s book as an exercise in how further developments change the historian’s perspective.

Both chapters concern Parliamentary Democracy since 1867,²¹⁸ but although the historical period in both editions ends in 1931, there are significant differences in the views expressed and judgements proffered. In the third edition, published in 1943, there is much concern for the future of Britain and, while the Labour Party is not directly mentioned, there is much that reveals a deep anxiety about the possibilities and prospects under a majority Labour government, clearly harking back to 1930s concerns about how a reformist Labour government could introduce major change, avoid constitutional crisis, and pre-empt evasive actions, say, of bankers and capitalists, by swiftly passing enabling legislation followed by necessary directives and Orders in Council.

But, in the ninth edition published in 1969, this general anxiety is simply absent. Suffice to highlight three specific differences: firstly, an additional sentence in the later edition changes the nuance of meaning in the relevant passage from the earlier edition: what appeared as a “natural” expansion of the function of government in the 1943 edition appears in the 1969 text as a direct response to expectations of a new working-class electorate. The second example concerns the way in which what became the basis of the celebrated “elective dictatorship” thesis is simply dropped. Thus the 1943 edition contains much about

²¹⁷ *Ibid*, pp. 9-33.

²¹⁸ D.L. Keir *The Constitutional History of Modern Britain since 1485*, third edition, 1943, pp. 456-464; and ninth edition, 1969, pp. 456-466.

the fear that a party advantage in Parliament could be used to impose socialism without revolution, *via* the ordinary use of the ordinary powers and procedures of the system. Keir speaks of a serious risk of a revolt against the established order: there will be a temptation to use an “omnipotent House of Commons, unrestrained by the Lords” to force through legislation amounting to revolutionary change with “a minimum of discussion”. On this view, the danger arises from the possibility that the Commons may become a means in the hands of “a part of the nation” enabling it to use “the accumulated powers of the administrative Leviathan” to achieve its own objectives. But he does not give in to despair, and avers that the British system is more stable than most may think. However, in the 1969 edition, this argument is changed: “a part of the nation” is replaced with “the Executive” and the danger is seen to arise from their capability to manipulate the powers of the Leviathan. The consequence is no longer the fear of a revolt against the established order, but serious concern for the future of British democracy, for the net effect may be disillusionment with the system. The fear of a class-based dictatorial future is replaced with the by-now-familiar thesis of executive dominance. Thirdly, in both cases, Keir expresses a fear for the changing rôle of the Commons: no longer a means of inducing consent, in 1943 he feared that it might become the “engine of coercion”, while in 1969 his fear was that the function of representing and reconciling interests may disappear, causing the Commons to degenerate and further fuel disillusionment with the system.

It is clear that, in part, the difference in judgement between these two editions is due to the different historical period with which Keir was writing, and in part due to the fact that his 1943 expectations did not materialise: the so-called period of consensus politics and an evidently reasonable Labour Party may have allayed his fears. Thus, the effective extension of the historical period beyond 1931 meant that Keir looked “ahead in retrospect” differently in 1943 and in 1969. One might add that had he revised this text in the late 1970s or the early 1980s, he would probably have resurrected most of his earlier concerns, if not also that of “New Monarchy”, and even added a few more.

Answering the problem of how we observe the new and perceive the import of current events does not obviate the need to raise a more general question of the significance of periodisation and the effect of dealing in periods upon the study, specifically, of the British system. As the analysis of Keir's text demonstrates, this question is the more urgent the closer to the present is the subject of the study (raising not a few questions about Contemporary History as a discipline). Moreover, because there is no point of obvious and indubitable break in British history – no fresh start – to initiate a manageable frame of time within which to construct a rounded account of its principles at work, the urgency also applies to how we understand and manage its historical dimension.

Grand schemes

The more general Medieval-Modern distinction does not apply to the British case without a good deal of modification. If much changed in 17th century England, that century ended without changing much: in a fundamental sense and in important respects, the régime as of the accession of Queen Anne recognisably mirrored that of James I, and whereas in-between the two reigns the conflict between the descending and ascending conceptions of sovereign power informed, at least in part, the problem of government in England, it was not at all the main question. 1660 famously marks the restoration of the régime, meaning the reinstatement of king and parliament. This is true as far as it goes, but this truth also serves to hide the fact that importantly the Restoration was a change in the institutions of government still exercising descending power: the nature of governmental power in the two decades before 1660 was no different from that after 1660, and we must say as much about 1688. It is thus that at the end of that century, the nature of sovereign power remained essentially as it had been at the beginning. If the *ancien régime* was brought to a catastrophic end in the French Revolution, in the UK (according to J. D. C. Clark), it came to an end only in 1832: this is a hopeful view, better to argue that the beginning of an end was initiated in that year, but the end of the beginning never came to pass, for subsequent changes only *appear* to signify the supposed demise of the *ancien régime*. We

are faced with a seamless historical period spanning centuries, but which cannot be treated as one seamless history: *ancien régime* is hardly an appropriate tag for any part of English-to-UK history.

The change from one age to another is evidently an untidy affair. This point may appear too mundane to seasoned historians, but it has to be said that because a historical period does not end abruptly (even a major revolutionary change does not mean total discontinuity) how much in and of early years after a successful revolution in fact belongs in the former period, in the sense that it is not distinctly of the new, remains a complex question, but it is nevertheless one the answer to which may have significant consequences.

Certain events may rightly be taken to signify the chronological start of a new *historical* age and there are a considerable number of dates as candidates for this purpose: 1216, 1399, 1485, 1603, 1688, and 1832 are obvious examples. But the identification even at the time or in the events leading to such a break can say nothing about the initiation of a *qualitatively* new age. Near contemporary but correct identification of the dawn of a *qualitatively* new age is remarkably rare: in an obvious sense this is so for good reasons. Thus the case of Giorgio Vasari²¹⁹ in dating the “Modern” as a *qualitatively* different period on the basis of the work of the mature Leonardo da Vinci (who died in 1519) is the exception that probes the rule. Incidentally, Vasari, like Filmer and Locke, makes no mention of Middle Ages – or, for that matter, the Dark Ages – for there was nothing to warrant the bestowing of collective identity of an “Age” upon it; thus the period in-between remained unnamed. Vasari is aware of the Ancients and presents the Renaissance as a three-stage cycle of regeneration of the Arts, leading to the Modern era.

In terms of ideas, Bacon is thought to have initiated the age of reason and “useful” science, while Locke is thought to have pre-empted the 18th century enlightenment in his *Essay concerning human understanding*. However, so far as political theory and the history of government is concerned, we seem to have no established date for the change: Hobbes is often the first on the list of names

²¹⁹ *Lives of the Artists*, first published 1550, 1965 translation, especially p. 252

after a reference to Bodin, but generally the end of Reformation, and of the Counter-Reformation, is relevant, so is the Treaty of Westphalia: but, altogether, the displacement of Absolutism is thought to mark the change from the Medieval to the Modern. Somewhere along the line, the meaning of the “modern”, *qua* the contemporary, shifts and is made to expand so as to apply to the period that began at the closing of the Middle Ages: the Modern era²²⁰ has a potentially distinct beginning, but feeds into an extended present without any modification to the meaning and use of “modern” *qua* the contemporary. We are left with three meanings for Modern: the now, a chronologically distinct period, and a qualitatively discrete period. Only the third invites serious attention.

In the work of Vasari, we see a distinct qualitative change marking the dawn of an era. The same cannot be said for the change in a political sense from the Ancient, or the Middle Ages, to the Modern.²²¹ Allott simplifies this schema and seeks to inject more direct meaning into each period’s description by dividing post-Roman Britain into four: *Germanising* 500-1000: *Galicising* 1000-1500: *Europeanising* 1500-2000: and *Globalising* 2000-?²²² This has the obvious advantage of showing the tendency of each clearly rounded age, and the character suggested for each can be readily accepted (albeit at a very general level), but this schema is at best suggestive, and in terms of the history of government and the idea of the State, of little help.

In all cases, the criterion defining a “period” is the relevance of the meaning that spans a period, whereby the span, hence the period, is defined by the meaning – they define each other. This circularity is important, and underlines the trite (though not so obvious) point that a scheme of periodisation has no presumed relevance and value beyond that for which it was devised. If it is to be used for any other purpose, the fact has to be problematised in the first instance, but this is not the first or even one of the first questions that one can answer. This

²²⁰ Strictly speaking, there is no noun, not even a Latin word, that describes a chunk of time that runs from a given date to the present and, possibly, beyond.

²²¹ For doubt about these larger categories of history see J. D. G. Davies and F. R. Worts ‘Introduction’ in their *England in the Middle Ages*, 1928

²²² Philip Allott ‘The Theory of the British Constitution’ in H. Gross and R. Harrison *Jurisprudence: Cambridge Essays*, 1992, p. 201

rather neatly shifts the focus to what it is that one seeks to examine. Incidentally, to repeat a point, the circularity in defining a period rather harks back to the interplay between the theoretical and the historical.

In the Medieval period, society and its leaders were theocratic, and generally the perspective was, in Walter Ullmann's phrase, the "wholeness point of view". Moreover, before the Modern period, the focus of argument was government, and, while both were present, the descending view was the predominant conception of power.²²³ But as Burns is concerned to argue, there was no serious closure at all: if the 17th century was a period of radical break and rejection of many ideas, much of the former times also survived that age: in seeking to refute ideas, authors ensured a continuing place precisely for that which they meant to reject. Much that leads to Rousseau can be linked to the older Medieval theories of natural law; besides, the "wholeness point of view" is not entirely and exclusively Medieval, for, symbolically, both Plato and Hegel belong in that tradition.²²⁴ Furthermore, Burns also points out that there is a greater difference between early and later Modern period, than between the early Modern and Medieval periods.²²⁵ Thus, both Ullmann and Burns insist on a degree of continuity, also suggesting that many modern political ideas were in fact born in the Middle Ages.

That said, nevertheless, the two periods stand in sharp contrast to one another. The theocratic nature of power is replaced with politics as a distinct sphere of human activity; theocratic society disappears and it is possible to reduce religion to a matter of private conscience; government is no longer in the service of religion; governmental power is placed at the service of purposes that are pragmatically and politically decided. Probably the best and most clear indication of the nature and scale of this change is seen in the difference in the meaning of, and attitude to, law in the two periods: based on the work of Kern,²²⁶ this large though often neglected difference is summarised in tabular form in *infra*

²²³ Walter Ullmann *A History of Political Thought*, 1965, pp. 17, and 12-13

²²⁴ J. H. Burns (Ed) *Cambridge History of Medieval Political Thought*, 1988, pp. 654-5 and 2.

²²⁵ *Ibid*, p. 1

²²⁶ F. Kern *Kingship and the Law in the Middle Ages*, 1939

Appendix 1. But the state *qua* the summation of this change emerges very slowly, over some two centuries and more: that is to say, the truly Medieval is separated from the truly Modern by a long period of transition.

However, the idea of a period of transition is an odd category: there is nothing in and of the period to mark it as such: such a characterisation is only possible with the backward gaze of the historian. This is not intended to invoke the idea of distance as a necessary pre-condition for the absence of direct interest in the subject (the so-called requirement of objectivity). Rather it is clear that any “period” can be designated as one of transition, depending upon the vantage points of the historian. If 1700 is distinctly different from 1450, at least in English history 1600 is very different from 1350, and 1500 is definitely so from 1250, whereas 1400 and 1150 stand almost for two different worlds: the two extremes of any long period are bound to be different, and we may see the period in between as one of transition. On this reading, the characterisation of a period as an in-between stage is only a matter of historical judgement; it is, so to say, in the eye of the historian. Though we may speculate upon it, as a matter of practice and reality, we are unlikely to see our age as one of transition, but this is not to say that “it” will not be so classed at a later time; after all, since *circa* 1950 the idea of the sovereign nation-state has been both boosted – there are more of them than ever before – and severely tested, in that the world is less strictly one of sovereign states. We are in a global age, and modernity too was only a period.²²⁷ On this view, “modern” can no longer mean “now”. Does this mean that the period we live through will be one that historians will have to examine in terms of “before” and “after”? Recognising the fact that these categories are essentially arbitrary in nature – in that they are not intrinsic to the period or “objective” to our understanding of a past, not that they are subject to change at will – must serve to ameliorate the importance that we tend to attach to History and its findings, and, no less, to the idea of lessons from history. This touches the thorny question of the extent to which we may really know the past, but that belongs elsewhere; on the other hand, how the “past” is viewed and presented is relevant here. But,

²²⁷ See Martin Albrow *The Global Age*, 1996

importantly, how we see the character of an age or its representative figures also depends upon the way we come to it: the example of Keir discussed earlier demonstrates the point, albeit a little differently, but now consider the following.²²⁸

To take one instance,²²⁹ John Locke is seen as the prophet of democracy, arguing for the ascending theory of power: in many ways, the fact that his political theory came into its own, firstly, with the American revolution and then in England more gradually into the 19th century (by which time much had already changed and was changing in favour of 'democracy') is apparently sufficient testimony in support of this claim, albeit that some had nagging doubts about it.²³⁰ But since there is nothing in Locke that speaks of democracy as we understand it, this reputation may be the result of the fact that we read our way back to Locke, where we see a dim picture of elements – in this case that of consent – that are intrinsically connected to democracy in our age, and then read Locke forward to the present. In doing so, we naturally find corroboration for the prescient modernity of Locke – prescient for his political theory had no home in the practical conditions of early Modern period, but had a strong resonance in the later Modern period, when the extension of the franchise necessitated a re-working of the idea of the individual and individual rights. But get a Medievalist to read Locke! I know of no such reading. However, in the course of the research for this work I *came* to an already familiar Locke but now with a feudal-medieval perspective fresh in mind and also from Medieval political theory, and found a surprisingly different, altogether *quasi*-feudal and Medieval Locke.²³¹ What struck me so forcefully was

²²⁸ See S. B. Chrimes *English Constitutional Ideas in the 15th century*, 1936, p. 314 for a brief discussion of difficulties in interpreting Fortescue.

²²⁹ Blackstone is another good candidate for similar treatment, and is part of the substantive arguments of *infra* Chapter Four, section 3.

²³⁰ F. H. Hinsley *Sovereignty*, 1966, p. 149. Given that Hinsley actually wanted the idea of the sovereign state to develop into what it has become, and showed an enthusiasm for it almost as a mark of modernity in a qualitative sense, his reference to Locke's affinity with medieval ideas was probably meant not as description but criticism. Even so, Hinsley recognised that there was something important in Locke that did not belong in the world of the modern.

²³¹ This is an important point in the historiography of political ideas. "Who reads Bolingbroke, if ever he was read through", is attributed to Burke: but now come to Burke after reading Bolingbroke, and a number of interesting revelations emerge; if in his "Vindication" Burke meant to satire and dismiss Bolingbroke's negative views, yet, his 'Thoughts on the causes of present discontent' show a great deal of conceptual affinity with him, and we

the extent to which he looks back to pre sovereign-state period in which the power of the “prince” was at the service of pre-existing “rights” over which he had no jurisdiction. Thus the fact that Locke placed such emphasis upon the notion of consent was not at all surprising; on the contrary, the absence of this notion would have been cause for much comment. Consent was an important medieval legacy: others, such as Hale, also made much of direct and “imply’d” consent as an indication of the legitimacy of the system as it had developed.²³² But Locke makes consent a continuing condition of legitimacy, for it is balanced by the threat of revolution: it is this combination that marks him off from his contemporaries. In this he is hardly the prophet of representative democracy: one rather expects that he would have had serious second thoughts about the meaning of consent had he been aware of the way in which this idea could be – in fact was – used inevitably to dis-empower the individual, thereby remove precisely that element of control which Locke meant to preserve. This is so despite the fact that in truth he extended the meaning of consent: initially consent was only affirmation of (doctrinal) truth; later, consent was to the person of the king holding that office, or it was a necessary ingredient in the making of law, in the words of Matthew Hale, “... all human laws have their power by reason of consent of the parties bound”.²³³ In part, the modernity of Locke is found in the way he extends the meaning and use of consent: in a sense inadvertently, he extracted further meaning from the idea of silent consent, more than one could reasonably expect to find in the preceding ages. Similarly, his argument with Filmer seems not so much as an attempt to bury the dead body of a set of antediluvian ideas, but rather to challenge precisely that body of thought which had previously challenged with some success the pre sovereign-state conception. In this, Locke was challenging

cannot dismiss this affinity simply because in his ‘Reflection on the Revolution on France’ Burke marginalises Bolingbroke. There are other examples: generally political scientists do not read William Blackstone’s *Commentaries*, but without that it is difficult to locate and properly understand Bentham’s *Fragments*, which was a response to and provoked by Blackstone’s works. Nor is it really possible to understand any of them in any sense properly if we do not come to them from a fresh reading of the 17th century.

²³² Matthew Hale, *History of the Common Law of England*, pp. 51/2, and *The Prerogatives of the King*, 1976, p. 169

²³³ *Ibid*

a real threat. Burns, and for that matter James Tully, place Locke in the in-between period²³⁴ – but it is not Locke who is in-between, rather it is us seeing Locke as both distant from us and further distanced from the medieval period. In part, the problem issues from the fact that we do not see the extent to which our conceptual problem with the notion of sovereign-state is a continuation of the medieval opposition to any such claim. The perception offered here parts company with the established and current view on Locke, although Parry's work is not altogether unsympathetic to emphasising the ideas and traditions that led to Locke, and upon which Locke drew, such as constitutionalism and his desire to be a constitutionalist, or his opposition to authoritarianism, not to authority etc;²³⁵ that is to say, more than merely 17th century contingent conditions.

At any rate, if the character of a period of transition begs many questions, taking the longer view, one notices an undeniable qualitative difference between “before” and “after” it, and in the case of the Medieval-Modern this difference is reduced to and summarised in the notion of the State. This places a rather heavy premium and burden on this notion. But the State emerged only as fact and practice, unaccompanied by any corresponding explanation. This is not to say that there are no references to it in theoretical discourses of various sorts, but that there is no theory of the State at the dawn of the modern period, or even now. Famously, the preoccupation of thinkers in the medieval period was government, law, duty and obedience, not politics or the state, and the political theory of the Middle Ages is almost by definition bereft of any discussion of this concept. But law, duty and obedience are also terms of discourse of the State, albeit with an entirely different construction and meaning. Indeed, the State as a concept is absent from the range of topics and the literature that J. H. Burns has identified as that of the period of transition.²³⁶ On the other hand, Skinner²³⁷ avers that no such theory was developed in that period, rather that the necessary foundations

²³⁴ J. H. Burns (Ed) *Cambridge History of Medieval Political Thought. Op. cit.* ‘Conclusion’ by Burns, and chapter 21, ‘Locke’ by James Tully.

²³⁵ G. Parry *John Locke*, 1978, especially pp. 153 and 160

²³⁶ J. H. Burns (Ed) *Cambridge History of Medieval Political Thought, op. cit.* and also J. H. Burns and Mark Goldie (Eds) *The Cambridge History of Political Thought*, 1991.

²³⁷ Q. Skinner *The Foundations of Modern Political Thought*, 1978, volume 2

for it were laid and were present at the dawn of the modern era. But that was some centuries ago, and we still do not seem to have a theory of the State. This is not for want of trying, but in examining the literature on the subject, it becomes clear that we have not progressed very far. What tends to stand for the theory of the State turns out to be a re-iteration of the Medieval-Modern distinction, or, possibly, more abstract arguments appealing to distinctly supra-human *quasi*-spiritual if not also semi-religious forces and ideals. Furthermore, the notion of the state that emerges from both historical and theoretical contributions appears to have no direct bearing upon the form of government, in that evidently the abstract notion of the State can take many forms, from liberal democratic to authoritarian or dictatorial. Presumably, since many religious movements have recently laid claim to the objective of creating a state in the service of their religion, the autonomy of the political is no longer a defining feature of its practice either. But, in truth, there is no theory of the State because there is no need for one: from the start, the State has been fact and practice, based upon and embracing the idea of sovereign power. The State is the abstract face of sovereign power in the modern period.

Given this, we must ask: is the Modern really one long undifferentiated and stable period? As a matter of historical fact, there is a rather large difference between the early and later modern periods in that in the first, the predominant view is the descending conception of power, while in the latter this view receives no recognition whatever, and the ascending conception is supreme.²³⁸ Just as we cannot speak of the State as a feature of the medieval period, “democracy” is not a feature of the early Modern period. It is a post-18th century concept that has come to stand for the politically modern, so much so that democratisation and modernisation are now (near) synonyms. Does this mean that the early modern period is also one of transition? Perhaps. At any rate, the shift to democracy is as important as that from the theocratic to the political: but in each case the effect is

²³⁸ The “19th century” is a period of increasing disenchantment. Almost everything is seen differently, and from bottom-up: not only political power and law, but also human reason; nature too is reduced to law of physics and chemistry, and creation is replaced with evolution, and, no less, morality gives way to ethics.

more apparent than real. For, if the ascending theory is not a gloss, nevertheless, in its most important feature – sovereignty – it mimics the descending view. Thus, profoundly important though in practice the idea of State is, and for that reason it should be the *differentia* demarcating the modern from the medieval, in fact that notion masks a significant continuity from the Medieval to our time. In other words, it is not so much that we need a theory of the State, but that we need to examine the notion of sovereignty in terms of the nature and extent of power it implies and sanctions, not just its characteristic historical features.

For current purposes, the important question is not the effect of this distinction upon our understanding heretofore, but about how the British case actually fits into this scheme of things. Thus, given that the State is shorthand for the Medieval-Modern distinction, when can we say a British State appears on the historical scene?²³⁹ If not, what purchase, if any, does the Medieval-Modern periodisation have on the study of the British system? Of course, the short answer is that on balance, and other than in linguistic usage, it has practically none: for the closer we get to the distinction in the British case, the less distinct it becomes. If we ever approached the development of a British State, it was under the early Tudors, when a range of developments and changes appeared that were later identified with the emergence of the State. Yet, it is not really meaningful to speak of the British State even a few decades later: the

²³⁹ The tendency for many in Scotland is to view 1707 as the moment of creation of a British State: clearly creating a union of the two countries made a practical and ideational difference to all Scots, in that Scotland was no more: but one must say the same for England and Wales, in that they too lost a previously separate “England and Wales” identity. Whether this means the creation of a British State is a different question. A positive response to this is necessarily predicated upon the further view that the treaty or Acts of Union actually created a new condition, a new political formation with a “written” constitution, which is not easily sustained. Else it may be argued that 1707 saw the initiation of the British State, because 1688 marked the creation of an English State: this too is not easily defended. Indeed Neil MacCormick, who subscribes to the “written” constitution and new State view, also recognises that this is not the established view, for despite the fact that, at least in terms of legislation, the territorial ambit of each piece of legislation is clearly demarcated, all that has happened since 1707 is not only contained within but also explicable only in terms of the incorporation view of the events of 1707. See his ‘The English Constitution, the British State, and the Scottish Anomaly’ in *Scottish Affairs*, special issue on Understanding Constitutional Change, 1998, pp. 129-145, especially p. 137. The use of the term of “State” in this context is at best a politico-linguistic device, and no more meaning than that ought to be read into it.

governmental régime inherited by the Stuarts was not at all the machinery of a fully-fledged state in the modern sense of that term, but one which invited arguments about the *locus* of sovereign power. It is only in 1688 that, for all practical intents and purposes, this argument is bracketed; even if 1688 is not an obvious departure, the settlement did not mean a new form of government. That being so, we must then agree with the thrust of Keir's rejection of Tudor "New Monarchy" and the 16th century as a new era. On this reading, then, the era within which we ought to examine the continuity of defining ideas for the British system is not demarcated by the dawn of the Modern period, but begins in the medieval period and continues to the present. However, this interpretation is far too crude: arguments below and in *infra* Chapter Four show the complexity of seeking to interpret the Revolution Settlement.

British history periods

The idea that we ought to take a longer historical period and, in a sense, ignore the established Medieval-Modern distinction is altogether paradoxical. Normally English/British history is neatly divided into three segments. Bagehot, subscribing to this view, discusses the rather "well known, three great periods in the English Constitution": ante-Tudor, Tudor to 1688, and from 1688 to his time,²⁴⁰ and characterises each according to its dominant form of government. Although there is room for much argument about the meaning of "ante-Tudor", 1688 was and remains a watershed in a way no other event since has been. This periodisation, at the very heart of the Whig approach to English/British history, has defeated more than one attempt at revision, and has accommodated distinct sub-periods. Thus the argument of, say, J. D. C. Clark about the extended (1688 to 1832) 18th century²⁴¹ and that of Lindsay Paterson about an extended (1789 to 1914) 19th century²⁴² are compatible with the category of "from 1688 to date" as one long period: their historically-focused claims do not affect the internal unity of the

²⁴⁰ Walter Bagehot *The English Constitution*, 1872, pp. 277-285

²⁴¹ J. D. C. Clark *English Society 1688-1832*, 1985. For Seeley, the relevant dates are 1688 to 1815: J Seeley, *The Expansion of England*, 1895, p. 23

²⁴² L. Paterson *The Autonomy of Scotland*, 1994, chapter 2

longer period characterised by the development of parliamentary government. Indeed, Bagehot presaged the possibility of such “internal” sub-divisions in the period since 1688 without questioning the evident unity of the period: in fact, each of his three periods is a collection of shorter episodes.

This scheme of three consecutive periods and supposed unity of the period since 1688, has apparently stood the test of time, in that since Bagehot wrote, and given the manner in which he accounted for the development of the form of government within the third period, no obvious point of break has been identified to warrant adding a further period or otherwise modifying this scheme. In an important sense, in offering an apparently coherent conceptual justification and a theory for the working system, Dicey has helped solidify the theme of the period. The 20th century has been wholly subsumed in the period “since 1688” and has been sub-divided into shorter periods with apparent rude ease. For instance in 1922, we enter a period of “constitutional” tranquillity, the “age of alignment”, the period of the “Steady State”²⁴³ or that of “dual polity”.²⁴⁴ However one may describe it, it ends *circa* 1970, marked by the Redcliffe-Maud and Kilbrandon Commissions created to examine the “constitutional” arrangements of the UK Union and institutions of government, although the relevance of joining the European Common Market must also be taken into account. None of these developments appears to threaten the evident unity of the period since 1688. Furthermore, while parliament in Edinburgh is the only example of an important institutional change since 1707, the devolved system remains consistent with the larger theme of “since 1688”.

Just as the Modern era (whenever it began) seems to end in and with an ever-moving frontier of “the present”, Bagehot’s “from 1688” also seems to have its “to” in our ever-moving contemporary time: the outer frontier of the Modern and “from 1688”, as indeed that of “in legal memory” since 1189, are all truly moveable feasts. In an indirect way, this is demonstrated by the manner in which Bagehot’s

²⁴³ R. Rose *From Steady State to the Fluid State: The Unity of the UK Today*, Strathclyde Paper 26, University of Strathclyde, 1978

²⁴⁴ J. Bulpitt *Territory and Power in the United Kingdom*, 1983, chapter 5

work is treated today; a case in point is Harrison's study,²⁴⁵ while the point is differently exemplified in the importance that Peter Hennessy attaches to Bagehot throughout his work: as a result, Bagehot and, to a lesser extent, Dicey appear as contemporary to us. The absence of historical closure is altogether rather curious.

Roughly since the end of the 19th century (once again beginning in the Arts and penetrating into some theoretical arguments) the idea of a "Postmodern" age has been present. Further changes, especially in the final quarter of the 19th century, destructive of the self-confidence associated with the Modern era and "modernity", further strengthened the thought that a new age has dawned, or is in the offing.²⁴⁶ But, as will be argued below, coincidentally, the age of Bagehot marks the dawn of a new age in British government, which he did not see: there is reason to believe that "from 1688" actually ended with Bagehot, and Dicey.

Such a refinement does not touch the question of how the three "standard" periods are related to one another. Briefly, if these are distinct periods, then we have to ask two questions: first, given that we have not had a historical/chronological break and a new start marked by some supra-political event and sealed in some hallowed document, how has the issue of legitimating the new system in the new era been resolved? Of course, the claim that these are distinct periods has also to be squared with the obvious fact of the continuity of much else besides. On the other hand, and despite the claim of the general irrelevance of the Medieval-Modern distinction, patently, no claim for continuity *tout court* can stand: it is truly meaningless to say that this is the constitution under which Alfred ruled. Yet, this too has to be squared with the fact that there has been no clear and palpable break. A meaningful periodisation scheme must satisfy the requirements of both continuity and that of discontinuity, and provide an account of the relationship between them: is British constitutional theory period specific? One obvious answer is that each period will attract some general explanation relevant to its conditions. But if the discontinuous periods are only segments within a larger condition of continuity, then the explanation of and for

²⁴⁵ B. Harrison *The Transformation of British Politics 1860-1995*, 1996

²⁴⁶ See Noel O'Sullivan 'Political Integration, the Limited State, and the Philosophy of Postmodernism' in *Political Studies* Special Issue The End of "isms"? 41, 1993, pp. 21-42

each period is at best only a variation on a more stable theme. This amounts to the claim that the historical *locus* of theoretical explanation of the British system is the longer period and the larger context of continuity. And the relationship between the two is most succinctly put in the form of two functions: first, the larger explanation provides the connecting link between the periods encompassed within it, enabling discontinuity to be contained and explaining the obvious absence of a fresh start, and, second, it provides the necessary larger arguments without which more focused explanations of the shorter periods will run into theoretical and logical difficulties. Importantly, this larger explanation is not a constitutional – *qua* institutions and power – argument.

Enough has been said to demonstrate that the so-called broad meaning of “constitution” is vacuous, and quite obviously the deductive meaning of the concept of Constitution does not apply here. Instead, the argument has been that the absence of a Constitution is no indication that this system is arbitrary, or beyond apprehension. Patently, this is a long-lasting system characterised by an enviable degree of “adaptive” stability, whereby important change has been accommodated within a larger context of continuity. This continuity, rather than the much-acclaimed “pragmatism” or much reviled idea of “muddling through”, invites attention. Moreover, it has enabled significant changes to be accommodated without obvious turmoil or the need for a fresh start, thereby disguising real discontinuity. We are faced with the difficult question of determining what has continued, what rôle it plays, and how to understand it.

Identifying a duration as a period has an undeclared effect, in that all that is contained in it is necessarily contemporary to everything else in it, and, to that measure, the whole is simply current: a period or an epoch is, in this sense, a limited chunk of timeless time, marked by some significant continuity, else it will lack any unifying character to define it as a period. More importantly, this principle also applies in obverse: to the extent that any idea from the past belongs also in the present, the timeless contemporary period must needs begin, at the least, with the “origin” of that idea.

For example; in part, the resolution of the issues concerning prerogative

powers and the meaning of law in the early 17th century was pivoted on the determination of whether the accession of William was a succession exemplifying the law of the land, or the result of conquest thereby making the king the source of law. The issue was resolved in favour of succession, which meant that the whole of English history and law prior to the Normans (and therefore ideas about “kingship”²⁴⁷ and the supremacy of law), became relevant to the argument about the powers and prerogatives of the King. While some find it difficult to apply this kind of reasoning to 1688, most accept the continuity thesis, even if only implicitly, and argue that 1688 did not incorporate anything new that was not there before.²⁴⁸ Such views underline the continuing relevance of a long span of history and support the idea that the whole of English-to-UK history is contemporary to us. Yet we well know that the political system and the pattern of government in and after 1780s was not what it was in the 16th and 17th centuries, or that what it is today is not what it was *circa* 1867, let alone at a more distant time. But we cannot pinpoint a significant moment of change that shows a clear break: the effects of 1688 could have been different from what contingently emerged in the 18th century, and it is only in retrospect that we can say 1688, Robert Walpole, and the development of the office of the prime minister are closely related: yet the latter is neither implicitly or explicitly in the events, argument, and the settlement of 1688.²⁴⁹ Far from it: had certain “unprecedented measures” which would have kept the king’s ministers out of Parliament (William vetoed the Place Bill in 1694; but its essence was embodied in section 3, Act of Settlement, 12 and 13 W III.

²⁴⁷ This is one case where it is not possible to speak separately of “Queenship”, and this inability cannot be resolved into a sexist perspective. Queenship has its own meaning. See D. Parsons (Ed) *Medieval Queenship*, 1993. A regnant queen would in fact exercise “kingship”: since the Normans, there have been nine queens *regnant* in England

²⁴⁸ The Declaration of Right, though it made nothing law which had not been law before, contained the germ of the law which gave religious freedom to the dissenters ... secured the independence of the Judges,... limited the duration of Parliaments, of the law which placed the liberty of the press under the protection of juries, ...prohibited the slave trade... (etc.) T. B. Macaulay *The History of England from the accession of James the second*, 1849, volume 3, pp. 448-9

²⁴⁹ There can be no greater claim to continuity than to say that this is the constitution of Edward the Confessor, which William also swore to obey. See L. S. Amery, *Thoughts on the Constitution*, 1964, p. 2. A vague version of this idea is, of course, in the background of Bagehot’s distinction between the “dignified” and the “efficient”.

Cap. 2, 1701) not been modified (and amended by the Regency Act, 4 and 5 Anne, Cap. 20, 1706, and the Place Act, 6 Anne, Cap. 41, 1707), the subsequent meanings of 1688 would have been substantially and distinctly different. We may safely speculate that the consequent régime would have more resembled that embodied in the American federal constitution. As it happened, it is possible to find historical episodes – such as the Lancastrian “premature *constitutional* government”,²⁵⁰ or in respect of a different period, the “New Monarchy”²⁵¹ – that in embryo or more – as in the Provisions of Oxford 1258, but especially the Statute of Marlborough, 1267²⁵² – resemble, if not foreshadow, developments since Anne. What caused the “correction” under Anne that, so to say, put the history of English government back on “course”? Similar situations are the result of like forces; but why also like responses centuries apart? Was the true political genius of the English – what Santayana has called the “English” tendency to follow “the easiest way of doing easy things”²⁵³ – at work? Given that history is contingent, the claim that the constitutional history of England-to-UK has developed contingently (upon which most if not all historians agree) may appear as no more than stating the obvious. However, in most cases the forces, at least the provenances of the forces that determine the shape of contingent events are known, such as in the form of principles in a constitution. In the case of the history of England to the UK, there are no such sources at all. It is thus that a couple of pieces of legislation – such as those proposed in 1692-4, or when enacted in a different form had they not been amended by another piece of legislation – would have altered the shape of government in this country, and to that measure set it upon a different historical course. This almost historical nothingness makes the rather stable if not steady progression of ideas, the broad similarity of outcome in evidently different

²⁵⁰ See G. B. Adams *Constitutional History of England*, 1935, chapter 9, especially pp. 216-8

²⁵¹ J. R. Green *A Short History of the English People*, new edition 1888, chapter 6, especially pp. 288-303

²⁵² G. B. Adams *Constitutional History of England*, 1935, pp 149-152, and S.B. Chrimes, *An Introduction to the Administrative History of Medieval England*, 1959, pp. 120-5. Also J. D. G. Davies and F. R. Worts *England in the Middle Ages*, 1928, p. 119, and J. E. A. Jolliffe *The Constitutional History of Medieval England from the English settlement to 1485*, 1947, pp. 299-300.

²⁵³ G. Santayana *Soliloquies in England*, 1922, p. 54

situations and, no less, in very different circumstances, all the more surprising. In a way, this is an invitation to see a great historical ghost, which some find difficult to resist. But the Whig-type teleological perspective also suffers from the defect of denying contingency to historical development. Denying the full-blown Whig-type approach, nevertheless, one has to admit the evident continuities and the associated fact that actual change has been confined to within a rather limited range. For Allott, the historical transformation of “government-from-palace” to “government-from-Parliament” is nothing less than a permanent and unfinished slow-motion revolution.²⁵⁴ On a longer scale, G. B. Adams takes the view that if the Puritan revolution was an attempt to initiate the logical conclusion of the English constitutional movement, it was a revolution before its time. And if in the reaction to it, the work of the revolution was undone, yet

[n]early everything for which the revolution strove is now a part of the English constitution, but not as a result of its endeavour. Rather as a result of slower, more normal process of growth, out of which in a sense the revolution indeed came but which it [the revolution] for a moment interrupted.²⁵⁵

Had the paradoxical (i.e. out of historical character) aspects of the Act of Settlement been retained, the potential for the development of the system based upon the fusion of the executive and legislature (much the singular mark of the British system) would have been absent; on the other hand, the system would have had the potential to develop into one based upon a more strict application of the principles of separation of powers. This may also be said about the 1719 Peerage Bill: had Sunderland succeeded in getting that Bill on the statute book, the relationship between the two Houses would have been different in ways that we can only speculate.²⁵⁶ English/British history is contingent, but this does not make it random and without, at least, a thin linear principle. We are driven, imperceptibly and irresistibly, to the view that in fact the “constitution”, the structure of power, *something*, has not changed, and is substantially what it was

²⁵⁴ P. Allott ‘The Theory of the British Constitution’ in H. Gross and R. Harrison *Jurisprudence: Cambridge Essays*, 1992, p. 192

²⁵⁵ G. B. Adams *Constitutional History of England*, revised edition, 1935, p. 333

²⁵⁶ J. A. R. Marriot *English Political Institutions*, 1925, pp. 153-4

centuries ago.

Quite clearly, this leaves a paradox: there is, as it were, a grand “constitution” that has not changed, but it has legitimated more than one type of government, and when viewed over a long period, these are actually different systems of government. One effect of this paradox has been to stamp a certain character on the study of the British system, such that a concern with the structure of government and its powers is ineluctably an argument about the sustainability of relations implied in this paradox. Therefore, the question as to when a particular practice has fallen into desuetude becomes an issue which, in cases other than where a practice has a clear legal basis, is not possible definitively to determine. Thus, the opponents of the exercise of a given power can only make a historical claim and support their argument with examples from within a period *after* the last example of the use of the power in question. Of course, this amounts to a pseudo-discontinuity thesis, and is a recipe for confusion. For instance, it is claimed that royal negative is no longer available: Dicey plays on a duality, suggesting that it is obsolete in practice but still available in theory,²⁵⁷ that is to say, dead but not yet buried. One must, then, assume that when Alan Beattie says that some “conventions [such as that the Monarch does not veto bills] ... appear to be clear and firmly established”²⁵⁸ he means to dispose of Dicey’s vacillation and bury the long dead.²⁵⁹ But this claim is only based on *the fact* that this power has not been used since 1707, not *why* it has not been used, and is much animated by the view that such a power should no longer be available to the incumbent of a hereditary office in the election-based age of “democracy”: thus, one might say, the contemporary period can only begin sometime after 1707. However, accepting the plausibility of this argument, namely that power not

²⁵⁷ A. V. Dicey *An Introduction to the study of the Law of the Constitution*, 1939, pp. 114-5, especially footnote 2.

²⁵⁸ Alan Beattie ‘Conservatives, Consensus and the Constitution’ in *LSE Quarterly*, 3-2, p.131

²⁵⁹ But the implications of this for the rôle of the Queen as the guardian of legitimacy and the “constitution” are evidently ignored when making such declarations.

used may be deemed lapsed,²⁶⁰ we may say, with Alpheus Todd²⁶¹ that the Commons cannot refuse supply, for it has not done so since 1688; I agree with Bernard Crick when he suggests, tongue-in-cheek, that because no government with a majority has been voted out of office since 1886, it is now *unconstitutional* for members to defeat their own Party in Parliament;²⁶² or ask Vernon Bogdanor, who declares the Commons to be an electoral college, whether that power, which has not been exercised since 1867 has, in fact, lapsed.²⁶³ It is sobering to recall Blackburn's account of how the hopeful expectation that the power to create new hereditary titles had lapsed²⁶⁴ was simply dashed by the stroke of a pen in the hand of the Prime Minister in 1983. Of course, we are better advised to prefer Balfour's view that a judgement about the availability of a given power can only be made in the light of the nature of the power in question and circumstances of its use. Thus, if a given power is to be used rarely, then the rarity of that use, even its absence for long, does not amount to its nullity.²⁶⁵ On this view, a period begins with the last major change, and ends with another. Hence, in this example, 1707 only marks the latest use of royal negative,²⁶⁶ and does not initiate a period in which royal negative is not allowed: George III was prepared to use it,²⁶⁷ and Disraeli felt it was still available as a safeguard against an "unconstitutional ministry and a corrupt Parliament".²⁶⁸ However, the veto *qua* royal negative is not used, for in the form of a veto it does not need to be used, but as a matter of form

²⁶⁰ Dicey thought that George III's attempt to influence the House of Lords to defeat a piece of legislation meant that royal negative was already obsolete in 1783. A. V. Dicey *An Introduction to the study of the Law of the Constitution*, 1939, p. 114, footnote 2.

²⁶¹ A. Todd *Parliamentary Government in England*, 1892, p. 4

²⁶² Bernard Crick *The Reform of Parliament*, 1968, p. 17, footnote 2

²⁶³ V. Bogdanor *Politics and the Constitution*, 1996, p. 6. But in his *The Monarchy and the Constitution*, 1995, p. 27, he contradicts this, suggesting the electorate has something to say on the subject.

²⁶⁴ R. Blackburn 'House of Lords Reform' in *Public Law*, Summer 1988, pp. 187-8.

²⁶⁵ A. J. Balfour 'Memorandum on the Constitution Question', typescript in *Balfour Papers*, British Library Manuscripts 49869, Folios 123-132, folio 124.

²⁶⁶ Charles II used it twice; James II not at all; William used it five times, and Anne only once. R. Lockyer *Tudor and Stuart Britain 1471-1714*, 1964, p. 370. The Hanoverians (*etc. cum* the House of Windsor) have never used it.

²⁶⁷ T.P. Taswell-Langmead, *English Constitutional History from the Teutonic conquest to the present time*, tenth edition by T.F.T. Plucknett, 1946, p. 717.

²⁶⁸ W. I. Jennings *Cabinet Government*, 1959, p. 375. However, Jennings dismisses this: Disraeli had no experience of office and little experience of Parliament.

and legislative powers of the Crown, constitutive of Crown-in-Parliament, it has not been modified, replaced or removed, only bracketed. The non-use of royal negative is both symptomatic of, and represents, a rather basic change in the working system, but one that the ordinary discourse of royal negative does not normally address. Ever since the rise of parliament as an established element in the system of government, the management of Parliament has been a major issue. When William III used the veto five times in a rather short reign, it was because he was the chief executive faced with a difficult Commons, while the latter relied upon its power of impeachment as its “weapon”.²⁶⁹ For entirely contingent reasons, the process and meaning of managing the Commons changed under the first two Georges, such that by the time of George III, it was no longer necessary to exercise any veto. If the process of managing the Commons did not recall the “New Monarchy”, it certainly did not resemble that of William III. If the will of the sovereign was still an important political element under George III, by the middle of the next century it had lost its practical significance. The location of the ministry in and responsible to Parliament, both dependent upon the electoral process, changed the rôle and position of the sovereign such that one could now only speak of the veto as a measure of last resort. Thus in the 1912-1914 debates about the veto,²⁷⁰ dismissal of the government or dissolution of parliament was no longer a matter of determining or influencing policy, but safeguarding the system, so to say, the constitution. But this also means that as a special power, it is to be used rarely: we can echo the sentiment of Burke to the effect that this undoubted power (a means of saving the constitution) should be kept in repose to be used on a worthy occasion.²⁷¹ The veto used by Anne in 1707 no longer exists, but royal assent and royal negative as part of the powers of the Crown have not changed. What has changed is the working system of government. Hence the fact that we tend to get two different answers to the question of royal assent. As a matter of course, assent is not withheld, for as a

²⁶⁹ J. R. Green *A Short History of the English People*, new edition, 1888, p. 697

²⁷⁰ See I. W. Jennings *Cabinet Government*, pp. 395-400, especially p. 400, and also Appendix III on ‘The Prerogative of Dissolution’.

²⁷¹ *Ibid*, p. 545

matter of fact in relation to legislation related to policy it is used on advice.

Since the time of Queen Anne no English king or queen has ever refused assent to a Bill. For, under modern constitutional rule, the king must, in matters such as this, act in accordance with the advice of his ministers, and his ministers can manage to prevent any Bills which, in their opinion, ought not to become law from reaching the stage at which his assent is required.²⁷²

For Ilbert and Carr, “matters such as this” means all Bills that have gone through their stages in Parliament. But this leaves the question of whether, and under what circumstances, royal negative may be used against or without advice, simply wide-open. This wider question can only be tackled in the appropriate wider context of the guardianship of the system: long ago Parliament was the guardian of the “constitution”; now it is the sovereign (latterly, the House of Peers) who keeps an eye on the commons so that they should not destroy the system. Is royal assent defunct? Hood Phillips was quite emphatic about it in 1962: “... the exercise of this prerogative today would be unconstitutional”; but this passage is modified in the 1987 edition of the book to read: “If the Queen were to refuse her assent, which would now be unconstitutional...”²⁷³ she would use words to mean that she will think about it. Is royal negative defunct, or is it the case that the manner of its use and expected effects – causing a crisis – are now different?

On the face of it, which argument supported by which historical “evidence” one prefers and believes (for often it amounts to preference and belief, in a political sense)²⁷⁴ seems to depend on the periodisation scheme one prefers and is prepared to support. But this is an incomplete if not a rather misleading view to take. Examining the issue less passionately – with less *politics* – it is easy to see

²⁷² C. Ilbert and C. Carr *Parliament*, 1953, p. 58

²⁷³ Respectively in O. Hood Phillips *Constitutional and Administrative Law*, third edition, 1962, p. 105, and O. Hood Phillips and P. Jackson, *O. Hood Phillips' Constitutional and Administrative Law*, seventh edition, 1987, pp. 135-6.

²⁷⁴ A good example is that of Neil MacCormick, who would rather see conquest as the origin and foundation of the English monarchy and, therefore, law of conquest and the powers of the king as the source of law in England, and, on the other hand, see the Union with England in terms of the creation of a new British State with a written constitution, and so forth. ‘The English Constitution, the British State, and the Scottish Anomaly’ in *Scottish Affairs*, special issue on Understanding Constitutional Change, 1998, pp 129-145

that the key to an answer is in the confusion of the perception: we have historically conflated, if not confused, “constitution” with “government”. While Britain has never had a constitutional system, there has always been an understanding of the structure of power, with arguments about its nature and corresponding legitimating concepts, and a dependent administration. But these elements have not been properly separated: in Britain, it is said, we think so far as necessary and no further.²⁷⁵ The result is a conflation, much aggravated by the irresponsibly loose use of the word “constitution”. What is more, the fact of this conflation has also not been recognised, but is present in, say, Leo Amery’s discussion of the point.²⁷⁶ Quoting Hearn to the effect that this is the constitution under which the Confessor ruled, he suggests that “it” – the “constitution” – has been subject to “incessant modification” since. Yet the “constitution” has remained apparently the same. What has changed is, of course, the structure of government: over the centuries, a system of government has been grafted onto the British structure of power and has changed its practices from time to time, but we refuse to accept the fact, or face its consequences. When we become clear about this conflation, and focus sharply upon the differences between the two,²⁷⁷ we also see that most, if not all, schemes to periodise British history actually relate to government, and to inter-institutional relations, not to the structure of power. One wonders to what extent this conflation is responsible for the view that there is a “great ghost” somewhere behind the structure of government, or that

²⁷⁵ P. Allott ‘Crisis of European Constitutionalism: Reflections on the Revolution in Europe’ in *Common Market Law Review*, 34, [1997], p. 447. Similarly, “legal ideas never reach very far beyond practical needs”, F. W. Maitland, quoted in F. H. Hinsley *Sovereignty*, Watts, 1966, p. 170

²⁷⁶ L. S. Amery *Thoughts on the Constitution*, *op. cit.* p. 2. A more recent, and in some ways better, example of this conflation is that of F. F. Ridley ‘What happened to the constitution under Mrs. Thatcher?’ in B. Jones and L. Robins *Two Decades in British Politics*, 1992, pp. 111-128.

²⁷⁷ On this, Burke and Bolingbroke probably agreed: see H. C. Mansfield Jr. *Statesmanship and Party Government*, 1965, pp. 160-3. It is important to make this distinction, a point well-made by Tom Paine: “a Constitution is not the act of a Government, but of a people constituting a Government;...” in *The Selected Works of Tom Paine*, 1948, p. 208. On the other hand, one wonders what to make of the claim that “political constitutions are not structures *outside* politics and action ...” J. Dearlove ‘Bringing the Constitution Back In: Political Science and the State’ in *Political Studies* 37/4, p. 539

this is a historic or evolving constitution.²⁷⁸ Indeed, this conflation may also be responsible for the assumption that this system of government implies a constitution, which notion has enticed some to produce an account of it, criticise it and suggest reform, ignoring good advice to the contrary from Burke to J. J. Park, and beyond. In a sense, though not exactly, this resembles the claim that in characteristic Whig historiography, we have tended to employ a constitutional approach to the past. Consequently, we have a distorted interpretation of British history.²⁷⁹ John Seeley's corrective,²⁸⁰ focusing on the State, can only work if the verity of the idea of the State is simply assumed, but this means assuming far more than can be readily justified.

When we make the significant conceptual move of accepting that, first, there is no constitution; second, that the structure of power is to be distinguished from the structure and form of government; third, that, oddly, in the British system, it is the latter that disguises the reality of the former; and, finally, that the relationship between continuity and discontinuity in the English-to-UK history is an extended inter-play, not a binary zero-sum game, we see that the structure of legitimate power has actually not changed at all, while the form of government – the *modus operandi* – has changed at least three times since the 13th century. This harks back to the concern with the lamentable neglect of constitutional theory, argues for the primacy of constitutional thought, and invites a re-reading of history.

A revisionist perspective

Mindful of many difficulties, it was necessary to survey the long span of post-Roman²⁸¹ English-to-UK history, constantly bearing in mind an understanding of what the system is supposed to be like today, in order to identify, in a broad

²⁷⁸ This can only make sense as “constitution of ...”; that is to say, the institutional form and relationships that together constitute it.

²⁷⁹ P. B. M. Blass *Continuity and Anachronism. Op. cit.* p. 35.

²⁸⁰ Sir John Seeley *The Expansion of England*, 1895, chapter 1, especially pp. 7-8.

²⁸¹ Symbolically, from the departure of the Romans and the collapse of Roman rule in “England”. One is aware of the absence of such a clear-cut and final break such that each followed a different and separate historical trajectory (see L & J Laing *Celtic Britain and Ireland*, 1990), but it makes analytical sense to chose a starting date. Thus “post-Roman” is used to symbolise such a beginning.

sense, the similarities over time between a series of “then” and “now” positions. These were examined with a view to determining the extent to which the appearance of the system matched or hid reality of power, and how much of that reality survives in current practice. Furthermore, this re-reading of history was accompanied by closely re-reading the theoretical material, giving rise to nuances of critical insight into the treatment of the subject heretofore. More than that, because the span of this review encompassed the whole of the post-Roman era, it was also possible to see not only the historical origins and meanings of institutions that are generally treated as essentially timeless, but also to observe two rather peculiar tendencies. One is that certain words have become fossilised, such that any change in the concept each expresses is disguised behind a façade of sameness. Second, this notion also applies to institutional forms, at times even to inter-institutional relationships. The combined effect of these two tendencies reveals the extent to which the historical appearance of the system has been its permanent *persona*. This appearance reflects the continuity of sovereign power over a long period within which the form of government, that is to say, the manner in which governmental power is used has changed some three times.

The upshot of this reconsideration is not some modification to the threefold scheme of periodisation, but a necessary change from sequential segments to concurrent streams as a means of organising and presenting the historical material. One consequence is that continuity and change are easily accommodated and their relationship explained: periods now take on a different significance. The scheme offered below is nothing more than a way of presenting the argument: such a scheme is not prior, or in any sense introductory, to the analysis, but an important though in itself incidental conclusion.

We may think of three “ages” of British government. The first starts at the beginning of the 13th century and ends in the late 17th century; the second has a kind of pre-history in late 14th century but actually comes into its own in the late 17th century, only to be displaced by a silent revolution in the late 19th century. The third, initiated by this silent revolution, also has a long pre-history from the 15th century and an extended gestation in the 19th century, and comes into its

own only in the last quarter of that century. Broadly, these “ages” may be understood, respectively, as that of the struggle for constitutionalism in England; of the formalisation of the *locus* of sovereign power presented as a *modus vivendi*, calling forth a necessarily new *modus operandi* (that strangely recalls some pre-15th century ideas); and of the effective but far from apparent subversion of the 17th century *modus vivendi*, when the 19th century modification to the *modus operandi* is elevated into a bogus settlement. Significantly, the essence of this settlement serves to undermine the very possibility of constitutionalism, but disguises the fact under an almost impenetrable façade so effective that the disparity between reality and appearance becomes almost impossible to demonstrate. Importantly, each “age” is only the dominant “phase” of its *stratum*; the idea of a later period is present in the preceding epoch, and when it becomes dominant is laid upon the idea of the previous epoch without altogether displacing it. This slowly-shifting stratification theatrically pretending to the embodiment of real change in the structure of power²⁸² yields an intriguingly different story upon interrogation. Incidentally, this manner of periodising gives expression to the first element of English particularism: it is not meaningful to divide this history into neat periods with clear beginnings and ends. Rather, we can only identify streams of time which run concurrently, and only to the measure that the idea of one becomes predominant is it possible to speak of a new period. But the reality of such a “transition” is enormously confused and obfuscated by the fact that the dominant idea of a previous age does not thus disappear, but is, so to say, pensioned off and elevated to an evidently timeless, honorific – though not wholly sinecure – position in the working system of the subsequent age.

Seen this way, there is no paradox at all. On this view, government and its actual structure are in fact derivative, and reflect the dominant idea of the age. But we are faced with a history that we cannot sequentially segment, even at the point of most obvious discontinuity. However, this is far from a problem: in fact, it

²⁸² This layering effect goes a long way in explaining the questions that rather perplexed Dicey, as to why certain features of this system are incapable of clear description. In the event, although he raised the point rhetorically, his answer has become a well-established nostrum. See A. V. Dicey *An Introduction to the study of the Law of the Constitution*, 1939, pp. 355-7. From the perspective of this study, his answer falls short of an explanation.

is the solution, specifically because it requires a prolonged historical dimension combined with a critical approach to cherished concepts. In a sense, it also invites a large dose of silence from historians disposed to generalise from short historical or contemporary history episodes, for they cannot realise how darkly they see the system of government when they look at it through the filter of the contingency of the politics in a short period.

The burden of the argument is that in disposing of a period-specific idea of British “constitution”, even as a generic term, we are liberated from an oppressive, irrelevant language, and are thus empowered to engage a different language of discourse that will better enable us to examine the structure of power in this country, and its relationship with the structure of government at any one time. More than that, looking at matters in this way, we also see a different meaning in the themes of continuity and discontinuity, whereby we can see in the second millennium three dominant phases: from the 13th century to 1688, then to 1867, and 1867 to the present. For some time, the tendency has been to describe the last period as one of the “Executive dominance of the legislature”²⁸³ without also distinguishing it as a separate period. However, as argued in *infra* chapters 4 and 5, it is actually rather more than that.

Grand schemes, such the Medieval-Modern divide even when softened by the interposition of a long period of transition, or periods in the manner of Bagehot and others, make rather little difference to the study of the British system. Far from segmented, English-to-UK historical time is actually stratified, but within the context of a larger continuity that contains all the *strata* all the time. These *strata* run through points of serious discontinuity where one idea from one *stratum* displaces the dominance of another, thereby both changing the dominant idea of the age and, under the guise of evident change, disguising the fact that nothing fundamental has changed: devolution in 1997 is a perfect case in point.

²⁸³ This idea was not new even in 1867: see ‘Cobbet’s Political Register’ in *Edinburgh Review*, volume 10, No. XX, July 1807, p. 419

Chapter Three: The foundations of the British System

Continuity and Change

It is a characteristic of this system that we can never speak of “restoring” it to any *status quo ante*. One can say this despite the fact of 1660, the Restoration, and, no less, the effects of the Recissory Act 1660 in Scotland that restored it and its relation with England to that of 1633. Indeed, the very meaning of the Restoration of 1660 is at issue here: but as was said in the preceding chapter, there is hardly any significant difference between the conceptions of power during the *Interregnum* and that before and after it: all the while descending power was exercised, and that was that, whereas the immediate question was who exercised that power and who had what control over its exercise. It is in this sense that we can readily claim that with us *status quo ante* is not an option. Indeed, for Leo Amery²⁸⁴ the situation is altogether simple: quoting Hearn²⁸⁵, Amery avers that the British system is truly “the very constitution under which the Confessor ruled and William swore to obey” but it has been subject to incessant modification in order to meet the changing circumstances. Therefore, it is different from one generation to the next, but not wholly alien to it. The problem is that Amery, among many others, failed to distinguish between the continuing historical system – for some the constitution – and the actual form of the system of government at any one time. However, the allusion to the historical constitution – which is oddly reminiscent of Burke, but he had a clearer idea of the distinction between the “antient” or “Gothic” constitution and the actual form of government at the time – serves to raise many more problems than it can solve. The conflation persists, and government and constitution implicitly become one and the same.

Hale offers the very crowning glory, so to say, of the continuity thesis. For Hale, the British constitution exemplifies the metaphor of the Ship of the Argo; it is the Argo when it leaves the port, as it is when it returns, but along the way every part in it has been replaced, though not all at once. This is a powerful metaphor. For Hale, there was no invasion and since succession can be natural or regulated

²⁸⁴ L. S. Amery *Thoughts on the Constitution*, second edition, 1964, p. 2

²⁸⁵ W. E. Hearn *The government of England*, 1867, second edition, 1887

by statute law, then there can be no usurpation if the disputed succession is retrospectively legitimated. What continues – the ship – is the overall political framework of lawmaking, which also binds the king. For Hale, given the formal continuity of the English system, there is continuity and that is that;²⁸⁶ indeed for Hale, the essence that continues is nothing other than the law-making rules. Continuity, including a good few “turning points” and “corrections”, stands out as the only possible category in British history because there is no clear re-starting point. Indeed the arguments above, especially with reference to the revisionist perspective of stratified rather than sequential periodisation, tend to underline the importance of the continuity thesis. But this also means that we must focus upon continuity as a significant concept in the study of the British system rather than take it at face value in the description of the system. Indeed, we ought to take extra care in the way we use this concept in that an appeal to a historical perspective is often taken to invest the system with a clear sense of legitimacy.

The fact that much in and about this system is old naturally invites obvious and exaggerated claims about its historical nature, may even lead to such patently absurd ideas as the claim that this is the constitution under which Alfred ruled, inviting vague references to the fuzzy, intellectually stupefying notion of a “historic” constitution. Such claims are hardly contributions to an explanation, and have even less to say on what it is that has continued and what rôle continuity plays in this scheme of things. More than that, often, such an appeal to continuity has the *quasi*-religious air of desperation about it, where the unfathomable is invoked to make sense of the evidently incomprehensible: one wonders if those who couch their explanations in these terms have not long since given up the attempt.

However, thus identifying the hazards of taking continuity as the supreme characteristic of this system of government ought not to mar and detract from the further fact that continuity is a supremely important feature and central concept in British government: in this study it is invoked as part of a controlled attempt to identify and focus upon the most enduring features of the system that have had a

²⁸⁶ M. Hale *History of the Common Law of England* and *The Prerogative of the King*, with introduction by C. M. Gray, Seldon Series, 1976

demonstrably determining impact upon it.

There are a number of rather obvious categories that define points of discontinuity in the continuous span of post-Roman English to UK history. One may periodise in terms of, say, changes in political geography: one may focus upon the development of Anglo-Saxon Heptarchy; or tell the broader story of change in political geography whereby it becomes possible to speak of the “King of the English” and trace the transmutation of this into the idea of the “King of England”, in other words, to trace the story of “unification” of England, or, better, “the making of England”. On the other hand, the Norman succession/invasion has for long been a good candidate for a new historical period which must end with the effective withdrawal from the continent, initiating an important new period characterised by the fact that English power (and sovereignty) is confined to the British Isles. Exactly what this change signified for English/British history is hard to imagine: certainly it precluded the possibility of a continental-type empire for England/Britain, and to that measure, one may reasonably argue, contingently determined the historical character of the British empire *overseas*. To what extent this is also a story of an English empire confined to geographic British Isles is a different question.

It is probably equally interesting to highlight points of discontinuity in terms of the fate of the “five” nations in what becomes the United Kingdom: here the focus has to be on the central and dominating position of England, while the story-line will be punctuated by such events as the incorporation of Wales, changes in the nature of control over Ireland, co-operation and conflict and, later, Union with Scotland, union with Ireland, later the fragmentation of the UK Union, and now also the era of “devolved politics” – as some are keen to use that odd euphemism – possibly leading to the dissolution of the United Kingdom Union.²⁸⁷ As to the fifth nation: the story of Cornwall is only just beginning to be told. These are

²⁸⁷ We are so used to the idea that the UK is actually a unitary state that we tend not to think seriously about the meaning of “United” in this union. But questions remain: we certainly cannot easily and without injury to concepts and facts of the case think of the historical development of the United Kingdom as a transformed *quasi*-continental-type empire, or depict it in terms of colonialism. But we can and ought to think of it as falling within the larger conception of Dominion status and concept, against the background of the Empire in a somewhat loose sense. For aspects of this, see *infra* Chapter Six, sections 1 and 2.

convenient and important points of change, marking discontinuity of one sort or another, but precisely what significant purpose periodising on the basis of such ideas may serve – other than to enable the narrative history of its nations to be written – is not at all clear.

Difficult though it is because English/British history is written as stories of periods, in reading it as a story without periods and a purposefully undifferentiated “history” of England to the UK, one becomes aware of the extent to which British institutions – the Monarchy, the Privy Council, the Judiciary and the jury system, parliament, local government, representation and an associated electoral system – are truly enduring features. No established practice or institution has ever been discarded: the relatively short duration of the office of the Justiciar is probably the only good counter-example: it was a sufficiently important office in 1285 for some barons to claim that the Justiciar should be appointed annually subject to their approval. But this office disappears under Edward I, and that is that.²⁸⁸ The outstanding element of the system of government as of later 19th century, namely the office of prime minister is missing from this list of long-lived institutions for the good reason that it does not qualify as a historical and long-standing feature. It is a category mistake to trace this office back to that of the Lord Chancellor and beyond to that of the Justiciar. Indeed, the office of the prime minister is, in sharp contrast to the longevity of the other institutions, an exceptionally recent, so to say, upstart institution: the development of His/Her Majesty’s *political executive* embraces the “innovation” of the distinction between the Crown as the *Head of “State”* as well as the “nominal” supreme executive, on the one hand, and the office of the prime minister as the head of *government of the day*, on the other. On this basis it is not even meaningful to see the origins of this office in late 16th century developments, although a historical line can be traced from the Elizabethan method of managing parliament to early 18th century office of the prime minister. Thus, so far as the *modern* office of the prime minister is concerned, it is not at all outrageous to describe the change and its development as a modification of the executive office

²⁸⁸ See T. P. Taswell-Langmead *English Constitutional History from the Teutonic conquest to the present time*, tenth edition by T.F.T. Plucknett, 1946, pp. 106-7.

of the king/queen, rather than an innovation as such: the true innovation is to be found in the *nominal* rather than actual office of the head of government. At any rate, in this list the Monarchy, arguably one of the oldest in Europe, is the longest surviving English to UK institution: if one can accept the many detours along the way, it is possible to see a connection between the House of Windsor and the West Saxon kings, and, thus, trace the institution of a single monarchy for and in England back to Alfred (849-901). This surely points to an obvious and, indeed, also remarkable continuity, worthy of attention: no other current institution (although one can make a case for the “Church in England-cum-the Church of England” as possibly an older institution) goes back that far, and none demonstrates more clearly the fact that, despite all else, there has been no utter break in the system of government necessitating a re-constitution, but there have been many “jerky” re-starts in making “it” work.²⁸⁹ But longevity, no matter how obvious, does not mean much in itself: claims to historical antecedence can have theoretical import if historical antecedence as a legitimating process and factor is conceptually established, or, in the least, is a clear conceptual possibility. Yet “longevity” and “precedent” have played important parts in legitimating change and enabling innovation in the British system, even if at times the game has assumed a bizarre character: it was because of the historical nature of the system that conflict over it in the 17th century took a historical form; thus the claimed legitimacy of the powers of the king, based upon its historical priority, became a major theoretical issue in the 17th century conflict, calling forth a counter-claim of at least an equal magnitude, hence the invention of “immemorial” privileges of parliament. However, the clear longevity of the Monarchy has only a symbolic and symptomatic importance for purposes of this study:²⁹⁰ although it is the most enduring single feature and oldest surviving institution in this system of government, as a matter of fact, its later and current importance is only in a

²⁸⁹ For one historian, the last real discontinuity was the Norman invasion: subsequent revolutions merely clear obstacles on the development of the constitution but do not change its direction; hence growth is generally uninterrupted. G. B. Adams *The Origins of the English Constitution*, 1920, pp. 43-4.

²⁹⁰ One problem is that we cannot account for certain features, especially “kingship”, no matter how far back in English history we delve, but must seek it in received tradition, the meaning of which is to be sought in anthropology and legend.

“manner and form” sense. The historical nature of the conflict in the 17th century is clearly demonstrated in the Convention parliament of 1688: the resolution of the question “can the throne be vacant” revolved upon whether the roll of parliament for the year 1399 was still valid or not.²⁹¹ In this study our quest is directed at continuity of substance, from which perspective the longest period of continuity may or may not coincide with that of the history of English monarchy: substance is not a matter of historical periods.

In terms of significant substantive change, we must divide an undifferentiated post-Roman period into two on the basis of the emergence and the practical importance of the claim to self-dependent sovereign power in a largely unified and centralised England. This distinctly qualitative and conditioned change occurred some time between the 13th and the end of the 15th centuries: by the 16th century it was already fact, but had not yet been re-cast into a settled *system of government*. This raises doubts about the wisdom of considering the early Tudor period as a historical watershed, associated with an imagined *different* character for the “Tudor to 1688” period: in a sense to so periodise is to assign to this departure an artificially distinct beginning, which it simply does not have.

The king’s initial claim to greater powers over his men – not over the nation, nor yet amounting to a claim to self-dependent sovereignty – was contested as it was made. While historically true, this statement of the case is also misleading: in an important sense, the claim was itself a reaction and a response to the feudal assertion of limit to, and control of, the pre-sovereign but substantively greater powers of the feudal king. In response the king delved into “kingship” and claimed further and necessarily intrinsic powers: the escalation in the scale of claims and counter-claims was an inevitable part of attempts to steady this unstable balance. In other words, the longest-lasting qualitatively distinct period of *sovereign* England to UK history begins with the *negation* of claims to kingly power, and the *assertion* of limit to the undoubted powers of the king. But because in this period the king is, for all practical intents and purposes, the government, arguments

²⁹¹ T. B. Macaulay *The History of England from the accession of James the second*, 1849, volume 3, p. 434

about sovereign power are also arguments about the form and structure of government. But this conflation leaves a rather sad legacy in that there are no arguments about the meaningfulness of sovereign power and claims to it: that point is implicitly bracketed in favour of the more urgent question of who should have it and how may its use be controlled. This sad fact results in and is reflected in the elevation of the idea of sovereign power to the status of fact, while the focus shifts to the claim that this fact does not translate into personal government of the king: all of this is, subsequently, formalised in 1688. That is to say, claims to sovereign power and attempts at its control (i.e. constitutionalism) are historical twins in the British case: they are the *Janus* face of one idea and the inseparable features of the same historical period; for this reason, if no other, it is necessary to treat the two in a related manner – hence the substantive overlap between the next two sections in this chapter. But a further, logical feature of this legacy must be noted: given that the Settlement of 1688 produced Constitutional, i.e. Limited, Monarchy, while the king still was the government we are bound to accept that because the powers of the prime minister are the executive powers of the king, and remain defined only to that degree and in that form, then the translation of the undefined powers of the king to the office of the prime minister must, in fact, also mean investing that office with the necessary *right to exercise* the relevant parts of executive power of the king. What is thus transformed is the largest chunk of the prerogative powers of the king, but we do not speak of the prerogative powers of the prime minister. As a result, other than “constitutional” functions, the king/queen *regnant* can only exercise *residual* prerogative powers. This has important ramifications for the structure of power although this point is often seen as an argument about the powers of the prime minister, often focusing on his place and rôle in the party, and power over the cabinet and ministers. However, the background importance of this argument in the development of the Neo-Tudor style of government is clear.

It may well be that this fortuitous twin in the history of English politics and government was instrumental in forestalling (strict and formal) absolutism in

England.²⁹² At any rate, the ultimate resolution of this challenge (constitutionalism v sovereignty) in Revolution Settlement also formalised the by then historically indubitable independence of this country and located its undoubted “sovereignty” within an inter-institutional setting, giving rise to a conceptually impossible *modus vivendi*.²⁹³ This is broadly the story of the first stratified period.²⁹⁴ The second stratified period begins thus, but it takes a while for its character to emerge and to become established. However, this too, comes to a sticky end in the second revolution, whereby the improbable 17th century settlement is wholly subverted. It is important to bear in mind that this subversion is consequential upon and associated with the development of the office of the prime minister, and for that reason we must keep constantly in mind the substance of the remarks made earlier postulating significant similarities between the office of the sovereign king *qua* the executive and that of the prime minister *qua* the head of the government.

This leaves a rather interesting situation. Given that the object of the exercise is to understand the British system, rather than engage in “safe politics” (which is the wont of partisan academics) we must interrogate an undifferentiated English history from the perspective of continuity: this raises and answers some intriguing questions. Over against this, we shall have to examine a large chunk of English-to-UK history from the perspective of government form and structure, where we can identify periods of discontinuity. In the first, ending in 1688, the undoubted executive and legislative powers of the king are constantly under challenge with a view to their control and limitation; the failure to create a stable balance gives rise

²⁹² The historical relationship between the presence of a powerful military machine at the command of the king and absolutism is rather obvious, and its absence in England somewhat conspicuous. See L. Stone (Ed) *An Imperial State at War*, 1994, ‘Introduction’, p. 18. More than that, the absence of the conjunction of war and state-building in England must place a question mark against any theory of the state that predicates the development of the state upon war, such as that of Charles Tilly (see C. Tilly (Ed) *The Formation of National States in Western Europe*, 1975; and his *Coercion, Capital, and European States*, 1990). But theorists have tended to ignore such local difficulties as English/British exceptionalism, or have sought to “accommodate” British developments in the later stages of the development of European polity, such as G. Poggi *The Development of the Modern European State*, 1978, and his *The State. Its Nature, Development and Prospects*, 1990.

²⁹³ R.W.K. Hinton ‘English Constitution Theories from Sir John Fortescue to Sir John Eliot’ in *The English Historical Review*, LXXV, number 296, July 1960, p. 424

²⁹⁴ On stratified periods see *supra* chapter 2, ‘A revisionist perspective’

to the dominant idea of the next age presented and understood in the form of a shift in the *locus* of ultimate supremacy, and its focal re-location within an inter-institutional setting, described as “the King/Queen *regnant*-in-Parliament”, with a strong bias to parliament. We then move, imperceptibly, to the increasingly symbolic presence of King/Queen *regnant* within a potentially powerful parliamentary framework now *containing* the executive. But the victor is soon vanquished: symbolically from 1867 – initiating the next stratified period – the controlling institution becomes a controlled institution, and we are back to the Tudors, the only settled part of the pre-1688 situation, though this time with a vengeance. The true nature of this momentous shift – a move back to the future – is normally not recognised, mostly because of the muddling influence of Bagehot, and Dicey’s simplistic re-description. Much as 1688 can be described as a focal but inert re-location of sovereign power into the inter-institutional framework of the Crown-in-Parliament, Dicey fancied that by his time ultimate power was analysed into discrete parts, each functionally assigned to a separate institution, with the result that ultimate power – the combination of the two – was now located in the inter-institutional framework of elections and a politically populated Commons (though Dicey did not use these words to explain his understanding). However, this apparently satisfying explanation masks significant differences between 1688 and 1867, and hides the reality of the system after the second revolution, which Dicey – and for that matter Bagehot too – could not see: an actual problem or at least a powerful perception of a potential problem is prerequisite for problematisation of an idea; it is no criticism of Bagehot or Dicey that they did not anticipate the true incidence of change at the time under way.²⁹⁵ But importantly this indicates caution in the way we approach and understand such analysts and apply their arguments to an examination of the period since: in this sense, Bagehot and Dicey are part of the problem rather than of the solution.

²⁹⁵ As a rule, problematisation follows an actual or at least the expectation of a possible problem. See Karl Mannheim *Ideology and Utopia*, 1968, p. 135.

Historical obstinacy

We may symbolically date the first stratified period from 1215: this is a good enough historical peg on which ultimately to hang the “constitutionalism v sovereignty” inter-play and dichotomy that eventuates into the undoubted establishment of the strong idea of institutional sovereignty as a historical mainstay. 1215 is symbolically important in that it marks a change in tone, although not the start of a new period; other dates – such as 1399 or 1485 that, for example, Allott considers as “re-constitutional” points²⁹⁶ – may serve as well but in a somewhat lesser sense. This broad ambiguity is indicative: it serves to underline the fact that there are no points of clear break marked by a fresh start in English-to-UK history. An actual historical point of change from what was distinctly the case before 1215 in contrast to what was definitely the case after the Act of Supremacy, 1535 (even though it took a while to settle down into a fixed pattern), cannot be pinpointed; rather it is a transformation that takes place over a long period in which the new has broken in, or is at the point of doing so, while the old is not yet dead. Such a condition, so to say, of transition, is always marked by many false starts. And the change, when it comes, is only recognised in retrospect: there is no “big bang”, and the Act of Supremacy is the *result*, and an *index*, of the change. On the other hand, this ambiguity is also revealing: the Act of Supremacy was not prompted by governmental and political, so to say, national considerations, or arguments about the extent and the nature of power of the King as opposed to that of the Pontiff in Rome, but over the practicality of matrimonial issues with implications for the succession; one might say it had dynastic-cum-state implications. In effect, that Act really only formalised, and in that sense actually finalised, an already existing arrangement: this formalisation, not the fact of power and authority that it so formalised, was the cause of much strife. Thus, if we take a *vignette* of the nature of power of the king before 1215 and that after 1553, we shall have no difficulty in recognising the scale of the difference not only in fact, but in the idea of the nature of that power.²⁹⁷ This

²⁹⁶ P. Allott ‘The Courts and Parliament: Who Whom?’ in *Cambridge Law Journal*, 38/1, 1979, p. 89.

²⁹⁷ Differences in fact may more readily be explained in terms of changing circumstances

amounts to an epochal but very slow-fused revolution:²⁹⁸ by 1553, it was possible to claim that sovereign power inhered in the Crown in a way that is simply not possible in 1485 or 1399, let alone 1215.

One may reasonably argue that a period that spans five centuries is simply unmanageable, and is far too long to have a distinct character. Indeed, from a historiographical perspective, *the* history of such a period can simply not be written. But because the perspective of this study is not constitutional or any other type of history, we may periodise in ways that are not available to self-respecting historians. At any rate, the claim is not that each stratified period in fact presents a solid and whole face, rather, that each is dominated by a somewhat different configuration of existing ideas, which are invoked when needed even though they are not present as a package of concepts at the beginning or at the end of the period in question. There is no “constitution” as such, or a package of “constitutional principles” to inform and guide developments. This remark leads back to a point previously made: the precise claim is that the outcome of the first stratified period is not the incarnation of an idea in the second, or that there is a ratchet-effect progression eventuating in the system of government we associate with the period since 1688. In other words, this manner of proceeding is not a surrogate re-working of the Whig idea of British history. On the contrary, as argued in the preceding section, the claim is that the dominant idea of one “age” fails, but instead of discarding it, its “mummified letter” and “fossilised manner and form” are elevated to a lofty position above the level of the *modus operandi*: the idea of a preceding age is pensioned off as an important though more than merely honorific *principle* of the system, and is incorporated into our understanding as another historic feature of the system. This also means that no part of this system is ever redundant or is discarded: each accumulated bit is part of the legitimating façade, and is used for the purpose; every authoritative

and the new demands upon governments as a result of economic change, international trade, and the emerging European state system. These facts have an effect upon changes in substance but do not determine its new nature, or make a contribution to the explanation of the new idea.

²⁹⁸ This is a re-wording of Allott’s “slow-motion revolution” in his ‘The Theory of the British Constitution’ in H. Gross and R. Harrison *Jurisprudence: Cambridge Essays*, 1992, pp. 192 and 199.

pronouncement is expressed *via* its “mummified letter”,²⁹⁹ and each symbolic action is played out in its “fossilised manner and form”.³⁰⁰

The elevation of the idea of a previous age vacates conceptual space for a new ruling idea, drawn from another historical *stratum*, which, because it is historically not alien, underlines the claim to continuity and pretends to evolutionary change, with the result that legitimacy does not become an issue. All this amounts to a silent claim that we are in fact faced with a limited number of ideas constantly present throughout the centuries, and, as it is understood in this study, that the spirit of each age is determined by the different configuration of these ideas in practice. It follows that one can have no arguments to give in favour of the unfathomable notion of an “evolving constitution” or “a historic system of government”. Indeed, in a close re-reading of this undifferentiated history, one becomes aware of two facts. Firstly, because this system of government is hardly ever fixed and its principles enunciated, and this is particularly true of 1688, it is generally meaningless to speak of a *British* constitution, without in the process denuding the word “constitution” of all conceptual meaning. And, secondly, that a long period of sovereign England-to-UK history containing a number of stratified periods of important but not obvious discontinuity is not the only important category of continuity that we can see. Indeed, other than geo-history, there are at least two other related but even less tangible matters to notice; namely, the singular character of successful change and “revolution” in England, and, further, the fact that when we take a long look at the undifferentiated post-Roman period, we observe the odd recurrence of a certain type of attitude and response, which, *qua* a pattern, becomes evident when different episodes are co-related to one another, but for which there is no

²⁹⁹ Such as a Proclamation to declare a state of emergency, war and peace, or to express Royal Command etc.

³⁰⁰ Such as the pomp ceremony of the state opening of parliament, or “Kissing hands”. Following the events of September 1997, a number of focus groups were set up and “the Palace” anxiously examined its rôle and image. Many subtle changes of no political or “constitutional” significance have since been introduced under the guise of modernising the Monarchy. However, the notion that by simple change, even the pomp and ceremony of the “constitutional” functions of the Crown could be altered, has been scotched. See ‘Parliament’s pomp spared reform’ in *The Times*, 30 March 1998.

discrete explanation, nor has this phenomenon been heretofore described. Moreover, both these are the consequence of *something* evidently alien to politics, government, Crown, or any other paraphernalia of rule that one may care to mention. It has been said that the English are a distinctly unhistorical people:³⁰¹ they may well be so, but they are also a definitely un-political nation,³⁰² and this is probably their greatest historical asset, if not the *causa sine qua non* of their liberty. It is important not to confuse the argument here: atavistic attitudes die hard in England, and the liberties of the English have a great deal to do with the fact that the nature of governmental (it is inaccurate to say political) power in England, as elsewhere, was essentially negative: until relatively recently, characteristically, governmental action was to ban or prohibit. That is to say, the essential bias was to the absence of control from on high, rather than positively constituted liberty; and this bias is still there, even if increasingly only in form.

The pre-history of our first period is eventful enough. Even if we interpret the events of 1066 as no more than a contested succession, we must still recognise a rather considerable shift of direction, if not actual change, whereby kingly government of the post-Heptarchy period is displaced with political feudalism. If economic feudalism was native, the fact is that political feudalism introduced an element that, in the least, enhanced certain attitudes and entailed certain types of relationships. Arguably, it was the combination of imported political feudalism and its English context that, so to say, defined the trajectory of the development of

³⁰¹ According to at least one historian, England as a nation has a rather short memory, and its actions are less influenced by its past than other countries. He wished that England would know more about its past, although he was also concerned that this should not be misunderstood: after all, only revolutionaries *think* about the past. See G.R. Elton 'The future of the past' (his first inaugural lecture) in his *Return to Essentials*, 1991, pp. 80-82, and footnote 4 on p. 82.

³⁰² The English, it is said, are good at compromise; instinctively, they prefer to solve differences by accommodation rather than conflict – but this does not easily translate into a love of politics: they have little interest in systematised and structured politics, and at any rate not for its own sake, but bring 'political judgement' to everything, from the vestry meeting to trade unions, meetings of local allotment holders, parliament or the guildhall. See R. Low in Ernest Barker (Ed) *The Character of England*, 1947, p. 39. There is an equally easy attitude to religion: Barker suggests, with approval and some amazement, that the English deal with religion last: *Ibid*, p. 570. But see A.T.P. Williams *Ibid*, pp. 71 and 83. See also Santayana's 'The British Character' and 'Distinction in Englishmen' in his *Soliloquies in England, and later soliloquies*, 1922.

monarchy in this country differently from that of, say, France. In other words, this difference is historically initiated.³⁰³ However, such a historical initiation is not from a new beginning: there is no Year Zero in this process. Rather, the largely alien concept of political feudalism is grafted onto the existing arrangements, with much emphasis upon continuity in order to reap the benefits of its legitimacy.

It is possible to give a historical account of the Norman and Plantagenet kings in terms of feudalism, as mediated by the geographic and other contingent features of England. It is indeed possible within that story-line to focus upon the Norman succession/invasion as the *differentia* that made limited, so to say, constitutional monarchy more than merely probable in this country.³⁰⁴ But when, in seeking to explain the post-1066 period theoretically, we necessarily expand our view and examine not only the immediate political inheritance of the Normans, but also pay some serious attention to the development of “kingship” in England, we discover a rather intriguing twist in the story.

Roman rule did not leave behind any clear political and governmental legacy. This fact is often ignored. Indeed, Roman institutions in Britain (which importantly did not include ideas about Kings of Rome) crumbled, as “native” kingly and Teutonic government spread. But it was the spread of Roman Christianity, long before the Normans,³⁰⁵ that brought back and established the influence of Latin,

³⁰³ This touches on some interesting points about historical development, and cross fertilisation of cultures. Short of the annihilation of a whole people, no culture is ever totally displaced by another. On the other hand, the introduction of an idea or a practice from one culture into another is not an innocent matter: for instance, Marx was well-aware that the introduction even of a little change would profoundly affect the existing trajectory and the potential of a culture, and, to that measure, determine its future. See my *Meta-Imperialism: A Study in Political Science*, 1994, chapter 2, section 3 on Marx. The idea of “chaos” has a certain powerful resonance in this.

³⁰⁴ G. B. Adams suggests that exceptionalism – “deviation from the continental model” – has two essential origins: the character of the king, and the limited extent of the country. G. B. Adams *The Origins of the English Constitution*, 1920, p. 30. While we must accept both of these, it is hard to imagine that this is all there is to it. In fact, Adams includes the relative weakness of the position of the king and the effect of the Norman Conquest as further necessary factors making for rapid and secure constitutional development. *Ibid*, pp. 3-16, and his *Constitutional History of England*, 1935, pp. 48-9. Incidentally, for Adams this development goes in a largely linear and direct line from that date to the present. See *Ibid*, pp. 52 and 319-322.

³⁰⁵ J. D. G. Davies & F. R. Worts *England in the Middle Ages*, 1928, chapter 1

and of Roman ideas.³⁰⁶ This, however, was not the only point of contact with continental events and ideas, for the enlarging Christendom was instrumental in ensuring a degree of commonality of ideas and developments across Europe for a considerable time, a fact that makes English particularism even more intriguing.

The nature of Anglo-Saxon and English kingly government is very much reminiscent of feudalism in an economic sense. So far as the construction of the concept is concerned, this may be no more than an instance of “fact leading theory”, as J. N. Figgis would have us believe.³⁰⁷ However, as John Millar puts it, each leader of the invading Saxons becomes a duke, a *herotoch*, and later, in virtue of leadership and conquest, a king, while he and his men take possession of land in virtue of their conquest. The leader/king had the greater share of the land, and divided it among his vassals over whom he exercised authority, but his direct authority did not extend to the other landowners.³⁰⁸ In other words a limited proto-feudalism of sorts is present in fact, if not yet in concept, and is gradually destroyed and displaced by the development of limited “kingship”, which was, evidently, well established by the time of Alfred (died 901). When Cnut was eventually chosen king (1017), even though his initial and probably the only good title issued from invasion and conquest, he reached back to the memory of, and promised to keep faith with, the laws of Edgar (died 975). Thus the period from the withdrawal of the Romans to the reign of Cnut may be seen as one in which fractured kingly government is transformed into a unified but limited “kingship”, a transformation to which the increasingly frequent use of the title “*rex*” bears historical testimony.

Abstracting the overall picture, roughly from the end of Roman Britain to the end of the Danish kings, and from the Normans to the House of York, one has to acknowledge the curious fact that each period is marked at the beginning by an early feudal-type arrangement, and at the end by limited “kingship”. That is to say

³⁰⁶ Contrast this with the claim that Roman influence was on-going and a significant factor in the development of the Celtic world and character of the Dark Ages. See L. & J. Laing *Celtic Britain and Ireland*, 1990

³⁰⁷ J.N. Figgis *The Divine Right of Kings*, 1914, p. 16. It is not that for Figgis this is a general truth, rather that the idea of Divine Right of Kings theory must presume the fact of sovereignty, else the theory cannot stand.

³⁰⁸ J. Millar *An Historical View of the English Government*, 1803, volume 1, pp. 230-232

the longer-term pattern of change in the form of government is the same in both periods. On this view, the Norman succession/invasion triggered a “back to square one” move, where an already established limited “kingship” was subjected to the forces of political feudalism, initiating another historical sequence in which kings would attempt to escape the power of the feudatories and seek to establish “kingship”. Incidentally while this second cycle is not interrupted, nevertheless, full-fledged kingship is not the outcome. But, first, how can we explain this repeated pattern?

If the monarchy dates back to the time of Alfred, English monarchs cannot so easily identify their blood heritage with England. Given that often succession was not in an obvious line, and that many rulers came from elsewhere but, in the nature of the situation, without a large enough army (the ever-present importance of the island nature of its geography comes into play) completely to overcome factional or local resistance, subdue and hold them, or to destroy them and repopulate the island,³⁰⁹ and to establish their legitimacy on the basis of conquest, as a rule “succession” was associated with and involved gestures of accommodation.³¹⁰ That this meant compromise is clear; that compromises were

³⁰⁹ Confinement to these islands, so Halifax thought, was not as punishment, but an act of grace. Well, ... but the importance of this “island in the sea”, as Santayana puts the obvious, ought not, for that reason, to be overlooked. Its importance pre-dates the two millennia of Europe civilisation: see Cyril Fox *The Personality of Britain*, fourth edition, 1959. Shakespeare recognised its importance:

This happy breed of men, this little world

This precious stone set in the silver sea,

Which serves it in the office of a wall,

Or as a moat defensive to a house,

Against the envy of the less happier lands (Richard II, Act 2, scene 1)

This is precisely the sentiment Halifax sought to reflect. For him, it was this confinement that “hath made us Free, Rich and Quiet; a fair Portion in this World, and very well worth preserving; a Figure that ever hath been envied, and could never be imitated”. He went further: the greatness of England in these matters was, he thought, a result of the fact that “Our situation hath made Greatness abroad by Land Conquests unnatural things to us.” See his ‘A Rough Draught of a New Model at Sea 1694’ in Halifax *The Complete Works of George Saville, Marquis of Halifax*, 1912, pp. 168-9. See also N. Langmate *Island Fortress*, 1991. Much is made of the moat defensive; but this cuts both ways. If landing a sizeable army on British soil is a complicated logistical exercise, sending an army out is at least as difficult and fraught.

³¹⁰ It is obviously wrong to over-conceptualise; yet, I cannot resist the temptation to point to an oddity that may merit further thought. In the 19th century, Grey and Brougham separately argued that government *for* others, conducted representatively, has a natural inclination to moderation (see *infra* Chapter Six, terms of government discourse). Does

not always, if at all, for the sake of and in the name of larger “national” ideas and interests,³¹¹ is also clear. We may note here a historiographical problem. In this study, much has been made of two related points: namely, the fossilisation of terms and institutional forms, and the fact that, for reasons that are not entirely clear, historians have tended to use words such as “nation”, “people” etc loosely and in an unwarranted generic, timeless sense. One consequence is that the essential political sociology of each period is masked. In an important sense, throughout the period in which feudalism and centralising pre-sovereign authority confronted one another, there was no “public political” sphere, and the bulk of the population – ‘the people’ – remained “politically” excluded, but potentially the object class. It was the religious precept that *rule is for the benefit and the good of the ruled*, but *rulers were responsible only to the “higher” authority of God*, that made ‘the people’ a potentially important element in the game of power: in the longer run, this larger group became the longer-term beneficiary of the game of property and power between the king and his men, that is to say, the nobles, the barons, generally the powerful feudatories. In this triangular context,³¹² the king would reach out to ‘the people’ as part of an attempt to destroy the power of the feudal barons. However, as Blass has observed,³¹³ Maitland saw clearly the paradox that what is precious liberty for the Britons today – for some, freedom

the fact that often English kings were not strictly native also mean that they were subject to this kind of force for moderation?

³¹¹ ‘Politics are always a matter of an articulate, vigorous few at work among an inert majority.’ P. Laslett *The World we have lost*, 1971, p. 176.

³¹² We are intrigued by and make much of the fact that the military as an established element has not had a rôle in British political history, without appreciating the historical implications. Abstracting the longer-term historical trends in British history exposes the interesting fact that each momentous change has been the result of two institutions working together: thus, feudalism was defeated by a combination of the king and church; king and parliament defeated the church; claims to kingly power rely upon the use that he can make of the judiciary and the support that the Judiciary gave to the Monarchy; and it is the combination of parliament and the courts that defeats kingly claims. We also find that, later, parliament is defeated by a powerful combination of government and party. It was only the fear of the collapse of this last combination that seemed to place the fear of military intervention on the horizon in the last quarter of the 20th century. But it has to be said that in all of this ‘the people’ as an institution is simply conspicuous by its absence, even though English/British history is marked by rebellion. Two against one has been the important and winning formula for maintaining limited government in this country.

³¹³ P. B. M. Blass *Continuity and Anachronism*, 1978, p. 264. See also Barrington Moore *Social Origins of Dictatorship and Democracy*, 1967.

under law, as such the birthright of this nation – was born in bondage: parliament, trial by jury, and *habeas corpus* all have their origins in royal prerogative and power, and representation was, originally, a burden (that of taxation) and still is. Institutional development and “political” change were not on an organised and calculated basis, or in pursuit of “national interest”, but on a contingent basis and in relation to some immediate purpose.³¹⁴ Of course, this paradox is not peculiar to British history: everywhere only the forced, imposed, and illiberal are born of their true progenitors: positive liberty and, to the extent that it has any meaning, democracy, are born of strange parentage, and take root only because of the “sagacity” of some “oppressors” who know a good thing when they see it, and seize it, albeit in pursuit of their own interests. But the condition of their nurture is very contingent: for example, A. L. Poole notes the importance of the character of the king in the extent to which restraints were effective in limiting royal power.³¹⁵ It is against this backdrop of ideas that we may notice the true meaning of promises and charters: importantly, obtaining charters was not part of an attempt to *develop* positive law, but was a response to the felt need to clarify the law and to ensure its continued application:³¹⁶ it was precisely the absence of *regular* law that made charters and promises so important, but in turn, they become the instrumental basis of regular law. All said and done, the overall character of these two periods (post-Roman to Danish kings, and Normans to the House of York) is defined by the inter-play between the development of kingly power and attempts to set limit to it: in short, that of emerging and nascent sovereignty and co-sovereignty as the controlling barrier to it, seeking to shift the system from sovereign power of the king to limited government.

³¹⁴ This is also true of the development of the administrative apparatus, from the office of “secretary” down to departmental differentiation over many centuries.

³¹⁵ A. L. Poole *From Domesday Book to Magna Carta*, 1955, p. 6. See also J. D. G. Davies and F. R. Worts *England in the Middle Ages*, 1928, p. 22

³¹⁶ As Kern has shown, because there was no machinery to compile valid law, and the law was not written and codified anyway, forgeries – of which there were many – were a problem. There was thus need to confirm the law from time to time, especially at the start of a new reign. The best means of protecting one’s interests was to obtain charters from the king, preferably including a clause explicitly overriding previous charters, or renewing recent ones, thereby also binding the king. See F. Kern *Kingship and the Law in the Middle Ages*, 1939, pp. 170-175.

This outline statement of the nature of two long and consecutive periods, when sufficiently expanded into a proper historical account, may say much about the two periods, but cannot explain the fact or reason for the repeated pattern. The pattern of one period repeated in another raises the legitimate expectation that, under certain circumstances, it must be “predictable”. But history is contingent, and contingency presages (albeit limited) unpredictability. If geography and contingency are not enough, to what else must we appeal? There is not even the factor of a largely fixed and “insular” English race present in both periods for us to focus upon some supposedly constant “English quality”,³¹⁷ although the sources of in-migration in both periods are largely the same. Do climate and topography have something to do with it? To say that it was all of these may have the important advantage of being historically true, but as an explanation it does not go anywhere.

Actually the issue is simply stated: where one expects contingency such that a historical account in terms of pragmatic responses (if not in terms of “muddling through”³¹⁸ as the template of political sagacity) would suffice, one is faced with a rather large dose of obstinate continuity which is not amenable to historical explanation at all. Evidently much change is accepted, but only when the new is naturalised and domesticated: an invasion or contested succession leads to promises of continuity; this leads to demands that the promises be kept, which in itself creates a new condition of limit; change of dynasty is heavily circumscribed by attempts, often to the point of absurdity, to establish some blood, or other important link with a previously legitimate ruler or dynasty; and, at each turn, further and more stringent conditions of conformity are attached. In other words,

³¹⁷ This is complicated analytical territory, touching the question of insularity, island nature of the geography of this country, and much else of that kind. See *infra* Chapter Six for some of these arguments.

³¹⁸ For some, this is a virtue: Barker thought so, provided that one was not self-conscious of so doing. E. Barker (Ed) *The Character of England*, 1946, pp. 553-4. But perhaps Barker’s point is not only well made, but also shown to be true: Peter Hennessy’s (mostly) adapted texts of his Radio 4 “Analysis” programmes (*Muddling Through*, 1996) demonstrate the point well-enough, but he uses this phrase from Winston Churchill (actually, John Bright used this phrase with reference to the fate of the Northern States in the American Civil War) to describe the absence of quality and forethought in British government, not in order to praise the character of their politics.

while historical development is distinctly contingent, yet, albeit *mutatis mutandis*, the longer-term pattern seems to be rather fixed. We can easily understand each component idea and step, but an evidently patterned persistence over a very long period and despite many historical changes and unfavourable circumstances means that, when we look at the whole picture we see an enigma. It is easy to see why some fall for the idea of single-minded purpose and meaning in Whig-type history, or even that of divine plan. Evidently change is absorbed provided there is conformity such that the larger pattern is not disturbed. But conformity to what? Obstinate individualism, perhaps? But the “English” are, *pace* Santayana, innately private, often eccentric, but not wholly individualistic. Incidentally, it has to be said that only an established larger context, amounting to an effective bracketing of many questions, can enable, invite even, relaxed pragmatism and easy compromise.

If the repeated pattern here identified is even in essence and to a degree correct, and if we acknowledge that limited “kingship” is preferable to feudalism, then we must surmise that the Norman invasion was a retrograde step. One particularly large difference is that economic feudalism was, with the Normans, embedded in and wholly subjugated to political feudalism whereby all land was held of the king: with the Normans the realm became the “estate” of the king. Naturally, we cannot know the trajectory of English institutional development without the Normans; nor is it meaningful to pose an “as if” question of this type. Yet, in view of the evident pattern already discussed, the intrinsic contribution of the Norman episode may not be as positive as some might think. Far from it: if the natural propensity of the pattern here identified was towards limited, “constitutional” government, then the Norman interlude, in the least, delayed its realisation, and materially affected the nature and shape of the outcome.

Importantly, the repeated pattern here examined was not an exception in the course of British history: historical obstinacy is pervasive and ever-present in British history. For instance, immediately following the Revolution Settlement and a few years into the reign of Queen Anne, the possible shape of post-1688 period was actually “open”. Had certain measures not been repealed or changed, British

political institutions would have developed materially otherwise than what we now know them to have become, and the shape of government in this country could have been quite different. But, somehow, a “correction” was administered in favour of a pattern for which there was a previous instance, and the “path” of British history was “restored”. Yet, there is no evidence to support any view other than that this deviation was contingent, and that the restoration was not a self-conscious return to an established or understood principle of British history; indeed, one can just as easily understand the correction in terms of contingent events, but the historical parallel is unmistakable. Similarly, one may raise a question about the substance and the general inclination of the Nineteen Propositions and the Provisions of Oxford: was there a historical or ideational connection? In some cases, we can see a rather direct historical connection, such as a line between the radicalism of the 17th century and that of late 18th and early 19th centuries, even though the 19th century developments were not presaged in the 17th century settlement. In a sense, 19th century developments were a throwback to what was rejected and never became a part of the 17th century settlement. Of course, when these ideas came to pass, they were also seen as part of the tradition of British ideas, such that their application was seen as no more than an evolutionary change. In this sense, the radical departure to “democracy” was no departure at all, and all took to it with relative ease.³¹⁹

Given that similar effects must have similar causes, we cannot avoid the difficult idea that there must have been *something* constantly present throughout British history, which at “crucial” moments would operationally and contingently determine the course of events. But, precisely, what? “Hand of God”, perhaps? Is this really the constitution that Providence has bestowed and guided? Clearly, these are non-answers; on the other hand, intuitively there is something in the

³¹⁹ This does not mean that there was no controversy about how we may understand the changing frame of British government after 1832: Alan Beattie argues that there are two views: the “Whig” and the “Peelite”, and the account that he gives of these two views places the two in the dichotomous tradition of the ascending-descending perceptions. Alan Beattie ‘Ministerial Responsibility and the Theory of the British State’ in R.A.W. Rhodes and P. Dunleavy (Eds) *Prime Minister, Cabinet and Core Executive*, 1995, pp. 159-178. This is an altogether interesting analysis, except that Beattie is too keen to relate the two conceptions to a theory of the State in Britain – without evident success.

claim that the system is the result of “the English character”, except that it is hard to know, at each stage, precisely who the “English” were and what their “character” was. This is made even more complicated by the fact that, often, political leaders were not English at all: is there then a “British character” – so to say, something in the air – even at this rather early stage? Yet this constancy and continuity is, beyond any doubt, there. What, then, can explain the fact that the course of the history of the system of government was corrected at “crucial” moments in favour of a certain tendency?

It is important to place this historical fact and the questions associated with it in a proper context. The history of every collectivity, a “people”, nation, or state, is a mix of continuity and change. The extremes are rare: volatility as a permanent condition is almost by definition not possible, and there are no examples of it. On the other hand, whereas static continuity is not altogether impossible, there are rather few examples of it: some nations, even today, seek to establish and maintain a society that is to be governed strictly in accordance with “historically received” rules, often rather rigidly interpreted. But all such attempts serve to provoke reaction and change. That is to say, it is reasonable to expect a discernible pattern in prolonged periods of the history of each and every nation, between “calm and continuity” and significant change (violent, or otherwise) leading to a settlement of some kind, possibly in the form of a constitution or a new régime, and so on. Whether the pattern and/or the cycle in each case is predictable is altogether a different question; given the inherent contingency of historical change, one must remain more than merely sceptical about such claims. Be that how it may, the history of every nation is one of continuity and change, albeit of different sort and to a different degree. It is the nature of this mix in the British case, whereby change is absorbed and made to appear as no-change, that makes it so interesting, well nigh unique. It is altogether characteristic that there is no history of military involvement in political change in the course of English history. Indeed, despite much civil conflict and a number of wars with Scotland, there was no military establishment as such, and, at any rate, for all practical intents and purposes, the 17th century settlement took the military

qua an instrument out of politics – this settlement foreclosed the possibility that politics and the processes of government could be militarised. So, bracketing the military as a factor and confining our attention to the political, what explanation is there for this very British situation? One possible answer comes from Hale,³²⁰ especially in contrast to that of Edward Coke while still a judge; and Burke's arguments, too, are relevant.

For Hale, it was crucially important but also enough that the constitutional system whereby and within which framework change could be accommodated should remain intact. This stands in sharp contrast to Coke's fear of change as degeneration, prompting the need to defend common law against all possible change, in particular against claims to the superiority of statute law.³²¹ But this is Coke the judge speaking; Coke the legislator played a different tune. However, Hale was sceptical about claims to antiquity and remote origins of institutions, and was not much taken with the idea of purposefully maintaining the substantive continuity of the law as a pre-requisite of continuity. In fact, his vision and, therefore, explanation was inherently more abstract and, as detailed above, his favourite analogy was that of the *Argo*, that tells the story of change made necessary in order to maintain the sameness of the matter, without which the essential identity of the matter will be lost. We may reasonably infer that this is precisely the point Hale wished to establish, but this leads to the difficult question of what we may not change without losing the essential identity of the object. The ship of *Argo* had an essential shape and functionality: but this cannot be said of the "state". We may make many necessary changes to preserve "the system", but this also means that legitimate and proper change can only be according to, and by, the means of this system, such that "the system" is necessarily privileged. As a result, for Hale, the Norman succession (he preferred the acquest of William; for William had a fair expectation of succession) meant the continuity of common law, and hence the king was bound by law: William thereby gained no larger a right than the king he succeeded. This does not mean that any succession was with

³²⁰ Matthew Hale *The History of the Common Law*, 1976, pp. 56-8, and *The Prerogatives of the King*, 1976, pp. 3-16.

³²¹ See C. M. Gray's 'Introduction' to M. Hale *The History of the Common Law*, 1976

good title; good succession was natural or regulated by parliament: on the other hand, there is the fact of “succession” by conquest, but any such succession remains incomplete until the consent of the people is added to it.³²² Furthermore, there was also the possibility of usurpation, with many examples in English history: in a chapter devoted to this topic, Hale made it plain that the fact of usurpation did not mean there was no government, or no duty of obedience to it. There is of course a distinctly medieval flavour to this idea, although Hale does not invoke medieval or religious explanations for the king's power and the need for obedience. He would allow as good all governmental measures during such a period, except that which sought to legitimate the usurpation itself. Moreover, at the termination of the usurpation, retroactive legislation would be necessary to confirm acts and appointments during the period of usurpation.³²³ Incidentally, Hale does not deal with the question of what ought to happen should retroactive legitimation be denied, and does not pronounce upon the legitimacy of action already taken during the period of usurpation.

For Burke, sovereignty was an immemorial matter, there had to be a significant distinction between the office and the office-holder, such that the king could abdicate, but not the monarchy; similarly for Hale, this meant that a lawful king could not disinherit his rightful succession. Furthermore, while Burke subscribed to the older view that parliament was a collection of the “best” (he did not use the word “wise”) it did not mean that parliament could change the “constitution” as it pleased: for Burke, there was no power to make a constitution according to one’s design and ambition. More than that, parliament also did not have the power to make any change in anything and everything:

... we entertain a high opinion of the legislative authority; but we have never dreamt that parliament had any right whatever to violate property, over-rule prescription, or to force a currency of their own fiction in place of that which is real and recognised by the law of nations.³²⁴

³²² M. Hale *The Prerogatives of the King*, 1976, pp. 17-8, and *The History of the Common Law*, 1976, pp. 49-51.

³²³ M. Hale *The Prerogatives of the King*, 1976, chapter 6

³²⁴ ‘Reflection on the Revolution in France’ in E. Burke, *The Works*, 1801, volume 5, pp. 107, 146-7, 327 and 335.

Indeed, elsewhere, he subscribed to the view that parliament only declared, not made, the law.³²⁵ But this did not rule out honest reform from a disposition to preserve and improve, which would make necessary change the engine of desirable continuity. There is a loud echo of Hale in all this.

The arguments of Hale and Burke appear compelling. However, as a contribution to an explanation of what continues, they do not quite hit the mark; in effect, their arguments only serve to push the *locus* of the explanation back yet one more step. We have to ask: what, precisely, is this system that continues, and by what mark shall we recognise its true nature? And, how shall we know what to preserve? Burke and Hale see 1688 as entirely restorative, rather than innovative and revolutionary. While there is much to be said for that view, there is much to be said against it too. At any rate, the formula of 1688 enabled far-reaching peaceful changes to be made in the form of government: put plainly, without 1688, political executive would have been out of the question, although 1688 did not presage, but only made possible, the development of political executive. In this sense it presaged the new and has to be seen as innovatory. What was preserved and what was new? Of course, without some clear answers there can only be muddle and confusion: Alan Beattie has remarked that in the absence of clear rules governing the British political institutions, constitutional reform has to be seen as a matter of creation, rather than discovery or maintenance.³²⁶ One rather expects Hale and Burke to contend – one can almost hear Oakeshott being quoted – that necessary and timely reform within an inherited system does not amount to innovation or creation: the rules are there but not as a discrete set, rather one comes to understand them as one learns how they work; one cannot know the rules without knowing the system as it works, and knowing how it works, one is no longer in need of information about the rules!³²⁷ Moreover, knowing the

³²⁵ “We do not *make* law. No; we do not contend for this power. We only *declare* law; and, as we are a tribunal both competent and supreme, what we declare to be law becomes law, although it should not have been so before.” ‘Thoughts on the cause of the present discontent’ in *Ibid*, volume 2, p. 303.

³²⁶ A. Beattie ‘Conservatives, Consensus and the Constitution’ in *LSE Quarterly*, Summer 1989, volume 3, number 2, p. 129.

³²⁷ A confusion lurks in the shadows of this argument; what Hale and Burke understood by the word “constitution” is not necessarily what Beattie, Johnson, or F. Ridley appear to

rules in the abstract – if it can be done – does not mean that we can work the system to which they refer.

This is all very well, except that it also makes explanation epiphenomenal, which also means that the nature of the relevant explanation is not identified. Moreover, because the Hale-Burke type approach has the potential to legitimate any *peaceful* change, it cannot even begin to offer an explanation.

It has to be said that the practice of British government has been and still continues to be influenced and informed by the Hale-Burke view, plus a steadying Bodinese dose from Halifax, for whom it is important that there is some “place” where undefined power is available at short-notice to deal with the unforeseen – at the time, Halifax thought this locus was summarised in the inter-institutional relationship of the king consulting “his Physicians in Parliament”.³²⁸ And so it is that change in the British system, including momentous change, is accommodated without disruption: as argued below, a definite move back to the future is made in 1867, that re-shaped the system much after the historical image of “New Monarchy” of early Tudors. But the process of change was, dare one say, typically British, such that no one much noticed the fact. In other words, as argued in this chapter, we are faced with the historically complicating factor that important elements of this system of government have all been present, even if only in vague and nascent forms, in an almost timeless sense throughout the second millennium. For that reason, they are seen as native to the history and the people – if not the character of the English – such that when some of these ideas are brought to the fore and applied, the resultant change is accepted as natural and evolutionary, if not the inevitable next stage in the proceedings, provided that the manner and form of the process has been observed: the upshot is that there is nothing that cannot be changed, and there is no change that is even potentially unconstitutional. Although from time to time, especially since the last quarter of

mean by it. They are separated by a conceptual divide, indicated by the American revolution, and most clearly and poignantly drawn by the French Revolution, and later made almost necessary by changing nature of ideas about society, and the rôle and place of the individual: if Hale and Burke do not speak from (in Walter Ullmann’s phrase) the “wholeness point of view”, they also do not speak in that of late 20th century discourses of state and constitution.

³²⁸ ‘The Character of a Trimmer’ in *The Complete Works of George Saville*, 1912, p. 65.

the 19th century, (national) referendum as a device has been much talked about and as often dismissed as politically and constitutionally not-British and alien to parliamentary government, yet when convenient, or politically necessary, as in 1975, 1978 and 1997, it has been employed. However, each referendum was separately enabled, that is to say, that while the device has been admitted into the system, it has not been made a part of it, thus preserving the “manner and form” of the system. This is the efficient secret of the longevity of this system of government, which has survived many changes in “objective” circumstances, because it has been possible peacefully to incorporate a great deal of change and adapt the system whenever necessary. Indeed, it is a little noted and even less commented upon fact of the British case that often there is much ado and “much to do” only when the change in question requires legislation. If Maitland understood well the relationship between the legal and the constitutional, arguably, he did not appreciate equally fully the relationship between the constitutional and the legal. In the United Kingdom, any scheme of reform classified as “constitutional” requires new legislation or change in the law, but such measures of reform are often characterised by two features. On the one hand, they attract much publicity, may even have their origins in an election promise, and are certainly the subject of set-piece parliamentary debate. On the other hand, such reform, in spite of all that is said about it, is hardly a constitutional change at all: often such measures amount to institutional innovation and re-arrangement, or possibly the legitimisation of re-allocated administrative powers. It is the essentially plastic meaning of the phrase “British constitution” that enables some to identify proposed schemes of change such as the devolutionary establishment of a parliament in Edinburgh and an assembly in Cardiff as constitutional reform. Of course, one can readily understand politicians “making hay” and basking in the reflected glory of the success of a “major” change in the system, or the news media falling for the hype: what is far more difficult to understand is the similar reaction of experienced, high-profile analysts. Take the case of the creation of a parliament in Edinburgh: this was trumpeted, often by high-profile academic professors in prestigious universities, as

constitutional reform of the first order.³²⁹ True, a “sub-UK national” parliament is a departure in that there has not been a parliament in Edinburgh for nearly three centuries, but such a reform is also misleading when it is classified as a “constitutional” measure except when the word is used to mean “institutional”. While it would certainly be wrong to say that parliament in Edinburgh is only a glorified local council, and it would surely be politically difficult to wantonly get rid of it, it is rather important to pay close attention to the exclusions in the Scotland Act. This departure may have as much influence as did the creation of a department of state for Scotland in 1885 and the elevation of its head to Secretary of the State with cabinet rank in the 20th century, yet neither change was ever seen as a major constitutional innovation and reform. Put differently, much that is truly momentous (and would be constitutional if there indeed was any sort constitution) is often created or reformed without any ado: historically, the office of the prime minister falls in this category, as does, for instance, the fact, the power and rôle of the Nolan-cum-Neil-cum-Wilkes committee. We suffer from a true blindness to what is constitutional in this country. Not much in the package of reform on offer since May 1997 was truly constitutional: was reform of the Lords an exception? Possibly – but see *infra* Chapter Five.

The claim that the great package of reform of the constitution is nothing of the kind will only raise eyebrows and reaction from the politicians, rather than from a wider body of informed public. British membership of the European Union is an exceptional case in point: the parts that have affected the nature and form of British government are the parts that have gone largely unnoticed, and become complicated political issues with constitutional reverberations after the event: the rôle of the European Court of Justice, and the 1986 Single European Act come to mind. It may be said, the public identification of an issue as “constitutional” keeps the politicians in check; happily, at least up to now, the British have not tolerated too much politics, and tend to react strongly to behaviour that offends simple sensitivities. Equally, the fact that the principles of this system of government are not obvious, and most accounts of it are couched in terms of warm and approving

³²⁹ For one publication making this claim, see J. Beaston (Ed) *Constitutional Reform in the United Kingdom: Practice and Principles*, 1998

but impossible concepts, is not so important provided things do not go drastically wrong. Does this mean that there are significant abeyances in the system?³³⁰ Possibly, except that if we could identify them, they would no longer be abeyances, and the system would be different: if the secret is that there are no secrets, then it is crucially important not to let the fact be known. This kind of approach to a serious question, of course, borders on the nonsensical.

In the absence of a constitution properly speaking and in the strict sense of that term, there are no established criteria to decide what is or is not a constitutional matter. It is often said that the British have a very political constitution. The meaning of this phrase is not obvious; presumably, it means that the maintenance of this system of government (including its reform) is a function of ordinary political processes, or, negatively, that there are no pre-set procedures for constitutional reform. But this says next to nothing about the nature of the system, and is hardly a guide to understanding what it is and how it works. Indeed, precisely because such a claim can be entered but cannot be dismissed with an outright and conclusive rebuttal, it is necessary to pay closer attention to its becoming and to apply some reasonable test to the meaningfulness of the claims about its concepts and practices.

The Hale-Burke kind of argument is inviting, but not as an explanation. For such a hard core of continuity, exemplifying the historical obstinacy of certain ideas, can only be an outcome, in this instance the consequence of a condition of stability, the elements of which are easily stated.

It may be said that, in effect, the whole of the political nation was present at any one time in the Witan or, later, in the *Magnum Consilium*. It must further be said that, in an important conceptual sense, this identification ceased when the first not-mandated representative empowered to 'bind' was called for in 1295, whereby the *Magnum Consilium* became a "proto-parliament". But this change only affected what became the lower house of parliament, while the largely feudal and propertied element continued intact and was present in the Lords, as such only speaking for themselves and in a virtual sense for their people. This is

³³⁰ See M. Foley *The Silence of Constitutions*, 1989

obviously not to say that the membership of the lower house was suddenly from a different social class; that only comes about centuries later. Thus despite the change from the *Magnum Consilium* at the top, the system remained unchanged, and was composed of a very stable class, supplying members of the ruling élite. That is to say, there is a stable socio-economic line from the magnates to feudatories to the great landowners, leading to the socially and economically important class from which the ruling élite is drawn. Stability, avers Peter Laslett, is the result of not too much internal change in the composition of the élite, such that renewing itself, it does not change the working of the political system.³³¹ This is still largely the case even now, despite the fact that the social composition of the active political élite has changed since the early 1960s. However, the element of continuity is more important than the extent of evident change: for centuries, only this class had access to educational facilities that renewed itself from the first-born, while his siblings as clerics and lawyers went into the service of the Crown. For instance, the extent to which the members of the Privy Council, Lords and Commons were closely related in a social and economic sense is a little noticed but important feature of the management of parliament under Elizabeth I.³³² This process became self-perpetuating, and even though the pre-requisites of wealth and its associated *noblesse oblige* commitment to public service lost their hold, yet, without putting too fine a point on it, this is still a system dominated at the top by a “traditional” “nobility” of education, produced by a system to which access is sociologically and economically still very much restricted.³³³ Thus, despite the fact that there are now over a hundred universities, intake into the Civil Service and the supply of top politicians is still dominated by a limited number of educational establishments. It is not for nothing that, when Alan Beattie

³³¹ P. Laslett *The World we have lost*, p. 205. Laslett emphasises that history is literally history, and that as a result much is left out of the account. More than that, he identified John Wilks as probably the first example of an actively interested participant electorate, breaking the immemorial pattern of passivity and subservience. *Ibid*, pp. 207-211.

³³² See M.A.R. Graves ‘The Management of the House of Commons’ in *Parliamentary History*, 2, 1983, pp. 11-38

³³³ Lord Home was the last patrician in politics. However, even though all the prime ministers since Lord Home up to 2002 have been from “non-noble” stock, all of them graduated from Oxford University (except one who did not attend University).

seeks to examine the “Peelite” view, he cannot avoid linking and likening it to the Whitehall view³³⁴ although he does not also point out that the essence of such a view is to be found in John of Salisbury!³³⁵

The second condition of stability has to do with the rather historically specific fact that even although each stratified age has a dominant idea (or, better put, it is possible to identify a certain character and dominant idea for each stratified age) nevertheless, the idea of each age has always been subject to a dichotomous conception and understanding. As a matter of fact, no age in the history of British system was ever so dominated by any one idea, such that its historical meaning can be accessed and understood in one and only one way, and in terms of that idea. Even although it is in a sense tautological, nevertheless, it ought to be said that because of this continuous proto-plural condition and, therefore, the possibility of asserting an opposing and opposed understanding, no single idea has ever become so dominant as to destroy all others. Indeed, in part the experience of the 17th century shows the utter bankruptcy of a “monolithic” approach to government in this country. Thus, fragmented feudalism is probed by centralising claims; parliamentary claims question kingly government; supremacy of eternal law is a check upon law-making; Whig and Tory attitudes stand for crystallised ideas about the nature of governmental power; “Whig” views about 19th century changes are checked by the more general continuity of Whitehall-cum-“Peelite” views. Importantly, all of these fall in line, in one way or another, with the dichotomy between a largely ascending as opposed to a largely descending view of power.

Third, the extended political nation, with the numerical size of the electorate as its index, is sucked into this top-heavy system, and the traditionally passive rôle assigned to it is enlarged and given new meaning. Thus, whereas this rôle has not changed much in form over the centuries, it certainly has changed in its effects and processes: it continues to prop-up and stabilise this top-heavy political

³³⁴ A. Beattie ‘Ministerial Responsibility and the Theory of the British State’ in R.A.W. Rhodes and P. Dunleavy (Eds) *Prime Minister, Cabinet and Core Executive*, 1995, p. 172.

³³⁵ See book IV, and also pp. lxii-lxiii, in Dickinson’s Introduction to *The Statesman’s Book of John of Salisbury*, re-issued edition, Russell and Russell, 1963.

system without affecting the nature of power in the system. It is important to note that the ubiquitous dichotomy here characterised has also invaded the political nation: the importance of this comes into its own in the 19th century and beyond, when the enlarged electorate is, in fact, organised and given political shape and form by nationwide political parties. Indeed, political parties are also organised on the basis of a dichotomy, reflecting this unspecified English tradition and, in the process, also re-enforcing it.³³⁶ That said, the fact of this continuous dichotomy has also served to occlude the attraction of other more extreme ideologies and theories, and with it also any breach in the dichotomous nature of party political activity at the expense of a multi-party system.

Fourthly, these elements of stability are conditioned by a certain attitude to matters political and governmental. On the one hand, the ruling class has accepted the supposed implications of *noblesse oblige*, interpreting it as the reluctant doing of duty, performing it as a burden rather than embracing it as a vocation, and pursuing it with ambition and enthusiasm. The important rôle and place of the long tradition of opposition and agitation notwithstanding, there is a similar absence of enthusiasm on the part of the larger political nation: one rather suspects that relevant characteristics here include a healthy dislike, hatred even, of politics and of politicians, a general lack of enthusiasm for matters political, governmental, even religious, a wonderfully mundane sense of lived life, and a definitely healthy disregard for pretentious “powers that be”:³³⁷ in the modern era, a promising new leader is the perfect candidate for satire; ridicule keeps politicians in check, and makes it easier to tolerate (but only for the duration) their

³³⁶ Two points arise here. First, the excluded part of the nation could only resort to insurrection and riots. From Wat Tyler and John Ball to the Gordon Riots and the Poll Tax clashes of the late 1980s, this has been an important mechanism of expression of dissatisfaction, defining the outer limit of tolerance. Many instances, such as the corn riots of 1766, the Chartist movement and so on, deserve further study. However, there is a second aspect: reform would also invite reaction in fear: specifically the 1832 Reform Act was seen as the “Great Betrayal” in that by including only a certain economic class (essentially the professions), it was thought the motive engine for reform was removed, thus inviting reaction and agitation for further change. For examples, see A. Fletcher *Tudor Rebellions*, 1968, and J. T. Ward (Ed) *Popular Movements c. 1830-1850*, 1970.

³³⁷ The multifaceted rôle of political satire is a much underestimated aspect in the study of government. For one example see R. Pound (Ed) *C. J. Grant's 'Political Drama'*. *A Radical Satirist Rediscovered*, 1998.

usually bloated egos. Fallen “heroes” (including former high profile politicians) are tolerated but only just, and even then only so long that they do not act bigger than they are. At any rate, so far as the general characteristics of the “English” are concerned, one can hardly do better than read George Santayana, whose description of the English is praise laced with criticism.³³⁸

Finally, more recently (in the era of political executive), continued stability has been predicated upon the real possibility that each side may gain the upper hand without having to destroy the other, and that each resolution in this kind of conflict is conditional. But the mechanism of the stability still requires a balancing process and weight. Importantly, the divide between opposing views has never been rigid or fixed beyond repair: instead, the divide, most visible in the “dyed in the wool” elements, has tended to blur at the “centre”, such that change in the balance has always been possible. It is difficult to generalise in one formula for both before and after the 18th century in this respect. However, the real mechanism of stability is best described by Halifax in his ‘The Character of a Trimmer’ – exemplified, for instance, by the voluntary absence of Tory opponents of the terms of Revolution Settlement at the crucial time – and is given “philosophical” expression in the idea of “the ship of state”, and its contemporary counterpart in the idea of the floating voter.³³⁹ In other words, a real absence of absolute and

³³⁸ Especially G. Santayana ‘Distinction in Englishmen’, in his *Soliloquies in England, and later soliloquies*, 1922, pp. 53-54 – but we shall examine this view in *infra* Chapter Six, section 1. Individualism has had a bad press: for Santayana, it does not amount to selfishness, hedonism or disregard of others. See K Minogue (in review of a book by D. Marquand), ‘Hard choices’ in *Government and Opposition*, 33/2, Spring 1998, p. 259.

³³⁹ Some might contend that the idea of “Big Tent politics” and the “third way”, as well as the evident reasonableness of the Liberal Democrats, belong in this manner of thinking. Obvious affinity notwithstanding, if the “third way” is meant to draw upon and reflect the Halifax-type characteristics of a trimmer, the case is not self-evident. Seeking to trim by politicians of a party government is an oddity of the first order. Indeed, the meaning of this in-vogue idea seemed two-fold: firstly, that where political parties can, they should co-operate. This is so much common sense that, party rhetoric notwithstanding, one wonders why it has to be said. However, it does not mean that coalition government would dispense with the need to trim: trimming, as Halifax examined and defended it, was against any policy for partisan reasons in preference for policy in favour of what might now be called the national interest, not simply against any one party or idea. That this raises some intriguing questions is obvious. Secondly, and especially in the manner in which the Secretary of State for Foreign Affairs depicted it during 1997-8, the “third way” is an attempt to apply moral principles to otherwise harsh business and geo-political considerations, which is just another way of saying that the overall perspective of national

unwavering commitment on the part of a minimal key number, differently defined in each instance, is crucially important. And this can work if the whole is underpinned by the preparedness on the part of all to accept that each result is only a temporary expedient and seek to obtain a different result the next time round – necessarily predicated upon the certainty that, exceptional circumstances notwithstanding, there will be a next time round in not too distant a future.

It is not at all a play on Hegel to say that the truth is in the whole: whatever else may be said about these categories, they are historically and, as it were, symbiotically related, and determine, that is to say, condition, each other.

The transition from Constitutionalism to Sovereignty

... only that power is secure in the long run which places bounds on its own exercise.³⁴⁰

The burden of the argument has been that a hard Medieval-Modern distinction is not directly applicable to the British case; that a more focused periodisation will cut across such a divide; that important continuity of the desire for limited government begins some time between the 13th and the 15th centuries and continues unabated; and that British history is, in fact, stratified, not sequentially segmented into periods. Even so, we cannot avoid the use of “medieval” and “modern” here, but these terms are invested with a somewhat different sense: rather than denote two distinct if not also discrete historical periods, they will be used to refer to two abstracted but different ways of organising the world.

We may depict this transition in terms of significant conceptual change. We may say that when the transition was complete, we find that teleology had been replaced by deontology; that rights take precedent over duties in defining the individual, now *qua* citizen; and that the purpose of government has shifted from the ill-defined almost religious good to identifiable interests of the state, later also of classes and so on, eventually of the people.

Because the history of government in England is stratified rather than

interest that informs the policies of this government is defined differently. But see Matthew Parris ‘The end of opposition’ in *The Times*, 1 May 1998.

³⁴⁰ John of Salisbury *The Statesman’s Book of John of Salisbury*, p. 367

sequentially segmented, it is particularly difficult to isolate the nature, and pinpoint the actual change of substance in the system. Nor are there distinct theories of government that can succinctly describe each type, or, indeed, the nature of the change. However, we know that between the 13th and the end of the 16th centuries, major changes of substance occurred, and we need an approach that enables us to highlight the new in the outcome. This approach cannot be a strictly historical one, in which the outcome, the new, can be seen in terms of its becoming, developing as a contingent outcome of the resolution of two sets of conflicts. Such an approach only serves to blur and obfuscate the *nature* of the new. On the other hand, by contrasting 1215 and 1603, difference is highlighted and the 'new' identified.³⁴¹

1215 has symbolic importance in that events that year mark the idea of limited power, even though, otherwise, nothing is actually settled, nor is it the beginning or the end of an era. More than that, it may well be that *Magna Carta* was not meant to resolve anything. Much is made of the intentions of the king, but, evidently, some barons had no intention of honouring the Charter, for soon King John was faced with rebellion and armed conflict was afoot.³⁴² In other words, *Magna Carta* did not even produce short-term relief and settlement. This is all the more surprising for two related reasons: firstly, *Magna Carta* was what the barons desired, not what the king wanted, and, secondly, the barons wanted it in order to clarify what was due from them, and to prevent arbitrary increases by the king: the barons sought this charter as protection. This consideration contributes to a better view of the substantive contents and rôle of *Magna Carta*, understood as a statement of what was thought to have been the state of affairs, rather than programmatic or stipulative of future relations. And much the same can and must

³⁴¹ For some, such a before-and-after approach exemplifies an impossible comparison over time: they would prefer comparison across cultures and system. But the later suffers from serious conceptual and methodological problems – which we need not rehearse here – whereas the former enables understanding. At any rate, not too many favour or can manage this approach: for a refreshing change despite its many limitations, see H. J. Massingham *Downland Man*, 1926, especially pp. 373-4. For a tabular contrast of 1215 and 1603, see *infra*, Appendix 2.

³⁴² A. L. Poole *From Domesday Book to Magna Carta*, 1955, pp. 477-82. It is worth noting that some barons left before the seal was put to the charter, and claimed that, for that reason, they were not bound by it.

be said about most of the charters other kings granted from time to time.

Yet many ideas in *Magna Carta* – taxation (aid or gift) by volition and, in that sense, by consent; limitation of powers and an agreed, as it were, “constitutional” means of controlling an errand king; trial by one’s peers, and the like – assume an importance beyond the immediate feudal context and are eventually established in more elaborate and lasting form.³⁴³ In other words, although *Magna Carta* was not intended to be programmatic, nevertheless, ideas that shaped it also determined the development of institutions in the next two centuries, and the principles extracted therefrom became the battle-cry of opposition to “kingship” and presumptuous kingly rule for all time. It bears repeating that this sequence is not unique in English history, for very much the same must be said about 1641: many innovative ideas from this fertile period, such as those of the Levellers, were ignored at the time, only to be called forth as the guiding spirit of radicalism over a century later, and to become the *alter ego* of political reform in the 19th century and beyond. All that said, as a marker, *Magna Carta* points to a serious issue and problem. It embodies and underlines two simultaneous though analytically separate conflicts, namely one between kingly government and feudalism, and another, larger one, between power and control over its exercise. But these two conflicts, and the manner in which they are resolved are not historically discrete: in the process of “defeating” or displacing feudalism, kingly government is also transformed, and while what emerges is somewhat akin to authoritative “kingship”, as a matter of fact “kingship” as such is not thereby established; indeed, it may well be that “kingship” portending absolutism was precluded precisely because of the complexity of this relationships. It may also be the case that the divide and conflict between the feudal lords and the king made the church a potentially attractive ally, making some religious concepts more directly applicable. At any rate, the unintended outcome was firmly to establish

³⁴³ G. B. Adams *Constitutional History of England*, 1935, pp. 332-3. He argues that in 1215, these ideas were ahead of their time and, for that reason, “revolutions” were necessary as a means of clearing obstructions to their realisation. In other words, revolution in the history of England, far from introducing change, only facilitated the development, so to say, of latent ideas. See his *The Origins of the English Constitution*, 1920, p. 43. As the arguments of this section tend to suggest, a long-term Whig perspective is unsustainable.

the idea of “kingship” as office, yet another interesting feature of English particularism. Of course, the idea of “kingship” as office is not a secular construction but harks back to magic and taboo ideas and combines it with a religious construction investing the office with more than merely magical powers.³⁴⁴ However that may be, we are on the road to kingly authority pretending to “sovereignty”: “monarchy” is on the horizon but is, in the event, not realised, and, instead, we move from the powers of the king to that of the Crown.

The internal complexity of these two sets of conflicts has a further consequence. Claims to sovereign power have been historically conditioned and affected by conflict, initially, between the feudatories, later parliament, and the king. On the other hand, the outcome of this conflict, in turn, severely affected the possibility and the shape of constitutionalism implicit in the inter-institutional idea as it emerged in the 16th century and caused it to be severely modified. The outcome, constitutional – properly speaking Limited – Monarchy, is a neutered concept, not a system of government at all: to be sure, it is not Monarchy in that the powers of the king are heavily circumscribed, and it makes a mockery of constitutionalism by serving to protect sovereign power and pretending to control how it is used, rather than define and establish limits.

Taking a *vignette* of an abstracted sense of kingly government, a king is thought to have the power of *imperium*, manifested in three ways: that of ban, of *hari bannus*, and of administering justice.³⁴⁵ These are closely related but essentially negative powers. There is a connection between *bannus* – from the Gothic *bandwo*, via the French *ban* to the Latin *bandum* and *bannum*, to *bandire*, “to give a sign” – with the more general power to ban, in the sense of a

³⁴⁴ See H. R. Loyn *The Governance of Anglo-Saxon England 500-1087*, 1984, pp. 19-20.

The rôle and place of magic and taboo in modern European culture are disguised by the extent to which Christian practice adopted and adapted these practices and, thus, masked their origin and meaning. This is not at all surprising. Moreover, it is a contention in this study that this argument also applies to the way in which we simply do not “see” the religious, thus historical – alternatively the historical, therefore, the religious – nature of sovereignty and governmental power, and the attributes of our contemporary institutions, except that some still refer, though in a vague sense, to the religious features of monarchy, and especially of and in the process of coronation. As argued in this study, this is far from being the extent of it – “kingship” and sovereign power are very much the underpinnings, well-nigh the very organising concepts, even of the present regime.

³⁴⁵ H. Fichtenau *The Carolingian Empire*, 1968, chapter 5

prohibition, an *interdicere*, which in the form of an interdict is still a current instrument of the law in Scotland, and in the form of a prohibitory injunction also one in English law.³⁴⁶ This set of powers is, of course, better described as prerogative powers. Here, too, it is worthwhile to linger on the Latin origins of this term, derived from *prae*, first, and *rogare*, or *rogatum*, to ask: that is to say, the right of the king to give the first, but, in effect, the only view; the affinity with privilege, from *privus*, private, and *lex* or *legis*, law, is clear. That said, clearly the functions of “government” and “kingly powers” appropriate to it are limited: nevertheless, the privileges of the king, to that measure, place him above the other feudatory powers, thereby enabling him to attend to matters common to and in-between them. It is important to bear in mind that the feudal “lords” are permanently interposed between the king and the “people”, and the development of “kingship” depends upon the destruction, or, in the least, a significant re-definition of the place and the rôle of this interposed level. However, far from destroyed, this inter-posed level grows into the social class that supplies the ruling élite, with important vestigial remnants even today.

Of course, in this abstract description, we also see the inherent limitations of the system, in that not even the totality of the powers of the king was yet equal to the resolution of all the contingent issues of government. That is to say, the power necessary for the king to act in many matters was very much contingent upon the co-operation of his free men. This condition entails two, though limited, possibilities.

The first is that in all matters not otherwise subject to existing arrangements, unquestionably legitimate power to act can only arise by, and is “created” through, the conjoined agreement of all affected by the issue. Both James Frazer and Henri Frankfort³⁴⁷ make a point of referring to “primitive democracy” as probably the oldest known form of government. Frazer does not give any further detail about it, although he refers to *Gerontocracy* based on the equal voice of all the elders. On the other hand, Frankfort suggests that “primitive democracy” was

³⁴⁶ Though a mandatory injunction may be issued to order a certain action to be carried out.

³⁴⁷ James G. Frazer, *The Golden Bough*, 1922; Henri Frankfort, *Kingship and the Gods*, 1948 and 1978, especially Book II.

what would now called a unit veto system, working on the basis of consensus. This meant that the “society” or “community” was often slow to act and, on occasion, it was necessary to “elect” a leader who could take decisive action quickly.³⁴⁸ “Kingship”, where the claim was not based on supranatural foundations, was a necessary but temporary expedient in conditions where the existing “primitive democracy” was thought inadequate to the task: often a king or dictator with wide powers was appointed for a limited period or the duration of a crisis, normally involving conflict with another people.³⁴⁹ Thus, to say that on matters outside the existing arrangements of power, action was possible as a result of conjoined agreement of those affected is only to recall the natural sense of “primitive democracy”, and to underline the fact that available (“constituted”) power was negative in character and did not imply prior sanction or confer blanket power for policy initiatives. This description characterises a time when it was not possible to claim “binding decisions” by a “sovereign” king, parliament or even both. This also marks the absence of a necessarily inclusive and purposive but abstract entity identified with and by reference to its “territory”, the pursuit of the interests of which is the *ultima ratio* and fundamental responsibility of the king, justifying his privileged claims to special fiduciary powers. Therefore, it is important to raise the question of constituent members and the beneficiaries of such a “primitive democracy” in the 13th century. But this is only another way of enquiring about the make-up of the *political* nation. We shall resume this point further on below; for now it suffices to say that “conjoined agreement” of all – very attractive though the idea is – translates into the voice for a small number of people who speak only for themselves, but who, in turn, and in their own feudal right, “govern” segments of the larger politically unempowered subject-population within a specified territory as their feudal property.³⁵⁰ The idea of consent of those affected is easily transformed into the apparently “elemental” concept of democracy, but only because elements of *isocracy* (equal and equally effective

³⁴⁸ *Ibid* pp. 215-6

³⁴⁹ By implication, “kingship” becomes an established norm and institution because of increased intercourse and conflict with other peoples. *Ibid*, pp. 219-220

³⁵⁰ S.B. Chrimes *English Constitutional Ideas in the 15th century*, 1936, pp. 307-8

political power for all) and the essential meaning of consent (agreement voluntarily given where dissent does not have a price attached) are misconstrued and misapplied, which is not far short of corrupting both. Such a corruption would be an acceptable price to pay if the outcome was not to propagate a lie, in the soul at that. Thus, whereas the historical episode of “conjoined” agreement in this country is interesting, it can easily lead, especially those already disposed to it, into making exaggerated claims about the political “birthright” of the English or the idea of “historical freedoms and rights”, possibly with allusion to teleological development of political democracy. No such generalised claim can be justified. At this point, two sub-considerations are relevant:

1. Given that feudatories, in virtue of the fact, had certain rights and spoke for themselves, these rights and privileges were not, and could not be, translated to the “political nation” as it grew in size. That is to say, *these* rights and liberties were not, as they could not and still cannot be, replicated and applied at large as a universal condition of “freeborn” English, although these rights and liberties were so translated but *in name* only. Once so nominalised, such rights and liberties are easily propagated by a simple rule-based definition. The long-lasting result – relevant especially today – is an interesting one: now, no one speaks for him or herself, except a few vestigial feudatories or their 20th century surrogates, in effect a finite number of peers by hereditary succession who were the subject of legislation concerning the composition of the Lords in 1998: the eventual completion of this reform would mean that, other than the Queen, no one in this system will ever speak for themselves! The rights and privileges of an enlarged political nation – the birthright of the English – are materially different from that of the “primitive democracy” of the Witan or *Magnum Consilium*. We shall briefly resume this point below; for now, suffice to say that there is a far greater conceptual difference between *Magnum Consilium* and parliament than the history of the subject would allow or can accommodate. This is a simple enough point, but has been made enormously opaque by the difficulty one encounters in trying to expose the elemental-appearance of modern indirect democracy as a concept. The extent of difficulty one faces in such an attempt serves to highlight the paradigmatic position of this apparently elemental concept, and the task is made even more difficult because one has to unpack the influential work of 19th century theorists, such as J. S. Mill:³⁵¹ as in many instances, fact and practice stand in the way of analysis and understanding; and there is a head-on clash between the requirements of historical fact and practical necessity with that of academic truth.³⁵² Indeed, to seek to unpack the elemental appearance of

³⁵¹ That is to say the idealisation of representative government as the best possible form of government, which is probably the case in modern circumstances (J.S. Mill *Utilitarianism, Liberty and Representative Government*, 1910). However, this is not democracy modified and made to fit, but its negation now dressed up as the best possible form: it serves to hide the fact that for the vast majority of people there is no voice.

³⁵² This situation may be more complicated than this account suggests. As a matter of meta-theoretical argument, there is a yawning gulf between direct and indirect democracy, and the relevance and impact of size on it. Yet, democracy and democratisation have become

democracy as a necessary academic exercise is to swim against the tide of opinion, "history", and, no less, the frenzy of the age: such an attempt invites abusive appellations of "undemocratic", "anarchist" etc. Incidentally, unlike the modern politically-emasculated generations, the subject nation of "pre-democratic" England was surprisingly uninhibited in showing its disaffection: every Tudor monarch suffered at least one rebellion, mostly in reaction to taxation; and with no army or police force to maintain control, a (religious) theory of obedience was (not always successfully) put to work. Of course, the rebellious had the foresight not to address their grievances against the person of the king or queen, but against a scapegoat or a minister,³⁵³ as parliament did often enough in bills of attainder and impeachment.

2. The numerical enlarging of the political nation never had an effect upon the shape of the system and the structure of power. It mattered but little if the king was faced with a council that was a perfect expression of "primitive democracy" or parliament that spoke for an absent abstract subject-nation. All that mattered was the fact of the "council" and the necessity in calling it in order to get the king's business done. From the start, the character of the enlarged political nation was "passive" and it has remained excluded from the system of rule. This, too, is a sacrilegious point to make: what of the Great Reform Act, which was the first tentative step in the development of modern British democratic system of government?

Circa 1215, a would-be authoritarian king would have faced possibly insurmountable resistance: they used to kill kings, and regicide (always a greater crime than just another murder) was not *made* a capital crime and charged with dire meaning until the king was re-defined as the vicar or shadow of God on earth. Thus, among factors imposing limits and preventing autocratic "kingship", we must include the fact that English kings tended to be relatively poor, dependent upon their freemen for arms, and that, before the succession was fully regulated, kin-right meant that there were rivals for the throne, often from powerful feudatories. Norman kings inherited a legacy not of fully-fledged but limited "kingship", and promptly feudalised it.³⁵⁴ However, if Frankish ideas

almost icons of modernity such that the vast majority of people who live under un-free or oppressive régimes desire it, aspire to it, and will die for it. That western régimes blindly support such moves is a different matter; that this *desideratum* has become the battle cry of the oppressed and un-free makes it so much more difficult to argue the case theoretically and make the point that indirect democracy is a misnomer. On the other hand, it is simply incomprehensible that "leading academics" do not appreciate the fact and are often at the forefront of democratisation, arrange university courses on the subject and are, even if only passively, leading the fight. That this also raises the issue of the rôle of academics in the world of practice is a different, though very interesting, point.

³⁵³ See A. Fletcher *Tudor Rebellions*, 1968

³⁵⁴ Historical wisdom suggests that, as G. B. Adams has argued, in view of the duties of feudal relations, every feudal "sovereign" was a limited monarch. *The Origins of English*

displaced Anglo-Saxon notions, nevertheless they too had to develop and work under the influence of geo-historical ‘English’ “necessity” that no-one could change. In part, the difference between subsequent developments here and those in Europe is explained by the negative implications of British geography: Anglo-Saxon “kingdoms” were all located on a relatively small island, and were therefore less susceptible – because less exposed – to frequent invasion, to volatility born of “external” events over the borders, and less subject to dramatic changes of direction brought about by easy alliances with powerful and accessible allies. This fact is often the cue for an exaggerated “island race” claim that the rhetoric of politics tends to encourage: no such claim is advanced here, and none can be sustained. Far from isolated and insular, France, the Netherlands and indeed Spain played strategic rôles in the relations between the nations and peoples of the British Isles right up to the creation of the Union. Besides, the claim that an island power is less prone to continental adventure overseas does not mean that an island is not a target for adventure from overseas. This absence of reciprocity in outcome explains, at least in part, the further fact that these islands have been more often invaded – the “English” are thus a wonderfully mixed “race” – than its inhabitants have managed to invade other realms in continental Europe. The larger point is that while geo-historical factors play a significant rôle, the reality of the burden of that rôle is often buried under exaggerated claims, whereby its necessary truth is lost.³⁵⁵

Constitution, 1920, pp. 169-171. See also H. R. Loyn *The Governance of Anglo-Saxon England*, 1984, chapter 7. However, that general claim does not contradict the further and specifically English history point that when the Normans came, English “kingship” was already limited, the Normans feudalised it, and so, as argued in this chapter, in a sense initiated the re-enactment of a previous trend, rather than starting a wholly new era.

³⁵⁵ “Insular because an island” is an exaggerated but not completely meaningless notion. However, if the British Isles became insular after the land mass separated it from the continent, then Ireland has always been insular, but there is really very little talk about that. Furthermore, such a blanket notion is misleading. Firstly, the topography of the land affected the “natural” distribution of population, determining access by invaders and patterns of their settlement, whereby the greatest concentration of the thus incoming population, and its actual demographic impact, was felt more strongly in the south and along the coastal regions of the south and east. One important result was that replacement became the dominant pattern of cultural change in these regions, as opposed to absorption/diffusion that was more the pattern elsewhere on the island. Secondly, following on from this, a degree of cultural unity characterised the area based on the Irish Sea, embracing Ireland, Cornwall, North Wales, the very north of England,

The second entailed possibility is this. The fact that only with the conjoined agreement of “all” could many things be done did not, *as yet*, signify a self-defining, self-dependent condition. If this was truly *quod omnes tangit ab omnibus approbetur* (that which touches all should be approved by all) in practice, it did not mean that this *omnes* could do as it pleased, for “the conjoined agreement of all” was still subject to its conformity to “the law”. Up to the time of Alfred and, with symbolic importance, of Edward the Confessor, creating new legitimate power was only possible as an interpretation of existing law, which could only be done with the counsel of the wise in the Witan, where the wise³⁵⁶ meant those who could understand and interpret received law, later also law of God.³⁵⁷ The significance of early Norman kings harking back to the laws of Edward the Confessor³⁵⁸ is not only that they thereby acknowledged existing law – the point

and the Highlands, in clear contradistinction to the whole of the region south of the line from Teesmouth to Torquay. But Ireland had a long-standing trading relationship with the continent conducted necessarily via England. Meanwhile, if Britain was exposed to possible invasion from the continent, Ireland was so exposed to invasion from Britain, and elsewhere; but in neither case did any massive invasion ever happen. That is to say, the idea of insularity has to be understood differently, in terms of a more phlegmatic, less abrupt process of cross-fertilisation, marked by the sheer absence of large-scale invasion. See Cyril Fox *The Personality of Britain*, 1959. But this far from explains the surprising fact that it is the *English* who have always claimed insularity and asserted their “difference” from their continental originals and brethren. See *infra*, Chapter Six.

³⁵⁶ J. Dickinson ‘Introduction’ in *The Statesman’s Book of John of Salisbury*, p. xxxvii. The Witan – as in the Witenagemot, the meeting of the wise – is from Old English “witan”, meaning men of knowledge; in Shakespeare: “weet”, and “wit”; in Old English wit also meant “right mind”; its current form is wit as in “witless”. But the ancient “wise” was one who understood the good and old customary law: they were wise because they had this attribute, were, so to say, deemed to know the law; they were not invited to speak the law because they were wise. Evidently the Witan met three times a year – Yule Tide, Easter and Whitsuntide, held at different places. It gradually also developed a ritual aspect, and became an occasion on which kingly authority was exhibited, and H. R. Loyn estimates that there were some fifty meetings between 900 and 1066, when the king would wear the crown and dispense justice. (*The Governance of Anglo-Saxon England*, 1984, pp. 102-3).

³⁵⁷ For a brief general account see A. Babington *The Rule of Law in Britain from the Roman Occupation to the present day*, 1978, chapter 3. Incidentally, the affinity between this process of interpreting the law to apply it to new instances and what ordinarily we understand by the phrase “common law decisions of the judges” deserves attention.

³⁵⁸ Such a promise of “continuity” was made by Cnut to keep the laws of Edgar the Peaceful. William the Conqueror renewed the laws of Edward the Confessor with the addition of further laws he made *ad utilitatem populi Anglorum* [for the benefit of the people of the Angles], and Henry I issued a “Charter of Liberties”, the only legislation of his reign – the famous *legi Henrici primi* was only a treatise on the laws of England, not the collection of his laws – in which he granted the laws of Edward the Confessor with the emendations made by William the Conqueror “with the consent of his barons”. T. P. Taswell-Langmead

often made about it – but rather that with it, they acknowledged the system of government and its limitations.³⁵⁹ In the round, the meaning of such a harking back is more to say that the new king would abide by the laws that The Confessor observed, arousing a “legitimate expectation” on the part of the “people” that the consequence would be as “good” and “just” a system of government as that under The Confessor – which, as is always the case in such a condition, was a romanticised view of it adjusted in one’s favour. But it also meant that any new law was only comment on “true law”, and, to that measure, itself subject to change and non-territorial in character.³⁶⁰ While there is a strong family resemblance between this and the general features of processes of common law as we know it, they are not instances of one idea and process.

Moreover, society in the era of the Witan and the *Magnum Consilium* was a divided one, in that only a few had political presence. And although it is an oversimplification, the divide was marked by presence in the Witan, as it was later in the *Magnum Consilium*. Furthermore, though something of an exaggeration, yet it is conceptually accurate to demarcate the period of the *Magnum Consilium* from that of Parliament on the basis of the presence of all who had a political voice, in person or by mandated delegation in the former, as opposed to open-

English Constitutional, tenth edition, 1946, pp. 48, 47, and 56-7. Two points are instructive: firstly, in his Charter Henry addressed the barons and tenets-in-chief separately from the “nation” at large, and, second, there is no mention of this latter category in *Magna Carta*, which has a more direct relationship with that part of Henry’s Charter that deals with the barons. That is to say that whereas *Magna Carta* was more an attempt to define the extent of feudal dues and prevent any arbitrary increases, Henry’s charter had an effect upon the rights of others, too. See J. C. Dickinson *The Great Charter*, 1968, p. 13.

³⁵⁹ The English/British have been singularly uneasy about the so-called “law of conquest” – and not just because its claimed meaning is such nonsense either. Throughout their contact with others, they either respected local law and custom, even to the point of accepting what would otherwise be offensive to their (religious) sensibilities, provided it was not offensive to their sense of fairness, and tended to rule *via* local intermediaries whereby they did not have to administer directly and come into contact with local law and custom. This does not make “angels in marble” or “rough diamonds” of the English, but is an important though insufficiently examined historical feature, calling for attention and research. For some further points on this, see *infra* Chapter Six.

³⁶⁰ H. R. Loyn *The Governance of Anglo-Saxon England*, 1984, chapter 3. Incidentally, this reference to non-territoriality of laws recalls a rather interesting and somewhat complicated argument about the notion of territory and its relevance to the development of the so-called British State.

mandated “representation” of the communes. Two differences mark this transition from an active and exclusive but numerically limited “political nation”³⁶¹ to a passive and larger one characterised by prior commitment to binding decisions at the top.³⁶² Firstly, there is a change in the *locus* of decisions: earlier, the rôle of the delegates was to convey a decision already made in county courts to the king in council and certify it.³⁶³ The claim to binding decisions rapidly changed the *locus* of the decision. Clearly open-mandated representation meant that the terms of the decision (usually about taxes) had shifted to “parliament”: in parliaments whatever the decision, it was made and taken in parliament, which the taxpayer was said to be committed to accept. When we add to this shift the further facts that the representative were chosen on a majority-vote basis, and that the decision in parliament, too, was on majority vote of those present, the argument assumes an altogether different character and becomes one about the increasingly tenuous and slender links between the views and desires of the tax payer nation and its representatives. This portends more than merely the germs of centralised remoteness, for here we also see a multiplier effect with geometrical progression implications for the escalating remoteness of the political centre from the governed. This outcome is a far cry, indeed, from the time when each who was touched had a direct presence and involvement in the making of a decision. As late as 1254, the representatives would declare – *via Omnium* – what tax they would grant on behalf of the counties, but the decision as to how much was taken previously in the County Court, not in parliament.³⁶⁴ The fact that at the time the extended meaning of this transition was not even an unintended consequence,³⁶⁵ and that the issue was never problematised, is important. As it

³⁶¹ Said to number around 2000 in the reign of Henry VII, who knew most of them. See William Perry *The Tudor Régime*, 1979, pp. 11-12

³⁶² The change from “all present and agreeing”, or “mandated” presence, to that of “representatives who can bind” is far more profound than may at first appear. Nor is the importance of this fundamental change acknowledged in the literature of constitutional history. Historically the difference between these two concepts reflects rather accurately the conceptual distinction between the upper and lower houses of parliament.

³⁶³ G. B. Adams *Constitutional History of England*, 1935, pp. 172-5. This procedure applied also to the clergy, whose decision the Archbishop of Canterbury conveyed to the council.

³⁶⁴ See D. A. Carpenter *The Reign of Henry III*, 1996, pp. 391 and 395-6

³⁶⁵ The “development” of parliament in the 13th century was *ad hoc*: importance was attached to these changes only afterwards. G. B. Adams *Constitutional History of*

happened, Edward I needed money for an expedition to France: taking his cue from the “model parliament” of 1265, he invoked the principle that what touches all should be approved by all, and summoned also the commonalty so that the “whole nation” could be taxed. But this meant two things: firstly, that the commonalty had to be present, for often they would refuse to elect, and secondly that said presence had to be in the form of representation by a body of men whose decision and consent would “bind” the taxpayer. This was not change in practice on the basis of first principles; the initiative for this momentous change and the first application of synecdochism (the principle that a part may stand for the whole,³⁶⁶ which is to be distinguished from majoritarianism) was only a “cunning” practical solution to his need for money, not the purposeful enshrining of a new, understood and desired principle. Clearly it is important to distinguish the historical specificity of a given case (which can only have a strictly historical narrative relevance) from its larger meaning and implications for and in the development of the system of government. Indeed, although the phrase *quod omnes tangit ab omnibus approbetur* from the Code of Justinian was first quoted in the summons to Parliament issued in September 1295, if at all, it more accurately reflects the reality of the practice before the change to one of “representation” in parliament.³⁶⁷ We are faced with a significant historiographical

England, 1935 pp. 184-5

³⁶⁶ We may surmise that the British system was always patriarchal from as far back as we can see, despite the fact that there have been many queens *regnant*. Up until the early 20th century, women had no political rôle or rights, and though there are now many women in the Commons, the civil service and government – increasingly also in the Church of England – the system is essentially that created by men and geared to their needs. Indeed the lexicon of government and political is also essentially patriarchal. For a general theoretical analysis, see S. Harding *The science question in feminism*, 1986. Incidentally, the system is also highly élitist: this too is a historical development.

³⁶⁷ This view is in direct contradiction to, among others, that of Taswell-Langmead who reckons this phrase only fits the theory and practice of later times, and that in 1295 it was not really accurate. T. P. Taswell-Langmead *English Constitutional History*, 1946, p. 159. The difference between these two views hinges on the way the idea of “representation” and “indirect democracy” is constructed. Incidentally, whereas we are also bound to say that the Parliament of 1295 is the first instance of a Parliament of the Three Estates of the realm, stating a historical truth does nothing for the legitimacy and unproblematical establishment of the idea of such an institution. If that idea is to be established, then we have to examine the many ramifications of the issue, as well as the implicit and explicit claims made for it, and consider the extent to, and the manner in which, such claims can in fact be realised in practice.

difficulty in dating, even roughly, when the feudatories effectively lost their duty of service and with it their *quasi*-isocratic rights,³⁶⁸ in short “feudal independence” (which had, of course, disappeared long before the Tudor reforms,³⁶⁹ let alone when feudalism was finally abolished in 1660), and precisely to date the period in which majoritarianism was indubitably established such that there was no escaping a decision once taken. We cannot positively trace the actual moment of change from either consensus or a system in which each had a separate, *quasi*-isocratic, liberty to grant, accede, or refuse, to the establishment of the majoritarian principle as the indubitable rule. But we know it has occurred when previous practices are no longer tolerated and “allowed”. If in this, as in many other instances, there was no clear process of change and, to that measure, there was no calculated, desired and expected reform, yet, the significance of the change cannot be overstated. For that reason, if no other, an exegesis of the topic is in order.

Now we assume the ubiquitous prevalence, if not elemental importance, of the majoritarian principle and begin with the assumption that, in all conditions, the desire of the numerical majority should not be frustrated (though hastily adding that the minority ought not to be neglected so as to avoid “majority-vote relativism”).³⁷⁰ More than that, we are also conditioned to consider this evidently simple idea inherently fair, immensely practical and, in a simple sense, “natural”:

³⁶⁸ The Statute of Liveries (19 Henry VII, c. 14) summed up the law on this and checked the abuses of master-man relationship; feudalism was as such not abolished until 1660 (12 Charles II, c. 24). On the other hand, aspects of kingly power which had over the years been diffused by delegation and licence were also removed and the powers of the king consolidated by “An Act for recontinuing of certain Liberties and Franchises heretofore taken from the Crown” in 1536 (27 Henry VIII, c. 24); this touched certain discretionary decisions – such as pardon, or appoint justices, without repealing existing legislation on the matter – and ensured that all writs were issued in the name of the Crown, and that the appointment of justices in the Duchy of Lancaster were made under the seal of that Duchy. This explains the oddity that even now (Justices of the Peace Act, 1979) some judicial appointments in that Duchy are technically on the recommendation of the Chancellor of the Duchy of Lancaster, and not the Lord Chancellor.

³⁶⁹ Thus we see no trace of any argument to remind us of the feudal past of this country in, say, P. Laslett’s *The World we have lost*, which addresses the period since the 16th century. On the other hand, Laslett is clear about that feature of the British system that in this study has been termed fossilisation of words and institutional forms. See *Ibid*, p. 25.

³⁷⁰ The description is that of Brian Barry (*Political Argument*, 1965, p. 61), referring to Broad’s criticism of Bentham (C.D. Broad *Five Types of Ethical Theory*, 1934, pp. 114-5)

in a crowd of more than two, the numerical majority decides for the whole, while the crowd *qua* a unit retains its coherence because the outnumbered do not, so to speak, exercise “exit”.³⁷¹ It has to be said that this simple description of what appears to be an almost common-sense idea ought not to be translated by simple transposition into a political principle: formation and re-formation of a group on the basis of “exit” may appear unremarkable and natural, but there is nothing natural about the all-embracing necessary condition of membership in the State where exit is not an easy option and a practical choice. That said, it may well be that by the end of the 16th century, possibly well before then, synecdochism – now reduced to the idea of majority rule – was simply taken for granted. But this claim calls for two comments. Firstly, we must not read a sense of inevitability into this contingent development, yet we must also recognise that the range of contingent possibilities is not, at any given moment, unlimited; more than that, some choices have a greater potential and propensity to come to pass than others,³⁷² such that the backward glance of the historian may ‘see’ a given sequence of contingent developments as ‘path dependent’. Secondly, even though we find the idea of majority decisions ‘normal’ and natural, it is not a central feature of the history of ideas in this respect: as a matter of historical fact, a scan of Plato’s *Republic* and Aristotle’s *Politics* and *The Athenian Constitution* shows the extent to which they are not concerned with majoritarianism as an overarching principle; rather, even though they make a few but significant references to majority decisions, it is safe to assume that they meant selectively to apply the principle. Aristotle makes the point that in “constitutional governments”, the positive decision of the majority should be final, but does not go as far as to install majoritarianism as the abiding principle. For Aristotle in many instances, especially in oligarchic deliberations, the veto, but not the assent of the majority was final.³⁷³ However, the concept is

³⁷¹ But recall Ireland before 1922 or Northern Ireland before 1969 or 1972, and indeed since up to 1997: whether “exit” has now been excised or actually turned into a possible political choice is the big question.

³⁷² Of course the development of the state – defining modernity, or vice versa – was a contingent matter, but the likelihood of development otherwise was made less probable because the practices that would make the state likely and feasible were already available and established. Historical contingency is in part a determined fact.

³⁷³ ‘Politics’, book IV, chapter 14 in *Greek Philosophers™* CD-ROM v4.3, 1991-5 World

not part of the agenda of theoretical analysis: in fact, medieval political thought is silent on the topic, but as practice it comes into its own in England between the 13th and late 15th centuries. But precisely because majority decision is natural and self-evident to us, it takes an effort of will even to formulate questions about it. However, in order to understand the scale and the nature of a few changes that defined the foundations of the British system, formulate questions we must: how did this state of affairs arise, and what are its implications?

Consent as such does not figure greatly in early medieval political thought. But in (early) modern thought (which was much given to accounting for the original of human political society as a theoretically necessary but preliminary question) this question looms large, and the tension inherent in the difference between the two modes of consent surfaces. Thus it is, for instance, that Rousseau makes an assumption that whereas the making of the social contract requires unanimous consent of each, refusal of some does not mean that the contract does not happen, but only serves to define the membership of a necessarily inclusive “state” system such that the dissenting people may be in it but will not be of it; that is to say, once a state is created the dissenting people become “foreigners” and the fact of their continued presence and residence is taken to constitute consent and willing submission to its “sovereignty”.³⁷⁴ Apart from the fact that this formulation begs a large question,³⁷⁵ Rousseau makes the further assumption that the terms of such a once for all creation *per force* mean majority decision on all other matters *within* it, although there is no indication that this rule is an outcome of the deliberative choice of its founders. In effect this means that those making the contract are confronted with Hobson’s choice. Those who assent do so to a package – that of majoritarianism with all that it

Library Inc, Screen 199:384

³⁷⁴ J. J. Rousseau *The Social Contract*, 1762, book IV, chapter 2

³⁷⁵ What percentage of all? How is this calculated, geographically? If so, who participates? If not absolutely all, then what criterion of selection, such as age, sex etc are applied. And if there are such rules, then how are they made without a system to which all, including those to be excluded, have consented, else there is no agreement on the ground-rules, and this means that legitimacy cannot thereby be conferred upon the ensuing steps. Of course, this is only crazy theory, else one has to assume the impossible, and altogether nonsensical, assumption that there is no sense of home prior to and above societal institutions and structures. Social and political lives do not have points of “cold start”.

entails – but those who dissent are subject precisely to the system they chose to reject, but now as “foreigners”. In short, they have a choice between assent and alienation – surely, on this view the character of the outcome is that of a “*societas*”, hardly “*universitas*”. Be that how it may, it has to be said that such a conception is theoretically predicated upon the impossible expectation that this kind and level of theoretical argument, and more, is actually available to all the participants such that their choice is on the basis of full knowledge of the terms and consequences of the idea.³⁷⁶ Incidentally, Locke, almost a century earlier, is not far behind in this: if he avoids the complication of a “cold start” and the problem associated with a “post-primordial” social contract, nevertheless, once in it, one is subject to a raft of necessary obligations, including the notion that one cannot alienate one’s (real estate) property from an existing state.³⁷⁷ Thus, each must pay his proportion of the cost of government, but this they must do on the basis of “their own, i.e. the consent of the majority, giving it either by themselves or by their representatives”.³⁷⁸ Furthermore, for Locke, too, presence of foreigners is automatic silent consent. Contract theorists, and in their own way divine right theorists, tell a tale rather than construct a theory that can reckon with historical fact: in the paraphrased words of Kissinger, such accounts do not even have the advantage of being true! Far from it, such conceptions are the figments of fertile imaginations, for acts of “political” creation – like the six days of creation – never did nor can happen,³⁷⁹ and because it is altogether febrile to assume that one can up sticks and go (exercise “exit”) the often-associated inference that continued presence amounts to tacit consent becomes impossible to sustain. Such wonderfully attractive but mad-hatter schemes reckon without lived-life. More than that, it is equally crazy to read meaning back into a presumed and fairy-tale (it is too much to say theoretical) act, and legislate that the outcome necessitates that binding decisions can only be on a majoritarian basis without, in some significant

³⁷⁶ Note the similarity here to the *dictum* that ignorance of the law is no defence.

³⁷⁷ See T. Baldwin ‘The Territorial State’ in H. Gross and R. Harrison *Jurisprudence: Cambridge Essays*, 1992, p. 213, referring to J. Locke *Concerning Civil Government, Second Essay*, 1690, paragraph 191.

³⁷⁸ J. Locke *Concerning Civil Government, Second Essay*, 1690, paragraph 140

³⁷⁹ This is true not only of societies that have not suffered a fresh start, but also the epochal events of the American, French and Russian revolutions.

sense, invoking the idea of “reason of the state”. Similarly, while Barry’s discussion of the finer meaning of majoritarianism as distinguished from majority decision captivates,³⁸⁰ none of it can inform the facts.

Social science is only a theoretical re-consideration of facts, but if it underlines, at the one and same time, the necessity and the inadequacy of history as a discipline, it does not amount to an invitation to obtuse “philosophising”. The presumed original of government, or, for that matter, a presumed essential human nature, is simply beside the point, and it is altogether irrelevant to seek to deduce from such an essentially fairy-tale notion binding rules of conduct. Nor is it meaningful simply to narrate things as they have contingently become, and assume that one can and should seek to justify “what is” in terms of its becoming. The true wider and deeper meaning of an action cannot be known to the actors at the time, and the meaning of a historical instance is that which the historian puts upon it in the light of much else since. This puts a rather different gloss on the idea of a historical system, and makes it a completely unintended outcome, which, for many, is precisely its most important point and source of strength. Of course this leads into a serious conceptual difficulty in that “unintended” is not the same as, nor can it be translated into, the idea of “historically sanctioned”. Clearly for each generation the system is historically determined – it is the necessity in and with which each must start³⁸¹ – and while it takes but a string of words to endow it with the claim that “what is” is historically sanctioned, the meaningfulness of this string of words is well nigh impossible to demonstrate. Such an attempt may involve a defence of the sense in which history sanctifies and legitimates the system (but in terms other than by “deriving” a positive from a negative: *viz.* because they did not up and leave, they must have been satisfied with it, even though they did not will it), or may be based on the argument that the system should continue to be what it has become. Clearly the problem issues

³⁸⁰ B. Barry *Political Argument*, 1965, pp. 58-66, where he associates majoritarianism with “committing oneself to the judgement of the majority,” whereas majority voting is liable to be abandoned whenever it appears that one’s principles have a better chance of implementation under a different system.

³⁸¹ See my ‘With Eyes To See What Is New’. Paper given at Frankfurt/Southampton Seminars, Riezlern/Kleinwalsertal, Austria, August/September 1994.

from the fact that it is not possible to start with clear, direct and free consent of each: contract theory of the “State” has to manage the necessary absence, rather than active presence, of direct consent. The State is not and can never be a contract, an original constitution, or a primordial condition. It can only come about as an imposition – whether historically and slowly, or as a result of violent irruption – upon an already existing community of people.

On the other hand, given the importance of consent, its meaning is rather neglected in the discourse of constitutional and political history. Partly this is due to the paradigmatic rôle assigned to the idea of consent in political thought, which serves to disallow critical questions about the nature and meaning of the different forms of consent. Of course the application of synecdochism, generally (mis)understood as majoritarianism, even majority decision, served the purposes of the king more than those of an unsuspecting nation about to be taxed. More than that, no one considered the issue theoretically.

If the origin of majority decision in England is obscure, nevertheless, there are rays of light that illuminate our glimpses of a possible historical path. According to John Millar, if there was a vote in the Witan, it was a qualified vote.³⁸² If this is the case, then the decision-taking principle was in some sense not only proportional, but also majority based; else qualifying the vote would make no sense at all. Apparently, Millar is the only one to make this claim: there is little historical evidence to support any single view on the prevalent decision-taking mechanism of the Anglo-Saxons. By the 12th century, evidence points to the claim that resort to majority decision-taking indicated an emergency situation, and a mechanism for “conflict resolution”. For instance, according to *lege henrici primi*, if one judge dissented, the majority view would prevail, but this rule did not apply to jury decisions – and doubt lingered such that a leading case of 1367 declared majority verdicts void.³⁸³ Some take clause 14 of *Magna Carta* to implicitly establish

³⁸² John Millar *An Historical View of the English Government*, 1803, volume 1, chapters VII and XIV.

³⁸³ J. H. Baker *An Introduction to English Legal History*, 1979, p. 66. Of course the present condition is regulated by the Jury Act 1975, as amended, whereby a minimum of ten votes is needed to return a majority verdict. A relaxed version of this rule applies to the Coroners courts (Coroners Act 1887, as amended).

binding majority decisions.³⁸⁴ Three points stand out in that clause: a counsel will be invited, for a purpose specified in “all letters of ... summons”, to obtain “common counsel of the realm”, and “the business shall go forward on the day assigned according to the counsel of those present, even if not all those summoned have come.” Does the combined effect of these phrases mean that decisions were on the basis of the majority vote of those present, and that such a majority decision was binding on all invited, not just those present? Doubt is cast on such a blanket claim when we examine clause 61: here, the majority decision of those present is deemed to be the decision of all, but the barons are explicitly invited to swear that “they will observe faithfully all the aforesaid”, and of course the charter binds the king. If it was necessary explicitly to clarify this rule of procedure in clause 61, then binding majority decision was no rule, and was not indubitably established, and inferring it from clause 14 is stretching the point. We have no account of specific meetings and instances following this charter to be able to determine precisely what rules were applied. On the other hand, it is the case that some not present when *Magna Carta* was signed claimed that, in virtue of that fact – their absence and lack of consent to the measure – they were not bound by it. There was lingering doubt about this as late as 1441, when a Sergeant Markham denied that the majority decision of the Commons was binding on all, but only those who assented, but by 1476 apparently majority rule was established.³⁸⁵ The Provisions of Oxford explicitly allow for majority decision of the members of the council, and the practice simply filtered into proceedings in the Commons.³⁸⁶ In 1430, the majority principle was first *stipulated* for parliamentary elections.

Thus, the “privilege” of being caught in the “tax net” endowed many with an evident “political” rôle and presence, but immediately blocked and permanently disallowed the possibility that they could ever exercise this “political”, “civic”, “national” – again, words fail the historical difference – privilege other than in a

³⁸⁴ G. B. Adams *Constitutional History of England*, 1935, pp. 131-4.

³⁸⁵ S. B. Chrimes *An Introduction to the Administrative History of Medieval England*, 1959, p. 137. The uncertain language is typical of this sort of story. Incidentally this topic is lamentably absent in standard constitutional history texts.

³⁸⁶ *Ibid*, p.135.

limited and indirect way. We might say that a new “political nation” was thus created by the addition by fiat of a number of people who never could enjoy the privileges of direct say as had done the limited but whole “political nation” heretofore.³⁸⁷ That is to say, at the time when appeal was made to *quod omnes tangit ab omnibus approbetur*, the mode of practice envisaged for it – clearly the only mode possible – was poised to negate its effect.

Thus, only in the period to the end of the *Magnum Consilium*³⁸⁸ those present had a political voice, and all who were entitled to a voice were present. That is to say the whole “political nation”³⁸⁹ was there; this meant all who had a recognised

³⁸⁷ The idea of direct and indirect democracy is not the focus of the argument here, nor is the point that change at this stage should have moved the system closer to the Greek ideal. Of course, if Finley’s view that Greek democracy “gave the poor a measure of participation, especially the right to select officials, while retaining for the rich the greater weight in decision-making” (M. I. Finley *Democracy Ancient and Modern*, 1973, p. 49) is at all accurate, then the newly-created English practice was a laudable move in the right direction. On the other hand, the point being emphasised is that the newly enfranchised received a *different* set of rights.

³⁸⁸ Pace medievalists who will, rightly, balk at such an implicit periodisation and will argue, with some justice, that there never was such a “period”.

³⁸⁹ Abstractions facilitate, but they can also cause much mischief. Political nation is a case in point. As a generic phrase, it can be applied to Anglo-Saxon England as well as the 21st century United Kingdom. However, the referent for this phrase will be vastly different in the two instances: in the former, it would probably be nothing more than the Witan, and in the latter nothing less than the body of the electorate. The mischief is in the implicit expectation that these two entities have similar, if not the same, properties, and that, *mutatis mutandis*, similar or the same principles apply. As a matter of fact, the generic description on the basis of broad similarities, so to say, at a systemic level, hides the real difference in the way each is incorporated into its corresponding governmental/political system, and the rôle it may play. Evident similarity over time is maintained mostly by the application of some linking concept, which, as a rule, does not stand close examination. A case in point is that of a small group functioning on the basis of participation of all, where the implications of the unit veto system encourage compromise, as opposed to indirect and representative – not delegatory – participation, applying the majoritarian principle, encouraging factions and the pursuit of sectional interest. In assuming that these are two examples of the way a political nation can express its will, we also tend to assume that they are equal not only in their consequences (whereby a decision is reached), but also in the degree of acceptance – the normal expectation is to encounter the word “legitimacy” in this context, but such a turn of phrase would also be a misuse – and the inherent weight attached to the decision thereby reached. In the world of practice, but especially in the relations between States, the differences here implied are simply ignored. For an example of the use of the modern abstraction “nation” in a generic sense see G. B. Adams *The origins of the English Constitution*, 1920, pp. 157-8, and 291-4. Similar generic uses are also to be found in F. Kern *Kingship*, 1939, pp. 12, 75, and 191 (the people, community and representatives); J. D. G. Davies and F. R. Worts *England in the Middle Ages*, 1928, p. 113 (consensus of nation at large, national concern, state security, etc); and R. Britnell *The Closing of the Middle Ages?*, 1997, p. 118 (popular politics). For a

right to participate³⁹⁰ in that they were independent in their possessions and were, so to say, the master of their conduct and under no necessity to adopt any rule of public conduct of which they were not, in some measure, the author.³⁹¹ They – bishops and abbots, aldermen and chiefs, at the Witan, and archbishops, bishops, abbots, earls, and greater barons, as well as those “holding of us in chief” as indicated in *Magna Carta* (article 14), at the *Magnum Consilium* – participated as allodial proprietors (pre-feudal free holders), though, in the period of the Witan, probably subject to a minimum qualification of forty *hides* of land:³⁹² if a later change and innovation may be taken to signify the absence of this “new” idea and practice at an earlier age, then 13th century changes in order to widen the tax net must mean that in former times only those present were taxed (this is actually better put in a double negative form: no one not present was taxed): tax was only a necessarily voluntary gift. Thus, whether anyone else was present at the Witan or the *Magnum Consilium* is irrelevant, for no-one else had any say in those proceedings. Moreover, the participation of “others” was not necessary, for it was thought that the larger interest of each was protected by its identity with

historically focused analysis of the “English nation”, see Edwin Jones *The English Nation*, 1998. The term “realm” is very often used when its extent and meaning is not clear. For criticisms of the use of such generic concepts, in particular “the people”, see W. A. Dunning *A History of Political Theory*, 1938, pp. 79-80. There are two occurrences of “public opinion” in *The Statesman’s Book of John of Salisbury*, pp. 39 and 134, but it appears Dickinson makes rather too much of the fact in his Introduction. *Ibid*, p. xxii.

³⁹⁰ There is insufficient historical evidence to be more emphatic about the rules here.

³⁹¹ H. R. Loyn *The Governance of Anglo-Saxon England*, p. 66. Loyn correctly suggests that the fact of presence and explicit consent in person made the decision binding. This is unexceptionable: but to claim that those not present are nevertheless bound by the decision requires a conceptual shift of some magnitude. Furthermore, the change from direct and positive consent of all affected, to a presumed tacit or consent by representatives, requires yet another, even greater, conceptual shift, involving rather complex arguments about the nature and possibility of democracy as a system of government, returning us to the problem of the application of *quod omnes tangit ab omnibus approbetur*.

³⁹² One *hide* was thought sufficient land for one household. See John Millar *An Historical View of the English Government*, 1803, volume 1, chapters VII and XIV. However, we have no clear idea about the decision-taking processes of the Witan, nor whether these early systems were based on unanimity or majority principles. In itself, that is not a major issue, but it does put a marker down for the importance of the claim, for instance in 1215, that absence at the crucial time meant that one was not bound by the decision reached. Such claims played an important rôle in shaping parliament in the early 13th and 14th centuries.

that of one's allodial "master":³⁹³ one is reminded of the 18th century idea of virtual representation, and late 19th century ideas of Tory democracy. Of course, more poignantly, one is also reminded of Burke's understanding of the relationship between government, economic and social structure, and property.

Yet, this picture is too innocent, and there is a risk of romanticising the medieval world at the expense of what we know as our only condition of life: the past is not always better, nor is the present the incarnation of all reason or the best of all possible worlds. Any account of the powers and institutional paraphernalia of kingly government and its limitations is necessarily silent about the lived reality of the situation. There are two aspects to this. On the one hand, the rude truth is not about the excessive powers of the king, but more about the utter powerlessness of ordinary people, and the extent of their vulnerability to the power of the others, especially feudal lords. We need only recall a few features of life at the time to see the truth of this: it was a slave-owning society,³⁹⁴ in which the distinction between *aut liberti* and *aut servi* made a significant difference to the kind of legal protection one could hope for; it was a world in which every man who did not own land was forced to have a "Lord" who would speak for him, and deliver him in case of trouble;³⁹⁵ a world in which a free man could be reduced to slavery, and this tainted the person, later also "corrupted the blood" and destroyed the male descendants;³⁹⁶ and in which outlawry meant condemnation to certain death.³⁹⁷ Moreover, it was a world that practised wardship³⁹⁸ (thus giving the king enormous control over succession to property and, therefore, economic, social, and political position and power), and where hanging, beheading,

³⁹³ *Ibid*, volume 1, pp. 203, 221, and 360-5.

³⁹⁴ H. R. Loyn *The Governance of Anglo-Saxon England*, 1984, pp. 41-2.

³⁹⁵ This notion, in a way, metamorphosed into the property qualification for the franchise in the 15th century; property ownership qualification was abolished in 1918, but universal – i.e. "unqualified" – franchise was only introduced in 1948.

³⁹⁶ H. R. Loyn *The Governance of Anglo-Saxon England*, 1984, pp. 42 and 128. Forfeiture and corruption of the blood, except in cases of outlawry, were removed in 1870.

³⁹⁷ Outlawry was abolished in civil matters in 1879, and in criminal matters in 1938, although the practice was largely defunct long before, technically, the punishment was available until it was abolished.

³⁹⁸ Only with the final formal abolition of Feudal Tenures in 1660 (12 Charles II c. 24.), which also explicitly repealed two acts (i.e. 23 Hen. VIII c. 6, and 33 Hen. VIII c. 22.), did wardship lose its political significance, and become a matter of law.

emasculatation, and for women, the “privilege” of burning at the stake³⁹⁹ were altogether too frequently used for all manner of what today are petty crimes.⁴⁰⁰ This was a world in which *droit du seigneur* (including the simply sick right of the *seigneur* to the “bride” of his “subject”) was established practice,⁴⁰¹ and where such burdens were not counterbalanced by any clearly defined, historically established, or conceptually possible to claim “rights”, other than those inherent in feudal relations. These points serve as a reminder not to romanticise the good old law in the medieval period. Of course, we have severe difficulties in imagining a living social form in which the vast majority are subject to the rule of their feudal Lord and the church,⁴⁰² and cannot easily comprehend the implications of this for lived life, yet we know it was a world in which the local was all many could ever know, and that their cultural, social, economic, and legal-governmental environment was on a very small scale indeed.

On the other hand, it is important to examine the relationship between the king and “the political nation”. It has now become a refrain in this study that part of the problem with the study of the British system is that the terms used to describe, for instance, the features of government and that of “kingship” in Anglo-Saxon period are essentially similar to, or are the same as, the ones used today,

³⁹⁹ See Poole *From Domesday Book to Magna Carta*, 1955, pp. 403-5, also for further details about private gallows.

⁴⁰⁰ H. R. Loyn *The Governance of Anglo-Saxon England*, 1984, p. 82; F. W. Maitland *The Constitutional History of England*, 1908, pp. 148-9; T. P. Taswell-Langmead *English Constitutional History*, tenth edition, 1946, pp. 29, 82, and 91; J. A. E. Jolliffe *The Constitution History of England from the English settlement to 1485*, 1947, p. 44; and G. M. Trevelyan *English Social History*, 1946, p. 348. Oliver Cromwell felt those who inflicted heavy punishment for petty crimes had to answer to God. Even so, famously by the end of the 18th century, some two hundred crimes attracted capital punishment.

⁴⁰¹ A little commented-upon fact is the difference between the king and barons in this respect: while the barons exercised *droit du seigneur* in their relations with their “subjects” – which presumably meant a right drawn from the king – there is no historical evidence to show that king arrogated the same right to himself, either in relation to his barons or in his own estates against his “subjects”. As a historical topic, this aspect of *droit du seigneur* has remained obscure. On the other hand, accounts of the rights of feudatories usually do not include this particular practice. For a sympathetic account of ‘Seignory’ as incorporeal right see Francis S. Sullivan *An Historical Treatise on the Feudal Law and the Constitution and the laws of England*, 1772, lecture 10.

⁴⁰² Peter Laslett makes the important point that because a good deal of what we now accept as routine governmental functions were performed by other than secular bodies, we are liable to mistake the extent of government at the time. See his *The World we have lost*, p. 139. See also A.M. Hocart *Kings and Councillors*, 1936, pp. 170-1.

but because the two instances are vastly different, the terms actually mean different things: this lays upon the analyst the onerous duty of circumscribing the manner in which such terms are used. Thus, whereas we are bound to say that the Witan had the power to dispose of a king and elect a new one, or that kings who came to the position and the title by conquest were in fact elected in and by the Witan, yet so saying serves to hide the fact that the position of the king then was not what we understand it to become when we speak of Monarchy.⁴⁰³ Furthermore, election meant only that succession was not a foregone conclusion: it certainly was not hereditary, even if the chosen king was from the heirs of the previous one. There was no impersonal estate but only that of the king as another proprietor. And even if his heirs had a kin-right claim to the title, succession even to a member of his family would still mean the division of the estate, leading to progressive fragmentation into smaller “units”.⁴⁰⁴ In other words, there is as yet no “realm” or an impersonal estate as such, and no *porphyrogeniture*; no one is yet born in the purple, much less can there be *porphyrogenitism*.⁴⁰⁵ Moreover,

⁴⁰³ The Witan, so argues H. R. Loyn, imparted what was later called a sense of “constitutionalism” to the old English monarchy. See his *The Governance of Anglo-Saxon England*, 1984, p. 102.

⁴⁰⁴ F. Kern *Kingship and the Law in the Middle Ages*, 1939, pp. 18-22.

⁴⁰⁵ When succession becomes hereditary, the idea of “election” becomes symbolic, preserved and acted out in the process of coronation: importantly there is no longer any distinction between *dominus* and *rex*, for, now, the king never dies. This raises an interesting question about who would “hold” the authority in an *interregnum* caused by a delay in succession – before the time when its succession was automatic and the king/queen was deemed never to die. When the kings are truly elective, as in the period of the Witan, it is easy to accept that in an *interregnum*, the Witan would be the highest authority, but exactly what its functions would be is not clear. As to the later period when limited “kingship” had been transfigured into monarchy with the backing of the Church, in the event of an *interregnum* kingly authority would “revert” to the Pope, so claimed Pope John XXII. (See J. N. Figgis *The Divine Right of Kings*, p. 52). However, there is no instance of this happening in this country. Chrimes raises the question of “peerage” in this regard when he points out that events under Henry IV testify to the view that if the king was unable to execute his authority, then the peers alone had the function of doing it for the duration. Furthermore, Richard, Duke of York, accepted the appointment to a limited protectorate of the realm from the peers, terminated when Henry recovered his health. (*English Constitutional Ideas in the 15th century*, 1936, pp. 148-151). The case of Charles II is not a good case in point, but demonstrates the fluidity of the historical system. General Monck declared for free parliament, and called one; elections – held under his protection – yielded the so-called convention parliament that invited Charles “back” to his throne. (See G. M. Trevelyan *England under the Stuarts*, 15th edition, 1930, pp. 328-337, and G. Davies *The Early Stuarts 1603-1660*, 1959, pp. 253-260). This parliament by an act declared its own status, and the following “Cavalier” parliament, summoned on royal

because a king had active duties, minors were not elected, no matter whose issue they happened to be.⁴⁰⁶ At any rate, a king was one leader among his equals⁴⁰⁷ selected because he was thought “best” able to perform certain duties, and it was in the performance of these duties that he was deemed successful or not. Put differently, the process of electing a king meant exercising a choice by equals among equals, an action by fellow freemen. This equal status of the king with his “men” is further demonstrated by the fact that only he could judge the allodial men with them, and that the ordinary process of jurisdiction did not apply to them, which is reminiscent of vestigial privileges of the peers of the realm.⁴⁰⁸ Seen in this light, the process of election, its importance, and “the powers of the Witan” against the king do not appear as great as they might otherwise do. But for all that, there is a balance of some sort here, and a remedy of some kind, but in a condition in which the king has limited powers and even more limited functions,⁴⁰⁹ and is only a leader amongst his equals. In a sense, the description *primus inter pares*, freely applied to feudal kings, is applicable with greater poignancy to the Anglo-Saxon period. It bears the emphasis that because there is no estate of the

writ retrospectively sanctioned the convention parliament. (G. Clark *The later Stuarts 1660-1714*, second corrected edition, 1961, p. 4). Power reverting to the Pope or the peers are points of historical-theoretical interest only: since the king/queen never dies, sovereignty cannot revert to its origin. On the other hand, precisely because succession is automatic, minority, absence and indisposition mean that regency is of greater interest. However, sovereignty does not descend, and a regent is not a surrogate sovereign: for that reason a regent (or councillors of the state) is debarred from performing all the functions of the sovereign. The essential idea in regency is to hold the situation until sovereign power is fully restored to the king/queen, i.e. to enable government to continue.

⁴⁰⁶ This does not mean that minor kings were unknown: Ethelred II was chosen king at the age of ten, and Henry III *succeeded* at the age of 9, in 1216.

⁴⁰⁷ This is illustrated rather neatly, though indirectly, in *Magna Carta*: articles 12 and 15 embody one set of principles regulating the relations between a superior and his subordinates, and apply it both to the relations between the king and his barons, and that of the barons and their men.

⁴⁰⁸ House of Lords, Standing Order No. 79 (1997): “... when Parliament is sitting, or within the usual times of privilege of Parliament, no Lord of Parliament is to be imprisoned or restrained without sentence or order of the House, unless upon a criminal charge or for refusing to give security for the peace. ...”

⁴⁰⁹ Much of what today is routinely accepted as governmental was at the time in the hands of allodial men, including Bishops. However, the coronation promise of Edgar at Bath shows how limited the expected range of his functions were, which, stated generally, are to protect the church, punish the malefactor, and do justice. See H. R. Loyn *The Governance of Anglo-Saxon England*, 1984, pp. 77 and 85.

realm other than the private estate of each, a succession, other than of the son of a king, does not entail succession to the estate of the former king. Therefore, even the greatest of such kings – meaning one with the largest area of England under his rule – was only the king of the English, not of England. Thus, to call him, as does Taswell-Langmead⁴¹⁰ *rex anglorum*, in contradistinction to *rex angliae*, is an overstatement and a misuse of “*rex*”⁴¹¹ even if this term was used in the tenth century,⁴¹² although from the eleventh century on it is more meaningful to speak of King of England rather than of the English.⁴¹³

Despite all protestations to continuity, the Norman introduction of political feudalism changed a major part of this picture. The king’s men – the barons (from the Latin *baro*, man) - held land in return for “public” service, owed fealty and were bound in a relationship of (feudal) honour to him: all this entailed reciprocal duties laid upon the king. That is to say, with the Norman invasion (or succession, for there is little magic in calling it one or the other), the king becomes the ultimate Lord of all the land, and the barons hold *of* him, not in their own right: they are *his* tenants, albeit “-in-chief”.⁴¹⁴

It is clear that, while technically the king is still the first among his equals, there is now a distinct difference between his and their position. If the barons meant to, and it served their purpose to maintain their equality with the king, the king meant to, and it served his purpose to distance his position from them. On the other hand, the Normans, harking back to “succession”, were also committed to continuity. This required continuity of the form of rule, which, in turn, required visible institutional continuity: yet, substantively, the *Magnum Consilium* was not a latter-day Witan, even if the annual pattern of its meetings was maintained, and each occasion was, evidently, used to perform much the same sort of function; nor were the laws completely those of Edward the Confessor. Conceptual tension

⁴¹⁰ T. P. Taswell-Langmead *English Constitutional History*, tenth edition, 1946 p. 19

⁴¹¹ See A. L. Poole *From Domesday Book to Magna Carta*, 1955, p. 3

⁴¹² This may have been a “political” move, seeking to assert the king’s position in England against the church and other kings. See J. A. E. Jolliffe *The Constitutional History of England from the English settlement to 1485*, 1947, pp. 101-3.

⁴¹³ H. R. Loyn *The Governance of Anglo-Saxon England*, 1984, p. 83

⁴¹⁴ F. W. Maitland *The Constitutional History of England*, 1908, pp. 154-161

is almost palpable, and, as a matter of historical fact, the very essence of rule was feudalised:⁴¹⁵ in attending the *Magnum Consilium*, men served the king personally, as the Lord of the vassals, but the king and feudatories were also poised against each other, as it were, naked, with no institutional machinery of any kind to contain this tension and manage the “conflict”. There is equally little doubt that the balance was increasingly tipped in favour of the king, especially as the expanding administration of king’s justice steadily created/extended a unified legal system throughout his domain at the expense of baronial courts. Importantly this centralising tendency is entailed by, and is very much in the extended meaning of prerogative powers: in this way, the king’s previously personal peace and limited justice are, so to say, “globalised” to coincide with the extent of his realm, defined by the extent to which his writ ran.⁴¹⁶ Necessarily the instrument of this centralising process is common law in the sense of law in common. But in this we are not looking into the abyss of absolutism: law in common was reconciled with tradition and local custom, such that “law in common”, as common law, assumed and evoked the generally accepted medieval character of “good” and “old” law. Equally importantly, the ruling idea of the age required that the king be subject to a higher law.

⁴¹⁵ Exactly “how feudalised” is an issue, for reasons largely irrelevant to the course of this study. However, if F. W. Maitland is correct in insisting that this country was never completely feudalised in an ideal sense (*Ibid*, p. 163), then how to explain the fact that much that is currently accepted as historically English, or British, is in fact feudal, in origin, form and meaning? One has only to bear in mind a number of contemporary practices and terms while reading, say, F. L. Ganshof’s *Feudalism* (1964) to see the continuity of feudal ideas and practices. Thus, *inter alia*: oath of allegiance/fealty; homage, done often with a gesture of the hand, such as “hand in marriage”, or “kissing hands”; *Consilium* as part of service owed, performed by sitting in *curia*; felony, understood as the failure to keep an obligation; *liege* ... one’s lord whom one serves, *dominus*; investiture, which creates right of *seisin*, that is to say *tenura*, tenure, right of possession; primogeniture, which leads to the indivisibility of fief as inheritance; conscientious objection, which issues from the right not to obey an order which is incompatible with one’s dignity as a freeman; and the importance attached to fidelity, and accepting the binding force of an engagement freely entered into. The oath of office, sworn as the necessary rite of becoming a Privy Councillor, and, indeed, the words uttered by Prince Charles in his investiture as Prince of Wales in 1969 are wonderful testimony to the continuity of feudal notions. Moreover, these are not merely “manner and form” features, but are – in a very feudal sense – visible processes creating binding relationships.

⁴¹⁶ See F. W. Maitland *The Constitutional History of England*, 1908, pp. 108-9, 110, 111-3, 148-9, and 154-161.

From the perspective of the third millennium, and because even a strictly academic vision is liable to be seriously distorted by the fatal attraction of contemporary paradigms, the medieval idea may present a confused and confusing picture. None of the certainties that in the condition of Globalisation are thought to be on the wane were present. There were no “States”; no centralised, secular, and sovereign power; indeed as Hocart puts it, the Medieval idea is characterised by conditional as opposed to absolute power in the Modern idea;⁴¹⁷ no distinctly political constitution of any sort; no unified economy; no government at the centre ever-ready with policy on just about everything; no centralised bureaucratic administration; no body of politicians with privileged opinion on every topic; and no media to whip up all this, as it were, in the service of democracy; indeed, no political activity as such. We must go further: it would simply not be meaningful to apply the conceptual distinction between “civil society” and the “state” to the medieval idea, no matter how these concepts may be adjusted. Put differently, the crude fact is that there was no *government* as a *defined set of institutions*, but this does not mean that there was no governing going on: there was a king and a good deal of governing, only not as we know it. One problem is that we do not have a sufficiently distinct historical vocabulary succinctly to differentiate the nature and form of governmental action and processes of governing in, say, the 12th as opposed to the 16th, or the 20th, centuries. Indeed, the problem created by this conceptual and linguistic limitation – well-nigh vacuum – is well demonstrated by the fact that many now insist on using the word *governance* in order to mark a “difference” in the nature of the system,⁴¹⁸ and to

⁴¹⁷ Hence the claim that Divine Rights Theory is not a medieval hangover but a modern idea reflected back upon the “medieval” age. See A.M. Hocart *Kings and Councillors*, 1936, pp. 148-9.

⁴¹⁸ For instance, the reason for the use of “governance” in N. Winn’s ‘Who gets what, When, and How? The Contested Conceptual and Disciplinary Nature of Governance and Policy-making in the European Union’ (*Politics*, 18/2, pp. 119-132) is not transparent from the article, nor is it possible to garner any meaning for it therefrom. It might, reasonably, be thought that this article is a rather bad example for this purpose, in that it also suffers from many other defects, including an evident lack of understanding of W. B. Gallie’s notion of essentially contested concepts, which, as a result, is wholly misapplied – this speaks volumes about the self-enclosed world of refereed publication. That said, we can only take the literature as we find it, albeit that, in certain areas of the subject, like the European Union, we are often confronted with articles that much recall “angels and pins” type

point to a shift away from the certainties of the sovereign state, and its characteristic form of government, to the uncertainty of a globalised world. But, “governance” and “government” do not differ all that much in their etymology and essential meaning so as easily to carry this distinction.⁴¹⁹ Sidney Low used the former in the title of his book in 1904,⁴²⁰ but, four years later, Lowell used the latter in the title of a book on the same subject,⁴²¹ and we find the fact not at all remarkable. Yet, had Loyn⁴²² used “government” in the title of his book in 1984, many would have found it misleading because “government” as a Middle English⁴²³ term is thought not to apply to the activity normally thus described in early medieval period, or thereabouts. But this is really because of a misconception about “government” aided by a few awful and uncharacteristic mostly 20th century practices. A more focused, better-informed understanding of the British system based on the core executive thesis would dramatically alter the picture. Arguably, a better-informed view of the essentially fragmented nature of the British system (with many *mezzanine* level non-governmental institutions invested with rule-making and regulatory powers, to coin a phrase, “structural

disputations of the yore, with as much meaning and relevance: Winn’s article, even though it is meant to be a “State of the Art” take on the literature, is of that type.

⁴¹⁹ Try as hard as does Beate Kohler-Koch (‘Catching up with change: the transformation of governance in the European Union’ in *Journal of European Public Policy*, 3/3, Sept 1996, pp. 359-380), she only manages to differentiate “government” from “governance” in what happens at the policy-making stage, as it were pre-policy or “pre-authoritative allocation” point. But the case is not even that simple. For the difference to amount to very much, government has first to be misunderstood, and identified with legislation, regulation and public administration, almost with a cold silent start from no base outside of the governmental machine, whereas governance is, in contrast, presented as policy made after and as a result of a series of interchanges leading to a decision, policy, legislation, regulation and administration. Thus phrases such “multi-tiered negotiating system”, “co-operative governing”, “target oriented steering of societal processes” or resistance to central guidance, are used to focus attention upon a presumed qualitative difference. Incidentally Kohler-Koch’s analysis suffers from an ambiguity in that the rôle and function of “decision-making” and “decision-taking” are not differentiated. On a more general note, according to Susan Strange, if there is a difference between government and governance, it remains elusive. Susan Strange *The Retreat of the State*, 1996, p. 183.

⁴²⁰ Sidney Low, *The Governance of England*, 1904. In fact, the text does not give any clues as to his choice of this word in the title.

⁴²¹ A. L. Lowell *The Government of England*, 1908

⁴²² H. R. Loyn *The Governance of Anglo-Saxon England*, 1984

⁴²³ For periods in the history of the English language, see L. W. Clark *Early English. An introduction to Old and Middle English*, 1967, p. 11

corporatism”) would further change the picture beyond recognition. It may well be that in this increasingly anti-historical age, words are redefined but mostly because of historical ignorance: properly speaking, meaning is, as it were, garnered in its usage, and we are expected to live with the consequences; only a bad moralist invents rules of behaviour! On this view, then, insistence on “governance” in preference to “government” only serves to reveal the historical poverty of the claim.

Be that how it may, whereas “governance” is increasingly used to describe the present condition of a globalised world and implicitly highlights its features, it is, in fact, hard to imagine that in this globalised world we are enacting, as it were, a Medieval scenario and returning to a “Medieval” condition, or that we have entered a neo-medieval⁴²⁴ period. This is so because, arguably, the centralised, self-enclosed and self-defining “state” has lost, or is now losing, its hold such that this is a period of fragmented rule (which is the essence of presumed similarity between the globalised world and the medieval period). The Medieval world was also one of pre-sovereign entities containing *quasi*-federal, de-centred “nodes” of governmental and legal processes, all subject to an all-embracing otherworldly “authority”, the features of which were thought beyond human determination. In other words, medieval fragmentation was within an understood condition of ultimate unity. Indeed the system’s coherence drew from the fact of an all-embracing, focused, and centralised spiritual authority, drawing upon the idea of supremacy of the law of God, nature or whatever, but locally subject to a feudal “code” and the justice of the king. One may say this unity was an expression of the “excluded middle” of self-defined and self-dependent “sovereign state”, so much so that, for many, the demise of the medieval world is best understood in

⁴²⁴ Or New Medievalism, as Hedley Bull had it (*The Anarchical Society. A Study of Order in World Politics*, 1977, chapter 11). Two points are relevant. Firstly, his understanding of Medievalism as “overlapping or segmented authority that characterised mediaeval Christendom” (*Ibid*, p. 262) is insufficiently clear and is, often, not accurately understood by those who have taken up the point, and, secondly, that he rather thought it unlikely to happen. Indeed, he claimed his argument was “an implicit defence of the states system” (*Ibid*, chapter 14, Conclusion, especially p. 318). Strange, whose findings are not a far cry from that of Hedley Bull, albeit with a slightly different motif and focus, and writes some twenty years later, does not find it necessary to appeal to such a description at all. Susan Strange *The Retreat of the State*, 1996, especially chapter 5, pp. 82-87.

terms of the historically contingent development and foregrounding of this “excluded middle”. This description of the “medieval system” invites two comments.

First, the king was in a precarious and inherently unstable condition interposed between “Pope” and “people”. Thus in describing the king’s position and authority, an appeal was usually made to an abstraction of the rôle and place of the Roman Emperor, hence the repeated references to the adage *rex in regno suo est imperator*, evidently first claimed in England with reference to Richard II in 1397. Incidentally, the importance of “*in regno suo*”, which clearly focuses attention on public law,⁴²⁵ cannot be exaggerated. Yet this argument ought not to be stretched so far as to make it coincide with the internal/external facet of “sovereignty”, although in “proto-” form that distinction is available in the necessary focus upon public law as the legitimate and sole preserve of the king, which, by implication, excludes any jurisdiction within his realm that does not derive from his authority. That said, it is important to underline the fact that there never was an act of conceptual creation, for “sovereign state” was the result of multiplication by amoeba-like replication of the existing idea of an ideal conception of sovereign power; that is to say, it was not *ab initio* in the sense of *de novo*, but of *ab origine*. There was no “moment of sovereignty” or of the “sovereign state” – just as there never was a “parliamentary moment”⁴²⁶ – but only the replication of presumed heavenly form and features of “sovereignty”⁴²⁷ on earth, so that, by 1648, or better, 1713, the world was recognisably different.⁴²⁸

The second is that replication refers only to the initiation of a multiple sovereign-state era; how this “idea” or “concept” is developed and used is an altogether different matter, albeit with significant implications, hence the differing character even of a handful of closely related European states. In this, we find another ingredient in the story of English/British particularism: evidently the

⁴²⁵ See Walter Ullmann ‘This Realm of England is an Empire’ in *Journal of Ecclesiastical History* 30/2, April 1979, pp. 175-203.

⁴²⁶ G. B. Adams *Constitutional History of England*, 1935, pp. 192-203

⁴²⁷ But the idea of heavenly father, sovereignty of God etc are all only human constructions.

⁴²⁸ A wonderfully apt graphic presentation of this process of replication would resemble Walt Disney’s animated characterisation of Dukas’s “The Sorcerer’s Apprentice” in “Fantasia”.

British, having started earlier, stayed closer to the original idea and have never redefined it; sovereignty in the British system remains today what it was thought to have been in the 16th century. In part this is the essence of the claim to continuity, underpinned by repeated claims to an absence of “a new start” idea. Thus in contrast to the essentially modern ascending view of sovereignty elsewhere, the British idea is thought to be old-fashioned and out of date. Be that how it may – there are quite difficult historical questions and logical queries about the meaningfulness of an ascending theory of sovereignty – it has to be said that “the first” and, to that measure, “out of date” and “left behind” idea has a counterpart in the historical fact that the United Kingdom was also the first to industrialise and was, for that reason, soon behind others in technology, even though this is not always accepted as an explanation, not even as a prolegomena to one, and instead tomes are written on British decline.

Because it is not possible for us to know about the lived-life form of the ancient and medieval periods, it is prudent to assume that our imagining of either will be necessarily inaccurate: we can only make an extra effort to understand the differences between then and now on a theoretical basis. One area in which the difference stands out is the nature and the rôle of the “assembly”. Thus, while we are clearly bound to reflect what has been said about the rôle of the Witan as the counsel of the wise, we are equally bound to place the issue in its proper context, else our “rosy” account will only induce some to transpose a Modern impression onto the ancient condition, one which simply has no bearing on it; namely, that the Witan was a *selective* and representative gathering.⁴²⁹ Nothing can be farther from the historical truth we know: given the slightly blurred vision of the theorist, we may better characterise the Witan as modified *gerontocracy*. Oddly *Magnum Consilium* is not romanticised, probably because it is now recalled largely as that element to which was added the representation of the commonalty, whereby the whole was transmuted into Parliament.⁴³⁰ But parliament in the 13th century is not what we see it to be in and after the 16th century. Ignoring the notion that parliament was a “court of law”, it has to be said that the desired rôle for

⁴²⁹ John Millar *An Historical View of the English Government*, 1803, volume 1, pp. 73-8

⁴³⁰ T. P. Taswell-Langmead *English Constitutional History*, 1946, pp. 131-2

parliament, evidenced in the various schemes of reform seeking to seize “political” control of the government from the king, did not materialise. Instead significant change came when, somewhat unexpectedly, parliament, in effect, claimed supreme legislative powers, which, as a longer-term result, changed its rôle and function. In order to focus more sharply upon this we need to examine epochal change in the meaning of law.

As often pointed out in this study, we suffer from the problem of the fossilised continuity of form of words and institutions⁴³¹ after their referents have changed, often so utterly that one tends to flinch from using the same word in the two instances. Recognition of this process of fossilisation leads to the reasonable expectation that we pay some close attention to what has in fact continued, by interrogating what has been discarded; in so doing we may well learn more about what has continued and, thereby, also about the shape of the present age: the idea of “law” is a case in point.

Medieval discourse of government is simply replete with references to “the law”. But because we find this term so very familiar, our suspicions are not aroused, nor can we easily manage to articulate questions about the precise sense in which the term is used in the two instances, especially that of our own. Yet, the story of the transition from the Medieval to the Modern form can easily, and most poignantly, be told as the story of the changing meaning of this term, and the fundamentally different concepts it evokes in each era, than in terms of changing meaning of sovereignty and the rôle of the idea of the State.⁴³² But

⁴³¹ In Tony Benn’s graphic description of the State Opening of Parliament “... the state opening of Parliament is a tribal assembly with the Chief (the Queen) on her stool, the Landowners (Peers) in animal skins, the witchdoctors (Bishops) in robes, the wise men (Judges) in wigs and the public (MPs) demanding justice.” Letter from Tony Benn, 8 January 1998. This recalls Rudyard Kipling, though his point is somewhat different:

*There are four legs to my Father’s Chair; Priest and People and Lords and Crown;
I sits on all of ‘em fair and square; And that is the reason it don’t break down.*

‘My Father’s Chair’, concerning the parliament of Henry III, 1265, Rudyard Kipling’s Verse, 1940, p. 716; see also his ‘The Reeds of Runnymede’ (about *Magna Carta*) p. 715, and ‘James I’, p. 721.

⁴³² As argued in *infra* Appendix 3 and, more pointedly, in my ‘Medievalism of the Modern: the Non-Rational as the organising principle of the state’ (1998), the distinction between the Medieval and Modern in terms of the development of sovereign State as a new entity is not sustainable. On the contrary, the argument is precisely that there is no new notion of sovereignty and that the state merely encapsulates and expresses a very medieval notion

since that history is more than merely the simple account of change from one type to another, and because the actual enormity of the change is not at all obvious, and especially as the confusing arguments and conflicts of an intermediary period hide the scale of this change, we must forego a detailed consideration of that story here. However, even a cursory glance at the tabulation in *infra* Appendix 1 readily demonstrates the scale of difference, and the incredible degree to which the word “law” used indiscriminately in both contexts is misleading, and stands in need of contextualised construction. Incidentally, the difficulty of accessing and examining this type of “history” is further complicated by the fact that some medieval ideas have passed into the Modern discourse. To take a crude example, the language of Dicey is that of Austin, in part that of Hale, with much from Coke, in turn recalling Bracton and Fortescue: ordinarily, we do not even see the inherent contradiction of juxtaposing these discourses.

It was in the 15th century that a substantive, well-nigh revolutionary change in the character of the legislative process was made. This difference can be shown vividly in the abstracted description of the two processes: in the first, petitions were presented to the king (the first petition ever recorded was in 1327) for an appropriate enactment in Council, whereas in the second, a draft bill was presented for consideration in and by parliament, to be promulgated in Council. This change was due mostly to the fact that often legislation in response to a petition had little bearing on what the petitioner had presented and expected. Put more generally there was no “control” over the outcome. This change had an impact upon the law-making rôle of the king: he was no longer presented with an issue upon which to legislate by “declaring” the law, but was instead presented with draft legislation – a Bill – sketched in a potentially final form, ready to be transformed into a statute with the consent of parliament and the magic touch of royal assent. The shift is from asking the king to declare the law, to presenting him with the would-be piece of legislation and asking that he approve. True, no Bill as such could have the force of law unless and until it was made and enacted, and although “the process” of enactment was never enacted upon, yet the

of sovereign power. On the other hand, the idea of the “law” is a far better *differentia* between Medieval and Modern.

process of law-making and the rule of recognition determined true law.

Even a brief reflection will suffice to show that the historically profound changes in the nature and, for that reason, the meaning and rôle of lawmaking are, actually, *internal* matters of the relationship between two institutions. When seen from the point of view of outcome, that is to say from any perspective other than the inter-institutional relationship between the king and parliament, and in part also the rôle of the courts, it matters but not at all that heretofore “law” was “found and declared”, and that the few *statutes* made were largely responses to petitions. More than that, the majority of statutes were, in fact, what we would today call Private Bills – very much the successor to Charters of preceding centuries, and a source of income for the speaker and some members of parliament. The point is that a statute was recognised as an agreed outcome between parliament and the king. That they changed the manner in which to proceed was, as it were, *their* business. Indeed it is altogether incredible (yet within the context of the development of the British system not so), that there is no history of the development of public Bills, nor any critical examination of the profound effects upon the shape of the system. We have very little detailed information about the way in which important public legislation in preceding centuries was enacted: for instance, Pollard introduces the category of public Bills into the history of the parliament more by the device of a rhetorical question than a proper account:

[I]f lords could inspire and inform petition to the crown, why should not the crown suggest and even draft a petition to itself? The idea grew very attractive when Henry VIII after 1529 found the commons inclined to support but half the lords in opposition.⁴³³

⁴³³ A.F. Pollard *The Evolution of Parliament*, 1968, p. 440. Graves has calculated the success rate of government bills per session thus: Edwardian: 93, of which an average of 36% were enacted; Marian: 48 and 45%; Elizabethan: 123 and 28%. M.A.R. Graves ‘The Management of the House of Commons’ in *Parliamentary History*, 2 (1983), p. 14. But sessions were short, and often far in between: Elizabeth had ten parliaments with thirteen sessions in a reign of forty years, the shortest session was four weeks and two day, the longest lasted fourteen weeks and six days, including ten days off. Management of parliament was understood and measured in terms of number of government bills enacted, even if it meant that the procedure had to be modified. The Speaker was clearly an important part of this, for managing the sessions also meant ensuring that procedure was adequate to the task: in the Edwardian and Marian parliaments, up to six readings was not unusual; it was in 1581 that the Speaker suggested there should be no debate on

The crude fact is that the system was as top-heavy then as it is now for any such change to have any resonance beyond the limited governing circle. This has been heavily veiled by the further fact that the attention of historians and analysts has generally been drawn to politically more sensitive and controversial issues or events, rather than institutions and the structure of power. Furthermore, probably equally misleading has been the predilection of Whig historiography which directs the gaze away from the question of innovative “increases” in the powers of parliament but focuses sharply upon the “expansion” or “extensions” of powers and activities of the executive king. Moreover, we must also recall the fact that this is not the first occasion in which profound change has been introduced and absorbed into the system almost in “the dead of the night”: recall the very fundamental change in the nature of representation, therefore shape, form, and subsequently also functions of parliament, that was silently – in fact unknowingly – introduced into the system at the end of the 13th century. The evidently “still surface” of this system over the years makes it very difficult to identify its true indices of change. We are apt to overlook the indicative importance of a measure such as the Royal Assent by Commission Act⁴³⁴ (1541; 33 Henry VIII, c. 21) and are, instead, much exercised by the fact of “An Act authorising the King to repeal attainders by letters patent” (1504; 19 Hen VII, c. 28) or “An Act that proclamations made by the King shall be obeyed” (1539; 31 Hen VIII, c. 8).⁴³⁵ Alas, the obvious does not get much of a mention: these powers were created in and granted by an Act of Parliament.

Yet the effect of this internal change in the making of statutes and its inter-institutional impact upon the legislative rôle and effective executive functions of the king has been profound, if little noticed and even less examined. Of course

first reading of a bill. By the end of the Elizabethan era, three readings for a bill was the norm. See J. E. Neale *The Elizabethan House of Commons*, 1949, p. 367, and chapter 19 ‘Procedure I’, passim, but especially pp. 357-360. See also A. G. R. Smith *The Government of Elizabethan England*, 1967, chapter 3

⁴³⁴ Taken more or less at random, the following do not mention the matter of Royal Assent by Commission, but do deal with proclamations: J.D. Mackie *The Earlier Tudors 1485-1558*, 1957; D. L. Keir *The Constitutional History of Modern Britain since 1485*, 1969; A.F. Pollard *The Evolution of Parliament*, 1968; G.R. Elton *The Tudor Constitution*, 1960; and T. P. Taswell-Langmead *English Constitutional History*, 1946

⁴³⁵ For one rather mildly critical view, see T. P. Taswell-Langmead *Op. cit.* p. 262

proclamation was an old common law device of administration, always issued in the Great Council.⁴³⁶ Geoffrey Elton, too, makes the point that as a device it was in use for long before the 1539 Act, and indeed, remained in use long after the Act was repealed. More than that, with specific reference to the Tudor age, he calls it a “necessary prerogative” if “the country was to be run efficiently”. It was the misuse of it under the Stuarts – because it undermined the law, not because its use favoured the Crown – that brought the issue to a head. However, Elton also emphasises the point that this, among other potentially sinister powers, was not abused by the Tudors,⁴³⁷ in a way underlining the fact that the working system was very much dependent upon a feel for it, almost requiring a sense of doing simple things in an easy way, characteristic of the English, and doing the right thing characteristic of “good chaps”. However, this simple change in the process of legislation gave rise to a new meaning and rôle for statutes and eventuated into a rather far-reaching re-configuration of the system, although, as ever, this change too was unplanned, and its historical consequences never anticipated. With the backward gaze of the historian, we may see the result as a protracted series of re-adjustments, culminating in a “stable” condition. But this took nearly two centuries, and we are not entitled to classify the intervening period as one of transition,⁴³⁸ after all, what emerged from all this was hardly a settlement, for it merely served to initiate the next series of unanticipated changes: truly, the study of the study of the British government is *una storia che mai finisce*.⁴³⁹ This notion also contributes an explanation for the predominantly political character of “constitutional” history in the study of British government.

However, this change in the parliament/king relationship profoundly affected judiciary/legislative and judiciary/executive relations. Despite some odd early 17th century claims that common law decisions can “control”,⁴⁴⁰ even annul a statute

⁴³⁶ The real difference between a great council and parliament was at this stage no more than in the manner in which each was called. T. P. Taswell-Langmead, *op.cit.* p. 181-2.

⁴³⁷ G. R. Elton *The Tudor Constitution*, 1960, pp. 20-23

⁴³⁸ For some comments on “periods of transition” see *infra*, Appendix 3

⁴³⁹ See especially section 3b of my ‘Political Science and the Study of British Government and Politics: *una storia che mai finisce*’ in I. Hampsher-Monk and J. Stanyer (Eds) *Contemporary Political Studies 1996*.

⁴⁴⁰ “... when an act of parliament is against common right and reason, or repugnant or

law,⁴⁴¹ the thrust of developments since the 15th century was to establish statute law as the superior form of law in the land, superior also to common law in that a statute can override and change common law rules – hence the oft repeated adage that parliament can “make and unmake” any law, in that it can also change laws not of its making.⁴⁴² That roughly two centuries of uncertainty follow is a different matter altogether.⁴⁴³ In a sense up to this point the question of rule of

impossible, the common law will control it”, so said Edward Coke, reporting an opinion of some judges, but only as *obiter* in the *Bonham’s Case* (1610). Indeed this oft quoted phrase is usually qualified by the further assertion that this view contradicts, or rather Coke contradicts, this view in his *Institutes*. Two observations are relevant: first, that in this case no Act was “controlled”, but the authority of an Act upheld, and second that according to some opinion, “common law” in this phrase means English law other than statute law, therefore not common law as that body of law which is ordinarily administered in common law courts. See O. Hood Phillips *Constitutional and Administrative Law*, third edition, 1962, p. 52. *Bonham’s Case* is often ignored in treatise on the “constitution” and constitutional history.

⁴⁴¹ It has been argued that this was so only because “a statute represented the terms of decision upon a complaint or petition; a decision of the highest authority in the land, but not different in kind from decisions by inferior branches of the *Curia Regis*.” J.H. Baker *An Introduction to English Legal History*, 1979, p. 178. This, argues Baker, accounts for the freedom with which “statutes” were interpreted. However, while Baker recognises that an important change took place in Tudor times, and that legislation in later times was drafted much more fully, such that judges were discouraged from “creative exegesis” (*Ibid.* p. 180), he does not focus upon the nature and wider implications of this change, and presents it almost as a simple matter of a new procedure. Though the terminology would be wrong, and the point exaggerated, nevertheless the output of parliament in the two phases may reasonably be presented, respectively, as “judicial decisions” and “law”. But this leaves one question unsettled: what of the many clearly public law type enactments which were often flouted, such as “the Provisions of Oxford” (1244) or “the Provision of Westminster” (1259): were they justiciable? How could any such decision be enforced against the king?

⁴⁴² “Make and unmake” is a standard refrain repeated in almost every text on Parliament’s powers, but the indicative value of this refrain – that is to say the historically important meaning of “unmake” – is hardly ever mentioned. If parliament is a “product” of common law, it ought to be impossible to argue that parliament can alter common law; on the other hand, if it is not, then, according to what principle is it supreme? Furthermore, if sovereignty of parliament is fact and legal concept, then in some sense that legal concept must be superior to parliament, else the claim, which underpins Dicey’s approach, becomes a problem. Indeed the language of Dicey on this question leaves much to be desired: in what sense is it meaningful to claim that parliament has “the right” to make or unmake any law”, or that “parliament can legally legislate on any topic whatever...”? A. V. Dicey *An Introduction to the study of the Law of the Constitution*, ninth edition, 1939, pp. 40 and 69. But see *infra* Chapter Four.

⁴⁴³ As Kern puts it, we can distinguish three phases of law: early, when customary law is supreme; an intermediary stage in which customary law is thought to be superior to enacted law; and finally when enacted law is above all else. F. Kern *Kingship and the Law in the Middle Ages*, p. 161, but see also pp. 164 and 165.

recognition of what is law had not arisen⁴⁴⁴ for law was eternal, although individual rules in any given condition had to be determined: Oakeshott's description comes to mind. Adjudication, he thought, does not make *lex*, but stipulates how a rule of conduct stands in relation to a contingent case; it is an illustration, not an exemplification; it is really "*lex* as it has come to be".⁴⁴⁵ And this was possible because there was no doctrine of absolute authority of statute law. But this new relationship changed the nature and the status of the judiciary, and ensured that it could never be a coequal institution with the legislature and the executive, although potentially it could play a part in controlling that part of executive activity that was related to and based upon law. The profoundly important question of rule of recognition of valid law was never definitively and positively answered; all they could do was to look at parliament roll, but how it got there was not a matter into which the judiciary could inquire. This is fine as far as it goes; however, if previously the law was the eternal law of God, unwritten and found in cases and where a new decision to fit a new case was arrived at by the mediation of reason of the law to the case, now, under the new conditions in which statute law was thought superior to other forms, more numerous, and capable of changing anything and everything, judges had to accept at face value and apply without deviation from the letter of the law – the spirit no longer mattered – as made by the King/Queen-in-Parliament. But *why* they accepted this change was never established as a matter of principle. The change from the previous practice to the new was gradual, achieved almost imperceptibly through the silent acceptance by the judges; it is thought to be part of the necessary process of the establishment, and recognition of what later is identified as supremacy of parliament. It would be wrong to argue that the judges, the judiciary as such, was instrumental in the

⁴⁴⁴ There is of course *Pilkington's Case*, from the reign of Henry VI, but as a rule this is ignored. Here the question of whether a given Act of Parliament was good or not arose: to determine the case, the judges looked at parliamentary procedure, but decided that the three assents was as far as the question could be taken. See S. B. Chrimes *English Constitutional Ideas in the 15th century*, 1936, pp. 231-3. A number of later cases, in the 19th and 20th centuries, all stopped at this point too: procedure in parliament is not questioned even to determine if an Act of Parliament is valid or not; there is no such thing as not a valid Act of Parliament.

⁴⁴⁵ Michael Oakeshott *On Human Conduct*, 1975, pp. 133, 134-5, and 137

transformation of the structure of power and, therefore, of the nature of the system. The fact is that the scale of the change was not perceived at the time, or for a long time thereafter, at any rate not in these terms. Common wisdom has it that the king's judges accepted the superior status of such legislation as a matter of policy. That may, indeed, be so, but that is hardly a worthy answer. It has nothing to say on why such legislation is or ought to be superior. Ultimately, this question too was answered (even if only obliquely), when in 1688 it was put in the Bill of Rights that proceedings in Parliament ought not to be questioned outside of it, even though it had long been the case that the courts would not (could not?) question Acts of Parliaments.⁴⁴⁶ That the Crown and Parliament Recognition Act (2 Will. & Mary. c. 2) gave the status of an Act of Parliament to the Bill of Rights does not make any difference to the question raised here. For the case is even more complicated than it may appear: some may argue that, as a matter of fact, the parliament of William and Mary, not the "convention parliament" (classified as their "second parliament") was technically capable retrospectively to validate the Bill of Rights, because it was a duly elected sovereign parliament, and as such in possession of the full powers of parliament. But this would be less than an answer, for that claim is the very essence of the issue: whatever makes parliament sovereign?⁴⁴⁷

It is clear that a simple change in the internal procedures of law-making process called forth significant adjustments that, in effect, completely re-shaped the system of government, and became the instrument of future change at will. By the end of the 15th century, the office of the king was definitely hereditary; however, if *porphyrogeniture* was well established, it is equally well established

⁴⁴⁶ J. H. Baker *An Introduction to English Legal History*, 1979, pp. 181-3.

⁴⁴⁷ To put it bluntly, whatever magic there is in the claim that "And the consent of ... parliament is taken to be every man's consent" [Thomas Smith *De Republica Anglorum*, in G.R. Elton *The Tudor Constitution*, 1960, p. 235] derives from two historical claims, *viz.* that consent is necessary and sufficient, and that consent given in parliament is the consent of all, in that all are present in parliament in one way or another. The first proposition is indubitable, provided consent is clearly given to a clear proposition. The second proposition is far from indubitable. It is enough to show that indirect consent is never to a clear proposition, and furthermore, it cannot be an open-ended delegation, that unless some matters are reserved, the delegation is not valid, for an equal worth of magic to be infused into the claim that "... the consent of ... parliament is not taken to be every man's consent". See *supra* chapter 1, and *infra* chapters 4 and 5.

that the *line of succession* could be altered by legislation when and if necessary. The understanding of the nature and extent of this 'new' legitimate power is such that, for instance in the following century, more than one chief minister was executed, as are a number of queen consorts and, no less, a queen *regnant*; and all of this as part of peace-time and normal processes of the judicial system or the exercise of the *quasi-judicial* powers of parliament! There is a Church of England, but, *by an Act of Parliament* the writ of no Pope runs here,⁴⁴⁸ and this change signals the transformation of intra-denominational religious difference into a "contentious" issue within the realm. There is a parliament of two houses, and if it is not frequently called, nevertheless, it is called, and always on royal writ; and even if it was an inconvenient irritation, it was for all that, also indispensable for certain purposes.⁴⁴⁹ More than that, the "third estate" has a presence in parliament mediated through the process of elections. There is an "electoral system" based on "Acts of Parliament", from the Statute of Westminster 1275 declaring that elections should be fair and free, to others calling for annual or frequent parliaments (such as in 1330, and 1363), and diverse further Acts regulating the process, and, finally, the great disenfranchising⁴⁵⁰ act of 1430 (whereby the introduction of minimum property qualification actually reduced the size of the electorate by excluding all freemen who did not own land, and not a few smaller freeholders). By 1450s, representation of the Shires and Counties had been determined and placed beyond the discretion of the King except to the extent that he could create new franchises, while the nature of parliamentary peerage, and entitlement to summons, was also largely fixed.⁴⁵¹ Yet, for long thereafter many were still taxed without even the semblance of having a say in the matter, even in the form of a vote at elections. The electoral system – which was only reformed in 1832 when the electoral net was cleansed and enlarged (but the first *real* reform only came in 1872) – afforded ample opportunity for

⁴⁴⁸ Indeed the *Regnans in Excelsis* Bull of Pius v (1570), excommunicating and deposing the queen, provoked a rapid response in the form of an Act (13 Elizabeth, c. 2), *inter alia* making the publication of any bull in England an act of treason - even concealing the fact that one had been offered absolution was made an act of treason.

⁴⁴⁹ G.B. Adams *Constitutional History of England*, 1979, p. 253

⁴⁵⁰ J. R. Green *A Short History of the English People*, 1888, p. 273

⁴⁵¹ P. Williams *The Tudor Régime*. 1979, p. 34

influencing the outcome of elections, despite all protestations and declarations of intent to the contrary. It was not too difficult to ensure that one had an agreeable parliament each time⁴⁵² – probably the first election free of royal interference was 1689, but only because William III was insufficiently organised for the purpose, and, at any rate, there was hardly any need to rig it. Even so, parliament was not always compliant – to coin a phrase, it was hardly a poodle of the crown! It had to be taken seriously if governing was not to come to a halt, or governors to lose their cloak of legitimacy triggering reaction. Like other enduring features that developed in an unintended way, it may well be that the important rôle and place of parliament was also the unintended outcome of the way Henry VIII “used” his parliaments that, in effect, made it impossible to ignore it. The focal rôle of parliament, pivoted on grants of taxation and redress of grievances, was well established long before the Tudor age. This was the historical essence of the inter-institutional nature of the system. However, this system harboured much potential for expansion and systemic corruption, even if at the time the fact and its importance were not recognised.

There is but a short step from the determination of binding decisions – on taxation, private legislation, making of public statement and declaring the law – by the King in Parliament to the making of new laws on any subject that are in their nature binding and beyond question. This transformation had two aspects. On the one hand, we see an enhancement and enlargement of the ambit of the claim that parliament can, with the King, legislate on any matter whatever. On the other, we see the implicit but crucial application of the idea that decisions thus taken are that of all, bind all and are beyond question. Together these amounted to a declaration that there was no authority beyond and above that of the King in Parliament in the English system. It was not parliament but King in Parliament that claimed this ‘sovereignty’ and declared England to be an Empire free from foreign control. However, this claim did not at this stage – indeed throughout the Tudor period – modify English constitutionalism based on necessary inter-institutional relationships in which no single institution was systematically

⁴⁵² “Where to elect but one / ‘Tis Hobson’s choice, - take that or none.” Thomas Ward, *England’s Reformation*, 1630, chap IV, p. 326

subordinated to another. The upshot was rather clear: in relying upon King in Parliament to make important changes, Henry VII and Henry VIII rendered Parliament a necessary part of any future change to that system and raised a legitimate expectation that all major changes and innovations would be by the same means. In a sense, the Proclamations Act (31 H VIII, c. 8. 1539) was only a belated recognition of, and an attempt to rectify, in short a response to the fact that now, in the highest matters, the king had a *necessary* 'partner'. Proclamation was one well-established device of government⁴⁵³ that the Tudor monarchs continued to use⁴⁵⁴; that being so, one must wonder about the motive behind and the felt need for this statute.⁴⁵⁵ Be that how it may, the fact is that Parliament was now an indispensable part of the processes of governing.⁴⁵⁶ In this regard it is instructive to look at two aspects of Marian England: all the reforms were by statute and Mary's policies – including her proposed marriage – were limited by her Parliaments.⁴⁵⁷ Mary did not need to refuse royal assent for the rather simple

⁴⁵³ Another device was Letters Patent. Indeed, the King's power by letters patent even to dispense with the parent Act was recognised in the 1534 Dispensations Act (25 Hen VIII. C. 21).

⁴⁵⁴ It is a characteristic of the Tudors, especially Henry VIII, that they exalted both regal and statute law (parliamentary power). See W. H. Dunham Jr. 'Regal Power and the Rule of Law: a Tudor Paradox' in *The Journal of British Studies*, 3/2, 1964, pp. 24-56. Incidentally, this article is a very good historical analysis, but, as with most strictly good historical pieces, rather disappointing on theoretical considerations.

⁴⁵⁵ This is not the only piece of Tudor legislation susceptible to such speculation. One may equally speculate about the need for and meaning of the Act to declare that royal power and dignity was invested in Mary Tudor (1 Mary session 3, c. 1. 1553). Was this because of questions about her legitimate birth, or Lady Jane Grey, or perhaps because she was the first queen *regnant*? It may even have been an attempt to assure the English in view of the prospects of her marriage to Philip of Spain. This episode remains an enigma. See J. D. Alsop 'The Act for the Queen's Regal Powers, 1554' in *Parliamentary History* 13 (1994), pp. 261-276.

⁴⁵⁶ Although it goes against the grain of every proper historiography to say this, yet in view of the claim ('A revisionist perspective', *supra*, chapter 2) that English/British history is stratified such that it cannot be cut into periods, we may say that the Proclamations Act and the Act concerning the powers of Queen *Regnant* evoke images of Revolution Settlement. In both cases, the power of the King/Queen *Regnant* in Parliament is invoked to define and reiterate the powers of the King/Queen *Regnant*: shades of the idea of Constitutional Monarchy, so characteristic of 1688, are clearly apparent even in the Tudor age. Incidentally, we have no corresponding description to "Constitutional Monarchy" relating to parliament: for good historical reasons, we cannot speak of limiting parliament, although there is no theoretical reason whatever why such a phrase should be considered an oxymoron.

⁴⁵⁷ See J. Loach *Parliament and the Crown in the Reign of Mary Tudor*, 1986, pp. 15, 126,

reason that she introduced only Bills that had a chance of success.⁴⁵⁸ Yet her short reign marked the undoing of the Protestant Reformation, much burning for heresy and so on. She succeeded in her policies because she managed her parliaments: in this, the rôle of the Privy Council is simply dispensable.⁴⁵⁹ Good management of Parliament was also a significant feature of the reign of Elizabeth I: she succeeded in undoing the Marian religious settlement by employing precisely the same means as Mary, *viz.* Acts of Parliament; King/Queen *regnant* in Parliament was indeed 'sovereign'! But to repeat a point, the parliaments that Henry, and other Tudor monarchs, so used was in an important sense different from what "parliament" was understood to have been even under the Lancastrian kings. Indeed, features of Tudor parliaments are interesting markers of this rather significant change. Previously, parliaments were *fora* in which petitions for legislation were put to the King and Acts were promulgated, as a rule, in Council after parliament had been prorogued. Now King in Parliament was the only maker of statute law, and as legislation was increasingly on the basis of full-fledged Bills presented to the king, legislation was, relatively speaking, more certain.⁴⁶⁰

It is clear that in, and from the 16th century, the process of governing was profoundly inter-institutional at its very core. In an important sense, this is the culmination of many attempts over the centuries to place royal power within limits. Equally importantly, none of the schemes of reform aimed at creating a parliament-based system of government came to fruition. The inter-institutional shape of the system was an unintended outcome of the process of adaptation whereby the often-conflicting desires and requirements of the king and people were reconciled: that is to say, the king's continuing need for resources that only Parliament *qua* 'the people' would satisfy, and 'the people's' need for redress that

172 and chapter 4.

⁴⁵⁸ *Ibid*, pp. 72-3, 172 and 230

⁴⁵⁹ *Ibid*, pp. 50, 52-3 and 73

⁴⁶⁰ A degree of confusion between "petition" and "bill" has dogged the study of this transformation. As Pollard makes clear, there was rather little difference between the actual meaning and use of these two terms, to the point that they are almost interchangeable. That said, however, Pollard also makes the point that, even if for the wrong reasons, a distinction between "petition" and "bill" has come to stand whereby "bill" indicates an extended text in preparation and as part of the process of making positive law. See A.F. Pollard *The Evolution of Parliament*, 1968, p. 130, Appendix III, pp. 438-440.

only the king (including his government and judges) could provide. In an important sense, the early Tudor revolution in government consisted in elevating this successful combination and necessary co-operation to new heights and enlarging its practical ambit. As an unintended consequence, the new status of parliament made it an indispensable part of the governing process, and, in the sense of the changes to the status of England in the world, also to the process of its state-building. Of course, the other side of this coin was the recognition of the enhanced office of the king: the position and power of the king in the 16th century is not even of the same type and in the same class as that of the king in the 13th century. The measured differences are highly significant. If kingly government did not develop into “kingship” and absolutism, it became an established hereditary monarchy with the initial attributes of sovereignty that the support of the church could bestow upon it. The king became the temporal vicar of God, the anointed, and if he was not above, but below the law, he was above ‘the people’. These trappings of sovereignty changed the office of the king.

As a rule, this is not how this system is described: indeed the Tudor, especially its Henrician part, is variously described as one of the “New” or “Strong” Monarchy, even of “despotism”, and so on. But an “inter-institutional” form is compatible with any of these descriptions, for how it works at any one time is not a necessary feature of its nature, provided that the multiplicity of institutions is preserved and they continue to function, at least to a degree, according to their “norm”. However, precisely because such norms are historically recognised, rather than conceptually constructed, the shape of the actual working system at any one time, especially in its earlier stages, is a function of other factors. Indeed with rather little change, this inter-institutional system was famously described as the balanced constitution of the 18th century. That is to say, in essence, the stability of the system is a dependent variable. However, to maintain even a semblance of inter-institutional reality both a “code” and a related process of “management” are, almost by definition, necessary. It may appear plausible to argue that, in the absence of a “constitutional code” regulating this inter-institutional relationship, its management may fall upon any one of its parts or is

achieved in a combined effort of some sort. But in fact, we find that this is not so, and that the tendency is for the executive, which is the least institutionalised part, to lead, and parliament to co-operate. This is not a mere rationalisation of some historical fact, but is also based upon the rational analysis of possibilities within an inter-institutional structure. King's government, *qua* office, was not for its own sake, and in the English/British experience effectiveness was never sacrificed to the nicety of the system: indeed "the constitution" has always been a legitimating gloss on the actual and effective structure of power, never antecedent to it, and rule according to the terms of the constitution is only possible under "normal" conditions. The government being that of the king, he was the more active partner in the inter-institutional relationship with parliament. One may indeed infer from this a legitimate expectation that the king should lead this partnership. During the Tudor period the inter-institutional balance between the Crown and the "estates of the realm" was maintained largely because of good management of parliament on the part of all the Tudor monarchs, especially Elizabeth. In an important sense, managing parliament marks one rather large difference between the Tudors and Stuarts: it is possible that the real fault of the Stuarts was their inability, probably because of their inexperience in this matter,⁴⁶¹ to manage parliament,⁴⁶² a game that Elizabeth was evidently adept at.⁴⁶³

However, generalisations upon a period, even when self-consciously constrained, such as those in the preceding few paragraphs, nevertheless serve more to hide the extent of substantive changes that have occurred over the period from, say, the 12th to the 17th centuries. Put somewhat starkly, the movement is from a time when, and a condition in which, the king was at best

⁴⁶¹ See L. Courtney *The Working Constitution of the United Kingdom and its outgrowths*, 1901, chapter 6

⁴⁶² See J. P. Kenyon *The Stuart Constitution*, 1966, pp. 24-53; also 'The Nineteen Propositions', document 67, especially proposition number 2, p. 244, and the king's answer, document number 9, pp. 21-23. Incidentally we may simply ignore the fact that Charles I so defined the situation as to make himself one estate of the realm at the expense of the clergy as an "estate".

⁴⁶³ Which does not mean that the relationship between parliament and queen was smooth and uneventful: indeed, Elizabeth imprisoned "unduly obstreperous members" and regularly refused Royal Assent to bills she had not the time to read or disliked. A.G. R. Smith *The Government of Elizabethan England*, 1967, p. 35.

“law finder”, where sovereign power was literally other-worldly and beyond human reach and comprehension; to an intermediary stage in which the king is “law maker” but on petition, as it were, mediating between the “law” and contingent circumstances; to one in which the king with “advice and consent” in parliament, that is to say king and parliament, the king and the “three estates of the realm” acting in concert, are the “law makers”, now also the only such body and the ultimate source of law.⁴⁶⁴ This sequence of change coincides and is historically and intrinsically associated with the transformation of what Pollard has called the original function of parliament (*viz.* to remove judicial doubt and determine new remedies for new wrongs) into a more focused function of creating new remedies for new wrongs.⁴⁶⁵ But Pollard does not identify a third stage in this sequence, namely that the largely 14th century function of providing new remedies, for which purpose parliament needed to sit rather infrequently, was replaced by the more positive function of making laws on a wider basis and on almost any topic, most clearly apparent in the Reformation parliament, and, indeed, of creating new powers.

The broader picture depicts, as it were, a slowly changing set on which the apparently un-scripted scenario of the transition from constitutionalism to sovereignty is played out: each “stage of change” is marked by the incorporation, in one way or another, of recent changes into the set, whereby the new integrated formation becomes the condition in which the *next* happens.⁴⁶⁶ And the outcome –

⁴⁶⁴ Despite the historical adage that what pleases the prince is law, or that the law in the breath of the prince, the king or the queen as *legibus solutus* if not *sui causa*, is as much a rarity in the history of English government as is the singular exception of the declaration (Commons’ Resolution, 4 January 1649) that “... whatever is enacted, or declared for law, by the Commons, in Parliament assembled, hath the force of law; and all the people of this nation are concluded thereby, although the consent and concurrence of King, or House of Peers, but not had thereunto”.

⁴⁶⁵ A.F. Pollard *The Evolution of Parliament*, 1968, p. 130

⁴⁶⁶ A contemporary example of this approach is that of Brazier, *Constitutional Practice*, 1994, for whom only the 20th century is relevant for our understanding of the system in the coming century. Thus, the “precedent” that a defeated ministry does not meet the incoming parliament is traced back to MacDonald in 1924, not to Disraeli in 1868. But see *infra* chapter 5. In a somewhat different form, Paterson offers a description of, as it were, the tidal wave sequence of decay- dissatisfaction- pressure for change with some re-interpretation of the past-change-stable period-decay (L. Paterson *The Autonomy of Scotland*, 1994, p. 180) that recalls a slightly different sense of the point about the incorporation of recent change into the set creating the condition in which the *next*

as it were, at the dawn of the modern age – is a structure of power and system of government that has features one can “see” in embryo in previous configurations of the set, and, as it were, trace their “historical development” from, say, 1215, whereas in terms of its actuality, it – the outcome – is an age and a world away.⁴⁶⁷

While attempts at constitutionalism continuously checked the power of the king, the paraphernalia necessary for a revolution whereby sovereignty of parliament could be claimed were gradually put in place. Importantly, synecdochism (the idea that parliament can speak for the nation), majoritarianism (establishing the principle that majority decision can bind the whole) and representation (establishing the idea that *they* could speak for and commit their principals) became part of the everyday lexicon of the discourse of government. Significantly, although without these theories and practices, the scenario of 1688 could have been played out, the language of discourse would have lacked the necessary conceptual apparatus to justify the outcome. Of course, characteristically, sovereignty of parliament was not claimed in theory, but the parliamentarians behaved as though it was established fact, and justified theory. It is also important to say that these concepts were put in place not because anyone thought they were important or needed, but because the exigencies of government demanded that the working of the system should now include this or that idea and concept: they were added incrementally and almost in total ignorance of their meaning or significance.

The true extent of the change here depicted does not easily hit home: we have no experience of non-sovereign rule and, evidently, the Bodinese perspective of the need for a single focal centre indelibly taints the modern mind-set. This may be too harsh on the medieval idea, for, all said and done, the pre-modern mind-set was also focused, perhaps more sharply than we can readily understand, upon a central and sovereign albeit otherworldly power over and above all else. Still, we can only know that mind-set as theory: it would be a mistake to focus upon the mind-set of the contemporary religious nations who prefer a hard doctrinal line and apply “fundamental” precepts of their religion as

happens.

⁴⁶⁷ See *infra* Appendix 2 for a tabular representation of the differences.

invariant rules, and assume that in observing them we see a true image of the medieval European world; such an assumption would be no less a mistake than the Enlightenment assumption that in observing the “primitive” tribal life one would see the infancy of civilisation.

Recalling the two conflicts to which attention was drawn at the beginning of this section, it is clear that to the extent the disappearance of feudalism did not mean the creation of a single centre of kingly sovereign power: for the resolution of the second concurrent conflict between the king and parliament meant that while the king or the queen was the sovereign, yet he/she had to act within a context of legality and probity – in parliament. While there were no rivals for the king any more, and it is no longer meaningful to think of the king as *primus inter pares*, yet the king is not the government, nor does he stand for the totality of powers that may be exercised in the name of England: ministers and secretaries are indispensable to the working of the government, but they are *his/her* secretaries and members of *his/her* Privy Council and household, and may indeed be individually dispensable. Furthermore, parliament is clearly the engine of power in the system, and is, in the process, elevated to a sufficiently high position such that some are prompted to claim that it becomes meaningful to think of it as the nation in its political aspect – the nation consenting to laws in parliament, and so forth. Yet this was also the end of the road: the law-finder king, without whose independent consent legislation was not possible, was in clear danger of becoming the legitimating factor in the process of legislation in the hands of a law-making institution. Some might see this as nothing less than right and proper: *quod omnes tangit ab omnibus approbetur*, and all that, leading, for the more hopeful, to ideas about democratic legitimation and so forth. But apart from the fact that such an approach will also land one in the untenable condition of Whig historiography, the apparent simplicity of the course of change belies the conceptual and historical significance of its nature as here depicted, and consequences as examined in later chapters.

While we may depict British government after 1688 as essentially inter-institutional – in so far as two institutions, initially the king/queen *regnant* and

parliament, later the political executive and parliament – between them shape and define its apparent character, yet, we cannot conceptually characterise 1688 to the present as one of co-sovereignty. Far from it: the actual character of the post-1688 period is one of a state with a sovereign institution at its core. In other words, the realities of the inter-institutional relations after 1688 are materially different from those that obtained before Revolution Settlement, even if, confusingly, its form is preserved. _

On the face of it, this claim runs counter to two well-established views. The first is that the English sovereign state was, in fact, created during the early decades of the 16th century, calling forth – and leaving room only – for state building thereafter. The second is that there are no innovations in Revolution Settlement in that nothing that was not law (and custom of the land?) before was made law. However, the contradiction is more apparent than real. And this for the simple but important reason that the claims about the Tudor period and 1688 are only partially true in that neither presents a whole account. They are both satisfying shorthand accounts that impart a particular sense and interpretation to their respective subjects, and condition how they may be understood. The apparent contradiction arises because both *dicta* function as conceptual closures.

To think of state building as a feature of the Tudor age is to begin at the wrong point. Far more is it the case that state building begins with the bringing together of a people under one rule, whatever the nature of that rule and however this end may be achieved. In the case of the English, we may think of state building to start when the borders with Scotland were by and large settled, Wales having already been ‘absorbed’ into the political orbit of the English kings. That is to say, when a recognisable and undisputed area and its population was under one central rule, when it was possible to speak of the English as a unified people.

That much said; there is no doubting the singular historical importance of events in the first four decades of the 16th century. But this importance assumes a different, modulated meaning and significance when we view it within the larger context of the development of sovereign statehood in the history of English government. Three points are relevant here.

“Sovereign statehood”, a pleonastic phrase, may actually be an instance of a *petitio principii*: defining features characteristic of one term requires those of the other. The *Janus* face of sovereignty is predicated upon entering a successful claim to (exclusive) authority within a defined territory. However, we cannot identify a “moment of sovereignty”, when it is instituted and established full-fledged and whole in English history. On the contrary, this “moment” is extended well over three centuries. The claim to sovereignty begins as early as the 13th century, and it is made fact by the 16th, albeit that in earlier parts of this period, such claims are also denied: on the one hand, we see the rôle of the Barons, then parliament, in seeking at least to control the claims to power entered by the king. On the other hand, we find that authority claimed by the king is argued to be inherently limited, subject to the Law of God/Nature, the authority of the Pope and, no less, existing law of the land. Equally importantly, at the time, remedies available against exceeding one’s authority were not political: the king is answerable to his conscience and God, with rebellion and regicide as practical remedies.

The Tudor transformations are extremely important in that they bring together the forces at work, dare to innovate, ‘nationalise’ political power, and bring it ‘home’. Sovereign statehood is thus not invented, nor is this concept at the time recognised as such: ‘We are an Empire’ merely declares independence from Papal authority. But this is on the basis of the authority of the king in parliament. We are apt to see “statehood” in this period in so far as we trace the development of features we now associate with sovereign statehood – *inter alia*, the monopoly of coercive power, control of the economy, monopoly of authoritative decisions, and so on – back to the period. We see it only with the blinkered backward gaze of the historian and would never see it were we to adopt a contemporary stance, gazing into the unknown. Our back is to the engine, and only historians know what this means, and can explain where we have been, and how we have arrived here; but from this point on, historians too, join the rest with their back to the engine. However, the backward gaze of the historian suggests that the Reformation Parliament staged a revolution in that it removed any remaining limit

to the legislative authority of parliament, thereby enabling some, in due course, to claim supremacy of King-in-Parliament,⁴⁶⁸ and thus achieve the *Janus* face of sovereign statehood.

What, then, are the essence and the achievements of Revolution Settlement? Did it innovate? This story belongs in later chapters, but for now we may say this much. On the basis of what has been said about the development of sovereign statehood, clearly it must follow that Revolution Settlement does not embody an innovation. Yet, we also know that this Settlement had the effect of limiting the range of possibilities of the future shape of the system and, to that measure, it created something new. As will be argued, this means that beneath the façade of continuity – presented and preserved in the fossilisation of form of institutions and manner of practices – we see a significant shift in the location of supreme authority and in the essence of inter-institutional relations characteristic of the English system. The balance created by the process of co-sovereignty was replaced with sovereignty of King-in-Parliament, and the inherent instability, so very characteristic of co-sovereignty, was resolved by a neat formula. But this was hardly a closure, for Revolution Settlement did not project a system of government; as a matter of fact it left the shape of the working system open but within the limitations of the terms of the Settlement.

A theoretical interlude: the problem of co-sovereignty

Where inter-institutional government refers to the presence of two institutions each claiming pre-eminence, and where there are no pre-defined rules about the powers of each their mode of conduct and their relationship one with the other, and where, by definition, there is no third institution capable of regulating the relationship between the two, we may characterise the system in terms of the archetypal form of co-sovereignty.

However, co-sovereignty is in essence unstable: *per in parem non habet*

⁴⁶⁸ G. R. Elton “*Jex terræ victrix*”: triumph of Parliamentary law in the 16th century’ in his *Studies in Tudor and Stuart government and politics*, 1974. See also his *The Parliament of England*, 1986, and M. A. R. Graves *Tudor Parliaments. Crown, Lords and Commons, 1485-1603*, 1985, especially pp. 78-9

imperium.⁴⁶⁹ We can envisage four possible working solutions, here stated in very broad terms. Firstly, all the politicians may be persons of good will and good sense such that, by necessary compromise, they make the system work silently. It may be far-fetched to say that redress before supply was a gesture in this direction. However, actual examples of periods and episodes exemplifying this *ideal* solution are rather difficult to isolate and examine from English/British experience; history does not readily record success. That much said; the Lancastrian period, when the king governed in harmony with his parliaments, may be a case in point.⁴⁷⁰

Secondly, such a system may be made to work by deliberate intervention. Government being that of the king, we may naturally assume that he will be the more active partner, employing various techniques to *manage* parliament. Such interventions may range from the politically and constitutionally agreeable means of giving a lead to parliament, to the less agreeable but probably not entirely illegal and immoral attempts to secure a compliant parliament, to the clearly unacceptable means of resorting to political and financial corruption. Richard II packed the Commons to get his way,⁴⁷¹ whereas William III dissolved parliament in order to prevent a measure made complex by amendments unfavourable to him.⁴⁷² Other than such pointed cases, we must also recognise that the Tudors employed such modes of intervention, which also feature in the long 18th century⁴⁷³ and in the Golden Age of Parliament (1832-1868). But the success of such modes of intervention are contingent: each episode is necessarily defined in its own historical context and is, to that measure, unique, even if in principle it is similar to others. This is not a systemic solution.

⁴⁶⁹ Equals cannot bind each other. See B. Tierney *Foundations of the Conciliar Theory*, 1955, p. 50

⁴⁷⁰ G. B. Adams *Constitutional History of England*, 1935, pp. 216-8

⁴⁷¹ J. Millar *An Historical View of the English Government*, 1803, volume 2, p. 169

⁴⁷² C. Roberts 'The Constitutional significance of the financial settlement of 1690' in *The Historical Journal*, 20/1 (1977), p. 62

⁴⁷³ Burke was concerned that parliament should not exchange its independence for protection, and that no parliament should be dissolved because of its independence. If forced to choose protection, then parliament will become subservient to the will of ministers. E. Burke 'A Presentation to His Majesty moved in the House of Commons. 14 June 1784' (passed in the negative) in his *The Works*, 1801, volume 5, pp. 7-49, especially p. 22.

Thirdly, because co-sovereignty has a *potential for conflict*: it can collapse under the sheer weight of the absence of trust and co-operation. It harbours a potential for disaster: it can lead to conflict if not civil war, when one institution attempts to disturb the necessary balance. By and large, this is a feature of the greater part of the short 17th century in England.

Fourthly, co-sovereignty is susceptible to changes by *systemic corruption*. This is distinguished from political and financial corruption by two features: here not the political personnel but the inter-institutional balance is corrupted while still pretending to co-sovereign equality; and it endures for longer than one session of parliament or one episode of political action. And if it succeeds, by changing the actual working relations between the two it creates a 'legitimate expectation' that the system should, thenceforward, so work. In other words, under systemic corruption the *form* of co-sovereignty remains constant while the *reality* of the relations of power alter, when one institution/organ uses the other as its "permanent" instrument of rule. Systemic corruption requires that the power of the organ so used is not diminished, and its legitimacy is not questioned, but that it should no longer have any will or real capacity for independent action. Typically this means that the king (the executive organ) uses parliament (the legislative organ) as an instrument of rule: the reverse is theoretically less likely to succeed; indeed attempts by parliament to dominate have generally failed.

To avoid a possible confusion, we need to recall that the claim that the king is subject to the law of nature and of the land – as did Fortescue⁴⁷⁴ – is not an instance of systemic corruption. Constitutionalism was the attempt to control this type of king and kingly power, not one that would claim absolute authority.

That much said; it would be pushing the point too far to think of *Magna Carta* as an attempt at systemic corruption. However, the Provisions of Oxford (1258), and the Statutes of Marlborough (1267) and Westminster (1269) exhibit traits associated with this concept: had they been given full effect, they would have placed a directing control upon the powers of the king. They did not work or were

⁴⁷⁴ *De Laudibus Legum Anglie*, 1942; *The governance of English*, revised edition 1885; and *On the Laws and Governance of England*, 1997. See also S. B. Chrimes *An Introduction to the Administrative History of Medieval England*, 1959, pp. 318-323.

not applied, but the Statute of York (1322) did, ensuring that powers hitherto exercised without were, thereafter, exercised within and with parliament.⁴⁷⁵ However, for entirely contingent reasons, this did not lead to the development of parliamentary government. The system remained inter-institutional, leading to co-sovereignty.

With the benefit of hindsight, it is now clear that the theoretical possibility of systemic corruption at the behest of parliament does not work without the interposition of a further institution. There are three examples of this. In the long history of government in this country in all its transmutations, we have only had one Constitution – viz. the Instruments of Government, 1653.⁴⁷⁶ The two decades from the initiation of political conflict between the king and parliament, through the *Interregnum* to the restoration of 1660 are rather closed books to students of British government and its ‘constitution’. For two reasons these decades are of interest. One is the richness of ideas about government that seemed to come forth from all directions, even if not all such theories were sustainable and some are definitely problematical at least to the extent that they eschewed political for theological reasoning. This aspect has been of deep and abiding concern to historians,⁴⁷⁷ but generally without proper input from political scientists, with the consequence that often we cannot see the overall constitutional arguments for the mass of political detail. The other reason is the problem of government after 1649. The Instruments of Government deserve independent study for this, if no other reason. However, from the perspective of the present chapter the Instruments of Government represent a truly constitutional attempt at upsetting the inter-institutional co-sovereignty balance in favour of parliament. Incidentally,

⁴⁷⁵ M. H. Keen *England in the Middle Ages*, 1973, pp. 91-2, and G. B. Adams *Constitutional History of England*, 1935, pp. 149-153. We must agree with Adams that this period marks the displacement of the Barons or Baronial council of the king by his parliament as the organ capable of and attempting to limit the king. *Ibid*, p. 180.

⁴⁷⁶ C. H. Firth and R. S. Rait *Acts and Ordinances of the Interregnum, 1642-1660*, 1911, volume 2, pp. 913-822. For a slightly edited version, see J. P. Kenyon, *The Stuart Constitution*, 1966, pp. 342-348

⁴⁷⁷ The best introduction to this topic is probably A. Judson’s *The Crisis of the Constitution*, 1949. Andrew Sharp’s *Political ideas of the English civil wars 1641-1649* (1983) provides a taste of the subject in excerpts. See R. Eccleshall *Order and Reason in Politics*, 1978, chapter 6, and M. Fulbrook *Piety and Politics*, 1983.

we must here note the more than merely family resemblance of the terms of the Instruments of Government to the Nineteen Propositions of 1642, and place a marker upon this and the fact that even though most of the terms of these attempts did not come to pass in the history of British government, nevertheless, enough of their combined ethos has been given effect such that the prediction that Charles I made in his reply to the Nineteen Propositions actually came true.

There is no history of the working of this Constitution: it was never put into operation. But that does not detract from its value as a conceptual example of the case under consideration. As a Constitution, the Instruments of Government was defective: setting aside the religious nature of the system envisaged in it, it is not clear who could promulgate it, nor does it contain any mechanism for its reform. Parliament was not allowed to review it, and all legislation incompatible with it was declared null and void, yet no mechanism to determine the issue of incompatibility was envisaged. _

It assigned legislative power to the Lord Protector and parliament (various provisions of the Constitution regulate this relationship) while executive authority was vested in the Lord Protector and the Council. Significantly, this Constitution does not allow for any independent action by the Lord Protector, whereas in the absence of necessary co-operation from the Lord Protector, parliament could legislate without his consent. The Council was charged with (advise and) consent functions without which the Lord Protector could not act when parliament was not sitting. Even so, such decisions were subject to parliamentary approval when that body next met: yet, there is no indication as to what would happen should parliament disapprove. Other interesting aspects include the requirement of the consent of an ordinary parliament to its dissolution within the first five months (three months in case of extra-ordinary parliaments that must be called in cases of need and war); elaborate procedures to ensure that writs for a new parliament would be issued in time; and equally elaborate procedures for the appointment of the members of the Council. Incidentally, the successor to the Lord Protector was to be elected by the Council.

The Instruments of Government represents an interesting case of systemic

corruption. Not only is this the first and only instance of creating a Constitution for England; in its outlook, provisions and general tendencies it presents an idealised version of conciliar government by the king within the confines of parliamentary sanctions and control – the *desideratum* of many since the end of feudalism. Incidentally conciliar government is not necessarily limited government and does not inevitably portend *substantive* constitutionalism.

The second example is also an instance of an attempt at creating conciliar government under statutory provisions. The Act of Settlement (12 and 13 W III. C. 2, 1701) provided for precisely such a form of government, but the relevant part of Article 3, section 4 was repealed in 1706 (Regency Act, 4 and 5 Anne. C. 20). Our final example of the legislature seeking to more than merely control the exercise of the powers of the executive is that of Andrew Fletcher's original Act of Security of 1703,⁴⁷⁸ which did not become law.⁴⁷⁹

In Fletcher's scheme, if the successor to Anne was also the king/queen *regnant* of England, then Scotland would have annual parliaments, and every important executive decision – from appointments to high office to declarations of war and conclusion of treaties of peace – would be subject to its approval. Moreover, such a king/queen *regnant* was divested of veto powers: royal assent was automatic, to be given in commission. A committee of thirty-one, with a *quorum* of nine members, appointed by parliament out of its own members was "to have the administration of the government, be his council and accountable to the next parliament". Indeed this Council was empowered to call parliament together; its decisions were to be by (secret) ballot, not the open vote; and presumably issues were to be determined on the basis of a simple majority of votes.

Characteristically, systemic corruption attempted by the legislature does not seek to dispose of the executive. Nor does it involve appropriating its powers and functions, but seeks to ensure that executive decisions and policies are subject to

⁴⁷⁸ Full text is in A. Fletcher of Saltoun *Selected Political Writings and Speeches*. Edited by D. Daiches, Scottish Academic Press, 1979, pp. 74-6

⁴⁷⁹ The Act that received royal assent in 1704 was not quite as far reaching as Fletcher's original idea. See P. H. Scott *1707: the Union of Scotland and England*, 1979, p. 14.

its approval – the object is not to institute parliamentary government, but to have a controlled executive. In this respect, we have one possible theoretical deviation that, broadly speaking, has not received the attention it deserves. This notion employs a different approach: instead of controlling the executive, it seeks to enlarge the power and purview of parliament. Thus, *circa* 1625 parliamentarians made an attempt to shift the functional rôle of parliament from that of an instrument in the hands of the Tudors to that of a constitutional body in the hands of parliamentarians. More specifically, as S. D. White⁴⁸⁰ argues, we see a shift around this time in the view of parliament as the proper instrument for correcting limited problems, to one in which increasingly parliamentarians take a wider view of the ills of the country and consider the proper rôle of their institution as one of offering the necessary remedies. Moreover, but only by implication, this also means that parliamentarians saw parliament as the only body capable of so doing. We may note the occasion in July 1625 when Charles dissolved parliament because it attempted to turn the issues of Catholics into one of foreign policy, and the grievances of the Commonwealth into a question of general reform, as indicative of this shift in attitude. However, White also considers that this transition in function and rôle did not come to practical fruition until the Long Parliament. This shift – though never fully defined and argued – soon becomes permanent such that there are no questions about the power of the convention parliament in 1660 and, indeed, in 1668 to decide the fate of the country. However, this does not feed into an immediate systemic corruption but provides the theatre in which the scenario of 1688 is played out, and becomes the silent basis upon which the form of government in the next century develops, and the whole eventuates into systemic corruption that is the Neo-Tudor style of government.

The king (or queen *regnant*) is more successful in effecting systemic corruption by seeking to reduce the legislature to subservience. However, the means available to the executive in this respect do not include Constitutions or

⁴⁸⁰ S. D. White *Sir E. Coke and the grievances of the Commonwealth*, 1979, especially chapter 6, pp. 187-8 and 190. On the other hand, according to R. Britnell, parliament was an instrument of rule even before the Tudors. See his *The Closing of the Middle Ages?*, 1997, chapter 9.

legal devices. Characteristically, the king must resort to sometimes-subtle strategies to achieve this end. The means relevant to, and the examples mentioned in relation to managing parliament, including illegal and corrupt practices, in a broad sense define the range of his options. However, such practices lead to systemic corruption only when they become part of the system – the rule, even if disguised – rather than an episodic exception. Incidentally, the institutional means and mechanisms whereby the executive could reduce the legislature to subservience, exemplifying full-fledged systemic corruption, did not emerge and develop except in embryo well into the 19th century. As a matter of historical fact, Neo-Tudor period is the best example of this type of government, but that story belongs in *infra*, chapters 4 and 5.

Chapter Four: British Government 1

The First Revolution: sovereignty of parliament

The supposition of *law...* is, that neither the king nor either house of parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions ... from any branch of the sovereign power, must necessarily be out of reach of any *stated rule*, or *express legal* provision: but, if ever they unfortunately should happen, the prudence of the times must provide new remedies upon new emergencies.⁴⁸¹

The Supremacy of Parliament *is* the Constitution. It is recognised as fundamental law just as written constitution is recognised as fundamental law.⁴⁸²

If the Common Law is Supreme, then those are so who judge what is Common Law; and if none but the Parliament can judge so, there is an end of the Controversy; there is no *Fundamental*; for the Parliament may judge as they please, that is they have the Authority, but they may judge against Right, their Power is good, though their Act is ill; no good Man will outwardly resist the one, or inwardly approve the other.

There is then no other Fundamental, but that *every Supreme Power must be Arbitrary*.⁴⁸³

Much has been made here of continuity and discontinuity, arguing that because discontinuities over the centuries have been treated in such a fashion that the result has always been apparent continuity, we are faced with the rather baffling task of discerning the extent of significant change in a long history that evidently does not tell the story of fundamental change. We may think of some ten such “moments” over the centuries:

- i. The Norman invasion or succession
- ii. 13th century attempts at change, such as the Provisions of Oxford
- iii. 1399, a revolution thought to have had a constitutional character
- iv. 16th century break with Rome and the regulation of the succession
- v. 17th century conflict between the king and parliament: claims to the ancient nature of parliament and its privileges, and

⁴⁸¹ W. Blackstone *The Sovereignty of the Laws*, 1973, pp. 96-7.

⁴⁸² W. I. Jennings *The Law and the Constitution*, 1959, p. 314. For Jennings there was no separation between law and constitution: they defined each other. In this way, Jennings avoids having to deal with the impossible question of whether *this* fundamental was a matter of law in the sense that it was derived from rules, or not.

⁴⁸³ Halifax ‘Political Thoughts and Reflections – on Fundamentals’ in *The Complete Works of George Savile, the first Marquis of Halifax*, 1912. p. 214.

- vi. Conceptual conflict between the historically justified claims of the king against the logical meaning of the turn of events
- vii. The first revolution: claims to sovereign power attributed to an organ of government where none existed before
- viii. Union with Scotland
- ix. In view of 6 above, the development of cabinet government as the only practical (and logical) solution to the impasse implied in Revolution Settlement, and finally
- x. Counter-revolution: the development of the Neo-Tudor style of government

Of these, two changes are conceptually significant, VII and X, treated respectively in this and the next chapter. In this chapter, three related questions are addressed: the nature of the Settlement; constitutionalism; and the idea of sovereignty of parliament. The following chapter examines aspects of parliament, the political executive, parties, and importantly, aspects of reform of the House of Lords, and ending with an account of the issue of the guardianship of this system. Whether we are now witnessing a Third Revolution is a minor question, reserved for Chapter Seven.

An Inconclusive Settlement

The eventful 17th century remains an important issue in the historiography of British politics, but it is not clear what rôle the study of that century has played, or can play, in the study of the British government since 1688.⁴⁸⁴ In part, the problem has to do with the absence of a well-established tradition of the study of British government separated from the history of politics. At its most confusing, this fusion is the essence of the claim that the British have a political constitution, that this constitution is often an issue in politics such that each general election is a referendum on it, and the like. To the extent that there are no pre-arranged special procedures that must be invoked in order to change the system of government, and instead alterations are achieved through its ordinary working processes, one may, with some apparent plausibility, argue that not only its reform, but also the very “constitution” is part of politics. If so, one must wonder why it is that the reform of the system – in the everyday language of British politics, constitutional reform – has never been a hot issue, not even when a party

⁴⁸⁴ Graham Allen considers the events of 1640-1660 an unfinished democratic revolution and enjoins us to complete it now. See G. Allen *The Last Prime Minister*, 2001, chapter 1.

has sought to make an issue of it, challenging proposals by others to introduce apparently radical change. In fact, in the 1997 general election, this issue proved a rather effective turn-off for most; to say that this was so because the Labour Party had promised referenda is to misread the situation, for the referenda in question dealt only with the issue of devolution and the governance of London. In the event, the Labour government claimed a mandate to modernise and reform the system. What are we to make of this contradiction? Evidently, the political public is bored by talk about constitutional reform, symptomatic of the fact that the system has always been at the mercy of the political class (and the “movers and shakers” of the system), such that the political public does not see what rôle it has in relation to it. This is naturally far from a desirable condition, but, one must hasten to add, not such a surprise: this system was never “owned” by the nation as such, nor is it now; all said and done, it is a very top-heavy system, but the implications of this fairly obvious point have not been spelt out in any detail.⁴⁸⁵

If the “constitution” is absorbed into the political process, we must ask: can there be any aspect of such a system with regard to which the use of the word “must” – in its proper sense of an imperative implying a need that cannot be denied – is indicated? Consider some examples: an Act of Parliament sets the duration of parliament, but if political prudence indicates that a general election be postponed, it is postponed, albeit *via* another Act of Parliament setting the date for the next election. However, this too can be changed if necessary, but the expectation is that the delay, though legal, will not be indefinite, and that the next general election will be held as soon as possible. A “Convention” calls itself a Parliament and gets away with it,⁴⁸⁶ but in “belt and braces” fashion, the subsequent parliament readily certifies the Parliament-nature of the Convention and ratifies its output as law. The line of succession is changed and the system still declared to be successive. An Act of Parliament gives effect to an incorporating union, and thereby creating a new parliament. Apparently there is

⁴⁸⁵ *Ibid*, especially chapter 4. His proposal for reform and procedures necessary for it are cases in point, as are various Constitution Unit papers on the subject.

⁴⁸⁶ See L. G. Schowerer ‘The transformation of the 1689 Convention into a Parliament’ in *Parliamentary History*, volume 3, 1984, pp. 57-76

nothing that is truly sacrosanct – beyond ordinary change – in the British system of government; perhaps not even its form. Can we change the régime – say to a Republic – by an Act of Parliament? Frankly, yes, because we have no constitutional mechanism at hand to prevent it.

We are so conditioned by fable and myth surrounding – if not actually structuring – the facts of the history of government and politics that today it is impossible to think of British government without thinking of parliament. Is parliament, then, sacrosanct? It was not always so, and in answering this question we must give two separate, though related, arguments. Firstly, that without parliament it would not have been possible to describe this system as *politicum et regale*, as did Fortescue. Secondly, since Revolution Settlement government has not been possible without a parliament, for only parliament can sanction taxation and other important matters. We should, therefore, not be surprised to find that, for some, Supremacy of Parliament *is* the Constitution. Yet the importance of parliament in this sense does not issue from the claim to its supremacy or being sacrosanct, but from the fact that it has a pivotal rôle in providing resources, powers and the all-important integument of legitimacy. But if nothing is sacrosanct, then why bother with the obviously empty claim that we have a constitution? Without a Constitution, this system has continued apparently stable and unchanged for longer than any other in the world, and has remained recognisably “the same” over many centuries. The hiatus of the 1640s ended with a restoration whereby the continuity of the system was resumed but with some subtle differences. This singularly British exception does not cease to amaze, indeed it amazes even more when we recall the extent to which the foundations of the system have always been in the air, in the living thoughts and ideals of the English élite, and have found expression in the conflicts amongst the élite, rather than firmly set in the birthright of the English – their laws.⁴⁸⁷ Sounds good and rolls off the tongue nicely, but the claim that the laws of the English are their birthright is also misleading. Are the laws still the birthright of the English? Of course, but this birthright no longer contains eternal laws but only what the

⁴⁸⁷ “And whereas all the laws of England are the birthright of the people thereof...”; article IV, Act of Settlement, 1701 (12 & 13 W III c. 2)

previous generation has left behind, and this is not necessarily the laws that they received as their birthright in their turn! The phrase remains the same but the meaning is simply a world and an aeon away: surely, on this reading, only the instrument of making laws is the birthright of the English, recalling Matthew Hale, but more directly Bright's evocation of England as the Mother of Parliaments. The fact is, that the practical meaning of law changed in the course of late 18th and 19th centuries: Blackstone could still think of the law as common law, and statute law as its occasional corrective,⁴⁸⁸ but this is hardly the sense of it at the turn of the 20th century.

The point is that the turbulence of the 17th century ended with a Settlement enshrined in law, and this fact has served to discount the relevance of that century to teasing out the ethos of the British system after 1688.⁴⁸⁹ This means that we must start with the terms of Revolution Settlement. It may be a banal truism to say that the evidently Whig nature of the Settlement puts a premium upon the Whig interpretation of British politics and government – it is always winners who write the history and rules of its historiography – but it is precisely for this reason that a focused re-interpretation of the Settlement against the backdrop of the arguments in the preceding chapters in this study may pay significant dividend in the study of British government. Not only will such an approach distance our interpretation and understanding from the Whig view – which may lead us to confirm or deny it, whether we like the conclusion or not – but it will also enable us to locate the post-17th century developments within the larger view of the historical dimension of British government, more consistent with the view of the past as presented in this study.

Clearly, we cannot do better than to begin with the document itself. The fully

⁴⁸⁸ W. Blackstone *Commentaries*, 1765, volume 1, p. 87

⁴⁸⁹ The 17th century is of considerable historical importance, and subject of continued study. The point here is that so far as the development of the system of government was concerned, the fact of the Revolution Settlement was a closure and put paid to arguments.

misnamed “Bill of Rights”⁴⁹⁰ (1 W&M. session 2, c. 2, 1690⁴⁹¹) is only the Declaration of Rights that William and Mary had accepted, which, suitably altered,⁴⁹² was passed as a statute, but only after the Convention had decided that it was a parliament after all! Simply put, the Bill changed the immediate succession, and placed a few limitations upon the hitherto undoubted executive powers of the King. More pointedly, it established the religious character of the British Monarchy, and with it that of the “State”. Along the way, in declaring certain matters illegal, a given view of legality and of rights was also established. It also contains a good deal of polemic, in particular with reference to true ancient and indubitable rights and liberties of the people of the kingdom, even though the Protestant religion, the protection of which is given such an important place in the whole matter, is hardly ancient, or part of the birthright of anybody.

But Revolution Settlement was not a Constitution or a new start in that it did not change the system of government, or even as much as imply subsequent changes to and developments in it. However, while it is not possible, by any stretch of the imagination, to deduce the subsequent form of government from the terms and the conditions of the Settlement, yet, there is a discernibly clear historical continuity between Revolution Settlement and subsequent changes. According to Macaulay:

[t]he Declaration of Right, though it made nothing law which had not been

⁴⁹⁰ For some this is the third such document, after *Magna Carta* and the Act of Supremacy of Henry VIII. The historical importance of these documents cannot be denied, but it remains the case that Revolution Settlement was a closure of a totally different order in the history of British politics and government.

⁴⁹¹ T. P. Taswell-Langmead *English Constitutional History*, tenth edition 1946, pp. 502-8.

⁴⁹² The Declaration of Rights forms only parts I-III of the Bill of Rights – with some minor stylistic corrections. A prologue was added, and sections IV-XIII are only to be found in the Bill of Rights. Whether section IV, detailing William and Mary’s acceptance of the Crown *etc.* is also part of the Declaration of Right is not so obvious. Section V implicitly establishes the authority of this convention-cum-parliament to legislate and continue to sit as such a body; in section VI the Declaration of Right is ratified as enumerating the ancient rights and liberties of the people of this kingdom; in section VII the title to the Crown is declared; in section VIII the succession is settled, and some limitation are imposed, whereas in section IX certain (especially religious) exclusions are clearly stated, followed in section X by the stipulation that upon the earlier occasion of either coronation or the first meeting of parliament after accession, the new king/queen shall repeat the religious declaration according to the 13 C II; section XI is the enacting clause, and section XII and XIII abolished dispensing powers and listed the exceptions.

law before, contained the germ of the law which gave religious freedom to the dissenters ... secured the independence of the Judges,... limited the duration of Parliaments, of the law which placed the liberty of the press under the protection of juries, ...prohibited the salve trade... (etc.)⁴⁹³

1688 was an essentially negative settlement, whereas the financial settlement of 1690 had a more directly positive effect upon future developments, while the Act of Settlement nearly created a system of government. The point is that Revolution Settlement and other measures in the decade immediately following did no more than condition the conditionality of the development of the system of government, but the course of that development has been entirely contingent, such that we cannot plausibly argue that Revolution Settlement indicated any *necessary* change; it did not even preclude the possibility of royal government. So, precisely what did Revolution Settlement achieve?

In the long first article, grievances are stated and thirteen remedies provided: these almost exclusively deny certain powers to the king. Even 1/8, 1/9 and 1/13, respectively dealing with free elections, freedom of speech in parliament, and, following from that, immunity for whatever is said in parliament, are directed against the king, prohibiting the impeaching or questioning of proceedings in parliament. There is nothing in the article to indicate that parliamentarians intended to exclude invoking “proceedings in parliament” in courts of law or preventing the general public from discussing them: the phrase used is “...in any court...”. Article 2 recognises the ascension of William and Mary to the throne of England *etc.*: they are recognised to “be and be declared” king and queen. More than that in this article William is invested with the “full exercise of regal power” in the name of the king and the queen. The line of succession is also clearly laid down. A new oath of allegiance and abjuring of Roman ideas is the subject of the next article. Articles 8 and 9 clarify the settlement of the crown, limit the succession, and exclude papists and those marrying papists.⁴⁹⁴ Article 5 declares

⁴⁹³ T. B. Macaulay *The History of England from the accession of James the second*, 1849, volume 3, pp. 448-9.

⁴⁹⁴ This simply made it unnecessary to countenance ideas of placing limitations upon the government in the event of a popish succession, as Charles II proposed in 1679. He suggested that such a king have no control over ecclesiastical matters, be disabled from unreasonably preventing parliament from assembling, that Privy Councillors and Justices of the Peace be appointed by parliament and only Protestants would be eligible to

that the Convention (composed of the surviving members of the last parliament of Charles II) should continue to sit as a parliament (and this is ratified in 1 W&M, session 1, c. 1). In article 1 section 2 the king's power of dispensation is removed, but article 12 reserves it to Acts of Parliament.

Burns⁴⁹⁵ avers that Revolution Settlement did not impose "constitutional limits" to the power of government, but re-distributed sovereign power within the structure of government. Ignoring the fact that the idea of sovereign power within the structure of government begs many questions, one can understand the sense of this description. Revolution Settlement achieved three things: it altered the line of succession, braced the king and limited his powers; it protected one religion (and granting its adherents the right to bear arms for their defence suitable to their condition *and* as allowed by law) without outlawing others, thereby creating a religious state in fact but not in name; and, significantly, it also assumed new powers for parliament, specifically, to dispense with laws, to levy money without any limitations of any kind attached, and have the only say on whether the king could maintain an army in time of peace and, by implication, also to determine its size and resources. But this Bill also left the government of the country in the hands of the king: in article 2 we read, "... the sole and full exercise of the regal power be only in and executed by the said prince ..."; without any indication as to its form and nature: thus the government was still that of the king. In the absence of any statement on its form and nature, Royal Government remained the norm.

Concerning the form of government, compared with the Nineteen Propositions and the Instruments of Government, even reaching back to earlier attempts, such as the Provisions of Oxford, Bill of Rights is altogether a rather mild affair. The Nineteen Propositions, as much as the Instruments of Government, would have made king and parliament co-equal in law making, and located the king's executive powers within a conciliar system; Charles II's attempt at a compromise in order to solve the exclusion crisis in 1679 would have had much the same

appointment as JPs, and that naval and military appointment should be by parliament or its appointees. He was also prepared to countenance further limitations that parliament may wish to propose. See J. R. Tanner *James II*, 1948, chapter 9, especially p. 158.

⁴⁹⁵ J. H. Burns 'Bolingbroke and the concept of Constitutional Government' in *Political Studies* 10/4, 1962, p. 267.

effect, albeit only in religious matters. In Revolution Settlement they did not bother with any of this because, we may surmise, they achieved the obvious religious objective by limiting the succession to a protestant king, married to a protestant queen. Even the belated, altogether mild attempt in the Act of Settlement to create a kind of conciliar government (article 2/4 of the Act of Settlement, repealed before the Act took effect) does not begin to put the effects of Settlement on a par with that of any previous conciliar scheme. Clearly, the ethos of the Bill of Rights was to limit the executive powers of the king in order to protect the Protestant religion and remove his law-making powers, not to create a new form of government: it was to adjust, not to change. We can see the verity of this claim in some related measures; the financial Settlement of 1690 is directly relevant here, so is the creation of a judiciary that was now in essence independent of the whim of the Crown, and the attempt (soon modified) to prevent holders of office of profit under the king – i.e. his ministers and councillors – from sitting in parliament, thus seeking to curtail the range of influences that the king could exert upon parliament. All of these had the direct effect of limiting the authority and the effective powers of the king, making it more difficult for him to act independently of parliament. The Settlement transformed what Charles I, perhaps somewhat hopefully, had called a “regulated monarchy”⁴⁹⁶ – what Halifax called “bounded Monarchy”⁴⁹⁷ – into what has remained its much-celebrated tag, a “Constitutional Monarchy”. In the process, it destroyed the element of inter-institutional “rivalry” identified and proposed here as the essence of co-sovereignty and basis of constitutionalism in the history of English government, without enunciating and enshrining a clear doctrine of the superior, if not supreme, authority of parliament. Parliament was an indispensable part and instrument of government long before this date, and retained this status after the Settlement. Yet the re-configured relationship between the executive king and legislative parliament – even though this was not spelt out – limited the range of paths for future developments: the

⁴⁹⁶ ‘King’s answer to the Nineteen Propositions’, 18 June 1642, in J. P. Kenyon *The Stuart Constitution*, 1966, p. 21-3.

⁴⁹⁷ ‘A Rough Draft of a New Model at Sea’ (1694) in Halifax *The Complete Works of George Savile*, 1912, p. 175.

balance was now tipped in favour of parliament.

On the whole, then, Revolution Settlement achieved something quite extraordinary. It brought to an end the troubles of the 17th century and the *quasi*-constitutional arguments that had been such an important element in the era of co-sovereignty. If we look upon 1539 as the moment when political power of the king was “nationalised”, we must look upon 1688 when it was “domesticated”. More than that, it was also a very effective closure for the resurgence of any such argument: once more, England’s “most excellent constitution” was the best in the world; monarchy was saved and made constitutional, and “Crown in parliament” became “Crown-in-parliament”.⁴⁹⁸ Unfortunately this complacency also put paid to any constitutional theory-thinking about the system, and this doomed our proto-constitution to remain so; thenceforward, the history of this system was, at best, that of the development of its form of government.

Yet, this claim places a rather significant question mark against 1688: the Bill of Rights is not a Constitution in the meaningful sense of that term, even though in its negative aspects it has an indubitably constitutional character. Given that a Constitution must foretell, if not institute a given form of government, the fact that the form of government in Great Britain changed without disturbing the character and the finer details of Revolution Settlement serves only to underline the conceptual question mark. This conceptual ambiguity is never historically resolved, but is, instead, constantly renewed and begged as a result of claims that Revolution Settlement closed the constitutional argument and that thenceforth this country was governed as a Constitutional Monarchy. However, “Constitutional Monarchy” is a neutered concept, not a system of government: to

⁴⁹⁸ M. A. R. Graves, quoting Thomas Smith’s *De Republica Anglorum*, avers that by 1559, the accession of Elizabeth, “king-in-parliament” was sovereign in England (*Tudor Parliaments*, 1985, p. 17). However, the question whether the king legislated with or in parliament remained an essential backdrop to the conflicts of the 17th century; it was by no means a settled question (see C. C. Weston and J. R. Greenberg *Sovereigns and Subjects*, 1981, pp. 3 and 4). We may reasonably accept that if with and after the Tudors the king’s powers were never greater than when in parliament, it was only after 1688 that the co-ordinate legislative powers of the king and parliament became the established orthodoxy: thus, only from that date can we properly speak of “king-in-parliament”. However, evidently oblivious to the difference, the Constitution Committee of the House of Lords declare “Sovereignty of Crown in Parliament” as the first tenet of this Constitution. (Select Committee on the Constitution. First Report, July 2001, paragraph 21).

be sure, it is not Monarchy in that the powers of the king are heavily circumscribed, and it makes a mockery of constitutionalism by serving to protect sovereign power and pretending to control how it is used, rather than define and establish its limits. Still, this neutered concept has since become an integument, a veil behind which real change takes place without disturbing the apparent sameness of the system. It successfully hides the fact that we have no Constitution, even though we talk much about it, but only a system of government with certain features that invest it with an overall character of regularity.⁴⁹⁹ We must begin with Revolution Settlement, but it does not take us very far.

It is a singular fortune of the British system and, therefore, of its study, that we cannot rely upon the history of the constitution, and call upon the history of government to illuminate and elucidate the nature and the meaning of its “constitution”. *Pace* aspects of the period since 1972, it remains true that even now we cannot rely upon the examination of singular events and occurrences as a mark of change in the system. In a system with a Constitution, the very meaning of such singular events derive from it and its principles, whereas we can only find meaning for this “constitution” in the nuance of arguments concerning certain events. For instance, Bolingbroke complained of the Septennial Act, but did not mention the Triennial Act that it repealed: if the power to pass the Septennial Act was dubious, whence the power to pass the Triennial Act? But then, the issue for Bolingbroke was not the power so to legislate, but that Septennial Act made the Commons (and so parliament) more remote by reducing the frequency of elections. For Burke, the case of Wilkes (the House regulating its own membership) raised issues of representation, but he remained silent on the fact that in 1430 (8 Hen VII, c. 7), many were actually disenfranchised, or that in *Ashby v White* (1702-4) the Lords determined that the Commons had the sole right to examine the right of election of their members, and that the qualification of

⁴⁹⁹ This point can be exaggerated and become misleading: for instance, Vernon Bogdanor claims that “Constitutional Monarchy” provides the overall frame legitimacy for further reform (V. Bogdanor *The Monarchy and the Constitution*, 1995, especially p. 301) which in an odd sense recalls Charles II who distinguished between “reformation and alteration” and said he could support the first but not the second (‘King’s Speech, 25 January 1641, in J. P. Kenyon *The Stuart Constitution*, 1966, p. 49).

electors or the right of any person elected was not cognisable and may not be determined anywhere other than in and by the Commons (and made a breach of this a matter of privilege). But then Burke's concern was not the regulation of elections – which the Commons had obtained in order to preserve its independence, naturally against the Crown – but the apparent presumption by the Commons of powers that did not belong to it, amounting to “unconstitutional” interference with the choice of the representatives by the people, the electors. On the other hand, Blackstone, who happily justified property qualification for electors,⁵⁰⁰ thought otherwise about the Wilkes case: in the next edition of his *Commentaries* he added the decision of the Commons to reject a member as a further disqualification and justified it on the basis of “law and custom of parliament”.⁵⁰¹ But this was no bar to his view that Henry IV's instruction to exclude the election of apprentices or lawyers was an “unconstitutional prohibition”, resulting in what Coke called *parliamentum indoctum*, and opined that it passed no good laws!⁵⁰²

Our analysts disagreed not over the principles involved, but over the interpretation of the import of single events. Yet, “authority” is the only source we have of the nature and meaning, that is to say the theory, of the system. This means, firstly, that any attempt to explain this system is liable to become an

⁵⁰⁰ The object was to exclude people of mean position who might be thought not to have a will of their own. W. Blackstone *Commentaries*, volume 1, pp. 157-8. Sullivan would further restrict the property qualification in order to return to the original principles of the constitution. F. S. T. Sullivan *An Historical Treatise on the Feudal Law and the Constitution and Laws of England, 1772*, p. 236.

⁵⁰¹ After enumerating the legally defined disqualifications, Blackstone says: “And there are not only these standing incapacities; but if any person made a peer by the King, or elected to serve in the house of commons by the people, yet may the respective house upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member: and this by the law and custom of parliament.” *Commentaries*, volume 1, p. 163. Incidentally, the source references for this is the Journal of the House of Lords for 17 February 1769, although 16 Geo. III, c. 16 made disputed election a matter for the Commons. See the *Dictionary of National Biography*, volume 2, p. 600 for a brief account of the incident and Blackstone's apparent embarrassment over this case.

⁵⁰² Contrast this view with that of Halifax, who was distrustful of lawyers in parliament, *inter alia* because they have “a habit of taking Money for their Opinion”. ‘Cautions for the Choice of Members in Parliament’ in Halifax *The Complete Works of George Savile, the first Marquis of Halifax*, 1912, paragraph xiv, especially p. 157.

exercise in the history of ideas on government: this is, by and large, but not exclusively true. But, secondly, it can also be taken to mean that because there are no undisputed authorities, there is no authoritative theory of this system. On the face of it, the absence of an authoritative interpretation is plausible but very misleading; theoretical understanding issues from arguments from first principles, not historically conditioned generalisations or the attractive arguments of this or that thinker. We may note that Bentham rejected Natural Law/Rights as mere words and proposed the idea of utility, which he employed as *a first principle*. So, on the face of it, the question is apparently translated into “whose first principles?” But the choice is not that open: we do not opt for one or other because we like or dislike them, nor is the test how much history each may explain, but where it starts, what objectives it seeks to serve, and how well the arguments are constructed. In other words, we begin with first principles outside the political/governmental system, not with first principles of the system: we must distinguish the two and their respective rôles. Indeed, often in the form of historically conditioned arguments, the latter serve a rather different purpose, and may even be offered in ignorance of it, causing some mischief. In a related sense, occurrences and important measures often serve to make explicit a further facet of the powers of an institution or office, which, until then, had not been acknowledged. This is as true of the history of parliament, whereby it becomes supposedly sovereign, as it is of the story and history of the expansion of the powers of the prime minister such that, today, many see it as a British presidency. But such conceptions do not account for the nature of the system: the political system is what it does, but its powers are created or sanctioned in view of a larger idea of its nature.⁵⁰³

To emphasise, Revolution Settlement did not provide a settled view of the nature of this system and indeed, as argued above, left government in a

⁵⁰³ Alas, in respect of the British system, there is an issue here. Powers are incrementally “created” in response to immediate needs and as a matter of convenience, but once created they tend to remain as additions to the powers of the institution concerned. See J. Millar *An Historical View of the English Government*, 1803, volume II, pp. 230-233 and volume IV, p. 80. Incidentally, this manner of incremental change (especially in the power of the executive king) is precisely what so disturbed Bolingbroke, almost frightened him, as he thought it would lead to the corruption of the system.

completely formless state. Royal government continued, but not for long; yet, 1688 was seen as a Settlement and almost every analyst or politician continued to speak of the “British constitution”. We have no clear guidelines as to what to make of this Settlement, and, as the arguments thus far show, we are also faced with the fact that the apparent continuity of the system is only a veneer, an integument hiding a rather large vacuum. In the event, we find meaning for this system in the folds of the arguments of three theorists in the 18th century. However, given the argument that *substantive* constitutionalism is a pre-condition of any Constitution, that under all circumstances it is incompatible with any assertion of sovereignty, and that from early 18th century a misconceived sense of constitutionalism was identified with separation of powers (*supra* Chapter Seven), we may begin by considering the fortunes of this idea.

Thoughtful doubts: Bolingbroke and Burke

The essence of the idea of “Constitutional Monarchy” is the limitation of the monarchic power. The imposition of such limitations in 1688 closed the arguments about *substantive* constitutionalism, *but only so far as the Monarchy was concerned*. Moreover, the fact that this limitation and the terms of the “new” régime were the creation of parliament, accepted by a king and a queen whose accession, and, thence the succession, was parliamentary, exemplified the apparent capability to create new powers *via* an Act of Parliament, with no limitations of any sort other than the ordinary working of the system. This point is well demonstrated by the fact that members of the Convention Parliament took care to establish it as a *proper* parliament: indeed, throwing the mantle of the legitimacy of the system upon each point of significant change has been an important practical feature of the history of British government, in the process glossing over fundamental questions and doubts. However, the further fact that Revolution Settlement did not obviously create a new situation meant that its effective devaluation of constitutionalism was not recognised: with prerogative powers curtailed and (the office of) the king made limited, *substantive* constitutionalism was apparently achieved, even though in fact *substantive*

constitutionalism was actually discounted. Was this a failing? From a constitutional theory perspective it certainly was. But from the perspective of the age, and in view of the relative positions of the two sides – king and parliament, where parliament braced and imposed limitations upon the king – and given the mantra that parliament, but especially the Commons, was the voice of the people and protector of their rights and liberties, the failure is not a failing as such.

The most high and absolute power of the realm of England consists in parliament. ...and upon mature deliberation every bill ... being thrice read and disputed in each House... the prince himself does consent to and allow. That is the Prince's and whole realm's deed: whereupon justly no man can complain, but must accommodate himself to find it good and obey it.

...

For every English man is intended to be ...present [in parliament], either in person or by procurator and attornies, of what pre-eminence, state, dignity, or quality... from the Prince (be he King or Queen) to the lowest person of England. And the consent of the Parliament is taken to be every man's consent.⁵⁰⁴

Besides, just who could have imposed limitations upon the powers of “king-in-parliament”? The only other organ of the system is the judiciary: could the judges impose limitations? Whence the authority for such action and in what way? How could such decisions be enforced? That the passages from Thomas Smith dealing with the Elizabethan era apply just as well, if not better, to the position in 1688 and beyond is indeed telling, and a demonstration of the claim that the fossilisation of institutions and forms often hamper the study of this system, while underlining as fact the notion that 1688 did not bring forth any obvious change in the system.

We need to note, and for now reserve, the thought that in the form described above – and assuming that the terms of that description can be justified – there is an obvious and *prima facie* case for the claim that such a body is indeed sovereign, and that, in terms of the discussion of the topic in the preceding chapter, it is the nearest to the idea of the whole people acting together. Yet, the arguments so far do not support the idea of sovereignty as the attribute of an

⁵⁰⁴ T. Smith *De Republica Anglorum. A discourse on the commonwealth of England*, 1906, Book 2, chapter 1, pp. 48-49, quotation updated into modern English.

institution or organ, even of parliament in this form, and, as will be argued below, the very idea of representation works to uphold the claim that no institution or organ can ever have such an attribute.

Placing limitations upon the king, even when done by 'England in its political aspect', does not amount to creating a settled system, far less a Constitution. It is a category mistake to assume that Revolution Settlement and associated Acts produced a Constitution for England. Indeed, in 1688 more than ever before was England in need of *substantive* constitutionalism. Yet, on the face of it, *substantive* constitutionalism was simply no longer a relevant category, and constitutionalism was seen in terms of adherence to the established system of Constitutional Monarchy. This rather obvious sense of the term continues even today: we have precious few contemporary pronouncements in constitutionalism in the United Kingdom, but Dicey's claim that it amounts to the government submitting to the will of the nation as expressed by the will of parliament is probably the closest we come to an attempt to re-construct this concept within the idea that Supremacy of Parliament *is* the Constitution. Moreover, this obvious sense of constitutionalism is also present in a system with a Constitution: there too, it essentially means adherence to its terms. This is also Bolingbroke's view; but he remained silent on the idea of a Constitution and focused sharply upon constitutionalism.

Bolingbroke's contribution has been examined from the perspective of the history of English politics, the development of what eventuates into His/Her Majesty's Opposition, or from the perspective of history of political ideas, and interpreted in odd ways,⁵⁰⁵ but little specific attention has been paid to his ideas from the perspective of constitutional theory and constitutionalism. Incidentally,

⁵⁰⁵ It is difficult to understand what Castiglione means when he denies the (theoretical) importance of original contract in Bolingbroke, and instead suggests that laws, institutions etc. "have progressively come to represent that 'general system' which people value as their own way of administering public affairs." From this, he infers that there are two ways in which the constitutive function of a Constitution works: according to original and voluntary agreement, or from the process of identification with a given group, its customs and traditions. See D. Castiglione 'The Political Theory of the Constitution' in R. Bellamy and D. Castiglione (Eds) 'Constitutionalism in Transformation: European and theoretical perspectives' *Political Studies*, Special Issue, volume 44, 1996, p. 422. This may well be the preferred view of Castiglione, but it is not that of Bolingbroke.

his motives⁵⁰⁶ are not relevant to the study of his ideas on constitutionalism.

J. H. Burns's examination of Bolingbroke's ideas suffers from the fact that Burns functions with a rather less than clear notion of Constitution and, therefore, constitutionalism.⁵⁰⁷ He seems to accept that each and every government that is not entirely arbitrary has a constitution in a descriptive sense.⁵⁰⁸ The result is regular form of government, where the regularity is the result of the application of historical ideas with prescriptive force, preventing abuse, rather than relying upon bounded authority.⁵⁰⁹ But regular government will collapse into arbitrary

⁵⁰⁶ Quentin Skinner provides the most extensive examination of his motives and the views of some of the more influential historians ('The Principles and Practice of Opposition: the case of Bolingbroke versus Walpole' in N. McKendrick (Ed) *Historical Perspectives*, 1974, pp. 93-128). David Armitage considers 1734 was a kind of watershed: his political expectations were dashed as result of the elections of that year and Bolingbroke became a marginal figure. Armitage avers that this explains the more leisurely and abstract character of his writings after that date: the remaining Letters in the Dissertation, and, by direct implication, also his discourses on aristocracy and the monarchy. (Introduction, in Bolingbroke *Political Writings*, 1997, p. xvii). J. H. Burns ('Bolingbroke and the concept of Constitutional Government' in *Political Studies*, 10/4, 1962, especially p. 264) dismisses the question of motivation as an important issue. See also A. S. Foord *His Majesty's Opposition 1714-1830*, 1964.

⁵⁰⁷ J. H. Burns 'Bolingbroke and the concept of Constitutional Government', pp. 264-276. To be sure, Burns offers a clear history of the conception of constitutionalism, but such an approach cannot allow for theoretical clarification. Equally, a historical approach to the notion dominates the more generally held views about constitutionalism, even in countries with a Constitution. For instance, an American view and an Australian view separately agree that constitutionalism means limited government, intended to protect citizens and their rights, or protect and foster private spheres from interference by the government. This picture is then seriously confused by the addition of the further claim that constitutionalism is limitation of government by law, and that therefore constitutional law must remain beyond the reach of the government of the day. (See E. R. Kruschke *An Introduction to the Constitution of the United States*, 1968, especially chapter 1, pp. 12-13, and G. Maddox *Australian democracy in theory and practice*, 1991, chapter 4, but especially pp. 108-9.) Read against the conception offered in this study, such approaches miss the point that a Constitution is only an instrument of the people, that the government of the day is only a derived body and can have no power beyond that which it has been given, and that the constitution is not a matter of law, far less of constitutional law, for it is essentially pre-political and pre-law, but that a sense of legal probity (procedural constitutionalism) follows the fact of a Constitution and is the instrument whereby the terms of the conditions of the government imposed by the people are kept in good working order. Yet another significant difference is that whereas in the current view the focus is upon "constituent acts" – even when it is in the name of "We, the people..." – in my argument the pivotal concept is that of ownership, from which flow important implications, especially concerning the rôle of the government and other derived bodies in procedures for change and amendment.

⁵⁰⁸ This is of course the "constitution of" sense of that term.

⁵⁰⁹ At the time of Henry III the only security the people had was that he would not abuse his power, not that he did not have power to abuse. See J. Hervey (Lord) *Ancient and Modern*

government when the expectation that procedures followed in the past are to be followed is disappointed. On the other hand, regular government differs from modern constitutional government – a system with a Constitution – in three respects: the role of “constituent’ acts” as the source of prescriptive rules, the process of amending it, and the question of guaranteeing compliance with its rules by force of sanctions. However, he also argues that constitutional government means government that is not arbitrary. For him the difference appears to be only a matter of degree, rather than of significant substance. Yet, what distinguishes arbitrary from constitutional for Burns is whether the expectation that procedures followed in the past will be followed in the future is disappointed or not; if disappointed, it is arbitrary rule, if not disappointed but without a Constitution, then it is regular government, where the regularity is due to historical ideas with prescriptive force. Burns presents these together as the ancient and the medieval understanding of constitutionalism, and suggests that it differs from the modern view.

We may reasonably work with three broad categories of arbitrary, regular and constitutional government. But that will leave the question of constitutionalism untouched, and take us back to the arguments of the preceding chapter. Equally importantly, it will also mean that constitutional government based upon historically sanctioned prescription – i.e. regular government – is an empty category, in fact a category mistake. In other words, England/United Kingdom has *never* had constitutional but only regular government. Moreover, given that constitutionalism is not a feature of a Constitution but only a certain precondition prior to it that defines it as a Constitution, we had constitutionalism or struggled for it for a long while, but that in its substantive sense discarded it in 1688.

However, Burns underlines the relevance of Bolingbroke’s ideas, especially when he suggests that in substance there is not a great deal of difference between him and Tom Paine, but also avers that, in effect, neither contributed much to the development of the modern conception. This is true but only to the extent that neither – or anyone else for that matter – offered a comprehensive

theory containing solutions that would satisfy the post-1803 understanding.⁵¹⁰ Indeed, there can hardly be any such theory except as a blueprint: the ideas behind such blueprints are simple and simply stated, and issue into shibboleths. The difficulty with Bolingbroke is not so much that his scheme does not satisfy these shibboleths, but that we cannot accept them as sufficient answers, because he mistakes Revolution Settlement for a constitution, and is concerned with constitutionalism under a constitutional form of government. He never recognises this mistake and, for this reason, his analysis ends in confusion and despair. Thus, while Bolingbroke's ideas fall short of a clear answer, he is distinctly modern in his conception, and his arguments have a continuing relevance.

There are, *inter alia*, five essential criteria for a Constitution in its only meaningful sense:

- the self-identification of the constituent element and power, and a statement of the act of constituting *above which there is none*
- limitation of powers and functions imposed upon all organs of government
- means for amending the Constitution
- means for regulating the relationships foretold, implicitly or explicitly, and
- guaranteeing compliance with the terms of the Constitution.

Conceptually we now think that the second criterion – the expression of *substantive* constitutionalism – excludes government action in respect of certain interests, and institutionally we now think that the last two requirements imply the need for a special adjudicating mechanism, a Constitutional Court. Moreover, apart from imposing sanctions, such a Court must have the power to order restitution of the practices foretold in the Constitution. We must note that there is no mention of sovereignty and sovereign power, although it is implied in the “self” element of the first criterion. Equally importantly, satisfying these criteria in the simple sense of providing for each is not enough: the whole hangs together and the outcome is recognised as a Constitution when the answer to each criterion separately and independently contributes to maintaining the pre-political

⁵¹⁰ 1803 refers to *Marbury v Madison*. By “post-1803” understanding is meant not only the presence of a Supreme Court with original functions to do with the constitution (as in Article 3 of the US Constitution), but also the extended practice of judicial review of the actions of any one organ of the state, other than that of the Supreme Court, which can be corrected either by a constitutional amendment or a subsequent Supreme Court decision.

requirement of constitutionalism, and where any breach would attract some sanction with the possibility of restitution. This last point has important implications for the sources of the Constitution. Finally, it is clear that there is a bifurcated function of guarding the Constitution: one to act as the guardian of *substantive* constitutionalism, the other as the guardian of *procedural* constitutionalism, with a little policing overlap.

It is clear that Bolingbroke saw the British system in terms of the criteria listed above. As an entry into his arguments we may note his distinctions between a constitution and a government. The first he understood as an assemblage of laws *etc.* derived from certain fixed principles of reason, directed to certain fixed objects of public policy, that compose the system, according to which the community has agreed to be governed. Government he understood as the particular tenor of conduct that a chief magistrate and others hold in the administration of public affairs. He further amplifies the distinction: the constitution is the rule by which princes ought to govern at all time; government is that by which they actually do govern at any particular time. Moreover, given that approximating the terms of the constitution is the crucial test, the actual congruity between these two sets of ideas determines whether we have good or bad government.⁵¹¹ But this is not a mere procedural judgement, for it also provides a measure of our submission, amounting to the claim that we are justified to resist unconstitutional measures. And to the extent that this (measured) resistance is in support of the Constitution, our defiance is not illegal or a revolutionary act.

He took it almost axiomatically that in 1688 the community agreed to be governed in a certain way: for him, Revolution Settlement was a constitution-making episode, and the result was the British constitution. Indeed he does not examine the agreement of the community in his 'A Dissertation upon Parties' but asserts it, for the simple reason that he has already established it to his satisfaction in his 'Remarks upon the History of England'.⁵¹² Incidentally, the latter is far from mere description, for it presents and examines in some form or another most of the ideas that inform his three political pieces, especially those related to

⁵¹¹ Letter X of 'A Dissertation upon Parties' in Bolingbroke *Political Writings*, p. 88

⁵¹² H. St. John (Bolingbroke) *The Works*, London, Volume 2, 1809

“A Dissertation upon Parties”.

His ‘fixed rules of reason’ are evidently related to the law of God/Nature, and as such they are obligatory and beyond our reach. However, only particular (i.e. constitutional) laws govern communities, and communities agree to be governed by a set of such laws.⁵¹³ More than that, the fixed objects of policy are also non-negotiable: liberty is the core object of the constitution, and the right adherence to the terms of the constitution will ensure this objective; similarly any corruption of the constitution will negate and destroy it. Indeed liberty under the constitution is the leitmotif in his ‘A Dissertation Upon Parties’. The point to note here is that for Bolingbroke these matters are simply beyond the legitimate powers even of good government – one that is in tune with the constitution. Taking it at a strictly conceptual level, it seems reasonable to interpret Bolingbroke’s idea to mean that government is limited, but this limitation does not arise out of the terms of a constitution, for a constitution is only the expression of that limit. Bolingbroke’s views on the idea of sovereignty support this interpretation.

In ‘The Idea of a Patriot King’, Bolingbroke rejects the notion that divine right or absolute power of the office of the king has any foundation in fact or reason, and attributes that idea to the alliance between (or unfortunate fusion of) civil and ecclesiastical polities. And if the king is an image of God on earth, for Bolingbroke God is not arbitrary but a limited monarch, albeit that it is only his infinite wisdom that limits his infinite power.⁵¹⁴ However, kings do not have the attributes of God: monarchs are inherently limited. But, more than that, and following the simile of the pilot and the ship, he claims that the king and his office are for the people: majesty, he declares, is reflected, not inherent light, and the necessary limitations of the power of the king must be so fixed as to ensure liberty.⁵¹⁵ For Bolingbroke *salus reipublicæ suprema lex esto* (sic) is a fundamental law. He has no time, so to say, for the pomp and ceremony of kingly glory: in Letter XIV of the ‘A Dissertation...’ Bolingbroke dismisses the paraphernalia of kingly office (also of Bishops and the like) as of interest only to the vulgar, and in the following Letter

⁵¹³ ‘The Idea of a Patriot King’ in Bolingbroke *Political Writings*, p. 227

⁵¹⁴ *Ibid*, p. 232

⁵¹⁵ *Ibid*, pp. 229 and 233

declares that peers are only commoners with coronets in their Coat of Arms! Yet they are *estates* of the realm and their “independency” is an integral part of the balance of the constitution.⁵¹⁶

However, denying sovereignty of the king does not mean that he attributes this to parliament. There simply is no room for this idea in Bolingbroke’s conception at all. On the contrary, his understanding of the nature of the British constitution as established in 1688 amounts to an elevation of the idea of liberty to a supreme end, with a system of laws, institutions and practices in a certain balance and relationship so as to protect it. Interesting implications follow.

Clearly on this view the nature of the system is simply fixed. The balance between the three *estates* (alas the King has become an ‘estate’: Charles II was the first to make this nonsensical assertion) is the essence of preserving the constitution, and if that balance is disturbed beyond repair, the constitution is automatically dissolved. Interestingly enough, Bolingbroke defines and defends the rights of the Commons and the Lords, but not that of the King. This, one has to say, is probably the reflection of the fact – alluded to many times in this study – that the king, as the pivot of government and the focus of the executive powers of the realm, was seen as historically preceding parliament, and as the source of all power and (constitutionally) the font of all troubles. In an obvious sense, the history of government in this country, from its early days up to 1688 – and by implication, even beyond that date – was a struggle to limit and control the powers of the king. For Bolingbroke, the right of a peer to a seat is inherent such that it cannot be taken away at the whim of the king; else they are not an *estate*.⁵¹⁷ In this way he seems to imply that their power and independence is safe. However, this is not the case with the Commons, for the people can unmake their representatives. But Bolingbroke’s concern is with the powers and privileges of parliament of two *different* Houses: should parliament yield that, then the whole nation has a right to resist, for it would amount to the destruction of the constitution. This, for Bolingbroke, is tantamount to the dissolution of the constitution, which, by direct inference, means that the people return to their

⁵¹⁶ ‘A Dissertation upon Parties’ in Bolingbroke *Political Writings*, p. 94

⁵¹⁷ *Ibid*, p. 164

original state, and can re-constitute the constitution or make a new one.⁵¹⁸ Bolingbroke does not tell us how, and what this may involve; however, the important point is that he locates the power to make a constitution with the people in their original state. This makes the constitution a pre-political – and obviously a pre-legal – matter. Even more interestingly, Bolingbroke avers that no power on earth can impose a constitution upon a people, far less the king and the parliament who may have destroyed the existing one! Here two points of further interest arise. Firstly, Bolingbroke does not invest the people with the power to amend an existing constitution; it is, indeed, telling that he does not as much as mention this function, for in 1688 England established a perfect system. Yet, he is not prepared to accept it as it stands: on his view, the focus of attention was too much upon the prerogative powers of the king to the neglect of the difficult problem of finance, for the latter, as much as the former, can be the cause of the corruption and ultimately destruction of the constitution. Having thus identified a serious problem with the system and practice of government at the time, he does not contemplate a reform of the constitution to correct the mistake, but seeks that correction in the better working of the system. Similarly, he is clear that if there is a true deficiency in the powers of the Crown, then it should be remedied – but fails to say how this may be done. The second point is that he seems to contradict himself on this question of ownership and the power to make a constitution: in Letter XIII of ‘A Dissertation...’ he claims that a constitution is a bargain between a prince and the people on the one hand, and between the representatives and the collective bodies of the nation on the other. This is, of course, his account of the original contract, but it does not stand in good relationship with his idea of the constitution as the property of the people in their original state. The fatal flaw with this argument is that *prima facie* he is making the king and parliament – purely political institutions – partners in Constitution-making. In a related sense, while he does not describe the king and parliament as political institutions, yet, he does not hesitate from declaring that the need for a constitution arises out of the fact that the rulers, as much as the people, have a

⁵¹⁸ *Ibid*, p. 166

natural tendency to depravity.⁵¹⁹ Hence the importance of ensuring that they only have limited powers, which, in a roundabout sort of way takes him close to the claim that the office of the king and parliament are human contrivances, necessarily invested with limited powers. Moreover, provisions intended to avert bad government and tyrannical rule cannot hinder good princes.⁵²⁰ One implication of this view is of utmost interest: a constitution must not only provide a settlement, but must do so with a view to the worst possible that can happen in the working of that system.

What can protect such a (working) system? Because Bolingbroke does not argue for a mechanism that can maintain and regulate the necessary balance of the system, we may assume he is gesturing in the direction of the idea of a political constitution. On this view, the system is protected by the jealousy of the parts to maintain their independence, and can be destroyed if and when this balance is disturbed. He takes issue with Bacon's notion that England can only be undone by parliament, and that there is nothing that parliament cannot do. For Bolingbroke, parliament is not sovereign – i.e. with arbitrary authority – but as the legislature, it is supreme and absolute.⁵²¹ Yet in 'The Idea of Patriot King', he clearly asserts the need for an absolute, unlimited and uncontrollable power somewhere in every government, and quickly denies that it need repose in the king.⁵²² But he does not tell us where this sovereign power is to be found, and, given his argument that the legislature, too, is inherently limited it is hard to see where *within the system* he can place it. Indeed, on his view, the argument

⁵¹⁹ *Ibid*, pp. 89-90 and 166. Bolingbroke (*Ibid*, p. 104) took the view that humans have a tendency to depravity, and that there is need to ensure that Princes act according to the constitution: "... our constitution supposes that princes may abuse their power and parliaments betray their trust;...". This stands in sharp contrast to the 19th century view that our system of government presumes good men who run it (W. E. Gladstone *The Gleaning of Past Years*, 1879, p. 245) and the "good chaps theory" of government which states that good chaps know what is expected of them and will not push things too far. From a constitutional theory perspective, irrespective of its truth, Bolingbroke's view is preferable.

⁵²⁰ 'The Idea of a Patriot King' in Bolingbroke *Political Writings*, pp. 133 and 234

⁵²¹ 'A Dissertation upon Parties' in Bolingbroke *Political Writings*, p. 165. J. H. Burns ('Bolingbroke and the concept of Constitutional Government' in *Political Studies*, 10/4, 1962, pp. 264-276, pp. 271-2) implies that "supreme legislature or supreme power" points to sovereignty of parliament; but Bolingbroke's work does not support this interpretation.

⁵²² 'The Idea of a Patriot King' in Bolingbroke *Political Writings*, p. 231

against sovereign power is stronger than for it: he considers it wrong to claim that there is nothing parliament cannot do (i.e. that parliament can legislate on anything), for it cannot annul the constitution: presumably, such a measure is not law and need not be obeyed; but he does not actually say this in so many words. For Bolingbroke, England will be undone only when the people are corrupted and elect unknown and corrupt representatives.⁵²³ However, the greater dangers arise from the possibility that the system could be undermined incrementally from within. He identified many points of danger. For instance, friends of the government – always distinguished from the friends of the constitution – would in the circumstances convincingly argue for more powers for the executive in order to remedy “claimed” deficiencies, but the cumulative effect of their actions would be to change the balance in the system and, in the event, destroy the constitution and the liberty it stands for. Equally importantly, he feared executive influence over parliament: there was no need for an army to subvert the constitution, simply place two or three hundred “mercenaries” in the two Houses, and the result would be parliamentary slavery. This would mean the tyranny of the law, and government by the arbitrary will of one man, *viz.* the king. Thus, for him, the greater danger arose out of the possibility that the Commons could be corrupted: at one point, he even said that a packed parliament was more dangerous than no parliament!⁵²⁴ For him, public liberty was in danger whenever a system – a constitution – was dependent upon will, as in the British case; and liberty is in severe danger whenever the will of one estate can direct that of all three.⁵²⁵ Yet he had no safe harbour for the principles of this system other than the minds and ideals of men, and thought this system was fixed as much as anything could be fixed,⁵²⁶ and therefore safe. For Bolingbroke, the danger to this system was never overt, but always slow to materialise and even more difficult to identify, a danger all the more insidious because at the time none can see the horror of things (i.e. small measures), but at a distance (in time) we see them clearly enough.⁵²⁷

⁵²³ ‘A Dissertation upon Parties’ in Bolingbroke *Political Writings*, p. 167

⁵²⁴ Bolingbroke *Contributions to the Craftsman*, 1982, p. 52

⁵²⁵ ‘A Dissertation upon Parties’ in Bolingbroke *Political Writings*, p. 170

⁵²⁶ *Ibid.*, p. 121

⁵²⁷ *Ibid.*, pp. 108-9

For Bolingbroke, the remedy was harmony between the government and the constitution, between how we are and how we ought to be governed.⁵²⁸ The conjunction of a Patriot King, an “aristocracy of talent” (who would prefer honour to profit)⁵²⁹ and annual parliaments would maintain the balance between the estates: Democracy and Aristocracy would temper Monarchy.

Two points command our attention. Firstly, the impression gained from reading Letter X of ‘A Dissertation...’ (which Bolingbroke presents a summary view in the form of two definitions) is vastly different from that gained from reading his four main works. This difference issues from the fact that the promise implicit in his definition of a constitution does not materialise. He points to a set of laws, institutions and practices, but fails to fix them into a set of principles. This inevitable failure epitomises the use of the phrase the “British constitution”: if ever-present, it is also always transparent such that – as said before in this study – looking at it we (can) only see British government. Secondly, the fluidity implied here defines Bolingbroke’s justified fears about, and helps correctly to predict the effects of a certain tendency in such a system. With hindsight, it is clear that Bolingbroke saw, more clearly than anyone at the time, how the system’s inherent instability would tend to change its nature, and on the basis of practical needs of the government at any one time move it away from the idea of its “constitution”. We might even think in terms of the idea (associated with Hegel and Marx) that an accumulation of quantitative change will, at a later stage, become qualitative change. He was, in essence, concerned with systemic corruption on the back of apparently necessary claims for the exigencies of government.

Constitution, balance and a gesture to natural law and natural rights are the currency of the discourse of the system in the 18th century. It is perfectly possible, and so far as the study of these three theorists is concerned, imperative, to identify and lay bare contradictions that each failed to resolve, or even identify

⁵²⁸ It is not beyond doubt clear to me that Bolingbroke would have used this phrase, rather than “how we do and how we ought to govern ourselves”. Although there is a significant difference between the two, both seem to fit because of his somewhat ambiguous stance on the “ownership” of the constitution and of the government.

⁵²⁹ ‘On the Spirit of Patriotism’ in Bolingbroke *Political Writings*, especially pp. 209-210. The phrase “aristocracy of talent” is not that of Bolingbroke.

as contradictions in their schemes. For present purposes, we must accept and leave to one side the fact of such contradictions as a defining characteristic of the age, and instead consider their comments and views upon the system and the government. Thus, Burke was as concerned with balance of and in the constitution⁵³⁰ as Bolingbroke, and thought that the increasing dependence of parliament, especially the Commons, upon influence was a major crisis in the system.⁵³¹ Sharing the outlook of the age and the contemporary history of the system, Burke and Bolingbroke both recognised that prerogative as the source of distemper of the system was now replaced by influence. Reflecting the different periods in which they functioned and upon which they reflected, Bolingbroke thought of influence as an instrument in the hands of Walpole, while for Burke it was the result of a change consequent upon the accession of George III, and the development of influence in the hands of “place-men”, “king’s friends”, the “second cabinet”, and so on, in short the “court party”. For both the result was the effective and true corruption of the constitution, without disturbing the form of the system. Burke reflected this well in his claim that the form and power of parliament was not touched, but its spirit and purpose was changed. The result in the working system was that parliament could no longer act as control upon the executive. For Burke, this was truly serious: the fact that king and parliament each had a negative upon the other was primary, and the very essence of the balance in the system; but influence worked to remove or devalue the negative of parliament, and this meant that the balance was lost, and the constitution could no longer work as it should. Again, we find that Burke and Bolingbroke shared a common vision in the notion that there was a British constitution embodying an original shape and purpose, any deviation from which would mean that its purpose – liberty and popular government – could no longer be achieved. Similarly, they shared the view of the remedy for this: make the system go back to what it ought to be, by restoring its good balance and practices. Burke did not go

⁵³⁰ The comments that follow are based upon and refer to ‘Thoughts on the causes of the present discontent’ (written in 1770) in E. Burke *The Works*, 1801, vol 2

⁵³¹ See also ‘Reflections on the Revolution in France’ in *Ibid*, vol 5, especially p. 229, where he emphasises the need for the independence of both Houses.

as far as Bolingbroke in calling for annual parliaments, but he certainly felt that elections should be more frequent than each six or seven years. They both wanted to reduce influence, and suggested remedies for it, and, in the process, focused upon taxation as an issue, long before direct taxation became the norm.

Importantly, both had a fixed view of the constitution: for Burke, it was the patrimony that each generation received, and upon which it had no positive or negative to give. This is consistent with his view that political power is a delegated but irrevocable trust from the whole nation⁵³² and also consistent with the notion that society is a partnership across the ages – the past, the present and the future. It follows that no generation has any right to interfere with it, for the patrimony they receive is also the patrimony of the next generation. This makes it all the more important to ensure that the system remains true to the idea of the constitution, hence the need for reform of government when necessary.

On one further important point Bolingbroke and Burke share an outlook, even if they come at it from different perspectives. They both deny sovereignty of parliament however parliament is defined. As argued earlier, Bolingbroke denied sovereignty of parliament – in the sense of arbitrary self-dependent authority – but recognised it as the supreme and absolute legislature. For Bolingbroke this distinction was simply axiomatic because parliament, only a part of the system, was a “creature” of the constitution. This means that while only parliament can legislate, and in that capacity it is supreme, there are areas in which it cannot legislate – in the least the constitution is beyond the reach of its power.

Burke distinguishes between the office holder and the office: the king can abdicate but that does not dissolve the monarchy. For Burke, succession is always according to the law at the time⁵³³ – common law before, and now statute law. But in claiming this, he also gives a small hostage to fortune, for the law need not be antecedent to the event, hence 1688. Equally he argues that the two Houses cannot dissolve each other, and dispels any doubts about it: such a

⁵³² See Appendix B in F. P. Canavan s.j. *The Political Reason of Edmund Burke*, 1960, p. 214. This view is certainly paradoxical to us, but it is one more of the contradictions that litter ideas about this subject in the 18th century; from this perspective we may perhaps think of that century as the age of transition.

⁵³³ ‘Reflection on the Revolution in France’ in E. Burke *The Works*, 1801, volume 5, p. 112

change is of the constitution, and the constitution – an engagement and pact of society – forbids it.⁵³⁴ The Commons, he argued, was faced with a fixed constitution and had no power to change it;⁵³⁵ there is no mention of the Lords, one may assume, for the simple reason that their constitution was prescriptive and clear. At any rate, parliament had only limited powers:

[w]e entertain a high opinion of the legislative authority; but we have never dreamt that parliaments had any right whatever to violate property, to over-rule prescription, or to force the currency of their own fiction in place of that which is real and recognised by the law of nations.⁵³⁶

His argument is altogether simple and clear: political power is delegated and remains irrevocable, but not all rights are delegated.⁵³⁷ This limits the authority of parliament, and dispels the myth of its sovereignty: parliament cannot alter the constitution, which is and remains the property of the nation.

The limitation of powers of parliament was not merely a theoretical argument for Burke. For long, it was feared that influence was corrupting parliament and deviating it from its purpose. Parliament was, in this sense, the victim, and correction to the system was needed to protect it and, with it, the constitution. But the case of John Wilkes raised the fear that parliament itself was now overstepping the bounds of its proper nature, power and purpose. It must be said that Burke wrote about this in 1770, after the second expulsion of Wilkes, who was then re-elected in 1774, allowed to take his seat and remained a member until 1790. But the fact that his case was remedied did not lead Burke to change his view, for the Wilkes case merely served to bring to the fore Burke's concerns about the powers of parliament. The problem was not so much that Wilkes was not allowed to take his seat and was outlawed, but that Burke thought that, in this matter, parliament – the Commons – appeared to act as though it had original powers over its membership. This was a matter for the electors, not for the House, and to assume otherwise was to corrupt the principle of representation and, with it, the nature and the purpose of parliament.⁵³⁸ Clearly for Burke, the

⁵³⁴ *Ibid*, p. 107

⁵³⁵ *Ibid*, p. 148

⁵³⁶ *Ibid*, p. 327

⁵³⁷ Appendix B in F. P. Canavan s.j. *The Political Reason of Edmund Burke*, 1960, p. 213

⁵³⁸ 'Thoughts on the causes of the present discontent' in E. Burke *The Works*, 1801, volume

result was nothing less than a major change in the system, and it is, surely, nothing less than the realisation of Bolingbroke's fear that representatives may abuse their trust.⁵³⁹ It is reasonable to assume that if to preserve liberty the independence of parliament and with it the constitution had to be preserved, suddenly to preserve the constitution it was necessary to ensure that parliament would not act beyond its powers, requiring some means to provide security against dangerous and – for both Bolingbroke and Burke – unconstitutional measures. Bolingbroke felt that the Septennial Act was a serious breach, and a cause of the corruption of parliament, and he also feared that parliament could vote supplies for the whole of its duration, for there was nothing to stop it. For Burke, interference with elections signified presumption of powers by parliament that did not belong to it. Implicitly they were admitting that the working system did not provide sufficient security against the corruption of the constitution, and to that measure they both felt the need for fixed rules to restrain the various parts of the constitution from usurping and thereby destroying the system. But neither devised the necessary means: it is all very well for Burke to reject the notion that the legislative assembly was sovereign and not bound by any prescription, and amplify it by the further claim that because, as the legislative assembly, it is not bound by any law, it does not mean that it depends upon its own will, for the people are the only source of its authority.⁵⁴⁰ But unless this idea can be cashed in practice, it remains irrelevant. Alas, neither Bolingbroke nor Burke draw the only meaningful inference possible and say that British government is not governed by any constitution or constitutional principles.

Bolingbroke and Burke functioned under the illusion of a British constitution, and sought arguments for ways in which to protect it and ensure that government was in accordance with it. Their arguments are supremely interesting in that they demonstrate the elemental vacuity of attempts to fix the principles of this system without recourse to a Constitution and agreed procedures to guarantee conformity with it.

2, pp. 289 and 293.

⁵³⁹ 'A Dissertation upon Parties' in Bolingbroke *Political Writings*, Letter XI, p. 104

⁵⁴⁰ 'Reflection on the Revolution in France' in E. Burke *The Works*, 1801, vol 5, pp. 327-8.

Thoughtful doubts: William Blackstone

In some more important respects, Blackstone sees the constitution similarly to Bolingbroke and Burke, who, we might say, all take their cue from Halifax:

It appeareth that *bounded Monarchy* is that kind of government which will most probably prevail and continue in *England*; from whence it must follow (...) that every considerable Part ought to be so composed, as the better to conduce to the preserving the Harmony of the whole Constitution.⁵⁴¹

Blackstone, too, subscribes to the idea of a balanced system, and looks with apprehension upon the consequences of disturbing the equilibrium of its three parts.⁵⁴² Loss of the necessary independence of any one part would spell “the end of our constitution”; for the legislature would be changed from that which, upon the supposition of the original contract, is presumed to have been set up by “the general consent and fundamental act” of the society. Does this mean the dissolution of all government, and a reversion to a condition in which society is at liberty to make another constitution? Quoting Locke, Blackstone recognises that this idea is based upon the notion that society has an inherent right to remove or alter the legislature when it has acted beyond the trust reposed in it. But Blackstone quickly rejects this idea on three counts: practicality, for it cannot be adopted: legality; for under the existing schemes of government no legal steps to effect such an idea can be taken: and theoretically; for such a move reduces all members of society to their original equality, annihilates the sovereign power, and repeals all laws. For Blackstone, it was unthinkable that a human situation should suppose a case that would destroy all law.

So long therefore as the English constitution lasts, we may venture to affirm that the power of parliament is absolute and without control...⁵⁴³

With this truism, Blackstone completes the full circle of a tautology, and in effect

⁵⁴¹ ‘A Rough Draft of a New Model at Sea’ (1694) in Halifax *The Complete Works of George Savile, the first Marquis of Halifax*, 1912, p. 175.

⁵⁴² Blackstone’s approach and general ideas about this system recall J. Harrington’s *The Commonwealth of Oceana* (1992): the importance of Harrington for the so-called Republican view that clearly informs most of the 18th century deserves separate treatment but is not directly pertinent to the purpose in hand.

⁵⁴³ W. Blackstone *The Sovereignty of the Laws*, pp. 37-8; the quotation from p. 38.

refuses to entertain any pre-law condition and entraps his conception in the framework of law. Presumably our "Provident constitution"⁵⁴⁴ is everlasting. Does this also mean that for Blackstone the idea of an original contract involving consent⁵⁴⁵ is, strictly, a theoretical presupposition? Does this further mean that resistance is never justified? He considers that if each and every one should take it upon themselves to decide the right and the wrong of the working system, then, in effect, there is no longer any society, for the latter requires (unquestioned) obedience to a single source of authority.⁵⁴⁶ But when the system breaks down, there is no single source of authority: what then? Blackstone does not give a single and comprehensive answer to this, but fudges the issue by giving an answer in three parts.

The first issues from history. In 1660 and 1668, Conventions met and disposed of the difficulty under the force of the "necessity of the thing, which supersedes all law". Blackstone justifies this by the obvious claim that "if they had not so met, it was morally impossible that the kingdom should have been settled in peace."⁵⁴⁷ So, in England, in cases of total failure, it seemed reasonable to Blackstone that

[t]he body of the nation, consisting of Lords and Commons, would have the right to meet and settle the government; otherwise there must be no government at all. And upon this and no other principle did the Convention of 1688 assemble.⁵⁴⁸

This is a contingent answer from English history, and does not issue into any general principle. This takes us to the second part of his answer: because both law and history are silent in the matter (i.e. of general principles), we should remain silent too. However, this silence is subject to the consideration (and this is the third part of the answer) that it is for a future generation, if necessary, to find a solution for such a difficulty in whatever fertile imagination (or the prudence of the times) may furnish, and exert those

⁵⁴⁴ The phrase is from Burke: 'Reflection on the Revolution in France' in E. Burke *The Works*, 1801, volume 5, p. 244.

⁵⁴⁵ W. Blackstone *The Sovereignty of the Laws*, 1973, pp. 34-5.

⁵⁴⁶ *Ibid*, Introduction, pp. xli-xlii.

⁵⁴⁷ W. Blackstone *Commentaries*, volume 1, p. 147

⁵⁴⁸ *Ibid*, p. 148

inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.⁵⁴⁹

Clearly Blackstone is gesturing in the direction of the idea of “original contract”: total failure calls for another contract by the only entity entitled to create one, namely the people. This line of argument clearly and unequivocally makes the original contract (read: the Constitution) the property of the people, but his lawyer predispositions will not readily allow him to propose pre-law arguments.

Blackstone does not talk of prescription – as a lawyer, he would not – but for him, the ancient nature of the system and its common law roots are the *Alpha* and the *Omega* of its true excellence. Even though it is impossible to “verify” his view of the historical origins of British government, yet, his few assertions on the subject are foundational to his view of the system as a whole.

Concerning absolute rights (i.e. the liberties of the English: the right to life, limb and property), Blackstone argues that founded on nature and reason, they are “coeval with the form of government, though subject to fluctuation and change” for “their establishment is still human.”⁵⁵⁰ However, these rights are asserted in parliament: examples include *Magna Carta*, Petition of Rights, Bill of Rights, and Act of Settlement. Equally importantly, these rights are protected by the “constitution, powers and privileges of parliament”, limitation of prerogative powers of the king, the right to petition the king and parliament, right of appeal to the courts for redress of injustice, and the right to bear arms for self-defence.⁵⁵¹ Clearly this means that parliament is a rather special institution and feature of the system. Not just that, but for Blackstone, parliament is coeval with the kingdom.⁵⁵²

All this puts a gloss on a misty history in which the meaning of parliament is not transparent, and we can only assume that he meant by it whatever eventually becomes “king and the three estates”.⁵⁵³ Moreover, he has some difficulty

⁵⁴⁹ W. Blackstone *The Sovereignty of the Laws*, 1973, p. 97

⁵⁵⁰ W. Blackstone *Commentaries*, volume 1, p. 123

⁵⁵¹ *Ibid*, pp. 136-9. Incidentally, he does not mention the religious restriction on the bearing of arms, as in the Bill of Rights.

⁵⁵² *Ibid*. p. 145

⁵⁵³ In the sense of that institution “that absolute despotic power, where in all government must reside somewhere, is entrusted by the constitution of these kingdoms”. *Ibid*, p. 156. It may appear obvious but it is worth the emphasis that parliament is both this collective body, and that body which controls the powers of the executive king.

accepting the fact that parliament is always and only called by the king, and with some relish (if not approval) points to the 1641 Triennial Act (16 Char I, c. 1) whereby failure to call a parliament would trigger a mechanism that enables the Lord Chancellor, failing that twelve peers meeting at Westminster to issue writs, failing that the electors are to meet and send representatives to parliament.⁵⁵⁴

We must take note of and pay some attention to Blackstone's choice of words: absolute rights are coeval with the *form of government*, whereas parliament is coeval only with the *kingdom*. The choice – we may surmise, though there is no way of knowing it – was probably intended to convey a distinction: coeval with the form of government places the people in a position of priority to that of government, such that they may institute it to reflect their absolute rights and devise mechanisms to protect them. This makes government a Burkean “contrivance”. On the other hand, coeval with the kingdom, in effect, makes parliament as equally long standing as the office of the king. This is, of course, compatible with his preferred view that only law makes a king.⁵⁵⁵

Three highly important implications stand out. Firstly, that government is constituted and instituted by the people. Secondly, that the two elemental constituents of this form of government have no priority and, therefore, no claim of superiority upon each other. This must mean that, not being the creation of either, neither can dissolve the other. For Blackstone, this fixes the form of the constitution while allowing for changes that do not affect the form. The third, perhaps less obviously important implication is that the claim that common law makes the king leaves the question of kingship untouched and somewhat ambiguous. Incidentally, this is in line with the view taken in this study that kingship and royal government are the accepted historical norms, and the various attempts at control and limitation – at constitutionalism – are directed against this (historically-speaking) ‘primary’ form of government.

Accepting the relationship between statute and common law, he nevertheless

⁵⁵⁴ *Ibid*, pp. 146-7. Two points are important: firstly, he does not mention that this idea was incorporated in the Instruments of Government of 1653, and that in the Triennial Act of 1664 (16 C. II, c 1) the mechanism was simply repealed.

⁵⁵⁵ *Ibid*, book I, chapter 7.

feels that the former can never improve the latter, but serves to pervert it. Put differently, he trusts common law far more than statute law. Indeed, we can probably see this relationship far better in terms of the analogy that he uses. He likens common law to a “regular Edifice” with beautiful symmetry, each room assigned its distinct office; but over the years this Edifice has been “swollen, shrunk, curtailed, enlarged, altered and mangled” by various statutes. The outcome resembles the old Edifice, but the harmony of its parts is lost, it is now an irregular construction. To make sense of the additions, and the reasons why the new parts were built, one has to have recourse to the model of the old, the original plan, which will give a clue to the additions, and thus to the new labyrinth.⁵⁵⁶ We find the general structure of this idea also in his argument that the laws of England are the birthright of the English, unless they are changed or restrained by a statute, but that these restraints are so gentle that they do not change the nature of the law.⁵⁵⁷ Yet he is adamant that the constitution reached perfection – true balance between liberty and prerogative – with *Habeas Corpus* Act of 1679, and this is reflected in Revolution Settlement. This is well in line with his notion that this constitution is ancient – pre-Norman – and that various Acts since have merely corrected its course, and removed corruptions.

In two further respects, Blackstone is very much in line with Bolingbroke and Burke, even if the way his arguments and terms of discourse are different. First, he accepted a category of “law” over and above ordinary law such that any statute law in conflict with it was not binding.⁵⁵⁸ There is much room for ambiguity here: on Blackstone’s view, natural law and reason were embodied into pre-Norman law, which then feeds into and “becomes” common law. Was Blackstone suggesting that any statute law in conflict with common law was not valid? As a matter of fact, later in the *Commentaries* he rejects this idea. Second, he argued

⁵⁵⁶ See the letter quoted in G. Jones ‘Introduction’ in W. Blackstone *The Sovereignty of the Laws*, 1973, pp. xxxiii-IV. Sullivan also uses the idea that we need to understand the old if we are to understand the current constitution for much the same reason. He argues that understanding feudal law is necessary to understanding common law, upon which the constitution is based. F. S. T. Sullivan *An Historical Treatise on the Feudal Law and the Constitution and the laws of England*, 1772, pp. 19-20

⁵⁵⁷ W. Blackstone *The Sovereignty of the Laws*, 1973, p. 63

⁵⁵⁸ *Ibid*, p. 29

that the mixed system (Monarchy, Aristocracy and Democracy) had a particularly beneficial effect in that, since no one form dominated, the system was impelled in a “new” direction.⁵⁵⁹ This is an interesting and elegant characterisation that also recalls the imperative need for the independence of each element.

However, seemingly, Blackstone parted company with Bolingbroke and Burke on the important question of sovereignty of parliament, and may, indeed, be the first to assert it in this way. For Blackstone, the monarch and the two houses constitute a “Sovereign Parliament”.⁵⁶⁰ We must note here that the two passages in which this notion is examined differ from each other: in the first he emphasises a general necessity for sovereign power, wherever it may reside – i.e. with no reference to any one form of government – and considers the making of law its essential attribute. In this passage, sovereign power appears as somewhat less than total, only omnipotent; but in a later passage⁵⁶¹ he corrects this, and, quoting Edward Coke, avers that the jurisdiction of parliament is transcendent and absolute, and cannot be confined in respect of causes or persons within any bounds. This jurisdiction includes the succession, and “the constitution of the kingdom and of parliaments themselves”: in support he cites the examples of Henry VIII (regulating the succession) and William III (changing the line of succession), and the “act of union and the several statutes for triennial and septennial elections” (on parliament). Indeed – as mentioned above – quite contrary to Burke’s reaction, the case of Wilkes merely induced him to add a new sentence to the next edition of his *Commentaries* to the effect that each House has the power to regulate its membership “by law and custom of parliament”.⁵⁶²

This may invite the comment that for Blackstone the British “constitution” is only what has *so far* happened. We may well agree with Bentham when he criticises Blackstone for justifying the *status quo* and the common law, and charges him with complacency, and prefer Bolingbroke and Burke who would distinguish between what has happened and what ought to happen, and opine

⁵⁵⁹ *Ibid*, p. 66.

⁵⁶⁰ *Ibid*, pp. 38 and 66-67

⁵⁶¹ *Ibid*, respectively pp. 35-6 and 71-2

⁵⁶² See also E. Barker *Essays on Government*, 1951, pp. 130-131

upon the need for reform to restore the system. However, G. Jones⁵⁶³ argues that lawyers are not much given to reform and that we have to understand Blackstone in his own terms. In view of the arguments above, I rather see the shortcomings of Blackstone's work as no more than a further demonstration of the inadequacy of fragmented disciplines to offer a proper picture and account of the British system: not surprisingly, Blackstone's failings are characteristic of the failing of the Constitutional Law approach and his work certainly contributed to shaping the study of the law.⁵⁶⁴

Blackstone has also been criticised for failing to deal with fundamentals, and to reconcile his avowal of sovereignty of parliament with his notion of the rôle and the place of Natural law.⁵⁶⁵ On the face of it, these are fatal criticisms, but only if we read him out of context, and fail to appreciate the full extent of what he actually does say. On the first point, he wrote when statute law was not yet a major part of the law of the land, albeit that it was growing in volume: the time when common law would be habitually described as "residual" was far away. Moreover, it is churlish to expect him to have anticipated the development of the system and have emphasised or discussed the cabinet, ministerial responsibility etc. His *Commentaries* are probably the best available primer of English law for his time. On the second point, he was not alone in placing Natural Law above and beyond the reach of the system *and* claiming omnipotence of parliament. The problem may be that we interpret him in the wrong way. And in part this problem

⁵⁶³ Introduction to W. Blackstone *The Sovereignty of the Laws*, 1973

⁵⁶⁴ In passing, we may notice the difference between Blackstone and Sullivan on this point. Sullivan was appointed to the foundation chair of Law in Dublin, and he organised his lectures according to the fact that his students were too far from the centre of legal activity and that it was better to offer them a largely theoretical account of the law, and leave it to them to learn the law in practice. Blackstone, on the other hand, incorporated a great deal of substantive law in his lectures, but delivered them during the legal vacation. (F. S. T. Sullivan *An Historical Treatise on the Feudal Law and the Constitution and Laws of England*, 1772, especially lecture 2). Two points stand out: Sullivan did not give an abstract account of the British system, but focused upon its development and roots; and he did not offer any thoughts on the question of sovereignty, or omnipotence of parliament, although, at one point (*Ibid*, p. 8), he spoke of "the supreme, the legislative power" lodged in three heads with distinct interests. In a way Sullivan was more historical and descriptive than Blackstone.

⁵⁶⁵ E. Barker *Essays on Government*, 1951, pp. 135-6 and also 142-3. But see W. Blackstone *The Sovereignty of the Laws*, Introduction, pp. xxviii-xlvi for a brief but good discussion of his critics.

issues from an indiscriminately interchangeable use of the two words “omnipotence” and “sovereignty”. His only other discussion of sovereignty occurs in book I, chapter 7, where, quoting Bracton, he agrees that the (common) law makes the king, and ascribes three groups of attributes to the king, *viz.* sovereignty, perfection and perpetuity.

Sovereignty – or pre-eminence – derives from the claim that the king is the deputy of God. This puts the king beyond the immediacy of the law such that there can be no suits against him except by petition, which, if allowed, will have the objective of seeking to persuade him. Equally, he is beyond reproach (for he can do no wrong) but his councillors and advisors may be impeached for assisting the Crown in contradiction to the laws of the land. The attribute of sovereignty means he is inferior to none, dependent upon none and answerable to none. Up to this point it is reasonable to expect that the argument will conclude with the contemporary view of sovereignty – *viz.* capable of arbitrary action. But Blackstone also adds that the king is subject to the law, although any attempt to control him must destroy the attribute of sovereignty. Given the coeval nature of absolute rights and of the parliament of the three estates, the king is sovereign only in the sense of omnipotent; and this is very much Blackstone’s view on parliament; king-in-parliament is sovereign only in the sense of omnipotent.

Bolingbroke and Burke also recognised the omnipotence of parliament without granting it the attribute of sovereignty, *viz.* arbitrary power. Blackstone, too, gestured in this direction, but as a lawyer he also recognised that as a matter of fact he could not see what power, in which way, could “control” an Act of Parliament that was plainly unreasonable and, for that reason, void. That such an Act, going against reason or Natural Law, was void was not in doubt; the question for a lawyer was what could anyone do about it. And the answer of this lawyer⁵⁶⁶ was “nothing, except to obey it”. In other words, there was no (judicial) power *above* parliament that could enforce eternal law. Control by the law was *below* the

⁵⁶⁶ Evidently this was an agreed answer from the judiciary. Jones in his Introduction suggests that Blackstone furnished his lectures over some fifteen years, in the course of which they were “scrutinised by the Bench”. One can only infer that the views expressed were broadly speaking shared by the “leading” members of the judiciary. See *W. Blackstone The Sovereignty of the Laws* 1973, p. xliii.

level of parliament, and the right to appeal to the courts functioned at the level of redress for injury. He was clearly asserting a matter of (legal) fact, and was, for once, not justifying it. Barker finds this a contradiction; but is it? On the face of it, it is and the criticism must be fatal, but not so when we consider what he does not say about sovereignty of parliament.

In the enumeration of topics fit for legislation in respect of which parliament had undoubted legislative powers, there is no mention of the power to dissolve parliament. He is adamant that no part of the tripartite system can dissolve the others, but it also appears that the power of the whole – the three parts together exercising omnipotent legislative power – does not extend to dissolving the constitution, and, one might reasonably argue, it is bereft of any authority to alter the balance of power between the three parts. The omnipotence that he ascribes to parliament with an array of strong words does not include the power to make or unmake parliament itself. Admittedly Bolingbroke and Burke withheld more than this from parliament, but to this extent Blackstone is very much with them: they all saw parliament as omnipotent, but not sovereign in the sense of being self-defining. For all of them parliament was limited, although the lawyer Blackstone withheld less than did Bolingbroke and Burke.

Thoughtless certainty: Dicey and after

It is evident that no matter how we look at it – from the constitutional theory perspective discussed above, or that of Bolingbroke, Burke and Blackstone – that we cannot successfully invest parliament with sovereign power, but no one need deny its omnipotence short of that attribute. Yet in our contemporary view (especially amongst lawyers, including Dicey, Barker and Jennings), we fail to see this, and instead begin with the idea of sovereignty of parliament as the essence and defining feature of the British system. Clearly Revolution Settlement does not lead to this idea, nor does reasoned argument naturally lead to such a conclusion.

In some way reaching back to Jean Bodin, more than one analyst has *asserted* the need for an ultimate and absolute power located somewhere *in the*

system, albeit that, normally, the assertion is not further qualified. This generally accepted idea appears to be a good basis for what eventually is established as the idea or the doctrine of sovereignty of parliament. However, while we need not dispute the relevance and importance of reserved powers, the ready acceptance of the assertion that every *system* must harbour a “sovereign” is the cause of much mischief.

It is clearly not possible to anticipate every eventuality or provide the powers and procedure necessary to deal with them. Nor is it meaningful to devise an inflexible political system so as to preclude or prevent necessary action under abnormal conditions, and in response to emergencies. It follows that we ought to accept a sufficiency of legislative and executive discretionary powers to cope with internal and external emergencies. We cannot readily and in a meaningful way pre-determine the extent of such power and the conditions for its use, but, because the exercise of such powers will almost certainly interfere with rights and established procedures, the framework for its legality is often established and the rules of its procedural probity are stated in advance, for instance in the form of an Emergency Powers Act.

It is relevant to point out that the undefined aspect of this executive power is by default invested in the highest political office of the government, *viz.* the prime minister. More than that, this power is exercised within the system, and cannot be used in any attempt to change it. Indeed, the necessary irregularity – which may involve the suspension of *procedural* constitutionalism – is nevertheless broadly regulated, and the termination of the emergency restores accountability including regarding events, policies and actions associated with the emergency. This means that there is a limit to this absolute and ultimate power and its exercise.

The need for an absolute *etc.* power in a system is an assertion, but so is the very idea of sovereign power over a people. The idea of a sovereign centre, as defined by Jean Bodin, has been a focal part of the literature of politics and there is reason to believe that it had some impact upon political thought in England. But as claim to sovereignty by the king or on his behalf, feeding into and fuelling

argument about the Divine Right of Kings,⁵⁶⁷ it has never been a definitive conception in the history of English government mostly because there was no need for it. The most attractive idea of the 16th century was that the king was never more powerful than when in parliament. Thenceforth, it was even more irrelevant to make any claims to sole sovereign power for the king: ⁵⁶⁸ James Stuart's conception⁵⁶⁹ – given in support of the idea of lawful king as opposed to a tyrant – was not part of the English tradition of thought on the nature of government and its powers. Moreover, even if we accept the idea of sovereign power (of God) as an abstraction, there is no logical way in which from this we can deduce the idea of sovereignty as an attribute of a political institution.

As a matter of fact, our 18th century analysts – almost to a man – focused upon the idea of the balanced constitution and a qualified sense of separation of powers, but not on arguments in sovereignty. Seen in terms of the arguments of this present study, we may consider that they were mistaken in clinging to an irrelevant notion of co-sovereignty, not realising that the first effect of 1688 was to render that concept irrelevant to the British case, and thereby discount *substantive* constitutionalism. But this does not make parliament sovereign, even though since 1688 the balance (of power) was distinctly tipped in its favour. A representative body is inherently not, and for that reason can never be, a sovereign body. But what if it behaves that way and the many take it on faith that it is so? For Blackstone, this raised a rather difficult question: how can one *in practice* impose limits and control it? Indeed, we must go further and say this: in effect, Blackstone retorted to Bolingbroke's hope that we might have constitutionalism if we succeed in placing certain matters beyond the powers of the tripartite parliament with a resounding but unanswerable "How?" – which

⁵⁶⁷ For a history of this idea, see J. N. Figgis *The Divine Right of Kings*, 1914. See also Filmer's 'Patriarcha' in his *Patriarcha and other writings*, 1991. For Figgis, the orderly development of English government owed something to the fact that its background theory was and for long remained Divine Right. *Ibid*, p. 146.

⁵⁶⁸ As Figgis argued, a dogma is always defined by its opponents, not its proponents. *Ibid*, pp. 44, 53 and 160. He also argued that sovereignty was a 17th century misunderstanding of the nature of a 13th century idea, and that the moderns, expecting to find a sovereign power, found it. *Ibid*, pp. 31-2 and 35.

⁵⁶⁹ *Basilicon Doron (1599)*, Scholar Press, 1969

recalls Halifax's notion that none will outwardly resist an Act even when they inwardly cannot approve of it. But Blackstone was not the only one to pose this question: Burke did so in 1756, some nine years earlier, although we have an unfortunate tendency to read his 'Vindication of Natural Society'⁵⁷⁰ in the context of a reaction to Bolingbroke or, oddly, as *prolegomena* to 19th century Anarchism. On the contrary, it is a tongue-in-cheek satire on the application of reason to human affairs (with implications for the idea of Enlightenment) whereby law is employed to turn a natural society into a political one, bringing many problems in its train. Concerned that we do not know when to stop – we fail to compute our gains, as he said in this 'Reflection...' and that we are not satisfied with any reasonable acquirement and thus fail to compound with our condition, as he put it in this 'Vindication...' – we lose our gains by our insatiable pursuit of more. Thus in his 'Vindication...', Burke questions what we have achieved in political society by appealing to the rule of the few in order to check the abuses of the rule of one, only to find that, in the nature of the thing, all governments tend to infringe rules of justice. Mixed government was the next corrective but the combination of the three does not necessarily mean the best of each, for the mix also carries the evil of each. Given this rather gloomy prognosis, he also avers that parliament knowing how to limit the king does not know how to limit itself. He thus arrives at the same difficulty that was so to disturb Blackstone; namely, how *in practice* to enforce the elemental and inherent limitation of omnipotence – which to both, and to Bolingbroke, was simply patent and beyond doubt. This question is surely the important bequeath of the 18th century to the idea of constitutionalism, to which there can be but three answers: namely, a Constitution; an equivocation, leaving the question open; or a false answer, in the form of embracing the impossible idea of political sovereignty and describing it as an attribute of the people.

Blackstone's assertion is an almost "by the way" point of despair, whereas Burke poses it in a pointed fashion. We have to accept that they were aware of the meaning of the assertion but perhaps not of the enormity of its consequences. Importantly neither provided a true answer, but left the question wide-open. On

⁵⁷⁰ E. Burke *A Vindication of Natural Society* (1756) London, Holyoak & Co, 1858

the other hand, at least since the latter part of the 19th century, a 'school' of thought based on an unequivocal assertion of sovereignty of parliament has emerged, generally associated with Dicey's *Introduction to the law of the constitution*. On the face of it, Dicey is only concerned with a limited legal answer to the question of sovereignty, but a close analytical reading reveals a different story, warranting the conclusion that he is the author of the strong sense of sovereignty of parliament as the be-all-and-end-all of the British system of government, even though his conception is contained within a legal framework.

Dicey asserts that sovereignty of parliament is the dominant characteristic of the British system, but only *from a legal point of view*. And this power is defined as "the right to make or unmake any law whatever; and [that]... no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament." Dicey also asserts that parliamentary sovereignty is fully recognised by the law of England,⁵⁷¹ although the absence of the negation of this claim is the only proof we have. In fact, Dicey's proofs are entirely consequentialist.

That parliament is sovereign – incidentally he thought of "sovereign parliament" as a type – is demonstrated by what has been achieved by employing its powers. He offers many examples but the most important, indeed clinching, case is the 1716 Septennial Act.⁵⁷² According to Dicey, the significance of this piece of legislation, and the proof-positive contribution it makes to the idea of sovereignty of parliament, do not issue from the fact that it was passed in the course of an existing parliament, or that it was a usurpation of the rights of the electorate, but that it was passed at all: a parliament of its own authority extended its current duration – its *legal* existence, its law-making powers.⁵⁷³ And the fact that this was done, one might add successfully, demonstrates the further fact that "Parliament made a legal though unprecedented use of its powers". Hence, the Septennial Act serves to prove that "in a legal point of view parliament is neither

⁵⁷¹ A. V. Dicey *An Introduction to the study of the Law of the Constitution*, sixth edition, 1902, pp. 37, 38 and 39.

⁵⁷² His next best argument is the fact that Parliament can and often has interfered with private rights.

⁵⁷³ *Ibid*, p. 44

an agent of the electorate nor in any sense a trustee of its constituents”: it is the “legally sovereign legislative power...”⁵⁷⁴ However, Dicey’s point is not made, for his argument merely supports the view that they did it, therefore, they can do it. But in the UK, legality and constitutionality do not always coincide, and in the case in point the probity, not the fact of the power, is at issue. The argument for it (also Dicey’s position) is derived from the:

... absurd doctrine of omnipotence of parliament; ... from the gross imperfections of the British constitution, or rather the absence of what is really meant by that term. A Constitution does not mean an existing state of things, but a constituted agreement or understanding between the community at large and the existing government touching what things are entrusted to the said government to do and regulate, and what not.⁵⁷⁵

Such an agreement can be adjusted if necessary; instead, we simply pass by the smallest majority the worst possible measures as good law.

For Dicey, sovereignty is, properly speaking, a “legal conception” meaning “simply the power of law-making unrestricted by any legal limit”, where this sense of “legal” is predicated upon what judges will enforce.⁵⁷⁶ However, sovereignty is also used politically, although Dicey seems to imply that this is an inappropriate but now common and established figurative usage; hence the political sovereignty of the electorate. He has no doubt that the “... two significations, though intimately connected together, are essentially different.”⁵⁷⁷ Furthermore, practical limits upon the exercise of sovereign powers of parliament are not inconsistent with its actual sovereignty.⁵⁷⁸ Indeed, Dicey explicitly rejects as without foundation in law the idea presented in *obiter dicta* or by other theorists (i.e. Blackstone) that a judge, or law of nature, could “control” an Act of Parliament.⁵⁷⁹ For Dicey, any such limitation was simply absurd: the processes of representative government would ensure that in the long run the internal and external limitations upon the

⁵⁷⁴ *Ibid*, p. 45

⁵⁷⁵ *Westminster Review*, Volume 20, January 1834, p. 208. We may note that the idea of a Constitution as an agreement between the governed and government is seriously problematical. See *supra* Chapter One, section “Do we have a constitution?”

⁵⁷⁶ A. V. Dicey *An Introduction to the study of the Law of the Constitution*, 1902, pp. 70-1

⁵⁷⁷ *Ibid*, p. 71

⁵⁷⁸ *Ibid*, pp. 73-9

⁵⁷⁹ *Ibid*, pp. 58-61

actual exercise of sovereign powers of parliament coincide.⁵⁸⁰

The first point to emphasise is Dicey's sharp focus upon law and the legal point of view. Given that his *Introduction* was – as with Blackstone – actually his University lectures to students of law, this is unsurprising. However, when we view this against his own account of the shortcomings of fragmented disciplines,⁵⁸¹ his pointed and exclusive focus upon law becomes altogether difficult to understand and accept. The situation is exacerbated by the further fact that he discounts the relevance of political arguments to any understanding of the notion of sovereignty of parliament. Indeed, he goes much further, and, in effect, discounts political arguments altogether: the constitution is a matter of law and that is all there is to it. Thus, he does not qualify and give nuance to his legal conception by arguments from history and political theory. Put differently, we may think of his legal conception as one leg of the argument, and legitimately expect other arguments so as to see a complete picture. But there are none. This raises many questions about what he may have thought of the idea of the state and the nature of government, but, alas, it is hard to envisage how his pointedly legal approach, imprisoning the idea of sovereignty in the legal corner, can allow and support any imaginative and attractive – let alone convincing – thoughts on such matters.⁵⁸²

But this is not all. Two further, more serious, difficulties are associated with the character of his arguments. In the first place, the principles he offers are mere assertions, not deductions from argued and examined first principles, or even historically conditioned generalisations. It is in this sense that without fear of contradiction we may claim that Dicey did not understand what was patently obvious to our 18th century analysts – as, indeed it was to Halifax⁵⁸³ – namely the

⁵⁸⁰ *Ibid*, pp. 79-83

⁵⁸¹ As detailed in his *Introduction*, 'The true Nature of Constitutional Law', in which he demonstrates the different but limited perspectives of law, history and political theory.

⁵⁸² This is not altogether dissimilar to MacCormick's stratagem: wishing to avoid the conclusion that law is a derived concept, he more or less equates, but in an imperfect way, the state and the law such that they are not identified with each other, nor can one have primacy upon the other, and uses this as a foundation for his argument against sovereignty. But, like Dicey, he too, asserts rather than argues this very paradoxical point. See N. MacCormick *Questioning Sovereignty*, 1999, chapter 2.

⁵⁸³ 'To say a Power is Supreme, and not Arbitrary, is not Sense. ... There is then no other

elemental nuance of difference between sovereignty *qua* arbitrary and self-defining power and sovereignty *qua* omnipotent within its powers sense. He even seems by implication to confound these two senses: at one stage, pointing out the error of his ways, he says of John Austin that he thought “Parliament is nothing like an omnipotent body, but that its powers were practically limited in more ways than one”; while at another point he speaks of Parliament as “legally omnipotent in regard to public rights”.⁵⁸⁴ Else, if he was aware of the distinction, it does not appear to have played any significant rôle in defining the principle of sovereignty of parliament, while his use of the word “sovereignty” in an unqualified sense merely adds another layer of conceptual difficulty.

Indeed we must say the same about his assertion of the principle of the universal supremacy of ordinary law and the dependence of convention on law, issuing into the further important claim that the general principles of this constitution – i.e. rights and liberties – are determined by judicial decisions, and that, therefore, this constitution is the result of the ordinary law of the land,⁵⁸⁵ for it is based on the law of the land.⁵⁸⁶ This is a significant concession to the common law tradition, but sits ill at ease with the idea of a sovereign parliament. If parliament as part of the constitution is a result of the ordinary law, then how is it that it has legal sovereignty over all law, including the common law? Moreover, this is not the only point of friction in his scheme: elevating Blackstone’s notion that in a democracy:

[t]here can be no exercise of sovereignty but by suffrage, which is the declaration of the people’s will⁵⁸⁷

Dicey speaks of political sovereignty. But the sovereignty of the people is not even of the same class as that of parliament. He pointedly rejects Austin’s

Fundamental, but that *every Supreme Power must be Arbitrary*’ in his ‘Political Thoughts and Reflections - On Fundamentals’ in *The Complete Works of George Savile, the first Marquis of Halifax*, 1912, p. 214

⁵⁸⁴ A. V. Dicey *An Introduction to the study of the Law of the Constitution*, sixth edition, 1902, pp. 73 and 45-6

⁵⁸⁵ *Ibid*, pp. 191-9, especially p. 199

⁵⁸⁶ *Ibid*, p. 414

⁵⁸⁷ W. Blackstone *Commentaries*, 1765, volume 1, p. 164

conception of the relationship between the electorate and the Commons, and assigns to the people a limited rôle and function, albeit that they are the only part of the system entitled to choose the representatives. On the other hand, parliament has an unlimited, illimitable power to legislate, including regulating the franchise. Clearly he uses the word “sovereign” to mean ultimate in both cases, but that is the extent of its common meaning in this context.

However, there is a second, complicated, difficulty arising from his arguments. To get a handle on this, we may recall an aspect of Blackstone’s arguments. Blackstone posed the question of how one can control parliament *in practice*, and left it wide open. Burke, too, left the issue in a similarly formless state. For Dicey, the question does not arise, because parliament is sovereign, and he supports this idea by an infantile “because it is” claim. This he infers from two negatives: if nothing in this system can control parliament and impose limitation upon it, then parliament is not subject to control, therefore, and *for that reason*, parliament is sovereign. This principle is offered with a complete lack of theoretical elegance and nuanced arguments. It is not even a summary re-working of the Austinian idea that the power of the nation is delegated so absolutely to the Commons that with the peers and the king, it can change anything and everything.⁵⁸⁸ For Dicey, sovereignty of parliament is not the conclusion arrived at *via* some theoretical argument, or even a deduced principle, but an asserted legal fact and a starting point. He does not engage, let alone attempt to answer, Burke or Blackstone, but implies that they did not see that parliament *was* sovereign. We might say he

⁵⁸⁸ J. Austin *Lectures on Jurisprudence*, 1885, pp. 245-6. Dicey has taken from, or shares some elements with, Austin. His formalism (see *Ibid*, p. 328) foreshadows Dicey’s formalism. Austin also avers that parliament can even annihilate itself (*Ibid*, p. 246), corresponding to Dicey’s view that while a parliament cannot restrict the power of its successors, it can commit legal suicide and divest itself of its sovereignty, but it must legally dissolve itself and leave no way of calling for another parliament (A. V. Dicey *An Introduction to the study of the Law of the Constitution*, 1902, footnote 1 on p. 65, pp. 65-7). In view of the arguments and stance of this study, the idea of parliamentary suicide is simply anathema. Incidentally, the Austinian conception of sovereignty of parliament is less absolute than it might appear: there are matters that will prevent parliament from doing certain things that would defeat the purpose and meaning of delegation, and this is enforced by moral sanctions. Equally Austin cannot see how parliament can make or claim rights for itself; these have to be granted by a third person (*Lectures on Jurisprudence*, 1885, pp. 247 & 284). Thus, Austin is a true heir of 18th century ideas.

asserts the (apparently) final triumph of Hobbes over Locke.

Out of the three possible answers to the question that the 18th century bequeathed, only one, Dicey's false answer has become the established orthodoxy. Why? In an odd sense, Dicey's answer fits some non-existent facts as demonstrated by his reasoning, but not any positive facts demonstrating sovereignty of parliament. Moreover, he garnered authority for his writings on the law of the constitution because of his academic position as the Vinerian Professor of Law at Oxford – in this respect, the heir to Blackstone. It may well be that his simple answer resonated with how parliament was perceived and how the system was actually thought to be working, so that he seemed to be describing the reality⁵⁸⁹ – even though he was inventing the principle on the hoof. Besides, the context is important. By the second half of the 19th century, the focus of attention was on parliamentary government and popular representation, with much pride in, so to say, the Golden Age of Parliament: as an institution, the mid-century parliament was seen as both democratic and unfettered. Brougham even argued that the system became a true mix of Monarchy, Aristocracy and Democracy only after the Great Reform Act.⁵⁹⁰ More than that, it is equally the case that common law was the greater part of the law of the land when Blackstone wrote, but by the time of Dicey this was already changing, and, what is more, statute law was necessarily the only instrument of increasing government activity in historically new areas of policy. Legislation was a sharp instrument of reform for the better. Of course, he also simplified matters and asserted this particular “principle of the constitution” so firmly and so positively that it was, on the face of it, impossible to deny it. There were no counter-examples, and his account of the examples that proved his point served to fill an apparent gap. That being so, the only answer to Dicey (other than the long answer as in this study) could have been “No, it is not”,

⁵⁸⁹ During the relevant period, the two Houses were technically equal, conditioned by certain “conventions” that regulated their actual unequal relationship. But the prominence of the Commons, for long recognised in certain matters (e.g. taxation) was gradually extended. We find the genesis of Parliament Act 1911 back in the early part of the 19th century.

What rôle this continuing story played in the formation of Dicey's conception is not clear.

⁵⁹⁰ H. P. Brougham (Lord) 'The British Constitution: its history, structure and working' in his *Works*, Volume 11, 1861, chapter 1, especially p. 14. For Brougham, this turned an ideal into a reality.

for his interpretation had set the terms of debate on the topic. It might be noted here that the Scottish arguments that the Union (1707) did not necessarily have to take the line of English interpretation of sovereignty (and that the Act of Union was not a Constitutional Instrument) were not based upon the notion that sovereignty of parliament was simple nonsense. Similarly, MacCormick's arguments⁵⁹¹ are predicated upon the historical reality of this notion: he begins with it and does not seem to realise that the true line of argument open to him was a simple one of "why sovereignty?" rather than the argument that "we have now arrived at a post-sovereign condition". Equally importantly, critical examination of Dicey tended to take issue with aspects of his arguments rather than with his principles: Ivor W. Jennings is a case in point. But even opponents of the idea of sovereignty, or, rather, proponents of the idea of pluralism, such as Laski, did not directly confront and challenge his ideas either. Indeed, this is also very true of the "New View": its proponents do not deny the idea of sovereignty, but promote common law above parliament.

Yet, although it became the established "theory", sovereignty of parliament *à la* Dicey was not the only interpretation available even at the time of his writing: this makes the establishment of this notion as the orthodoxy even more disturbing, for there were other more nuanced interpretations that did not conclude in a well-nigh eschatological closure. In this regard, we may note that Henry P. Brougham, William E. Hearn and the very influential John W. Salmond (the latter two both contemporaries to Dicey) contributed significant studies that did not offer or support Dicey's idea of sovereignty of parliament.

Brougham⁵⁹² – a lawyer, Whig MP and Lord Chancellor – begins by re-defining and in the event expanding, the meaning of the "British constitution": conduct of affairs in parliament may be reckoned as part of the constitution because it is the necessary consequence of representative government, as are rights of public meeting and a free press. The interesting point to notice here is

⁵⁹¹ N. MacCormick *Questioning Sovereignty*, 1999, chapter 8

⁵⁹² H. P. Brougham (Lord) 'The British Constitution: its history, structure and working' in *Works*. Volume 11, 1861, and *Substance of Speech on Life Peerage*. 15 February 1856, James Ridgway, London.

the way in which, by this expansion of the notion, Brougham has simply redefined the study of the constitution as the study of the system of government. No wonder that he devotes some six extensive chapters to representation and representative government, one to the reserved powers of the people – viz. the press, jury service and public meetings – and only three to the “constitution”: namely two on the form of mixed government and one, as it were, omnibus chapter entitled “The constitution of England”. The second point of interest is the way he seems to follow the 18th century view of the need for a balanced system. He defends the Lords as a necessary element in the system and is set hard against any change that would dilute its power and position, and therefore its effectiveness, as a check upon the Commons. This balance is also important to him because he holds that whereas the actual working of the checks and balances in the system are seen in the compromises that characterise its working – in a way reaching back to Blackstone – nevertheless he is concerned that at any time the more powerful body in the balance will tend to “qualify” the system. The third important point is that he does not offer any principles of the system other than those that relate to its representative nature. Even then, these are not asserted as defining principles, and he placed the greatest emphasis upon the evolved nature of the system, as corrected in the 19th century! Sovereignty of parliament does not come into his scheme of things and does not play any rôle in determining the shape of the system. Indeed he is critical of the extensive powers of each House in respect of their own affairs, and particularly critical of the Commons in respect of its behaviour in protecting its privileges. He preferred co-equal Houses in parliament, and in the event that the three parts of parliament could not agree, then the last resort was an appeal to the people, and if the people returned a parliament (i.e. Commons) similarly resolved, then the Lords and Crown must give way. Though critical of its then present structure and advocating reform, nevertheless, he thought England was a free nation because it had a parliamentary system of government. We may add that he recognised and reserved a right of resistance – the foundation of mixed government – but only if the evil was intolerable. The people, he thought, had a revolutionary right to

change the form of government – i.e. change the régime – but this can happen when society has been dissolved into its elements, necessitating a new constitution.

Hearn⁵⁹³ takes a rather common law and historical view of the system, using the two categories of the executive Crown and controlling Parliament as the broad framework within which to present an account of the system. In so doing, he does not neglect developments since the 18th century, including the office of the prime minister, and the cabinet. His study is a mix of the historical-constitutional argument with some emphasis upon the system of government. In this, he accepts that the queen-in-parliament is the highest law-making authority, admitting no limitations other than those set by physical and moral conditions. For Hearn, parliament is still the council of the crown, and has no independent authority. Internally the two houses are checks upon each other, and together a check upon the Crown, and, in this sense, parliament – the legal organ for the representation of the popular will – is the guarantor of the liberties of the English. But for this to be effective, the independence of each element in parliament must be preserved: packing either will destroy the system.

While Hearn clearly admits of the highest law-making authority of parliament, he does not construct this into a principle. Indeed, if there are any principles in the system, it is his notion of “manner and form”, though he does not use this phrase. The system works in a certain way because each part of it acts in a certain known and expected way. This also feeds into his deep concern with the Rule of Law as the mainstay of the English form of government. It is thus clear that he tends to limitation and restraint of power, rather than accepting unlimited power and seeking to enumerate its properties and identify its location in the system.⁵⁹⁴ Incidentally, on two points, his account raises doubt. Firstly, he considers “constitutional” and “unconstitutional” as relevant to the use of discretionary power only, whether vested in the Crown or any other body. Thus unconstitutional becomes identified with departure from customary behaviour.

⁵⁹³ W. E. Hearn *The government of England*, 1887

⁵⁹⁴ *Ibid*, pp. 490-7

... whenever experience and the proved utility of any mode of exercising any discretionary power are such as to raise a reasonable expectation in the public mind that that power will continue to be so used, any deviation from the customary method, which tends to defeat this expectation and rests merely on the grounds of actual ability to so deviate, is unconstitutional.⁵⁹⁵

Secondly, he offers some historically derived ideas as the principles of the constitution. Thus, he argues that it seems to have become a settled principle that those whose interests are affected by any changes should be consulted about them, and their consent obtained. He then proceeds to offer this as part of the theory of the constitution.⁵⁹⁶ It is not clear whether he is suggesting these are principles that inform the constitution – that they are prior to it – or that they arise historically and are accepted as principles. Either way, the character of such principles is to exert a restraining, therefore constitutional effect upon the system, in contradistinction to Dicey's first principle that goes the other way.

Salmond⁵⁹⁷ took the view that the state and constitution are prior to law, and for that reason a Constitution is not law – indeed he took an anti-positivist view and disagreed with Austin that law is always the result of a command. On the contrary, he considered a Constitution to be a matter of fact, underlining law, never based on law, but the law takes notice of it. Similarly, he viewed civil law as consequential upon the state, and, problematically, inferred therefrom that common law was not (civil) law; however, the state would enforce it because it is already law.⁵⁹⁸ At any rate, in enumerating types of law, the category “constitutional” is simply not mentioned, but he took the view that constitutional law is only the reflection, the image of the constitution *de facto*, that is to say, of constitutional practice.⁵⁹⁹ This raises the question of the basis upon which statute law is recognised and enforced. That the output of parliament is law is a pre-legal matter: no statute or law can create or confer this rule, which also means there is no legal theory of sovereignty of parliament.⁶⁰⁰ This also means that because no

⁵⁹⁵ *Ibid.* pp. 124-7, the quotation is from p. 127

⁵⁹⁶ *Ibid.* pp. 425 and 427

⁵⁹⁷ J. W. Salmond *Jurisprudence*, seventh edition, London, 1924

⁵⁹⁸ *Ibid.* p. 50

⁵⁹⁹ *Ibid.* pp. 19 and 154-5

⁶⁰⁰ *Ibid.* 169-170; but see H. W. R. Wade 'The Basis of Legal Sovereignty' in *Cambridge Law Journal* 1955, 13, pp. 172-197. Wade seems to say that, in theory, sovereignty of

constitution can originate in law, and is of necessity of extra-legal origin, it must obviously be of an illegal origin resulting in good law and good succession. By applying the maxim *Quod fieri non debet, factum valet* (that which should not have been done may nevertheless be valid when it is done), he justifies, for one, the Bill of Rights.

Salmond's work is rich and interesting, but for present purposes, we may focus upon two aspects of it. While accepting the omnipotence of parliament, he does not go as far as to accept its (legal?) sovereignty. This is made very clear in two different contexts in his text. The rule whereby Acts of Parliament have force of law is historical only, although he also calls it "legally ultimate". Lawyers must accept it as the law because it is the law – presumably on the same basis that the state would enforce common law because it is law. No statute can confer this rule of recognition because that would mean presuming the power that is being conferred. More importantly, Salmond argues that from this ultimate principle one can derive the body of the law – i.e. the legal order – but one such rule there must be. In Appendix II, he considered the theory of sovereignty, which he considered to be an essential, indivisible, illimitable, unlimited power. The Queen-in-Parliament was the legislative sovereign, and the Crown the executive sovereign, presenting a distinctly non-Hobbesian view of the British system. But he also found the requirement of "illimitable" less than clear: for him, sovereign power was in fact limited, although in theory it was felt to be illimitable. In pursuit of this point, he argued that the extent of the legislative power of parliament depends upon and is measured by the recognition afforded by the tribunals of the state: enactments not so recognised are, for that reason, not law. This he presents as fact, but:

...it is difficult to see by what process of reasoning the jurist can demonstrate that it is theoretically necessary.

Admitting that the idea that statutes contrary to reason are void has long since been abandoned, yet, Salmond had no difficulty asserting it: for it seems, he argued:

parliament is a political fact for which there is no purely legal authority, but in practice it depends upon the view of the courts.

sufficiently obvious that its recognition involves no theoretical absurdity or impossibility, however inexpedient in practice it may be. Yet it clearly involves the limitation of the power of the legislature by a rule of law.

For Salmond, legislative sovereignty of parliament was indeed limited: he thought it perfectly feasible for the courts to declare illegal a measure to extend the duration of a parliament while still sitting: parliament was sovereign for the period for which it was originally appointed, and was destitute of extending that time. Equally, it was clear to him that the rule used to regulate the manner of legislation could also regulate the matter of legislation: the power that makes a limitation is not thereby lost, but must pre-exist the limitation and cannot be limited by it.⁶⁰¹ In this way, Salmond argued against the absurdity of the theory of sovereignty.

Despite their many differences, Salmond is very much in line with Blackstone: he recognises the question and gives an answer that goes just that little ahead of Blackstone, but still leaves the question wide open and asks: How can one argue in theory, with implications for practice, of limiting what is, by common acknowledgement, omnipotent legislative power? This is also the case for other analysts examined here; only Dicey asserts sovereignty, thereby denying, rather than answering, the question.

The second interesting feature of Salmond's work is the fortunes of his *Jurisprudence* since the last edition published in his lifetime. A highly influential work, many subsequent editions have been published; however, contrary to the normal practice of adding an introduction to the original text, his text has been revised many times.⁶⁰² Interestingly, the most significant revision concerns the sovereignty of parliament, such that his critical stance is reversed and the new text positively states and supports the idea of sovereignty, and the Appendices are deleted. It is thus that in the twelfth edition the significant passage concerning the limitation of sovereignty of parliament – and its subjection to a pre-legal and higher rule – is re-written explicitly to offer sovereignty of parliament as an ultimate rule:

⁶⁰¹ *Ibid*, Appendix II, especially pp. 524-530; the quotations are from p. 529

⁶⁰² O. Hood Phillips and P. Jackson *O. Hood Phillips' Constitutional and Administrative Law*, seventh edition, 1987 is another example; but here the changes are more obviously marked, and result for the most part from updating the information and the text.

[t]hese ultimate principles are the groundnorms or basic rules of recognition of the legal system. The fact that they are underivable from other legal rules must not mislead us into regarding them either as mere matters of practice or as mere hypotheses. The doctrine of parliamentary supremacy in England, for example, involves more than mere usage and practice: it involves the acceptance of the view that Parliament's word *ought* to be observed. Nor is this, ... a mere hypothesis to be assumed for the sake of argument: for Parliament *is* in fact supreme. These ultimate principles are indeed rules of law, though differing in some respects from ordinary less basic legal rules.⁶⁰³

Salmond is put on his head, and that is that. More than that, this construction also shows the extent to which the idea of sovereignty of parliament is an assertion, not susceptible to any conceptual argument. No wonder that some have attached fairly harsh tags to the conception: Heuston avers that Dicey draped “the attorney’s mantle around the shoulders of arbitrary power”,⁶⁰⁴ and, accepting that many have doubted the verity of the idea of sovereignty of parliament, also points to the fact that a number of *obiter dicta* in the inter-war period have underlined the sovereign capacity of parliament to legislate. An attempt to make sense of sovereignty of parliament leads to absurdity: for example, MacCormick sees in this idea nothing more or less than power without restriction; this he can say because he also opines that sovereignty is a form of power. However, he is also of the view that great revolutions by overthrowing the rule of monarchs restored sovereignty to the people, who organised themselves and adopted a Constitution. From this he infers that a constitutional state is a democratic one. Yet he is also prepared to entertain the possibility that a Constitution can confer sovereign law-making power, sovereignty conferred by law. Yet, he is absolutely clear that a constitutional order or tradition essentially serves to divide power, thereby making it difficult to identify any sovereign power or body in that system.⁶⁰⁵

⁶⁰³ P. J. Fitzgerald (Ed) *Salmond on Jurisprudence*, twelfth edition, 1966, p. 112

⁶⁰⁴ R. F. V. Heuston *Essays in Constitutional Law*, 1964, p. 1. Quoting Blackstone (“What parliament doth, no power on earth can undo”), Heuston unfairly accuses him of the same crime, calling them both “high priests of the mystery”. See also H. G. Calvert ‘Comments I’ in *Public Law*, Winter 1985, pp. 672-5.

⁶⁰⁵ N. MacCormick *Questioning Sovereignty*, 1999, pp. 124-9

The chimera of sovereignty of parliament

If parliament is sovereign, two questions arise: what is the nature of sovereignty ascribed to it as an institution? And exactly, what is parliament? The obvious answer is to give an account of the two Houses, probably with a dash of history to show law, constitution, and privileges of each, and to point – as did Dicey – to certain Acts of Parliament as demonstration of the absence of restraint upon its legislative power. But because our questions are different, such obvious answers do not suffice: the preferred, indeed the only answer that can be sustained in theory, is that given in *supra*, Chapter One, ‘*An excursus on sovereignty*’. But we can take the argument a little further.

Even if we grant the idea of sovereignty, we are faced with the difficult issue of arguing for this as an attribute of an institution, or even of a Constitution. At best, and recalling Locke,⁶⁰⁶ we can only entertain “omnipotent within its powers” meaning of legislative sovereign. But parliament is the instrument of the people: clearly representation is the key, but we are only concerned with the larger idea of representation, indirectly with the mechanics of elections, hardly at all with consequential problems for the democratic system.⁶⁰⁷

The idea of representation may be understood, as it were, philosophically: in this sense we may wonder what it means to make present something that is not present.⁶⁰⁸ This sense is not of any immediate interest, for we are concerned to consider the extent to which representatives can commit the represented.

⁶⁰⁶ The Lockean principle of fiduciary nature of political power informs this study throughout: “in a constituted commonwealth... there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.” For Locke, power entrusted is limited by the purpose for which it was entrusted, and he argues for a perpetual power in the community to save itself from their legislature or any one else. “And thus the community may be considered the supreme power, but not as considered under any form of government, because this power of the people can never take place until the government be dissolved.” J. Locke *Concerning Civil Government*, Second Essay, 1690, paragraph 149.

⁶⁰⁷ For a good and fairly comprehensive study, see D. Judge *Representation. Theory and Practice in Britain*, 1999, but also H. P. Brougham (Lord) ‘The British, Constitution: its history, structure and working’ in *Works*, Volume 11, 1861, for a comprehensive examination of this notion in its 19th century setting.

⁶⁰⁸ H. F. Pitkin *The Concept of Representation*, 1972; also A. H. Birch *Representation*, 1971.

On the other hand, we do not question the historical idea of representation, and if anything reach back to Edward I and claim that the first complete parliament – i.e. of the clergy, nobility, and commonalty – only met in 1295. In this, we ignore the fact that it also represented a rather important change in the nature of the system. We can see this change very clearly in the wording of the writs issued in 1282, 1290 and finally in 1295. The first invited members whose purpose and function was described as *ad audendum et faciendum*, [to hear and to do] but the writ of 1290 emphasised the need to agree to what is ordained there and then in parliament, whereas in 1295 the writ calls for members with sufficient powers to decide on behalf of the electors and commit them to the decision.⁶⁰⁹ The change was from a parliament of delegates carrying decisions taken at the local level, to one in which the decisions were to be taken at parliament with a prior expectation that the electors would accept them – in that they had invested the representative with sufficient powers – and were, therefore, bound by them.

This House doth not so represent the whole commons of the realm as the shadow doth the body, but only representatively.⁶¹⁰

It is customary to distinguish between a delegate and a representative, as Burke did so famously. And it is the accepted view to argue that in the United Kingdom members of parliament are representatives, not delegates. And the difference turns upon whether the representative is instructed to act in a certain way or is expected to decide on issues of public concern according to his conscience, and offer his “best” – according to Burke, independent – judgement. This distinction works in practice, but that is only practice and has nothing to do with its true meaning: for in theory the distinction is of little moment.

The only meaningful difference between delegation and representation is the extent of what is delegated: representation is only delegation of a certain sort.⁶¹¹

⁶⁰⁹ W. Stubbs *Select Charters and other illustrations of English constitutional history from the earliest times to the reign of Edward I*, 1929 edition, pp. 458, 470, 473 and 481-2. But see *infra* Appendix 4 for the full text of such a writ in Latin and a literal English translation.

⁶¹⁰ James I (of England), speech at prorogation of Parliament, 7 July 1604, J. P. Kenyon *The Stuart Constitution*, p. 40

⁶¹¹ In the Second Agreement of the People, the Levellers sought to place limitations upon the power of their representatives. See D. M. Wolfe (Ed) *Leveller Manifestos of the*

Whereas in one the terms of the delegation are explicit, in the other they are not.⁶¹² On this reading, then, in electing a representative, one still holds back that important residual power that makes delegation or the choosing of a representative possible. Put differently, the absence of explicit terms does not imply, and cannot be made to support, the further claim that representation is total and amounts to “ownership”: that which is not present can never be made present in toto. And this amounts to the claim that in the absence of clear and positive instructions, upon a range of matters representatives are not empowered to commit the principal. For under all circumstances, we can loan the use of ownership, or divest ourselves of it. But this, too, raises issues of its own: we can only divest that which we possess, but not that which is an attribute of what we are; equally clearly we cannot loan the use of our attributes. On this reading, then, *mutatis mutandis*, no representative body can claim, or be accorded, the full range of powers one would equate with the idea of being sovereign. Therefore no representative body can change the terms and conditions of the basis on which it is recognised as a representative body, or change the terms, conditions and procedures whereby representatives are selected. To accommodate practicality, one may accept that such changes may be proposed by the representative body, but can have no force until ‘the people’ explicitly endorse them. In other words, at best such changes are and must remain tentative proposals subject to the approval of those delegating. It follows that parliament can never be sovereign: recall Bright, for whom England was the *Mother* of Parliaments.

The mechanics of representation, too, serve to underline the difficulty of claiming sovereign powers for parliament. British MPs are elected for territorial units, and we make a quantum leap when we ignore this rather important fact. The representative is selected on the basis of competition between different belief systems, ideas and preferences, along a spectrum that may include irreconcilable extremes. But the object of the exercise is to select one member for the whole community both to stand for the constituents of that community and to promote

Puritan Revolution, 1944, pp. 223-234.

⁶¹² Full discussion of this point requires detailed analysis of the idea of delegation, and that of Regency as an instance of it. Limitations of space exclude such discussion here.

“its” interests, but on national matters to think of the good of the whole rather than just of the community he/she represents.⁶¹³ This is simple territorial representation in a national assembly, and is in theory and practice simply irreconcilable with the representation of ideas and preferences. Furthermore, for practical purposes – after all government cannot stop – we may reasonably argue that in choosing a representative, the entire community, inclusive of all shades of opinion, accepts to be bound by anything and everything that he/she may contribute to decide in parliament, even when he/she was opposed to the decision, or did not even participate in the proceedings. This enables the working system to function, and we may accept that in this sense the decisions of Parliament are the decisions of each and every elector and citizen. This claim underpins democratic theory, the kernel of the idea of majority rule. But this is a practical solution, a necessarily conditional compromise, designed to ensure that the working system will not cease to function, and is predicated upon the contingency of the floating vote and changing majority, eschewing a fixed, prolonged or permanent majority. It is a working system solution and its focus is sharply inwards into the system. For that very reason it cannot stand for an indubitable principle of the nature of power in the entire system: it does not instance sovereignty of parliament, but gives recognition to its law-making omnipotence. Put differently, it is a first order rule, dependent upon a second order principle, which it cannot portray: no consideration of the rules and principles of the working system can lead to the second order principle that parliament is in fact sovereign.

This line of argument stands in sharp contrast to the leading ideas of the age: Hart, for one, avers that the sovereign electorate sends representatives and gives them *its* sovereign power. Representation amounts to unreserved absolute delegation because the courts are not concerned with any claimed limitations. Hence, any limitations can only be in the form of a trust that the representatives will not abuse the power thus delegated to them.⁶¹⁴ But, as with Dicey, this is a

⁶¹³ The MPs from Northern Ireland who refused to take their seats is an extreme counter-case, but, by all accounts, they nevertheless discharged their duties as members for their constituents.

⁶¹⁴ H. L. A. Hart *The Concept of Law*, 1994, p. 74. Important traces of John Austin and John Salmond are clearly visible in his scheme.

rather limited legal view.

Arguments from and based upon representation, as much as any based on the theoretical examination of constitutionalism and Constitutions, lead to an anti-sovereign view of parliament. Sovereign power is omnipotence (*general* law-making power) plus the further power to decide on second order – constitutional – rules, *inter alia*, concerning parliament (“ownership”). We may amplify this distinction thus: the supposition is that an omnipotent parliament can only legislate downwards, towards the working system, not upwards, towards the reason and the source of its existence, and the very font of its authority. This we cannot say of a sovereign parliament unless that body is located *above all else* and the ambit of power to legislate includes all matters, including parliament. This we cannot say because it raises questions that we cannot answer in any logical and coherent, therefore satisfactory way. Yet, it is said that parliament is *in fact* sovereign: so, whence the idea of sovereignty? And what sort of an idea is it?

Recalling the arguments of *supra* chapters 1 and 3, we may note that, seen in the abstract, the controlling parliament gradually becomes the institution within which the powers it had sought to control are exercised. But this it can only do if it successfully claims the very power that it seeks to control, namely sovereign power. This being so, we have a point of departure in answering our question.

It is clear that no such power could possibly have been claimed for parliament on the basis of its supposed representative nature at the time of Revolution Settlement, or even when Dicey wrote, and, indeed, since. Such a claim would have to be predicated upon the notion of (political) sovereignty of the people. But, as argued before, the idea of sovereignty of the people can only support the idea of an omnipotent parliament in the law-making sense. However, in 1688 sovereignty of the people was not an established idea, and it is hard to see how it could have been thought of as a meaningful theoretical or practical proposition. The primary idea that government is *for* the people was well established, and the people have always been allocated a limited rôle: they could “elect” the holder of the office, not create the office or stipulate its powers, let alone delegate their own original power to that office. And whereas Dicey asserts the political sovereignty

of the electorate, he asserts the sovereignty of parliament but as a *first principle*. The point is simply this: if, after 1688 parliament was *in fact* sovereign, then the sovereign power it claimed and exercised must have been of the same ilk and type that the king claimed, and which, in the era of co-sovereignty, parliament sought to control. Indeed in imposing limitations upon the king, the king's powers were deemed below that of parliament, and in assuming powers that it denied the king, then, clearly, it asserted into own superior powers: but our questions remain.

This is the conceptual point at which the history of religion and that of the development of the sovereign state fuse together.⁶¹⁵ Recall that sovereignty was a religious concept; the Church took on the paraphernalia of sovereignty from Rome and passed it on, such that the Pope, the Emperor and subsequently also kings of independent state all vicariously exercised sovereign powers of God. Recall also the arguments in medieval political theory concerning the irresponsible position of the king in relation to the people, and his direct and absolute responsibility to God. It is true that this sense of the origin and meaning of the sovereign is gradually pushed into the background of the arguments; granted that by mid-17th century, the Commons could declare that “The people are, under God, the original of all just power: ... that the Commons of England, being chosen by, and representing the people, have the supreme power in this nation ...”; and granted that Royalists, and especially Divine Right theorists, proclaimed the essentially religious basis and sense of this power, yet the power they were all fighting for was described by the religious concept of sovereignty. Sovereignty of parliament is of this sort; its meaning issues from this otherworldly sense. Interesting conceptual consequences follow.

If parliament in fact is sovereign then we are back at the idea of sovereignty of God exercised by his/her Vicar – previously the king, now parliament – as the sovereign authority over us. In “electing” a king, the people “choose” one man, recognise him as the recipient of the sovereign powers of government on earth, and accept that he should exercise such power over them. We “elect” members

⁶¹⁵ See my ‘Medievalism of the Modern: the Non-Rational as the organising principle of the state’, unpublished paper given at Southampton/Frankfurt link seminars, Goethe University, Frankfurt, 1-5 September 1998.

of parliament who, collectively, receive and exercise for the duration the powers of parliament that we have not and cannot create and bestow upon them. Consequently, on this view, each parliament is equally “sovereign”. In this sense, parliamentary government has supplanted royal government, and there is no difference in the nature and extent of the powers available to an unfettered king, as it is to an unfettered parliament. In an important sense, claims to sovereignty of parliament represent retrogression: royal sovereignty was acceptable only because the king was limited and the rule of “rolling sovereignty” was breached; for Bracton, common law made the king, and Fortescue had no doubt about the limitations of his powers,⁶¹⁶ and considered opinion since concurs.⁶¹⁷ But sovereignty of parliament admits of no limitations, as Dicey was at pains to point out. In this sense, the power described by the phrase “sovereignty of parliament” is not the power of a limited, but truly sovereign, unlimited king. This interpretation is consistent with the essence of Revolution Settlement: parliament assumed the powers that hitherto the king had claimed and parliament had sought to control, but in the process, knowingly or not, assumed the power it had previously denied the king over many centuries. But the effect was that the rule of “rolling sovereignty” was restored. Moreover, the king was a concrete person under law and God, with revolt and regicide as ultimate means of resistance, but parliament is an institution outside of the law, and remains protected by the laws it makes! We cannot meaningfully ascribe sovereign power to its members who at any one time bring the institution to life: that being the case, we can only argue that the abstract institution “Parliament” is sovereign, with no possibility of any limitation other than an expectation that elected members would not betray our trust.

We are used to the historical claims of independence of parliament, asserting its privileges against the incursions of the king, the courts and no less the people. And there is a good deal of historical sense in these claims, especially when examined in context. Moreover, we forget the cumulative nature of the development of this system of government, such that a privilege claimed and

⁶¹⁶ J. Fortescue *The governance of England*, 1885.

⁶¹⁷ For instance, J. Millar *An Historical View of the English Government*, 1803, volume 2, chapter 5, especially p. 153.

asserted against, say, interference from the king becomes a privilege of parliament as such and is liable to be asserted against anyone whose actions are deemed to be an interference with the independence of parliament. Recall Bolingbroke: he felt that incremental increases in the power claimed for the executive king that at the time seemed appropriate, or could be justified in relation to events, would lead to the corruption of the system. It is not the particular historical examples that need to be recalled but the logic of his argument; and when we abstract the argument in this way, it becomes clear that we can say exactly the same against the incremental increases in the powers and privileges of parliament. Bolingbroke's concern applies just as strongly to parliament, indeed all the more so because parliament has also asserted a right to sole and uncontrolled exercise of its authority over its privileges, which actually puts it above the ordinary law of the land: this is clear enough in the Bill of Rights, and Thorpe's case offers an antecedent for it in 1454.⁶¹⁸ And if previously when the king claimed power, there was an institution – namely parliament – that could stand up to him and “check” his power, we seem to have none that can stand up to parliament and check its power. In this connection, recall the sense of despair in Blackstone's concern that *in practice* nothing can control parliament, and Burke's supposed “satire” in which he said, in so many words, that the parliament that knew how to control the king does not know how to control itself, and wondered who could control the controllers. Of course, the true answer that never came was “no one”; and in the absence of a Constitution that creates a parliament, defines its duties and assigns powers to it, we grope for words to describe the situation. How can an *institution* be thought to be sovereign? It defies all sense to make such a bizarre notion our own, as it is simply impossible to give unproblematical meaning to it.

As humans, we argue that we should only do what we ought to do: this “ought” imposes a qualification, and limits what we can do. Any claim to sovereign power is a simple assertion of freedom from all limitations. As humans, we control what we can do by the application of rules of reason supporting ethical and moral

⁶¹⁸ See T. P. Taswell-Langmead, *English Constitutional History*, 1946, p. 219-221

arguments: we *will* our own limitation, as we assume that God does. But an institution has no volition; sovereign powers claimed for an institution are only limited by practical and prudential considerations. We may wish to argue that the electorate in choosing members for one parliament invests it with a certain will for the duration, and empowers the enlivened Commons to employ and deploy the sovereign powers of the abstract institution to further the objectives the electorate has supposedly chosen. This is, in some ways, a plausible argument, but it supports the idea of an omnipotent parliament as subordinate to ‘the people’. Taking the argument one step further, we must say that whatever the range of powers made available to parliament, given the above, it can only employ and deploy them for the duration and within the confines of the objectives set for it: that duration over, the will and power evaporate, and the electorate is precisely where it was before the last election, and ready to create another parliament. But, importantly, this line of argument will provoke the further thought that a snapshot of the will of the people, a dead view of it, is unlikely to have validity for a long duration. Thus, frequent elections – each or every other year – are needed to ensure that the “will” so invested is that of the people at the time.

To support the idea of a sovereign parliament, then, we must pull back even further into totally inhuman abstraction. We must, so it seems, invest the institution with some sort of volition, but, clearly, this cannot be in the form of “will”. I know of no existing arguments in support of this proposition in relation to parliament; however, we may find a candidate in respect of arguments about law.

This, so to say, “theory” is based on the notion of “self-referencing”: in the absence of a clear starting point, even if that is in the form of an Archimedean point of reference outside it, over the centuries law is said to become self-

referencing.⁶¹⁹ Gunther Teubner⁶²⁰ criticises this notion for its apparent insularity and independence of the environment in which it functions, and develops it into the notion of autopoiesis – a self-reproducing system, with related qualities of self-organisation, spontaneity, and so on. And when this results in self-identity, which acts as the criterion for further change, the system becomes self-reflexive. Importantly, this does not amount to legal autarchy, for not all causes are located within it, but the system responds to its environment by extracting new elements from the flow of events. The whole becomes self-regulating and autonomous when all the components of the legal system are linked together. In such a system, the logic of perturbation and response displaces that of cause and effect. But the final phase of the development of this system is when it becomes self-descriptive: this means that it contains a “theory of legal sources in which norms can be guaranteed by precedents or other processes of law creation internal to the law itself.”⁶²¹ Significantly, in an autopoietic system, variation can only take place within its “structural drift”, while still admitting of the influence of the external environment, which may indeed include other autopoietic systems.

The essence of this kind of argument – which has important similarities with the idea of systems theory – is to postulate the acceptance of a historically developed system as a body of ideas and practices that are meaningful in and of themselves. It sanctions the acceptance of a system that can only come into existence when we have lost control over it, when legal rules take on a life of their own, and become ends.⁶²²

The abstract idea of a fully autopoietic system seems to fit the idea of an institution invested with necessarily original sovereign powers. And we may

⁶¹⁹ Arguments of this type suffer from a rather serious theoretical difficulty. For instance, H. L. A. Hart’s conception of law is crucially predicated upon an “if” sentence which contains a very important but never examined assumption: he says “if there is a rule that...” (*The Concept of Law*, 1994, pp. 57-8). This assumption is crucial to his conception of law, but Hart does not disclose the nature of such a “rule”, which “if” it existed would mean a certain thing, or tell us what would happen to his system if such a rule did not exist, but its perceived effects were the result of something else, say, Austinian “habit of obedience”, or even obedience to the first “*rex*” because he was powerful and effective.

⁶²⁰ G. Teubner *Law as an autopoietic system*, 1993

⁶²¹ *Ibid*, p. 41, but *cf.* p. 71

⁶²² *Ibid*, pp. 23-4, 40, and 44-5

surmise that its first effect is to make the institution separate and almost independent of 'the people', except that its output is in response to the inputs of "perturbations". This puts in mind the idea of God, but that is no accident, for the two are strangely similar. Parliament has powers that do not come from us, and we can only choose members who will collectively determine what use to make of those powers – recall that this was the very essence of the idea of a king we "elect" who then acts as the secular Vicar of God. The actions of both, such a king and such a parliament, are for our own good, even if at the time or even persistently, we should feel otherwise. This power has no limit except that it sets for itself: God is controlled by his own "infinite wisdom" and reason, a Divine Right king by the law of God, and parliament by the practicality of its decisions. Surely it is not an exaggeration to suggest that self-referencing or the idea of autopoiesis are the theory of Godly power in a disenchanted world: they are secular versions of the power necessary to rule a society in a condition in which it is no longer meaningful to tell us that we are subject to the Law of God. It discounts the individual as the individual, and thereby denies the possibility and historical meaningfulness of any system and set of institutions as derived from the deliberate but contextualised actions of men over the centuries. This is reason simply gone mad.

Self-referencing and autopoiesis do not account for sovereignty of parliament.⁶²³ A close examination of the idea of representation tends to suggest an omnipotent, not sovereign, parliament. And a historical account of the development of this system of government is devoid of any reasons to convince us that we should accept it. So our question stands: how do we account for sovereignty of parliament? Well, one way is to assert it as a principle, and hope that no one will notice the grotesqueness of the assertion. But once the "principle" is interrogated, it simply collapses: it is not possible to deconstruct it and manage

⁶²³ Some try to apply the self-referencing notion to the idea of a Constitution. For instance, apparently impervious to theoretical complications and its practical effects, McCormick states: "[t]he constitution is a totality of interrelated rules or norms that is historically given and yet dynamic in providing for the possibility of its own change by processes for which it itself makes provision. The dynamic aspect means that it both empowers and yet sets conditions on legitimate change up to and including change in the constitution itself at the highest level." N. MacCormick *Questioning Sovereignty*, 1999, p. 93

to reconstruct it back into the apparently whole notion we started with; it is not a principle that human reason can construct and support. Another way is to take it as historically bequeathed: but this also means shutting up about it, as well as ignoring what it means and the consequences of accepting it. As argued in the next chapter, in large measure, the idea of sovereignty of parliament is a necessary pre-condition for the Neo-Tudor style of government, and given the discontent with this system of government (especially in the past two or three decades), to that measure, this notion is to blame.

Sovereignty of parliament is a chimera, a wonderfully attractive but actually grotesque product of infertile imagination. On the other hand, the arguments of the present study place parliament below the level at which it can interfere with what are commonly called constitutional issues: parliament is omnipotent but only within its powers. This means exclusions, which are defined by the very meaning of the idea of delegation and representation, or possibly transcribed in a Constitution that gives effect to this meaning: ‘the people’ impose the limitations, even if and when they should desire not to.

Two related points emerge from this discussion. Firstly, and to repeat the point, the 18th century attempts to fix this system without resorting to a Constitution failed. A fudged answer only made it possible for a false answer to gain currency. Secondly, and issuing from this fact, the British system can only be described as regular government, not a constitutional one. And in so far that this view is not the result of any defining occurrence since 1688, there is no option but to say that this was the constitutional meaning of the Revolution Settlement of 1688. One important effect has been to sideline constitutional theory arguments in favour of (the certainty of) law and history: Barker dismissively referring to general constitutional (theory) arguments as the “theatrical background”⁶²⁴ simply epitomises this sorry condition. Constitutional theory arguments point in a different direction, but the British have a morbid peculiar fear of fixed systems, and fail to realise that though famously the most flexible system ever, the British constitution – what there is of it – is, in effect, petrified and best characterised as

⁶²⁴ E. Barker *Essays on Government*, 1951, p. 137

simply immobile. This is not because its working principles will not allow and accommodate change, but rather because its core concept is applied at the wrong point and assigned to the wrong institution. Furthermore, given the working system as it is, power assigned to parliament, which does not even belong to that institution, is made available to the government of the day, thereby defeating the primary objective of limited power. The problem is the unqualified acceptance of sovereignty of parliament and its implications.

The idea of sovereignty of parliament is indefensible in terms of constitutional theory arguments, and as theory it is sheer nonsense. But it has been accepted as fact, and for long invoked and acted upon as though it were truly a principle of this “constitution”; it has shaped this system of government. We must now turn our attention to that fact.

Chapter Five: British Government 2

The Second Revolution: Neo-Tudor style of government

It is a peculiar misfortune of the British that the continuity of their institutional development has hidden from them the dangers of tyranny.⁶²⁵

The reference to the Tudors is only meant as an allusion to the claim that the Tudor monarchs used parliament as an instrument of rule: for Richard Britnell, who agrees that Tudors used parliament, it is clear that parliament was an instrument of rule long before the Tudors, but as mentioned before, S. D. White suggests that in 1625 parliament moved away from being an instrument of rule and developed a constitutional rôle.⁶²⁶ However, this was only turned into a focal practical function by and in 1688.

The touchstone of the analysis of government in the 18th century was the idea of “balance”; Bolingbroke represents this tradition well enough, we see it in Burke, and indeed in William Blackstone’s work. They all considered the maintenance of such a balance in the tripartite parliament as of first importance in ensuring the safety of rights and liberties of the British: disturbing this balance they equated with destroying the British constitution. But given that the idea of balance was the leitmotif of 18th century comments upon the system, and that analysts looked upon the maintenance of the balance between and the preservation of the independence of each part almost as an index of the health of this “constitution”, it is odd that no one picked on the fact that Revolution Settlement had produced a heavily conditioned balance. The succession was parliamentary,⁶²⁷ and the balance between the two Houses related to the nature of each, determining the distribution of functions between them: for instance,

⁶²⁵ N. Johnson *In Search of the Constitution* 1977, p. 12

⁶²⁶ R. Britnell *The Closing of the Middle Ages?* 1997, p. lii and chapter 9; and S. D. White *Sir E. Coke and the grievances of the Commonwealth* 1979, pp. 187-8 and 190.

⁶²⁷ We tend to take this notion lightly and at face value, for, as a matter of fact, the succession was regulated many times by an Act of Parliament, but since the succession of 1688-9, we tend to think of the title as Parliamentary. But this raises questions: if parliament as a body only comes into being by virtue of a royal writ, and title to parliament draws from the Crown (and used to cease with the demise of the sovereign), the king or queen *regnant* is its head: how can a body determine and grant a *title* to its head? Either the historical analogy no longer holds, or the idea of parliamentary title is contradictory.

taxation was already the preserve of the Commons. More than that, they did not seem to consider the fact that the only element that could, in any way, be said to be independent was the Lords. The electoral basis of the Commons could hardly provide a meaningful claim to its independence: and whereas they objected to influence, whether exercised by political leaders or the Crown, they did not seem to mind the fact that in most cases election to the Commons was hardly anything of the kind. Burke even considered a commendable feature the fact that one could with some ease get a “good man” into parliament *via* a “pocket seat”! That is to say, the condition of a perfectly balanced system of independent parts was never achieved in this country: it remained a wonderful dream and a beautiful theory, but, alas, only a desideratum. This also meant that whatever the balance, in practice it was inherently unstable.

This inherent instability is the key to the development of the Neo-Tudor style of government. Indeed, the argument about the development and nature of this style of government hinges upon the claim that, in response to felt need and immediate political desires, adjustments in this unstable system pushed the balance and independence of each part even further away from its desideratum with longer term consequences for the system.

The Neo-Tudor style of government is predicated upon a certain relationship between the Commons, political executive, and nationally-organised political parties. It is the attributes of each that give the mix its very distinctive character: the Commons is the predominant body in Parliament and delivers its legislative powers; the political executive provides positive leadership and is dominant in the Commons, and the instrument of this domination, connecting the two, are the nationally-organised political parties, delivering a few hundred “party place-men” into that House. These are the essential ingredients of the second revolution; but there was no revolutionary moment and point of significant change, not even a 1688: we may think of the first time a government resigns after a general election but before meeting the in-coming parliament as an important occurrence in the 19th century, but such a move is only a product of, and in a sense serves to symbolise, the actually changed nature of the system, and the fact is confirmed

the second time it happens. And, yet, probably even more so, this very effective but entirely British counter-revolution was, like the first revolution, very slow to reveal its true character. The second revolution was the result of a number of small changes over the years independently affecting aspects and, importantly, attributes, of our three components (in the manner feared by Bolingbroke), leading to an incremental systemic corruption of the “constitution”, with no marked stages at all. On the contrary, we are probably prevented from seeing the reality of this process of systemic corruption because we habitually focus upon certain 19th century events (the Chartist movement, Catholic Emancipation Act, Great Reform Act) or the series of measures from 1867 concerning the franchise, the ballot etc, as markers of progressive change. Equally importantly, we are blinded to changes in the meaning of the system because we are so taken with arguments about democratisation, the development of parliamentary government, and probably also the great debates of the period, including the (Irish) problem of the Union, and the all-important first decade of the 20th century. Moreover, we are blinded to the truth of these changes because of two other factors. First, by accepting a “version” of history that supports the view we are historically propelled to support, we preclude the possibility of the meaningfulness of alternative, or – more importantly – more comprehensive interpretations. Second, because at the time the process of corruption remains invisible, the meaning of the changes can only be known when viewed within a longer time-scale, necessarily after the event. In a sense, this makes contemporary history part of the problem while emphasising the need to review, reconsider and re-write history as part of this process of identifying the “true” meaning of events and changes. However, this statement is misleading; for the truth cannot be a function of a longer span of time approached in a way in which the craft of the historian plays a dominant rôle. This is only another way of saying that the true meaning of the system is only apparent to those who examine it in a necessarily theoretical unified approach against the longest historical span. Conversely, the truth of the system is not available to the narrow vision of the fragmented discipline analyst because this fossilised system of government presents a largely constant

appearance over many centuries, disguising real change. This is made more difficult by the fact that this, second, revolution occurred in the manner that Bolingbroke understood so well: the system's various parts (the relations between the two Houses, development of a political executive) changed individually; the revolution was the result of the combination of forces of the changed parts now pulling in a new direction, in the manner that Blackstone grasped so clearly. Moreover, the tempo and appearance of this revolution chimed with the English/British psychological preference for the political and the gradual. The new institutions, policies and activities were seen as appropriate responses, a product of the English genius for peaceful change when needed. But in this, we are as guilty of a sense of complacency as attributed to our 18th century analysts: like them, we, too, begin with what is received and hardly question its nature, but show some concern with what could and should happen next, and we can probably see better than they did because, with their help, we can remove the invisible blinkers by standing back and taking a hard look at the whole.

It is doubtful that a parliament (even with the impossible attribute of sovereignty) in which its three different parts retain their independence could have contributed to the development of the Neo-Tudor style and form of government, let alone made it possible. In an important even if somewhat obvious sense, the story of the second revolution begins with the loss of the legislative independence of the Crown and ends with the loss of the (legislative) independence of the Lords. Indeed, we may surmise that the need to carry two Houses, each based on a different principle of composition, would have been a very difficult if not insurmountable task, even for a political executive armed with the formidable machinery of the nationally-organised political parties: two equal Houses might, just might, have seriously retarded and affected the nature of the outcome, if not prevented the development of the Neo-Tudor style of government. But all that is speculation: "as if" is never good historical argument. For however it is described, the combined effect of a few changes eventuated into a systemic corruption now known as the Neo-Tudor style of government.

Parliament

It is remarkable that in the Tudor period – the period of despotic government – there should have been steady progress in the development and definition of the privilege of Parliament. The explanation is to be found not in the strength of Parliament but in its weakness. It was the Tudor policy to rule by means of Parliament because Tudor sovereigns were not afraid of Parliament, they were too strong to be threatened by their assemblies, and they could scarcely be expected to look a century ahead, and see to what height the claims of an assembly might grow. Thus they were ready to do what they could to promote the efficiency of Parliament and this led them to look with favour upon the growth of Parliamentary privilege.⁶²⁸

In the preceding discussion of sovereignty of parliament, we treated parliament as one whole institution, for sovereignty was considered an attribute of this whole; but between “then” and “now”, somehow, legislative sovereignty seems to have become, effectively, the attribute of one House only. Thus, for present purposes, we must look inside this tripartite institution. However, in so doing, we are concerned only with the two Houses; the story of the place and rôle of the king/queen *regnant* is one of continued (political) marginalisation, to the point at which today it is perfectly meaningful to look upon the Crown as only the repository and personification of the idea of royal government (which, importantly, is still the only theoretical foundation for the present system of government).

An important effect of Revolution Settlement was to seriously compromise the legislative rôle and place of the Crown, that is to say, its place in parliament. Mistakenly, we look upon the distance since the last royal negative (in 1706) as a mark of the demise of this instrument and the effective end of the legislative rôle and function of the Crown. True, royal negative has not been used since, but there has been no need for it: influence was used to ensure that the deliberation of the two Houses produced an acceptable Bill, or the power of one House was used to halt the proceedings before an unacceptable Bill was presented for royal assent.⁶²⁹ Importantly, we no longer think of royal assent as an independent function of the Crown, but *by* the Crown *for* the government of the day, else the queen would become involved in politics. That much said; we also think of the

⁶²⁸ J. R. Tanner *Tudor Constitutional Documents A.D. 1485-1603 with an historical commentary*, 1930, p. 550

⁶²⁹ A. S. Foord *His Majesty's Opposition 1714-1830*, 1964, pp. 185-6

possibility of royal negative as an aspect of the rôle of the Crown as the Guardian of the “constitution”, which requires that we accept the royal negative as a reserve power. The better view on this point is that of Balfour, who claimed that powers that are to be used rarely are used rarely, and on that account cannot be said to be obsolete and no longer available.⁶³⁰ We probably cannot say the same about the power to create peers to “pack” the House in order to win a vote: this power exists, but because of the very distant basis of the nature of the two Houses, the legitimacy of using the Lords as anything other than a revising chamber is seriously in doubt. Moreover, because this power is now exercised at the behest of the government of the day, any attempt to pack the Lords would create political difficulties, and the Crown may well be justified in refusing, thereby precipitating a crisis and a general election.⁶³¹

As long ago as the first decade of the 19th century, some were concerned with a possibly serious corruption of the system. To take a measure of this notion, we need only pay some attention to the *Edinburgh Review* comments upon Cobbett’s *Political Register*.⁶³² Rejecting his pessimistic analysis (which expected a revolution) and prognosis (calling for the large-scale reform of the electoral system), they launched into a brief defence of the United Kingdom: far from lost and ripe for revolutionary change, they claim this is a country with probably still the greatest achievement in liberty and prosperity to its name. Listing the gains, they offer two propositions, namely that a

country which enjoys these advantages must be worth fighting for, *whatever*

⁶³⁰ A. J. Balfour *The Constitutional Question*. October 1913, Balfour Papers, British Library Manuscripts, 49869, folio 124

⁶³¹ We must modify this comment for it to apply to the post-1999 first stage reform of the Lords, but realistically must await the second stage of that reform. Incidentally, it is simply wrong to start any discussion of the Lords’ function and powers with the findings of the 1918 Bryce Commission: it did not create a new four point definition of the functions of the Lords, but recognised and recommended what was, by and large, already political fact. See (1918) Cmnd paper 9038.

⁶³² Commenting on Cobbett’s 11 volumes, 1802-7, the article is by an “ART” in Volume 10, April (No. xix) and July (No. xx) 1807, pp. 386-421. The comments here refer essentially to pp. 406-421. These views, especially concerning the reform of the electoral system, are repeated in a later issue: volume 24, July 1809, pp. 277-306. Additionally, they make the point that under the British system no ministry should remain in office for too long: this degrades the opponents by “systematical exclusion” from office, and an eventual change of ministry will bring inexperienced people into office.

may be the defects of its government. This is our first proposition. Our second proposition is, that the government cannot be utterly bad and detestable under which these advantages have been obtained and secured for so long a period. (*Emphasis added*)

Granting that there is still an issue of placemen, they deny that it is a problem or that it can be cured with reform of the electoral system. Indeed, they aver that placemen are better in than out of parliament, where their influence will be more difficult to gauge. Equally they recognise the issue of the sale of seats, but argue that it does not place the “constitution” in any danger. They justify their rejection of electoral reform on the basis that in every government, real power is in the hands of an “effective aristocracy”:

[i]n a country where rank, wealth and office, constitute the chief source of influence over individuals it is proper that rank, wealth and office, should make the greatest number of its legislators.

Besides, so their argument runs, the function of parliament is to preserve the freedom of the people, and this is achieved under the present system by the frequency of, freedom in, and publicity given to its debates. This informs the public and excites their spirit; which is very important for, *ceteris paribus*, it is on the spirit of the people that ultimately liberty depends. But, they also aver that electoral reform will not change things much because the electors will still choose the “right” people – the kind that sits in parliament now.⁶³³ That being the case, it appears they rejected electoral reform because of a fear of democracy as a political system, a fear that remained strong well into the first decade of the 20th century.⁶³⁴

Yet, the *Edinburgh Review* article is not a sycophantic assessment of the British system. While they do not find fault with the fact that the balance between the King, the Lords and Commons has changed, they are critical of the nature, and, thus, the implications of that change in the circumstances. On their view, the system works well when the three parts co-operate together, and the existing checks and balances regulate this functional co-operation. Government is a practical activity; there is no point passing measures in the Commons that the

⁶³³ Confirmed by the fact that the social composition of the first post-1832 Commons was not all that different from that of the last elected on the pre-1832 franchise.

⁶³⁴ Such as in W. S. McKechnie *The New Democracy and the Constitution*, 1912

Lords will reject, or, for that matter, to which the king cannot give his consent. But necessary co-operation can be taken too far: moreover, no sooner is the necessity of bringing the parts together recognised that it is also understood that it can only take place in the Commons. This is so because popular influence could not possibly obtain a place in other branches of government, for the direction of influence has always been the other way round: it must at all times have been difficult to prevent the influence of the Crown and Aristocracy from affecting elections to the Commons. Consequently, a multitude of members in the Commons are devoted to the support of

... public functionaries for the time, and of the views and interests of most of the great families in the kingdom.

... The result is that the balance of the constitution now exists, in a great degree, in the *House of Commons*; and that that assembly possesses nearly the whole legislative authority.

This change they attribute to immediate causes: in order better to perform their functions, it was necessary for the king and the Lords to operate in the Commons; among them, not against them, but always covertly.

We may note that J. J. Park⁶³⁵ expressed the same thought in more academic terms. He argued that the “purposive or theoretic constitution of Great Britain” – that is the essence of the Settlement – has ceased to exist in fact but the change is little noticed. The substance of the constitution now (1832) is that

1. the power of government is essentially exercised in the Commons,
2. as a result the Commons has come to take a part in the exercise and has a voice in every act of cabinet
3. the other estates have come to be represented in the Commons, therefore,
4. collision between these elements has no longer happened except on extraordinary occasions because their battles have been fought in the House.

The Commons was thus the *arena* of government, and the strict division that Blackstone and others felt was the characteristic of this system is no longer true.

On this view, as expressed in *Edinburgh Review*, the Commons is the “virtual representative” of the three “estates”, and also where the chief “virtue and force of the government” is to be found. This does not render the other two parts

⁶³⁵ J. J. Park *The Dogmas of the Constitution*, 1832, Lecture 1, especially pp. 6-9

redundant: in a way, they consider royal negative as the instrument of his/her rôle as the guardian of the constitution, and think of the Lords as the place for more mature deliberation and further opportunity for argument, i.e. a revising chamber. In other words, a limited “fusion” is necessary for the maintenance of this mixed form of limited government. And this fusion has two important features: firstly, the fact of placemen, and, secondly, the concentration of power in one House. But the proper level of fusion is now upset because of the increasing scale of government, its finances and, in view of the present (Napoleonic) war, the size of the navy: almost every third person in the country now receives or can expect to receive some public office. But this circumstantial exigency has implications for the system of government.

The right of nominating to public office must reside somewhere, but will inevitably be influenced by parliament; and if “parliament, which means the majority of the House of Commons”, can exert such an influence, they will do so in their own favour or that of their connections. Those seeking preferment will side with the majority in order to obtain it, and the majority will naturally attract and invite such people in order to maintain itself in power. The outcome, portending real danger, is to strengthen and extend the influence of the government, both in and out of parliament. But this extension of government influence is circumstantially driven, and will abate with the reduction of debts and the scaling down of the establishments. They consider this as unsatisfactory but can see no effective and immediate solutions to it, and aver that the increased vigilance of the people (for all government stands on opinion) is the only but longer-term remedy. This leads them to the view that the immediate way to guarantee the “established forms of the constitution” is for the politicians to clean up their act! They must show that in great crisis they can set aside party, prejudice and self-interest and use their talents for the good of all, or step aside in favour of others willing and able to do so.

We may observe three features of this argument. First, they seek solutions to the problem from *within* the working system: characteristically, they do not consider the possibility of ensuring the right level of fusion by stipulating the

relationships between the three. Second, the arguments of the piece show the proclivity in the system, so to say, its natural bias and drift, to a certain type of corruption and degradation, away from the desideratum of balance and independent parts, but they do not see the systemic issues. Third, it shows the gradual pre-eminence of the Commons *before* political democratisation, that is before franchise extension and reform of the electoral system. This demonstrates rather well that the tendency to concentration of power in the Commons was an independent variable, not a contingent function of the immediate circumstance or achievement of democratisation; it was a systemic inclination, not circumstantially or conceptually driven. It is by no means an exaggeration to say that electoral democratisation was a response to, and recognition, of the changed circumstances; it followed, rather than directed, the events. Indeed, we may further argue that *post facto* recognition is typical of the history of British government, and an important element in how the British “constitution” is understood.

But on the whole, this *Edinburgh Review* article is interesting and odd precisely because of its prescient nature; quite inadvertently and implicitly, it testifies to the inherent instability of a system without a Constitution, while showing the almost inevitable systemic tendency of this form of government to an increasingly powerful executive; this tendency has proved to be a major factor in harnessing changes in institutions and practices that together create the Neo-Tudor style of government.

Clearly, the *Edinburgh Review* article presents a working view of the system where the balance, now in the Commons, was regulated in a *practical* way ensuring its smooth working, and did not amount to the further claim that the system of government, the British “constitution” had changed. Indeed, the disparity between the reality and the form of our system is an index of its practicality in its “normal” mode, but this disparity did not mean that at the time the Crown and the Lords were thereby made redundant or reduced to mere façades. On the contrary, the problem was precisely that the form, and with it the possibility of reversion to the formality of power, continued, such that when, under

“abnormal” conditions, the practical regulation of the new balance between the three collapsed under the weight of disagreements, the Lords and, ultimately, the Crown could exercise their full powers and stand up to the Commons.

Taking a sharp look back from this perspective it is clear that, in effect, the 19th century was a period of adjustment whereby the form of the system was brought into line with the reality of the new balance. But we must also note a rather peculiar feature of this process in that the scenario of ideas about and the desired form of the system was almost complete by the fourth decade of that century, and the period thence has been one of enacting the changes. The combined effects of the various measures up to and including Parliament Act, 1911, was formally to recognise the predominance of the lower House, in place of informal regulation of the balance in a House that virtually represented and contained the other two elements. There are two aspects to this: firstly, a series of measures that together define the process of democratisation, and secondly, the relationship between the two Houses as enshrined in law in 1911. These are separate, though not wholly independent, processes.

For present purposes, we are not concerned with the history of the various measures of reform – from a time when the object of reform was to satisfy the practical needs of the middle classes by paying elected members and hoping that they would “govern by means of the middle class for the working class” until it was possible to institute universal suffrage,⁶³⁶ to the 1948 Representation of People Act, when universal suffrage was finally established. Nor can we be much concerned with the fact that in between, and indeed also in 1948, government was *for* ‘the people’ by the political élite, socially or otherwise defined. Equally we need not focus upon the introduction of the ballot, and related especially anti-corruption measures, and need only note that these are important achievements in the realisation of the ideal of political democracy (technically achieved with the establishment of universal suffrage), and measures since are only footnotes to or adjustments in the application of the idea of universal suffrage. Moreover, we are not concerned with the question of whether and to what extent the Commons may

⁶³⁶ Article by “A” ‘A letter to the Earl of Durham on Reform in Parliament, by paying the elected’ in *Westminster Review*, April 1839, pp. 475-508, especially p. 494

be classed as “democratic”, and how well it represents the people, nor with the electoral system or alternatives to it. And because the idea that “a sovereign state is a democratic state” is based upon the mistaken elevation of “popular sovereignty” in the working system in place of the undefined position of the pre-political ‘the people’ who own and make a Constitution, we need not bother with it. Clearly any system of government based upon a Constitution is a limited one, and in this the electorate has a large part to play. Such a system may be democratic in degrees, but that is a consideration of the working system, consequential upon the application of constitutional theory principles in order to institute limited government. Moreover, the argument that sovereignty is the pre-political attribute of a people – necessarily free from any government, and which they exercise when they create or change *their* constitution – and that this attribute cannot be invested in any constitution or any institution, plays havoc with the notion that any “concern about sovereignty is also a concern for democracy”.⁶³⁷

The focus of our attention is on the changing balance between the two Houses of Parliament, and for this purpose we need to examine some ideas current at the time of the Great Reform Act. We find three types of arguments: one, the practical response to a limited and immediate situation, namely the call to pack the Lords; the second, a legal and working system argument, resulting in a re-definition of the powers of the Lords; the third, a “constitutional” argument, involving the electorate.

The detailed circumstances of the passage of the Reform Bill are of no direct consequence, but the difficulties associated with its passage provoked a good deal of argument about the powers of the Lords. The opposition in that House was identified with the non-English and Spiritual peers, and the obvious remedy was to recommend packing the House in order to counterbalance that “faction”. With the passage of the new Bill, the urgency of the matter evaporated, but the problem of the composition and powers of the House became an issue. The obverse of the call for the reform of the Commons – such that, by more frequent elections, control of electoral practices and prevention of corruption, pay for the

⁶³⁷ See N. MacCormick, *Questioning Sovereignty*, 1999, p. 125

members, and so on, it would be “conformed to the people” – was the equally important call for reform of the Lords so as to ensure that it conformed to the people by acceding to the wishes of the majority.⁶³⁸

The Aristocracy-Democracy divide was a theme many played upon in the aftermath of the Great Reform Act in pursuit of the reform of the legislature. For instance, in an interesting piece “W. M.” argued that the pursuit of the interests of the Aristocracy has brought the issue of Lords alive, in a way that no amount of words could ever have achieved. But political institutions are for the pursuit of the good of the people, and this means that the system was out of kilter with its social reality. An appeal to the people would resolve an issue every now and again, but elections are occasional events, leaving much room for mischief by the Lords, for the unreformed Lords would make every ministry in effect conservative. On the contrary, he thought that the object of all liberals ought to be

... so to reform the constitution that the distribution of constitutional power may no longer be different from that of real power; that the form of government may cease to be aristocratic, now that the ruling principle in the nation is democratic.

Finally, he advocated free votes in parliament on a number of measures, some of which are in character constitutional (like the ballot, parliamentary duration, Lords reform, qualification of members, Church rates, and even the Irish question).⁶³⁹

For J. A. Roebuck, the solution was altogether simple: annual parliaments and life peerage.⁶⁴⁰ But the idea of packing the House with life peers in order to get over an immediate difficulty provoked two considerations: first, the thorny question of whether the Crown had the power to create life peers, but also the larger question of ensuring that the House would behave itself in the future.

The answer to the first question was not immediately forthcoming. However,

⁶³⁸ See *Westminster Review*, volume 16, June 1832, pp. 121-9; volume 17, October 1832, pp. 450-68; volume 19, October 1833, pp. 387-430; volume 20, January 1834, pp. 197-238; and volume 22, January 1835, pp. 259-75.

⁶³⁹ “W. M.” ‘Terms of alliance between the Radicals and the Whigs’ in *Westminster Review*, January 1837, pp. 279-318, especially pp. 311-3; the quotation from p. 311.

⁶⁴⁰ ‘The Evil of the House of Lords’ in *Westminster Review*, volume 23, October 1835, pp. 509-518. Incidentally, Roebuck thought since the Lords would not readily agree to any such reform, the Commons should tack the relevant measures onto money Bills. *Westminster Review*, volume 24, January 1836, pp. 47-9

Henry Brougham, while expressing serious concerns with the idea of interfering with the composition of the Lords for political reasons, nevertheless felt that if creating life peers was a necessary practical step, then it should be done in the least damaging way such that the new creations would not change the balance of the system. This meant, in his terms, “neutral” additions, which really meant sons of the existing peers.⁶⁴¹ But he articulated the argument and made the interesting point that if, on the face of it, the power to create life peers existed, a closer examination of the law and custom of parliament showed that it did not.⁶⁴² For Brougham, the difficulty was that creating life peers would be legal, but unconstitutional in that it was against the spirit of it – although he also said it would be against existing law. He placed much emphasis upon precedents that determined the prerogative, and argued that available cases, for one reason or another, did not support the notion of a general right to create life peers. But politically too, he was distressed because granting this right was tantamount to enabling and recognising the probity for the sovereign to pack the House, which could be repeated. This would expose the peerage and remove their independence, whereas by refusing the idea of life peerage we would protect the right of the peers against possible encroachments by the Crown. Of course, if the law and custom of parliament did not support the idea, there was nothing to stop the power being created by an Act of Parliament – as in the 1876 Appellate Jurisdiction Act (39 and 40 Vict. c. 59) and more to the point the 1887 Appellate Jurisdiction Act (50 and 51, Vict. c. 70) whereby the term of membership of the Law Lords was extended for the duration of their life, but, above all, there is the 1958 Life Peerage Act. In the United Kingdom, when legality is assured, unconstitutionality does not arise in the sense that it cannot be enforced.⁶⁴³ The

⁶⁴¹ H. P. Brougham (Lord) ‘The British, Constitution: its history, structure and working’ in *Works*, Volume 11, 1861, pp. 268-270

⁶⁴² H. P. Brougham *Substance of Speech on Life Peerage*. 15 February 1856, James Ridgway, London

⁶⁴³ Often constitutionality is confused with reasonable expectations: *inter alia*, Brougham thinks of the unconstitutional to mean “against the spirit of the constitution”. H. P. Brougham (Lord) ‘The British, Constitution: its history, structure and working’ in *Works*, pp. 284-5. The unfortunate feature of this way of looking at the issue is that the remedy for any such action is necessarily political.

Lords was not, in the end, packed, and this has not happened since. But that was not the end of the matter, for the question of the balance between the Houses was now an issue.

Accepting that a leisured element in society is needed to produce refined arts and habits, "P.Q."⁶⁴⁴ is nevertheless highly critical of the Aristocracy, and identifies "unnatural inequality" as mischievous and a problem. Political privilege reserved for the few in the form of money, dignity and power, obtained through sinecure appointments rather than as reward for important service, is the degradation of the rest, and an injustice: theft of property is not as injurious as theft of one's dignity, which always means adding it to that of another. He is particularly critical of political privilege, which he finds present in all three branches, but above all in a hereditary sovereign. Generally, privilege, and power that goes with it, are prone to misuse and may be used mischievously, calling for checks so as to ensure that only good use could be made of it. But privileged power is, to that measure, outside any control and often used by individuals for their own advantage at the expense of others. This makes them the enemies of the people. Political power that is not for the good of the community ought to be abolished, he argues, not because it is superfluous but because it is noxious. Good government is not really compatible with this kind of power, and the mischief even greater when privileged power is in the form of legislative power. He was concerned that nearly half the legislative power was in the hands of the Aristocracy who did not desire and could easily prevent good government. But a remedy was at hand:

[w]e think that the power of the House of Lords to effect the incredible mischiefs, involved in their power of frustrating any schemes of improvement, might be taken away by a change very little perceptible. Let it be enacted, that if a bill, which has been passed by the House of Commons, and thrown out by the House of Lords, is renewed in the House of Commons in the next session of parliament, and passed, but again thrown out by the House of Lords, it shall, if passed a third time in the House of Commons, be law, without being sent again to the Lords.

Co-equal Houses can mean an impasse, therefore one must prevail: the

⁶⁴⁴ 'Aristocracy' in *London Review*, volume 2, 1835-6, pp. 283-306. Confusingly, after two years, *London Review* ceased publication and was incorporated in the *Westminster Review*. This article is now in *Westminster Review*, volume 31, January 1836

Commons is under an obligation to legislate for the good of the community, not for themselves, and they must prevail. But allowing a limited delaying power to the Lords would avert the evil of precipitate legislation: on questions of constitutional importance, delay is not a bad thing, and in this, the Lords could play a rôle for the better. But the Lords could reject this measure of reform: what then? For “P.Q.” the answer was simple: the Commons could pass a resolution declaring that any measure they passed a specified number of times should be law, and the acceptance of this by the people will make it law. “P.Q.” dismissed the possible reaction of the Lords, and, in an indirect way, averred that the rôle of a good king would be critical in ensuring the success of such a reform.

Apparently this scheme was forgotten: there is no evidence of it anywhere since, and no one seems to have quoted or referred to it. However, it re-emerged in 1883, brought about by fear of the reaction of the Lords to further measures of franchise reform: John Bright, in a speech to the Liberal (Party) Conference in Leeds, reasoning from the claim that the Crown cannot now refuse royal assent to Bills, wondered why the Lords could not be similarly circumscribed:

[w]hy not enact that if Peers have rejected a Bill once and it has been considered in a subsequent session by the Commons, and, after due deliberation, has been again sent to the Peers, then the Peers must pass it on and it will receive the Royal assent and will become law?⁶⁴⁵

Trevelyan suggests that “P.Q.” was in fact James Mill; at any rate, there is no evidence to show that Bright or anyone else remembered his piece. Nonetheless, Bright’s speech placed the scheme in the domain of politics.

The resemblance between the two ideas here described and the terms and objectives of Parliament Act 1911 are unmistakable, even if at the time no one seemed to recall “P.Q.” or Bright’s arguments. Exactly how this idea survived and informed the debate remains unknown, but it is, surely, far-fetched to assume that Bright re-invented the idea, or that it was re-invented by yet another person in the 1900s, and that at least three people came to much the same conclusion independently of each other: far-fetched, but not impossible.

Of course, it is important to examine the circumstances in which the idea was

⁶⁴⁵ G. M. Trevelyan *The Life of John Bright*, 1925, p. 439

taken up and acted upon in 1910 but not before: in this, the history of British politics (especially the Irish question and the behaviour of the Lords on that issue) as well as the development of a new class with emerging political clout, are important considerations. But from the perspective of this study, other considerations are also relevant. We must recall the changing nature of law, and the increasingly important rôle of statute law as an instrument of government in creating new powers and institutions, thereby enabling the government to give effect to their policies. More than that, the fact that the latter part of the 19th century was also a period of important social and economic legislation (and various schemes of improvement, from education to sanitation etc, all aiming at improving social conditions in new and expanding urban areas), coupled with processes of democratisation, means that the Commons was seen as the true repository of the right power to do good for the majority of the people. The fact that a new balance between the two Houses was enacted in 1911 is merely an index of the change that had already occurred – this was truly bringing the form of the system and the reality of the balance between the two Houses together, making form and reality coincide. This reduced rôle for the Lords raised the question of their relevance and further rôle: and again the findings of the Bryce Commission reflect, if not mimic, ideas about it from the 19th century. In 1835, J. A. Roebuck agreed with De Lolme that there was need for a body of contrary opinion, and with Blackstone that the separate estate and rank of the Lords meant that it was a check upon the desires of the Commons, but also with Brougham that the Lords performed the invaluable functions of amending legislation and correcting the errors of the Commons. To achieve this, it was necessary that the Lords represent a different constituency, and acquiesce in the decisions of the Commons, who represent the majority.⁶⁴⁶ In 1918, Bryce summarised the rôle and functions of the Lords thus:⁶⁴⁷

1. to examine and revise Bills from the Commons
2. to initiate non-controversial Bills
3. to interpose so much time, but no more, as may be needed to allow the opinion

⁶⁴⁶ 'The Evil of the House of Lords' in *Westminster Review*, vol. 23, October 1835, pp. 511-4

⁶⁴⁷ (1918) Cmnd paper 9038, p. 3

- of the nation to be expressed upon it, and
4. full and frank discussion of large and important issues, especially useful in a House that cannot determine the fate of the government.

Function one is common to the two Houses: the Commons revise measures first introduced into the Lords, and *vice versa*, albeit that the divide is not functional but also material: public Bills are generally introduced into the Commons first. The second and fourth functions are new in the sense that our analysts do not mention them: circumstances change and functions adjusted accordingly. Today, we must add the Lords' important functions in respect of the European Union and delegated legislation, the Constitution Committee to act as a focus for its interest in and concern for constitutional matters, and the Human Rights Joint Committee. But function three is very much the desideratum of those who sought to empower the Commons at the expense of the Lords without forfeiting the benefits of having a revising chamber. Interestingly, "P.Q." specifically mentioned the importance of the second chamber in slowing down the pace of legislating in more important matters, and equally interestingly, Brougham desired a strong, co-equal Lords. This takes us to the third, "constitutional" solution.

For Brougham, four characteristics were of foundational importance if liberty and the limitation of the authority of the sovereign were to be secured: they are

- a national assembly in which members are entitled to sit as of their own right, or title,
- this body to be called regularly and as of necessity,
- their assent to be required for enactment, and the sovereign to be bound by laws,
- At least one part of this assembly to owe their seats to the multitude.

He desired to protect the rights of the Lords against the encroachment of the Crown, and prevent abuse of power of each House in respect of its privileges: he desired independent, strong and fair Houses of Parliament, and there is no evidence to suggest he was prepared to sacrifice the authority of the Lords at the altar of democracy. It was clear to him that if any one body in the mixed system dominated, it was no longer a mixed form of government: and if the independent concurrence of each is not required, it is mixed in name only. On the other hand, co-equal Houses is a recipe for deadlock on important issues.

There is at least circumstantial reason to believe that Brougham was aware of

the “P.Q.” arguments: they were contemporaries and if there is no evidence to suggest that he responded to or commented upon that view, there is reason to expect that he may have heard of it – after all, J. A. Roebuck had sought leave to introduce a Bill into the commons on the subject in January 1836 (which “P.Q.” thought was precipitate because the matter had not yet been examined in any great detail). Yet, we find no evidence of Brougham’s knowledge of the suggestion in his 1861 publication, and his solution differs in a rather important respect from that of “P.Q.”. Brougham felt that when the Commons hold one line, and the Lords (or the Crown, with or without the Lords) another,

... an appeal to the people by dissolution is the resource of the Constitution; and if this ends in the return of a parliament similarly resolved, the Crown and the Peers almost always must submit.

But this “resource of the Constitution” was a reserve power, to be used when necessary to ensure the motion of the whole machine, and to prevent mischief.⁶⁴⁸

In the event, the idea that informed both “P. Q.” and John Bright was enacted in the 1911 Parliament Act, amended in 1949. The essence of 1911 Parliament Act was to ensure that certain types of Bills are treated in specified ways, which means it changed the power of the Lords in certain ways. Thus Bills certified by the Speaker as “Money Bills” do not require the concurrence of the Lords, while public Bills passed by the Commons a specified number of times and rejected by the Lords will be presented for royal assent in the original form in which the Commons first passed it (though some changes are allowed as amendments of both Houses). The result is to enshrine in law the absolute voice of the Commons on money matters and on measures that they consider vital, and upon which they will not yield. Importantly, the time-scale of the delay this Act allowed in effect meant that the mechanism of the Act could only be used in the first three years of any given parliament. However, the rights of the Lords in respect of other Bills was recognised, and the power to extend the duration of Parliament was excluded from the provisions of this Act. In 1949, the period of delay was reduced from two to one year; in essence, the provisions and the spirit of the original 1911

⁶⁴⁸ H. P. Brougham (Lord) ‘The British Constitution: its history, structure and working’ in *Works*, p. 16

legislation still hold.

The essential difference between Brougham's desired relationship between the two Houses and the condition created by the Parliament Act is simply this: in the first, the electorate has a rôle to play; in the second, it does not. True, in 1948, the preference of the Labour Party was to allow a short delay in which to consider amendments, whereas the Conservatives, desiring a longer delay, thought of it as the period in which the electorate could be *informed*, and have a chance to express an opinion, though not formally in an election.⁶⁴⁹ Of course, the nuance of difference between the two Parties is of little moment in that neither would allow a formal decision by the electorate, and it is by no means certain that the public would respond in the way that the Conservatives would wish. But the true meaning of this difference emerges only when we consider the whole issue from a somewhat different perspective.

In rejecting the idea of a general election to decide the issue between the two Houses, this power is reserved to and made a feature of the Commons. This is not a matter of merely this or that procedure, but reflects an important point of principle: for in so enacting, the effective power of parliament is removed and repaired to the Commons, enabling it to insist on certain measures – which the House had done three times by 2002: Parliament Act 1949, War Crimes Act 1991, and European Parliamentary Elections Acts 1999.

Why establish a superiority of the power of one House if it is so little needed? In effect, Parliament Act 1911 is an act of constitution making, even if it is not a constitution as such, or exhibits any of its characteristics. The question is pertinent also because of the evident aversion of the British to Constitutions and constitution making. That much said, it is in the nature of a Constitution that not all its terms will be needed or applied all the time. However, in our case a *practical device* (the 1947 Salisbury/Addison agreement) was employed to regulate the new balance between the two Houses, and this made it unnecessary to invoke the terms of this Act too often. We must not overlook the fact that even under the terms of Parliament Act 1911, extending the duration of parliament is

⁶⁴⁹ O. Hood Phillips *Constitutional and Administrative Law*, 1962, p. 166

subject to the co-equal decision of both Houses: the annual extension of the life of parliament – or the delaying of general elections – in the course of an emergency, such as the Second World War, are cases in point.

In a sense, a constitutional character would have been given to Parliament Act 1911 had Parliament Acts (Amendment) Bill, November 2001, been enacted. Lord Donaldson presented this Bill, it was read a second time on 19th January and examined in the Committee of the House on 28th February 2002, but, with no further action, the Bill was lost at the end of the session. In this Bill, the list of exclusions offered parenthetically in the original 1911 Act (“other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years”) was to be replaced by five listed exclusions:

1. a Money Bill;
2. a Bill containing any provision to vary the constitution or powers of the Lords;
3. a Bill not all of whose provisions have been fully discussed and considered by the House of Commons;
4. a Bill containing any provision for amending or repealing this Act or amending the Parliament Acts 1911 and 1949;
5. a Bill containing any provision to extend the maximum duration of parliament beyond five years

These interesting provisions would have protected the power of the Lords in respect of what may be called constitutionally-important provisions, and one may see them as necessary in order to restore to that House a degree of independent power. If enacted, it would have placed the Lords on a par with the Commons in respect of their own powers and future. But that Bill disappeared without trace, for the Parliament Act 1949 (Amendment) Bill before Parliament in 2001 was of a totally different nature. While they both reiterated the legality of any Acts passed under the provisions of the 1911 and 1949 legislation, the 2001 Bill, recognising the importance of accepting the powers of an elected (or partially-elected) second chamber, provided that, the provisions of the 1949 Parliament Act would apply only to measures first introduced into the Commons in the third or a subsequent session of any Parliament, effective from the date of the first election of members to that House. This is really only a minor adjustment and, in effect, means that despite the possibility of creating at least a partially-elected Lords, real power

would still reside in the Commons. We must also note that there seemed to be a disparity between the way the “mandate” of each House would run: for the implication of the provisions of this Bill were that despite the increasing distance from the last time that the mandate of the Commons was renewed, it would, nevertheless, have its way on matters upon which a partially (even fully?) elected Lords may disagree.

The point is that the power of parliament is in effect concentrated in the Commons. Given the ruling idea of the age that Parliament is sovereign, then, to that measure, the Commons exercises the sovereign power of parliament. But that leaves the Lords as the current issue of the problem of parliament, except that touching it also means dealing with the *big* issue of the position and the powers of the Commons.

Political executive & nationally organised political parties

The essence of the Neo-Tudor style of government is the capture of the *powers* of parliament – now thought to be sovereign and concentrated in the Commons – by the executive *via* the institutional means of nationally-organised political parties. This is more than what the Tudor monarchs managed: they used parliament as an instrument of rule:

intimidated servile parliaments were often the praxis of his [Henry VIII's] tyranny, but never a check upon it; ...⁶⁵⁰

But now, parliament is captured by the government of the day.

One can “control” the use of the powers of parliament by simply ensuring the loyalty of its members. This can be achieved in more than one way. In the 18th century it was done by placemen and influence: indeed, in the name of smooth governance, it was thought necessary to regulate this link between the executive and the legislature by a number of “conventions” of the “constitution”; Burke comes to mind. Moreover, this link was thought so important that some feared for the breakdown of the system at the time of the Great Reform Act, for that Act was thought to sever it: Holdsworth quotes the Duke of Wellington and Bagehot to this

⁶⁵⁰ J. Hervey (Lord) *Ancient and Modern Liberty, stated and compared*, 1734, p. 19.

effect.⁶⁵¹ Meanwhile, others at the turn of the 19th century thought that the problem of placement had become more widespread, and some feared that long parliaments would produce the evil practice of attempting to bind members by extracting pledges of party support, in effect creating a party of delegates.⁶⁵² The history of parliament and electoral reform is the story of the demise of independent members. In many important ways, all the measures of electoral reform (whether extending the franchise, establishing secret ballots, or preventing corrupt practices) contributed to the development of the idea of nationally-organised political parties creating a Commons composed of “party delegates”, thereby consolidating the idea of “party government” but with a difference in that “party” appears to have a purchase upon a “safe” seat. The important point here is to understand the inter-position of the “octopus”⁶⁵³ of nationally organised political parties between the electorate and their parliament⁶⁵⁴.

This type of party is not a natural development of the idea of party that Burke and Bolingbroke understood; namely, for a body of “men” united in common purpose and in pursuit of common interests, but without the further qualification that this body of “men” must pledge its support for all the issues in advance, and

⁶⁵¹ W. S. Holdsworth ‘The Conventions of the 18th Century Constitution’ in *Iowa Law Review*, 17/2, January 1932, p. 166.

⁶⁵² *Westminster Review* 20, January 1834, p. 236

⁶⁵³ The allusion is to the way political parties appear everywhere, yet are private bodies that are out of sight, with as yet no public funding and very little public control. Yet they organise the electorate and the Commons, influence the workings of the Lords, structure the divide in local councils, and become involved in the least likely appointments, such as the Chair of Board of Governors of the BBC.

⁶⁵⁴ The use of the phrase “their parliament” may give hostage to fortune: the meaning intended is not that there was a time when the people owned this parliament and that parties have usurped this, but that any meaningful parliament is only an instrument of the people who elect its members. This notion is materially different from the usual mime, for instance that “Parliament is now the effective vessel of sovereignty. Its power and its exercise of sovereignty springs from the democratic mandate granted it by the people through the ballot box. But sovereignty does not belong to parliament. It stems from the people, it belongs to the people and it cannot be alienated without the consent of the people. In theory and in practice the Crown in Parliament hold national sovereignty in trust for the people of Britain.” (M. Ancram ‘Sovereignty and the nation state in the 21st century’ speech, Commonwealth Club, London, 30 January 2002). For two reasons, this is pure cant: if the theory propounded in this study is correct, then less than sovereign power is passed onto parliament, and it cannot be “the effective vessel of sovereignty”. Second, we do not see features and practices that will support the idea that the claim is also true in practice.

that any deviation from the party line may mean that the “party” may decide not to support them as candidates at the next elections. The supposed freedom and right of the electorate to decide upon the future of their representatives are simply usurped by the political party that selects its candidates for the next elections. It is true but futile to retort that any qualified person may stand as a (non-party) candidate. Leaving aside the problems of finance and resources, in relatively safe seats the party tag is probably more important than any other factor, whereas in marginal seats a third party, rather than an independent candidate, will probably benefit. To emphasise, we may note that this concern with a party of delegates is materially different from that that animated our 18th century analysts, who wanted frequent elections in order to ensure that the Commons more accurately reflected the “current” view of the constituents. In other words, given the large number of safe seats and “tribal” party loyalty, to the idea of members as “party delegates” we must add the idea that for many the choice is between parties, and in many instances the outcome of the contest in a constituency is largely a foregone conclusion. If most seats are no longer in the pocket of magnates, they are in the gift of political parties. Clearly this is an exaggeration, but the point is to show the “octopus” effect of the nationally-organised political parties in binding the various elements of the system in such a fashion as to deliver (the supposed sovereign) powers of parliament into the hands of the victorious party, i.e. the party with a majority of seats in the Commons, not the party that has received the relative or absolute majority of votes at the elections.

The claim that the government of the day captures the powers of parliament must be placed in its proper context, for it is easy to misconstrue this notion and expose the argument to the charge that one is focusing upon a spurious idea. It is thus important to identify the parameters of the notion. It certainly does not translate into the idea that, once the numerical balance in the Commons is known, everything else is only part of the theatre of parliament, that all the divisions are foregone conclusions and, for all practical intents and purposes, that MPs can just pack up and go home. The government of the day with a good working majority captures parliament in the sense that, in almost all cases, where

it matters in a certain *political* sense, they direct the exercise of the powers of the Commons such that, under *normal* conditions, the government is sure to receive the support of the House. The parameters of this context are determined by the construction of “*normal* conditions”, but this qualifying phrase can only be defined somewhat loosely. For this reason, we need to consider a few examples that point to the sort of conditions under which this support cannot be taken for granted or even easily made to materialise, or that the government may have to yield. In any given instance and under ideal analytical conditions, we are bound to identify and examine three perceived interests: *viz.* that of the nation as defined by the government of the day; that of the government of the day; and the immediate longer-term and electoral interests of the political party in question. But because identification of interest is a highly political act and part of politics, we do not have the luxury of an easy start and, indeed, may find that any analysis beginning thus is very likely either to founder or rapidly become an argument in politics. That much said; the question still turns on what is understood by *normal* conditions, but it is easier to make the point by considering what may be *abnormal* conditions. For current purposes, we need only identify three broad categories.

As a rather crude rule of thumb, it can be said that every measure that touches the structure of power at the centre is almost by definition an *abnormal* condition. Obvious cases here include the reform of the electoral system and of the second chamber. Parliament Act 1911 was difficult enough to enact, whereas the 1968 Parliament (No. 2) Bill was abandoned in the face of a “rainbow” opposition of left and right. A two-day debate in the Lords and a debate in the Commons, both in January 2002, sent such a strong message of disapproval that it became unlikely for the government to propose a Bill on the basis of its White Paper. The nub of the issue had to do not so much with the powers and composition of the Lords as such (which remained a major concern for peers) but the effect of any such reform upon the powers of the Commons (which appeared to be a permanent concern of the Commons *and* the government) and upon the relationship and balance between the executive and parliament as such, a

concern shared by the members of both Houses. But, for what it may be worth, it has to be said that so far as the reform of parliament is concerned, every government appears to be in a permanent no-win situation, for the rather obvious reason that every part of the system involved in the process of legislating such reform is an interested party: this is the core of the system seeking to reform itself, but there is no obvious way in which their different desiderata can be reconciled. It is thus that every attempt to reform that part of the system has been prefaced with a declaration that it is not the final reform, but even that is not enough to appease the different parties. Of course, the problem is that this is self-reform of a fundamental nature, and is hardly likely to work, because there is simply no constitutional system.

Not every measure that changes the system (which some are happy to call “constitutional”) suffers such a fate. Life Peerages Act 1958 and Peerage Act 1963 did not become difficult issues, but attempts after 1997 to reform the Lords became a high-profile issue that caused a good deal of trouble for the government. On the other hand, attempts at devolution foundered at the referenda stage in 1978, but the government of 1997 managed it with almost perfect ease. Indeed, since 1997, there were some twenty measures of reform, but one is often hard put easily to recall even the more important ones, such as the independence of the Bank of England in setting monetary policy and base rates, Human Rights Act, a new Mayor for London, and so on.

Moreover, almost any confrontation between the executive and legislature where the executive issues a warning that it will treat a forthcoming division in the Commons as a vote of want of confidence is equally an *abnormal* condition. This does not happen often, and indeed, we may even find that what is ordinarily expected to be a vote of want of confidence may not be treated as such: recall James Callaghan, who decided that a penny off income tax was not such a disaster. But also recall John Major: opposition to the Maastricht Treaty from within his own party annihilated his Commons majority, and he had to declare the vote one of want of confidence to get the policy endorsed. He won, but in terms of the fortunes of the government and his own party, it was a truly pyrrhic victory.

As a final category, we may think of any measure that the party may deem detrimental to its support base, such as the 1968 Industrial Relations Bill (which the Wilson government abandoned in the face of expected difficulties in getting it through the Commons), and a number of occasions in the 1980s when, for instance, specific aspects of the reform of the National Health Service, or education policy, were faced down. We may add that touching some long established principles, such as the right to trial by a jury of one's peers, can also cause trouble: it is thus that, even though a manifesto item, the Blair government changed course on the 2001 Modes of Trial Bill in January 2002 because of evident opposition from senior government figures and the fear that Labour MPs would give it a rough ride in parliament, particularly after the turbulent passage of the Anti-Terrorism, Crime and Security Act 2001.

But given such limits, the government of the day can be assured of support because of its majority control of the Commons: it is in this sense that we can speak of the government capturing the exercise of the powers of parliament. Incidentally, in this respect, we are not interested only in the exercise of legislative, but also political/scrutiny powers of the Parliament.

The instrumental function⁶⁵⁵ of nationally-organised political parties is only valuable and can deliver if certain other conditions are also met, and the party machine is used in a certain way. Two conditions define the instrumental nature of parties: a leader with a team that can be translated into a government, and a declaration of the programme they wish to implement. But because the target of this mechanism is an elected parliament, and only the Commons is elected, a third, thus contingent, condition arises; namely the relegation of the House of Lords to a revising second chamber status with distinctly less important legislative and scrutiny powers. This amounts to the claim that in electing individual Members of Parliament, the "nation" elects a government by giving one party a

⁶⁵⁵ It is worth noting that the changing identity of political parties is a good index of changes that characterise the system: in terms of rough and ready "centuries", we may say that in the 17th century party was identified as faction and was shunned; in the 18th century it was seen as like-minded people working together, and was thought necessary if parliament was to function; in the 19th century, especially for Queen Victoria, it was a means of carrying on *Her* government; whereas in the 20th century it is distinctly the means of competition for political power.

majority in the Commons, to execute a declared programme and do what else may be necessary to govern.

The first condition could only be satisfied when and if the executive echelon was itself part of the political stratum: that is to say, when the king or the queen *regnant* ceased to be the chief executive, and the executive function, with undefined powers necessary for it, was delegated to the leader of the party with a (clear) majority in the Commons. Such an incumbent merely fills the office of the chief executive for the duration, but this undefined office is, in a fundamental sense, different from that in which we could speak of the executive office of the king, for this is a political office. More than that, this undefined delegation happened before the era of intense government activity and involvement in the affairs of the nation: it is in the era of the prime minister as chief executive that the functions of government, and powers necessary for it, have been expanded such that today the government is involved in practically every walk of life of the citizens. It is also important to understand that an undefined cluster of prerogative powers was delegated such that, as occasion demands, new functions can be added without any difficulty. This recalls the essentially Medieval and religious idea of the *plenipotestas* of the king, furnishing him with sufficiency of power to take action when needed. Thus, it is only in the abstract sense of the office of chief executive that we may speak of the executive functions of the king and that of the political executive as in one category. In albeit a roundabout way, this takes us to the current idea of the political executive, *viz.* the office of the prime minister.

We need not repeat the oft-told story of the emergence and development of this office, save to emphasise two points. First, there are no clear antecedents to this office in the longer history of British government; the short-lived experiment of the office of the Justiciar was abandoned many centuries ago. Indeed, the nearest we come to this office before the 18th century is perhaps that of the Lord Chancellor, with some other important political figure in the Commons acting as the king's or queen's necessary instrument of "managing" and "leading" parliament. However, the Hanoverians brought the idea of a first minister with

them, and it is possible to see some connection between the idea of the office of a prime minister as it develops here and the Hanoverian practice,⁶⁵⁶ even though we accept that late in the 18th century it was thought “unconstitutional” for a first minister to control the cabinet.⁶⁵⁷ But the origins and history of the office really matter rather little.

The second point is that because this office has never been established, the totality and range of its functions are unclear. To the extent that it has been mentioned in some statutes – one important instance is the Scotland Act 1998, which offered a glimpse of some statutory powers and duties of the prime minister – we know some of its statutory functions, but there is no definitive view of what it ought to be and what it ought to do, or more importantly, what the extent of its power is. For this reason, if none other, in order to study this office, many resort to political biographies of its former holders, which is fine as far as it goes, except that it does not go very far: in the absence of some coherent and established conceptual framework, life histories cannot exemplify larger meaning. There is no established framework and cogent theory: theories of kingship are relevant here, but only too often they present historically-contingent stories and arguments. On the other hand, pointed studies of the office have failed to provide a unified and coherent framework and conclusive arguments.⁶⁵⁸ We are thus forced into repeating the claim that the office is what its incumbent makes of it, and this can range from a self-willed, if not “presidential”, prime minister to that of an affable chair of the cabinet. Equally, we are forced to accept that its functions and powers appear to have grown over the years, evidently in response to political exigencies. We may add that the office is, and has invariably been associated with, the leadership of the party successful at general elections, that its term is

⁶⁵⁶ A. S. Foord *His Majesty's Opposition*, 1964, especially pp. 277-8.

⁶⁵⁷ W. S. Holdsworth 'The Conventions of the 18th Century Constitution' in *Iowa Law Review*, 17/2, January 1932, p. 175.

⁶⁵⁸ *Inter alia*, see G. B. Smith *The Prime Ministers of Queen Victoria*, 1886; H. Van Thal (Ed) *The Prime Ministers*, 2 volumes, 1975; C. Bigham *The Prime Ministers of Britain 1721-1921*, 1922; B. E. Carter *The Office of Prime Minister*, 1956; R. Blake *The Office of the Prime Minister*, 1974; and P. Hennessy *Prime Minister: The office and its Holders since 1945*, 2000. Less interesting and less informative studies include: J. Barber *The Prime Minister since 1945*, 1991; J. Margach *The Anatomy of Power*, 1981; and A. Salter *Personality in Politics*, 1947.

not fixed (it is not even meshed in with the duration of parliament) and that until recently the procedure for appointing a prime minister was altogether “mysterious”. Now that we have mechanisms for electing the leaders in both main parties, the procedure is a little clearer. At a general election, the potential prime minister is known, and the expectation that the leader of the party with a majority will be invited to “kiss hands” is simply not disappointed. What if there is no clear outcome? A political chief executive there has to be, and if it means asking the Speaker of the Commons to declare which group is the largest in the House, a viable appointment will be made, even if it means another general election soon. The extent to which the office has become a political one is demonstrated by the fact that every effort is made to ensure that the monarch does not become involved in the choice.⁶⁵⁹ This is further underlined by the fact that opposing the government is no longer “unconstitutional” or treasonable, and one does not need to justify and excuse one’s political opposition by appeal to arguments such as Patriotism, as did Bolingbroke.⁶⁶⁰

All this is very interesting, but for present purposes, we need focus upon one and only one fact; namely, that the office of the prime minister receives – it is the sole recipient – of the full but undefined executive (Prerogative) powers of the king/queen *regnant*, wholly placed at the disposal of an incumbent who functions in the political arena of parliament; and it is different from that of the Secretary of State. We must agree with Gladstone that the head of the British government is not a grand vizier,⁶⁶¹ an all-powerful servant of the Sultan, who rules in his name, by his authority, and is responsible only to him. We must agree not because the British prime minister is any less, or that he/she is merely *primus inter pares*, but

⁶⁵⁹ The public actions of the king/queen *regnant* hide the reality of their theatrical nature. In this regard, we need to pay some attention to the behind-the-scene activities of the Secretary to the Cabinet and private secretaries to the King/queen *regnant* and the prime minister. Peter Hennessy calls this the “hidden wiring”, but it is not new. Such preparations are the very reason why the system appears to work so smoothly, as though it was tightly regulated. Indeed, the system would collapse without it. See P. Hennessy *The Hidden Wiring*, 1995, especially chapter 2. But also see M. V. Brett (Ed) *Journal and Letters of Reginald, Viscount Esher*, Volume 2, 1934, for an account of behind-the-scene activities in the reign of Edward VII. See also J. Lees-Milne *The Enigmatic Edwardian*, 1986

⁶⁶⁰ ‘A Dissertation upon Parties’ in Bolingbroke *Political Writings*, 1997, pp. 99 and 109-111

⁶⁶¹ W. E. Gladstone *The Gleaning of Past Years*, 1879, volume 1, pp. 242-3

because a prime minister is far more than this: he/she is a surrogate king/queen *regnant*, exercising executive powers that belong to the office of the king/queen *regnant* and doing what the king or queen *regnant* can no longer do. However, only the political/executive powers of the Crown are “delegated”: the powers of the prime minister are not original and the office is not, and cannot be invested with what might, for want of a better term, be called “constitutional” powers of the Crown. The latter include the power to appoint and dismiss a prime minister (i.e. the government) or any minister (albeit upon the advice of the prime minister), dissolve parliament and with it the government of the day, cause a new parliament to be elected creating a “new” government, inaugurate the new parliament and set the process of government in motion, and grant royal assent to Bills. It would be folly to expect that these powers and functions, too, should be passed on to the office of the prime minister if for no other reason than for practical considerations. Indeed, those who wish to “modernise” the system without creating a Republic locate some of these functions in the Commons and invest a special Commission with others; in a Republic, these functions belong to the office of the non-executive President; and in an executive-President system they are regulated by the terms of the Constitution. Moreover, the divide between “constitutional” and political/executive functions serves two further unintended purposes. On the one hand, because the office of prime minister was never instituted as a new, *ab initio* entity, but evolved as a practical development within the system of Constitutional Monarchy,⁶⁶² the historical notion of royal government is preserved. Our highly political executive, born of party and functioning within a party-strapped Commons, is nevertheless “Her Majesty’s Government”; “kissing hands” places the seal of historical “legitimacy” upon the appointment, all underlined by the practice that the members of the government and the leader of the Official Opposition (and indeed anyone else who may be called to “tender

⁶⁶² The usual description is to say that the office is mentioned in the Treaty of Berlin 1878, and in a few Acts, such as the Scotland Act 1998. Incidentally, a royal warrant of 1905 placed the incumbent in precedence next after the Archbishop of York. It is interesting, and bizarre, to note that the practice of identifying the sequence of deference and precedence – order of importance in the land – is actually an important matter: a new life peer is told his number in the queue!

advice to the Crown”) must become Privy Councillors. On the other hand, locating the “constitutional” and political functions in two offices makes it possible to think of the Crown as above the fray, and in a sense, as the Guardian of the system.

Although the Crown's undoubted power to create new peers was underlined in the 1830s, that power would, nevertheless, have been exercised on behalf of the government (i.e. the majority) in the Commons. The power to create peers is now only exercised at the instigation of the prime minister. The Crown breathed its last gasp of wilful exercise of power in appointing the prime minister in 1834-5: George III and his “new tyrants” in 1783 is the much celebrated and discussed episode, but the end truly came with William IV who dismissed Melbourne and appointed Robert Peel: the result of the elections made it impossible for Peel to continue and Melbourne was appointed again. This matter was in effect put to bed in 1842 (even if the true significance of this change in practice was not apparent or appreciated until after 1867), when the ministry of Melbourne lost a motion of want of confidence in the Commons by one vote. The new House then supported Robert Peel, who assumed office *on his* terms against the wishes of the queen on the matter of appointments to the Royal Household (the so-called “bedchamber question”).⁶⁶³

This is not to say that the king or queen *regnant* is a (political) mute. Research is needed to show the extent to which George VI influenced the reform zeal of the Labour administration of 1945, by impressing the need to ensure that their reform measures would not result in changes in the working system. More to the point, given that for instance, Elizabeth II had seen ten prime ministers by 2002 and been intimately informed about State affairs for some fifty years (she receives State and Diplomatic Papers, daily reports from Parliament, and receives the prime minister in a weekly private audience), she is well-placed to take an informed but distant view of matters and offer informal advice in private. Bagehot was probably right about the place and rôle of the king/queen *regnant*. However,

⁶⁶³ See G. B. Smith *The Prime Ministers of Queen Victoria*, chapters 1 and 2. See also T. P. Taswell-Langmead, *English Constitutional History from the Teutonic conquest to the present time*, 1946, pp. 718- 723. See also G. H. L. Le May *The Victorian Constitution*, 1979, pp. 42-6 and 87-8. It is hardly likely that the rôle of Queen Victoria in dismissing Lord Palmerston as Foreign Secretary in 1851 (*Ibid*, pp. 61-75) could be reproduced.

things can go wrong: recall the tension between the Queen and prime minister in the 1980s. The point is that, being above the fray, the Queen no longer can have an active political rôle. But this prohibition runs deeper than matters of public policy: she cannot actively espouse even a good non-political cause. Indeed, many are concerned about the relatively high profile of Prince Charles as Heir Apparent on certain issues, but should he ascend the throne, he too will have to desist and act the part, and hope his past does not catch up with him.

It is clear that the development of the office of the prime minister has reshaped the landscape of government, but has not changed the historical conception of the nature of this system of government. That is to say, the practice but not the form or rhetoric has changed: the ambit and practice (with it the powers) of government at the turn of the 21st century are simply a world and an aeon apart from that in the heyday of parliamentary government, let alone any period before. In an important sense, this is how it should be, for the practice and powers of government ought to correspond to the functions of governance at any one time – it would be a moot point to emphasise pro-active or responsive types. But such enlargement of the ambit of government action should not change the form of government, except when the form prevents or makes difficult a new practice. On the contrary, the form should allow for changes in practice without too many difficulties, but presenting total flexibility as a supreme virtue simply goes too far. In this respect, this system differs from others with a Constitution, for here it is easier to institute change provided that the government of the day desires, or at least approves of it. Incidentally, this formulation can mislead, for the net effect of this manner of proceeding is not total but a two-tier flexibility, for this system is the hardest willy to reform at its core, but, alas, the core is in greatest need of alteration. At core, it is immobile: as Ben Okri memorably put it:

[I]t is often thought that a constitution that is unwritten is flexible and very visible when used by the powerful, but becomes very inflexible and invisible when it needs to be used by the powerless.⁶⁶⁴

The office of the prime minister became the focal centre of this system

⁶⁶⁴ *Towards a written constitution. Proceedings of the Charter 88/The Independent Constitutional Convention*, Charter 88 Trust, November 1991, p. 104.

through the realisation of the potential of nationally-organised political parties. This leads to the second condition necessary for the development of the Neo-Tudor style of government, namely a declared programme of policy and promises of action, inviting the electorate to give that party a majority in the Commons.

The Tamworth Manifesto (1834) is often mentioned in this regard, but the Newcastle Programme (1891) is a better landmark.⁶⁶⁵ Whether the former was an attempt to construct a party without principles, as Disraeli said, is beside the point: the fact is that whatever else may be said about it, the organisation of political parties at large was not and could not be anything more or less than as an electoral machine, promoting a potential government and programme of action. But such machines can serve more than just this purpose. Indeed, they became the instrument not only for creating but also sustaining a parliamentary base for the government of the day, for all practical intents and purposes, thereby sustaining the government for the duration of a parliament. And if initially a declared manifesto was an invitation to the electorate, it soon became obvious that it was also a wonderfully agile instrument of moral persuasion available to party parliamentary managers. We may reduce this notion to the claim that the electorate has, as it were, decided which party, therefore which political leaders, should form a government⁶⁶⁶ and has endorsed their proposed programme. Therefore, members of the party elected on such a “ticket” have a duty to sustain and support the government so that it could fulfil its promises. But such a development was not entirely innocent: this stability was bought at a price.

It meant that a vote on practically every measure in the Commons had the potential to become a vote of want of confidence, and that MPs of the party in office did not have the right to question this “contract” between the government

⁶⁶⁵ See R. Blake *The Conservative Party from Peel to Thatcher*, 1985, pp. 39-41, and B. Harrison *The Transformation of British Politics 1860-1995*, 1996, p. 172.

⁶⁶⁶ Are political leaders expected to serve for the duration? Mid-stream changes of incumbents happen for all sorts of good reasons, as in the successions of Eden and Home. But there may be arguments about the cases of Wilson and Thatcher: Wilson had apparently planned his resignation before the election: disclosing it would have caused problems, while not disclosing it raises the question of probity. As to Thatcher, there is some room to argue that she should not have resigned office but sought the dissolution of parliament. But that would have damaged the Conservative Party, and every political leader is always a party person!

and the electorate. It had the potential, soon realised, of denuding parliament of one of its supposedly prime functions, *viz.* to debate and approve policy. With this denuding went a significant loss of accountability, for a MP was there as a party delegate. In an important sense, this created an interesting tension. Indeed we ought no longer to describe MPs in Burkean terms, for the reality is far removed from it even if the very inviting rhetoric remains. Yet, they are expected to be independent of party colour and influence in their constituency work: they represent a *whole* constituency, not just those who voted for them, and in this they are expected to act *for* their constituents. But they are also party members, and in this they are expected, also by those who voted for them *and* those who did not, to act as party delegates. Indeed, we may go further and claim that the dream of a Commons composed of independent members has simply evaporated. The sheer volume of work involved and the absence of facilities for members means that they must rely upon the party – the Whips office and the whips – to keep them informed, and organise, if not manage, their actions in the House. The Commons singularly lacks any internal structure and organisation. *Prima facie*, there is no need for any such structure and organisation: 650 elected members attend, debate and vote. But this idea is simply not practical, and has every potential to collapse into utter chaos. Unless they are organised, MPs will not be able to function at all, but in the absence of an internal constitution for this body, the task is left to parties in parliament, with a good deal of “behind the chair” arrangements. Party whips in effect organise the party in parliament, keep the members informed and supply vital “preening” information to the leadership. Preferment in parliament in the form of membership of Committees and the all-important choice of Chairperson for the various Committees is a function of the Whips office – although currently these arrangements are being changed.⁶⁶⁷ Indeed, the whips also perform the all-important function of identifying candidates

⁶⁶⁷ Some procedural changes have already been made, but even allowing for the short time period since these changes, analysis of them tends to be theoretically thin, and more political than constitutional. For instance, R. Hazell *et al* ‘The Constitution: coming in from the cold’ in *Parliamentary Affairs*, 55/2, April 2002, pp. 219-234. At any rate, for a general survey since 1997, see P. Cowley and M. Stuart ‘Parliament: Mostly continuity, but more change than you’d think’ in *Parliamentary Affairs*, 55/2, April 2002, pp. 271-286.

for preferment into government. Of course, rebels soon feel the weight of the party machine, and few rebellious members survive. No wonder that, as a rule “leaving” a Party almost certainly means joining another in the House: rather than sitting as independent members; they cross the floor, for there is no counterpart in the Commons to the haven of crossbenchers in the Lords, who do not need to think of a political future. An individual independent member, not receiving party whip and papers, will be lost, will find it altogether difficult to function, and will have no political future: it is a nine day wonder.

The net effect of satisfying these two conditions is to create a government that is nominally dependent upon parliament, but successfully controls the exercise of the powers of the Commons upon whose support it depends for continuing in office. Of course, it is true that the Commons *can* vote out a government, but that is tantamount to party political suicide, and would almost certainly bring the opposition into office. The pressure for unity in political parties is great, but it is not always easy to achieve: MPs are ambitious in their own right, and although the obvious way up “the greasy pole” is by being a good party member, some are informed by principle, others find that in given instances they are unable to follow the party line, or are under pressure (for one reason or another) from their constituents. Others might see themselves at the margins of the party and recognise that they can have no realistic ambitions for preferment: they may rebel from time to time, but their actions are ultimately controlled by the fear that they might destroy not only the government of their choice – of their party – but also their own support base and career in politics: Enoch Powell had no future in the Conservative Party when he advised the electorate to vote for Labour in 1974.

The government of the day has the whip hand in all this: responsible government means that ministers must answer to parliament: this is still so, but they can do so with little fear for their office and policies, for if push come to political shove, they will win the vote. And if claim to collective responsibility was an attempt to ward off an interfering king, it had a pay-off in the form of keeping errant ministers in check, and is now more an instrument to protect the government against parliament. And because, especially on issues of importance,

the government of the day will treat every vote as one of want of confidence, and will remind its parliamentary members that a reduced majority would play into the hands of their opponents, dent the moral base of their own policies and so on, it is no longer possible to think of parliament, especially the Commons, as the organ which gives rise to, sustains and dismisses the government. In Neo-Tudor style of government, the function of dismissing a government belongs to the electorate, which means that there are no changes of government (i.e. party in office) without a general election – but returning a government does not in itself mean that the electorate has approved its record and issued a fresh “mandate”, for there may be no real choice at the time; at least the general elections of 1983, 1987 and 2001 are good examples of this. That fact notwithstanding, in effect now only the electorate can create or dismiss a government. Perhaps the *ultima ratio* of nationally-organised parties was not fully brought out in its naked glory until the 1990s, when the Labour Party too assumed this character⁶⁶⁸ (the Conservative Party has always been first and foremost an electoral machine). But this *ultima ratio* was always there and even when some did not think of the Labour Party in that light, it nevertheless had to rely upon it to gain power and form a government *before* it could be used as a “battering ram of social change”.⁶⁶⁹

This close intertwining of the fortunes of government and its political party, and therefore, the structure and ordinary workings of the Commons raises the larger question of the relationship between the executive and legislature. In an important sense, “centralisation” is only a by-product of this historical development: if, as Dodd⁶⁷⁰ thought, it was merely a means of binding the king to the cabinet, it soon became the focal conduit of control of parliament. Sidney Low understood this well when he suggested in 1904 that it was easier to convince the cabinet than parliament.⁶⁷¹ And given the increasingly important rôle and position of the prime minister, it takes but little for the centralising tendency to work its way through to the ultimate level: during the Blair governments, anguished cries were

⁶⁶⁸ H. Wainwright *Labour: the tale of two parties*, 1987, chapter 7.

⁶⁶⁹ Quote attributed to Crossman. See F. Mount *The British Constitution Now*, 1993, p. 166.

⁶⁷⁰ A. H. Dodd *The Growth of Responsible Government from James the First to Victoria*, 1956, p 185

⁶⁷¹ S. Low *The Governance of England*, 1910, p. 93

heard that “Tony wants” became the driving force of government policy, and the prime minister was actually expected to have and express instant opinions and declare government policy on almost every issue; if an Examining Board fails, it soon lands on the desk of the prime minister, for it touches government policy on education! Yet, there were also equally anguished cries that the direction of government policy was no longer in the hands of elected politicians or high-level civil servants, and that political advisors were running part of the show, creating tension with the permanent staff at No. 10 and with parliament, once again raising the question of lines of responsibility. Yet, it was also the case that, for instance at prime minister’s questions in the Commons, Blair often invoked the mantra of departmental responsibility of ministers and took pride in participating, as a former prime minister put it, in proceedings in a *real* parliament (though perhaps the irony was all but lost upon her).

But this parliament has two chambers, where the “octopus” effect of nationally-organised political parties is altogether weak in the Lords. This brings us to the third contingent condition necessary for the development of the Neo-Tudor style of government, namely the rôle and powers of the Lords. Clearly the landmark here is Parliament Act 1911, aspects of which have already been discussed; we now need to examine a different aspect of it. However, to avoid confusion, it is important to recall that the genesis of the issue between the two Houses pre-dates the development of nationally-organised political parties and indeed the processes and steps of the development of representative and responsible government. Put differently, not radicalism nor the incarnation of the idea of electoral democracy made the clash inevitable, for the kernel of the issue was the range of powers exercised by an unelected House. In a slightly different sense, it was also a clash between an essentially conservative and a largely progressive view of the nature of government. It would be an exaggeration to say that the ultimate effect of Parliament Act 1911 has been to make this parliament a one-chamber legislature; yet the very objective of the reform was to ensure that where, as a matter of policy, an issue was important to the government of the day, it would have its way irrespective of the second chamber.

The Lords, and the problem of Neo-Tudor style of government

“Do we have a single chamber parliament?” The answer to this is by no means obvious. Clearly we do not, yet it is hard to see in what *real* sense we actually do. The essential difficulty in answering this question stems from the fact that this bicameral legislature is composed of two *incompatibly different* chambers. Because the functions and the powers appropriate to one House do not relate to that of the other, and because the composition of the Lords places it beyond the pale of any conception of electoral democracy, it is very hard even to imagine, far less to accept, that chamber to exercise any meaningful power in the process of legislation or in any other capacity that touches the exercise of governmental power. But this question of difference must be placed in its proper context.

While it is true that from inception – from when they became visibly separate entities – they were different, it is equally true that the difference between them has grown wider such that there is no longer any conceptual affinity between them. The Commons changed as a result of two factors: first, the reform of the electoral system and the extension of the franchise, culminating in universal franchise by 1948; and, second, the activities of nationally-organised political parties. Skewed and much exposed to serious criticism, it is still a House based upon a wide franchise. Meanwhile, the few changes to the composition of the Lords (important though they are in their own right and for the history of the House) have only embellished it. This embellishment and much else, besides creating a hardworking and in many ways an effective Lords, have not and do not touch the larger, far deeper question of its nature: they have not squared the circle of legitimating a hereditary, socially antediluvian idea with the wonderfully irreverent attitude characteristic of a disenchanted world. The consequence is a significant divergence between the natures of the two Houses, such that now this Lords does not belong in an electoral democracy and cannot legitimately participate in using the powers of parliament. The point is not that this type of chamber is out of place because the UK is a perfect democracy and its parliament is sovereign, but that this type of chamber does not belong in any kind

of democracy (real or sham), and none should suffer it to use the powers of parliament, even if those powers are strictly defined and limited, far less its supposed “sovereign” powers. On this account, there is no need to entertain the question about a single-chamber legislature, for that is the wrong question to ask: given the desirability of two chambers, the real concern must be with how to reform the Lords such that it is at least within the pale of understanding before we can begin to examine its power and functions. The question of its composition is of the first importance, and many current difficulties arose precisely because this question was long avoided. True, various measures had an impact upon the composition of the House (some more than others) but none touched and made the slightest difference to its generally appointed *nature*.⁶⁷² It is thus that the problem of the Lords, and any attempt to reform it, are deeply the problem of parliament such that it would be folly to reform the Lords without, in the least, re-writing the conceptual nature of this parliament as such. This in turn would entail clarifying the relationship (and balance) between the two Houses, and, no less, between the legislature and executive. This recalls the point made earlier that in reforming the Lords, the centre is actually reforming itself, and goes some way to explain why the Lords has been such a difficult problem, actually since the 1820s. The agenda of this and the next sections are thus defined: after a brief account of the present relationship between the two Houses and proposed measures of reform, we shall proceed to consider the Lords as the Guardian of the system.

Parliament Act 1911 gave statutory expression and effect to the Commons’ claim to have the sole say in matters of finance: they had claimed this back in the 17th century, and made more effective it by opting for a consolidated finance Bill late in the 19th century. This Act also made parliament potentially a single-chamber legislature in respect of public Bills introduced first in the Commons. The actual mechanism of the Act served to enable and allow a degree of discretion in that the Commons did not have to disregard the Lords on every measure, but the

⁶⁷² There may be a nuanced argument about the relative desirability of a hereditary House in which members attend in virtue of some right to do so, as opposed to one in which members are political appointees. But both types belong to a larger class, *viz.*... that in one way or another, hereditary *and* life peers are appointed not elected.

latter recognised its reduced position and behaved accordingly. A necessary rider to this obvious point is that frequently invoking the terms of Parliament Acts 1911 and 1949 would have provoked moral and political reaction and crisis, even at a time when the media were not as robust and “aggressive” as today.

We must see the Salisbury Convention of 1947 in much the same light: that is to say, recognition by the Lords of their further reduced position. A House based on hereditary peerage was simply out of place in the immediate post-war world, with its resultant and massive dislocation of social attitudes, and at a time when universal suffrage was about to be introduced. Besides, not yielding to the reform measures of the Attlee government would have meant indirectly confronting the electorate, which, because of differences in the social and political circumstances, would have been a far more serious challenge than that of 1906-1910. Moreover, this “convention” – in truth only a self-denying ordinance – served to delay necessary change and the 1958 Peerages Act bought precious time for the House, which they used wisely. They proceeded to assume functions and undertake duties that the Commons would not or could not undertake: detailed discussion of the principles of Bills, informed technical comment on Bills drafted badly or hardly examined in any detail in the Commons; setting up the type of Committee and undertaking the kind of detailed examination of topics that the Commons were simply unable to do; later on, focus upon the European Union, followed by Human Rights, the “constitution” and so on. In most parochial analysis of the working system, emphasis is rightly laid upon the good work of the Lords. The quality of their work is indeed excellent: they are diligent; and a bargain for the nation at twice their current cost. These claims, and many more like them, are true but beside the point, for we are still left with the fact that it is a House out of conceptual time and place. We need not focus upon the thorny issue of social hierarchy: “commoners with coronet on their coat of arms” might be happy with their “elevated status” and see it as an achievement, they might even delight in having received recognition for whatever “service” they are said to have rendered; such recognition is only infantile nonsense, and provided it does not intrude into the realm of public power it may be left alone to die of social

neglect. Lesser honours do not intrude into the exercise of public power, and are often used to reward long service or achievement of some kind: well, so be it, although it is difficult to see why an achievement or fact of good service is not, as such, sufficient recognition and reward, and that there is need for further recognition from an institution that is itself anachronistic, if not actually conceptually monstrous. It may well be that maintaining social distinction and perpetuating social hierarchy is a necessary prop to maintaining the *quasi*-religious system of monarchy, for by bestowing honours monarchy is further renewed: possibly; but as Hegel said, let the dead bury the dead.

Politically-motivated life peerages are of a somewhat different sort. The Lords may be the proverbial Elysian Fields for erstwhile politicians, although of late some have refused the traditional honours that attend retirement (to their utmost credit, Edward Heath and John Major declined, and one might have expected Bernard Weatherall to refuse), and it is one way of getting rid of party “grandees” and “big shots” no longer in favour. But it is utterly impossible to understand how one may justify the elevation of non-politicians or former civil servants, such as academics, just because they are good party men. One expects right-thinking persons not to be corrupted by the lure of ermine and title, and prefer to make their contribution in their chosen field, subject to the rules of their field of activity. The sovereign “commanding” the “wise” to attend and give their “good counsel” was probably fine when the king/queen *regnant* was the government. But much has changed since, such that there is no need for that kind of counsel any more.⁶⁷³ However, the exercise of that prerogative is now in the gift of the government of the day, and is put to a different use. For now, such appointees are not expected to give their “good counsel”, but are placed in the Upper Chamber of the legislature, and the actual differences between the two practices appear to have been completely ignored. Reasonably, one ought to expect such appointees not to participate in the exercise of legislative or political power of any kind or

⁶⁷³ Perhaps that rôle is reserved for, and the function performed by, a new element in the current “court” system, in the form of the body of special advisors that inhabit No.10 Downing Street. This has provoked the consternation of many parliamentarians and the media who see them as powerful elements not subject to any measure of political accountability.

degree, and it is only rational to expect such a “council of the wise” to disappear when the government goes out of office; alas, there is nothing quite as logical as this in this system of government. Moreover, creating peers for life introduced yet another twist and distortion into this system of government, perpetuating what is now a historical oddity by giving it a fresh lease on life, but now out of its time.

There is no gainsaying that the present problem of the Lords stems from this renewed lease on life. If, occasionally, a thorn on the side of the government and a pain to the Commons, it is, for all that, functionally very useful to both, especially in its pre-1999 form. It is implicit in comments made earlier about the relationship between the party-strapped Commons and the party government of the day that neither would want that relationship to end or be significantly reformed. This is so for the altogether obvious reason that the two elements, i.e. the party in parliament and the executive, are in a relation of symbiosis which they find satisfactory, if not crucial to the continuity of their present position of dominance in the system. On this view, we might be justified in the claim that the renewed, revitalised and “electable” Labour Party made an ill-considered promise in the 1990s to dispose of the hereditary principle and reform the Lords. This promise was in part delivered in Stage One of the reform, in the form of the 1999 House of Lords Act. But that was the easy part, and resulted in a rather intriguing situation, implicitly threatening the cosy symbiosis mentioned.

Stage One reform produced an essentially appointed House (the 90 odd remaining hereditary peers were to disappear by dint of another Act of Parliament in Stage Two). For some, especially in the Lords, this meant an upward review of their thus-far questionable legitimacy: the House became more assertive if not more authoritative, so much so that some questioned both the validity of the Salisbury self-denying ordinance and the broader limitations potentially buried in Parliament Act 1911. For others, especially in the Commons, this raised the inevitable fear that a revitalised and re-legitimated Lords would threaten the fragile electoral legitimacy of the Commons and its pre-eminence. Although it is artificial to separate the issues and the way they have been examined and

discussed in various debates in the Lords,⁶⁷⁴ we may yet do so for ease of analysis.

On a motion of Lord Simon of Glaisdale, the House debated Parliament Acts 1911 and 1949 and the Salisbury Convention.⁶⁷⁵ Apart from a robust defence of the system, and arguments against any change⁶⁷⁶ the tone of the debate was to argue for more and better powers for the House of Lords: Lord Peston felt that should the House be fully elected, Parliament Acts 1911 and 1949 will have to go, whereas some – including Lords Desai, Rodgers and Strathclyde – questioned the relevance of the Convention, while Viscount Cranbourne emphasised the importance of a stronger Lords for a better Commons and even called for powers to insist upon post-legislative referendum. Over against this, Lord Williams of Mostyn, expressing the government view, mounted a robust defence of the prevailing conditions: Parliament Acts 1911 and 1949 were law of the constitution, whereby the Commons get their way without having to claim absolute supremacy; the Commons are supreme because of their electoral base, and any post-legislative referendum would detract from the authority of parliament. Moreover, the Salisbury doctrine has become a Convention and is part of the constitution, and stays. Having earlier declared that the two Houses are in an un-equal balance, he concluded that nothing had changed to require a modification of the law and convention regulating the relations between the two.⁶⁷⁷

The effect of the enactment of either Lord Donaldson's Parliament Acts (Amendment) Bill (2001), or Lord Renton's Parliament Act 1949 (Amendment) Bill (2001) would have been to enhance the position of the Lords in relation to the Commons. Though the two debates took place almost a year apart, and the first Bill was lost after its Committee Stage, and the second seemed likely to suffer a

⁶⁷⁴ In four debates in the Lords, viz... Parliaments Acts (Amendment) Bill: 19 January 2001; Parliament Acts and Salisbury Convention debate: 24 January 2001; Parliamentary Referendum Bill: 31 January 2001; and Parliament Act 1949 (Amendment) Bill; 16 January 2002. Parliamentary Referendum Bill 2000 is discussed further below.

⁶⁷⁵ Lords *Hansard* text for 24 January 2001.

⁶⁷⁶ Notably from Ralf Dahrendorf and Philip Norton. *Ibid*, columns 273-8. Incidentally, the latter wanted clarification of the Salisbury Convention in order to generate criteria of relevance for its application.

⁶⁷⁷ *Ibid*, columns 296-9.

similar fate – possibly without a Committee stage – and given that they are different in detail, yet the import of the two was very similar.

Lord Renton sought to limit the applicability of Parliament Act 1949 to measures introduced for the first time into the House of Commons in the third and subsequent sessions of parliament. This would mean that any measure that the government intended to enact by invoking the terms of Parliament Acts in the first two sessions would be subject to a delay of two years – Parliament Act 1949 would not apply. Moreover, this amending Act would come into force with the first popular election for the new Lords. In other words, given an elected element, the Lords should have enhanced powers. Interestingly enough, the view of the government was simple: they refused to oppose it in the Lords, expecting full well that it would be defeated in the Commons,⁶⁷⁸ if it got that far.

Lord Donaldson invoked the rather stale and already irrelevant debate about the delegated-legislation nature and, therefore, effect of Parliament Act 1949, and sought to avoid a “confrontation” between the Courts and Parliament by enacting that all measures passed under its terms are valid Acts of Parliament: we need not really bother with this “debate” (but see *infra* Chapter Seven, *Excursus on common law and judges*), even though concern with this well-worn notion dominated the second reading stage of the Bill. However, Donaldson really intended to enhance the powers of the Lords especially in respect of their own composition and powers. Thus, the list of exclusions in section 2(1) of Parliament Act 1911 was to be extended such that any Bill containing any provision to vary the constitution or powers of the Lords, Bills not fully discussed and debated in the Commons, Bills amending (implicitly or otherwise) the provisions of this Act or Parliament Acts 1911 and 1949, or extending the duration of the life of parliament, were to be excluded from the terms of Parliament Acts 1911 and 1949. The debate was largely nondescript, and only two interesting points emerged from it. Lord Goodhard made the argument, firstly, that the idea of delegated legislation as applied to Parliament Act 1949 was fiction, and that no Act of Parliament can ever be delegated legislation; and, secondly, that it was inappropriate for the

⁶⁷⁸ Lords *Hansard*, text for 16 January 2002, columns 1154-1176

unreformed Lords to veto changes to its composition.⁶⁷⁹ The Committee Stage (28 January 2001) did not produce any argument of note, and the Bill was lost at the end of the session.

It is clear from the above discussion that the mood of the Lords was actually rather very different from its pre-1999 one. Suddenly, the government were faced with the fact that the beast that was the subject of their Stage One reform was not the same that was the subject of Stage Two! They actually made their own position far more difficult than a wholesale reform of the Lords in one fell-swoop would have presented. Be that how it may, the government entrusted the question of the reform of the House to a Royal Commission.⁶⁸⁰

For various reasons, this was a doomed exercise, and a colossal waste of time and resources. Its terms of reference so restricted its ambit as to make the exercise futile. It was invited to report on the rôle, function and composition of the second chamber against the background of the “need to maintain” the pre-eminence of the Commons and within the limits of the present settlement. The Commission confounded this by expressing a sense of satisfaction with the Lords: so far so good, they said, but changes are needed if the House is to play an effective rôle in the new century (2.17). They then compounded their difficulties by adhering to a rather difficult – almost Whitehall/Official – view of the system: they identified the features of this “constitutional settlement” as: sovereignty of parliament; the absence of a written constitution; Commons as the repository of the democratic authority, the body that makes or unmakes governments, calls the prime minister and government fully to account, controls taxation and grants supply, and can override the Lords including in amending Parliament Acts 1911 and 1949 (3.3 and 3.5). They expressed the view that “... whatever the theory, parliamentary sovereignty in the United Kingdom resides, in practice in the House of Commons”, and thought that this defined the need for a second chamber, made urgent necessary because normally the (one-party at a

⁶⁷⁹ Lords *Hansard*, text for 19 January 2001, columns 1308-1331

⁶⁸⁰ *A House for the Future*. Royal Commission on the Future of the House of Lords (2000), Cmnd 4534 (henceforward Wakeham Report). References are to paragraph numbers, given in parenthesis in the text. This Report is available online: <http://www.archive.official-documents.co.uk/document/cm45/4534/report.pdf>

time) government is dominant in the other House, and the exercise of power is only really constrained by the media, public opinion, and electoral cycles. Hence, it is altogether curious that they should argue for a second chamber in order to “complement” the Commons in the scrutiny of the executive and hold the government to account (3.6 to 3.10). The net effect, they rather hoped, would be to “enhance” the ability of parliament to carry out these functions, without undermining the authority (i.e. pre-eminence) of the Commons (3.11).

By accepting the centre view of the system – even though they also identified its core problem – they placed themselves in a tight corner: the die was cast, and there was no chance that this Royal Commission could say anything of any interest whatever. One is rather surprised that the majority of its members – at least its academic complement – did not resign when this kind of government and self-imposed restriction became clear. How could they recommend a *real* second chamber without undermining the altogether problematic fusion and concentration of power in the Commons? The answer is rather obvious: they could not. Yet, they were not completely dead to the real issue: the problem, they said, is not an issue between the two Houses, but one of the relationship between the executive and the legislature (4.6). In the event, they recommended not only a camel (a horse designed by a committee) but a lame one at that. They could not recommend an elected House, and could not avoid an elected element; they could not recommend the continuation of the hereditary principle without exposing themselves to deserved ridicule, and sought to create a better House by recommending a largely appointed House with a small elected element while emphasising the need for an *independent* appointment commission. It was almost inevitable that they would accept that the current balance between the two Houses was about right (4.7 and 4.12) and accept that increasing the powers of the second chamber would be inconsistent with pre-eminence of the Commons! (5.7). However, they recommended that, over and above the existing powers of “suspensory veto” in legislation, co-equal power over the duration of parliament and the dismissal of judges and some key appointees, the Lords should have equal power with the Commons in amending Parliament Acts 1911 and 1949.

There is much else besides in this Report (it became famous for the number of recommendations it made, some 132)⁶⁸¹ – although, in view of their restricted terms and self-imposed conceptual limitations, very many were rather obvious and expected. However, it is worth pointing out that in one respect (concerning Statutory Instruments - The Wakeham Report, Chapter 7), it is not at all clear whether their recommendations would increase or decrease the Lords' power.⁶⁸² Surprisingly (for it came from experienced and thinking people), they also thought that the oddity they proposed should function as the Guardian of the “constitution”, and made a number of recommendations for that purpose – we shall resume this point below.

The government could not wholly reject or accept the Report: indeed, having set restricted terms of reference for it, the prime minister in his introduction to the White Paper (2001, Cmnd 5291) took the echo of Commons pre-eminence as a kind of finding and recommendation by the Commission – as indeed did the Lord Chancellor in his opening remarks in the debate on the White Paper. They accepted the broad view that the new House should be largely appointed with an element of directly elected members, on the whole to correspond to the most recent distribution of the votes for each party. This White Paper was the subject of debate in both Houses, to be followed by a period of reflection.

Robin Cook,⁶⁸³ as Leader of the Commons, summarised the government's preferred option by emphasising the rejection of hereditary peers, the subordinate rôle of the Lords in revising legislation, scrutinising the government and debating

⁶⁸¹ A good deal of its recommendations concerned the relative *minutiæ* of the new House. Such detail is important to further refine their view of the proposed composition of the House, its powers and functions, but is relatively unimportant for larger, more abstract considerations, as in this study. Equally, reforms proposed by the Leader of the Commons in December 2001 (such as better pay for committee chairpersons, and the appointment to Chairs by the House rather than directed and controlled by the Whips) are important details with possible implications for a more effective Commons, but not of concern here.

⁶⁸² Whether changes they proposed to the procedure for Statutory Instrument – in effect creating another category of delaying power – and an addition or subtraction from the power of the House of Lords is perhaps debatable: they presented this as enhancing the power of the Lords (chapter 7 of The Wakeham Report) but their “Lordships” disagreed. See the two-day debate on White Paper (2001) 5291, 9/10 January 2002, especially speech by Baroness Williams, columns 572-3

⁶⁸³ House of Commons *Hansard* Debates, 10 January 2002, columns 702-9

public policy, but with no powers to compel the Commons to change the view of its “elected majority”. Moreover, certain matters were reserved for the Commons: the decision as to what should become law; power over finance; and the right to form a government on the basis of majority in that House. The very foundation of his argument was the claim that the Commons are “... the wholly democratically elected chamber, on which its prerogatives rest”. Their preferred composition on the reformed House (some 600) would include 20% elected, 20% appointed by an Appointments Commission, and the remaining seats distributed among the parties on the basis of their most recent electoral support. This would produce a House not dominated by any one party, but the party of government would form the largest block.

This is a rather complex way of describing the system, and we may simplify its true import thus: save for power over finance, the Lords performs the same duties and carry out the same functions as the Commons, except that they have no power to compel the government to change course. The Commons is the only chamber empowered to do so, but it does not because it is party-strapped. Therefore, it follows (as it must) that the government is beyond effective “constitutional” scrutiny and control in all respects, which also means that it is controlled by reason and methods of political expediency.

It is hard to say what the mood of the Commons was in the ensuing debate, except that they did not endorse the proposed changes. Two threads seemed to run through the debate. Firstly, that nothing should undermine the position of the Commons and that an elected second chamber would seek more powers on the basis of its democratic legitimacy. Secondly, there was support for an elected House: an Early Day Motion, calling for a wholly or substantially (later said to mean *circa* 50%) elected House, attracted a sizeable number of signatures. These two desiderata conflict to such an extent that it may not be possible to discern a single mood for the Commons on this subject – to give Robin Cook his desired “centre of gravity” – although the Select Committee on Public Administration seemed to think that the overall preference of the Commons was for an elected second chamber (discussed below).

The Lords staged a two-day debate on the White Paper. The Lord Chancellor opened the debate,⁶⁸⁴ remarking that an un-elected Lords could be an effective check and balance in that it could persuade and restrain the Commons and the government:

We took as our starting point the recommendations of the Royal Commission chaired by the noble Lord, Lord Wakeham. We have not followed every detail, but we believe our basic approach to be the commission's. We started, as did the commissioners, from the role and functions that the second Chamber should perform. We concluded, as did they, that it should be a revising and deliberative assembly, not seeking to usurp the role of the House of Commons as the pre-eminent Chamber. It should have a membership appropriate to its functions, and not seek to duplicate the other place. It should be as representative as possible of the broader community in the United Kingdom, but not so constituted as to put at risk the relationship between elected Members of the Commons and their constituents, as a wholly or substantially elected House would do. We concluded that it should not be dominated by any one political party....

...a second Chamber that was wholly or largely directly elected could bring it into conflict with the other place. Our system of parliamentary democracy is built on the accountability of government to the House of Commons and through that House to the people. To assume power a government must command a majority in the House of Commons; to retain it, it must retain the confidence of that House. That is what has given us stable democratic government for so long and which reform of this House must not imperil.⁶⁸⁵

In other words, the government desired to institute some changes to the composition of the House without changing its powers, so as not to disturb the basic balance of the system. This point received an odd echo in the words of Lord Richard who said that no government would want to make life difficult by having an elected second chamber.⁶⁸⁶

The balance of the argument in the Lords was distinctly in favour of an un-elected House: for Lord Wakeham, this meant preserving the pre-eminence of the Commons while being able to make them think again.⁶⁸⁷ In a rare moment of realism, Lord Wakeham also said that reform will go as far as the Commons – *read* the government – would allow; which stood in sharp contrast to Lord Ferrer's view that parliament should reform itself to reflect its thinking, and that the

⁶⁸⁴ Lords *Hansard* text for 9 January 2002, columns 561-4

⁶⁸⁵ Both quotations *Ibid*, column 563

⁶⁸⁶ *Ibid*, column 603

⁶⁸⁷ *Ibid*, column 583

government should have no say in it.⁶⁸⁸ Two further points deserve mention: Lord Sewel suggested that the legislative proceedings in the Lords should really be the committee stage of Bills as part of the process in the Commons; while Lord Saatchi (not a former politician) was the only member to express doubts about the idea of the pre-eminence of the Commons.⁶⁸⁹ But the most surprising idea came from Lord Palmer, who lamented that few realised how fortunate they are to have *this* House of Lords, as the only effective opposition to the government.⁶⁹⁰ Their “Lordships” were not amused with the proposals in the White Paper and the government got a rough two days in the House.

Perhaps the fact that the debates were wholly against the tenor of the White Paper, albeit for different reasons, only goes to underline the point that touching this topic means touching the entire system. The Conservative Party saw an opportunity for mischief in all this and quickly proposed a plan to be put to the “promised” joint committee of the two Houses. There are three interesting features in this proposal.

First, they related it to reform of certain Commons procedures and concepts, such as confirmation of key appointments and the rôle of select committees, and sort of promised to make further proposals.⁶⁹¹ Second, they proposed to replace the Lords with a 300-strong Senate, with a balance between elected (multi-member constituency, and simple plurality system) and appointed (by an independent commission) elements of 80-20. The Law Lords would be ejected into a Supreme Court, while Lords Spiritual would represent various faiths. Such a House would have no need of the Salisbury Convention (although a new one would evolve) while Parliament Acts 1911 and 1949 would be entrenched to protect the new Senate’s powers. The basis of this approach was the avowed principle of sovereignty of both Houses, deemed essential to the functioning of a bicameral system. The Senate would have enhanced powers, including the power to call for referenda on constitutional Bills, but details were sparse: indeed, as in

⁶⁸⁸ Lords *Hansard* text for 10 January 2002, column 731

⁶⁸⁹ Respectively *Ibid*, column 707, and Lords *Hansard* text for 9 Jan 2002, columns 615-6

⁶⁹⁰ Lords *Hansard* text for 10 January 2002, column 723

⁶⁹¹ *Delivering a Stronger Parliament. Reforming the Commons*, The Conservative Party, February 2002

most cases, only general desiderata were stated, with the details to be examined and agreed to in the promised Joint Committee. Incidentally, this also meant that this kind of reform is in the gift of parliament, which means the government of the day. Lastly, the Senate would be assigned the function of constitutional watchdog, assisted by the “Senate Select Committee on Constitution”.⁶⁹²

The third feature of note is the incredible opportunism of this move. Recall the Conservative reaction in 1860s and beyond: they thought of the Lords as the guardian of the political system: when the electorate and the Commons were at one, the “vocation of this House has passed away”; otherwise, they would appeal to the idea of the mandate. As Lord Salisbury described it

[t]he plan which I prefer is frankly to admit that the nation is Master, though the House of Commons is not, and to yield our own position only when the judgement of the nation has been challenged at the polls and decidedly expressed.

He also enumerated the advantages of the “Doctrine”: it is theoretically sound; popular; safe against agitation, and “so rarely applicable as practically to place little fetter upon our own independence.”⁶⁹³

Clearly the (Conservative) Lords did not wish to concede ultimate – almost sole – legislative and political power to the Commons, and even thought of carving a role for the electorate as an ally, expecting either that they would have to accept the outcome, or more likely, that the progressive elements would not be prepared to concede any real power to the electorate at all. By this stratagem, they appealed to processes of democracy that the progressive element did not appear too keen on: but this kind of appeal is characteristic not only of the last decades of the 19th century, but also that of the first decade of the twenty-first! Was the Conservative Party now serious about a nearly wholly elected Lords? Their contribution was a counter-proposal (not a policy statement) in response to the White Paper, that they wished to place before the hoped-for Joint Committee: this declared a desire for a better balance between the executive and legislature but did not spell out the details. Moreover, they promised further proposals

⁶⁹² Strathclyde (Lord) and E. Forth *The House of Lords: Completing the Reform. Response to the White Paper*, The Conservative Party, February 2002

⁶⁹³ G. H. L. Le May *The Victorian Constitution*, 1979, chapter 5, especially pp. 136-7

to re-establish the pre-eminence of our essential democratic institutions, and to demonstrate to the electorate both how their vote can make a difference and how their participation in democracy does not start or end with a single vote cast every four or five years.⁶⁹⁴

Serious or not, they managed to make much hay in the present sunshine. The government could not possibly accept their proposals, even as the compromise outcome of a possible joint committee. But whatever the shape of the final reform, the Conservatives could always say that they proposed a more democratic version, which, should they come to power, would refuse to enact because it would mean too many changes too quickly. Heads or tails, they win! Their strategy seemed a pretty safe one: they called for democratic and radical changes that the democratic and radicals elements when in government would not entertain. It is a bluff they could pull relatively easily because no beneficiary of the system has as yet shown any readiness to undermine the very foundations of their success in gaining access to governmental power. In enabling the Senate to call referenda on constitutional Bills – which they wanted the Joint Committee to consider – they reached back to the preference for referenda that the Conservatives exhibited at the turn of the last century (or Henry Brougham’s appeal to the people as “the resource of the constitution”, *supra* section on Parliament), which they knew full-well the Liberal Party and the radicals would not accept then, nor could the Labour government: for in Neo-Tudor style, access to governmental power is highly valuable precisely because it grants (relative) freedom of action to the party in government, provided they manage their majority in the House, and keep an eye on the next general election.

But reform there would have to be: the Labour Party let the cat loose and committed to some action because Stage One emasculated the old but did not create a new House, not because, as Robin Cook put it, the Commons is modernised but not the Lords.⁶⁹⁵ The government was in a bind: as a simmering problem, the issue of the Lords could have continued for a little longer, but it is not a simmering problem any more. The point is that if the government did not

⁶⁹⁴ *Delivering a Stronger Parliament. Reforming the Commons*, The Conservative Party February 2002, p. 11

⁶⁹⁵ Evidence to Commons Select Committee on Public Administration, 17 January 2002, 225

institute further reform – which is possible on the back of much delay because of the absence of the requisite support⁶⁹⁶ – the next government would have to do something about it. Would the Conservative party, should it gain power, create a Senate according to their ideas, or, as is more likely, would they trim it – as a result of the compromise in the Joint Committee – to ensure the continuity of pre-eminence of the Commons and thereby renew the basis of Neo-Tudor style of government?

Serious reform of the composition (and the powers) of the House of Lords is sensitive because it reveals the fundamental poverty of the theoretical basis of Neo-Tudor style of government. For many, the British membership of the European Union provided *the* opportunity for “constitutional” reform, especially to put an end to sovereignty of parliament *in practice*; application of higher norms as in judgements of the European Court; a necessary re-think on citizenship, rights and so on. The effect has not been quite the revolutionary change that some hoped for, and the desire for reform became acute in the 1980s. Perhaps it was the frustration of that decade that induced the Labour Party in 1992 – possibly believing its own rhetoric about modernisation, and perhaps oblivious to the involved nature of the problem – to make a rash promise to replace

... the House of Lords with a new elected Second Chamber with the power to delay, for the lifetime of a Parliament, change to designated legislation reducing individual or constitutional rights.⁶⁹⁷

In 1997, they made this more explicit and perhaps less obviously radical, proposing a two-stage reform. First, to remove the hereditary peers as the “first stage in the process of reform to make the House of Lords more democratic and representative.” Stage two would follow a review, to ensure that “party appointees

⁶⁹⁶ For instance, the Lord Chancellor emphasised the need for consensus on a compromise because the government and parliament cannot and do not aim to bind their successors. (Lords, *Hansard* text for 9 January 2002, column 562). He repeatedly said that there are as many opinions on this as there are people (e.g. in his evidence to the Commons Select Committee on Public Administration, 24 January 2002, 390), echoed by Robin Cook’s search for the elusive “centre of gravity” (often repeated, such as in his evidence to the Commons Select Committee on Public Administration, 17 January 2002).

⁶⁹⁷ ‘It’s time to get Britain working again’ Labour election manifesto, April 1992. See also Labour Party Policy Paper, Appendix 1 in R. W. Blackburn and R. Plant *Constitutional Reform*, Longman, 1999.

as life peers more accurately reflected the proportion of votes cast at the previous election". They also promised a Joint Committee of the two Houses to undertake wide-ranging reviews of possible future change.⁶⁹⁸ Then in 2001, they seemed to realise the folly of their promise, for in the election Manifesto that year, they slipped in the requirement to reform the Lords while maintaining the pre-eminence of the Commons. In this, they promised to support the conclusions of the Wakeham Report, produced by a commission that took its cue about the primacy of the Commons from its initial remit issued by the government!

This promise was rash at least in the sense that they clearly had no strategy other than a skeletal idea of what they did not want – as the quotations above clearly demonstrate. Thanks to this folly, the impetus for change now came from what some might have thought a manageable piece of reform that turned out to be a quagmire and a political nightmare; one clearly unintended consequence of reform was to place the very essence of Neo-Tudor style of government on the line. The Lord Chancellor provided indirect evidence for this when he insisted that the question of relationship and balance between the two Houses was different from that of the legislature and the executive, and that they can and ought to be tackled separately.⁶⁹⁹ This absence of forethought was also reflected in Robin Cook's pronouncements,⁷⁰⁰ but he also insisted, rightly, that an elected second chamber would jeopardise the pre-eminence of the Commons, for a wholly-elected second chamber could not have limited powers.⁷⁰¹ For the Lord Chancellor, a substantially-elected second chamber would threaten to end the all-important pre-eminence of the Commons – "essential for the stability of British government" – because an elected Lords would

upset the conventions which caused the House of Commons to be accepted as superior, conventions which were premised upon the House of Lords being unelected which in practice would prove to be swept away over time if we had a substantially elected House of Lords.⁷⁰²

⁶⁹⁸ <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>

⁶⁹⁹ Evidence to Commons Select Committee on Public Administration, 24 January 2002, 392

⁷⁰⁰ Evidence to Commons Select Committee on Public Administration, 17 January 2002, 194

⁷⁰¹ *Ibid*, also 230; and Commons *Hansard* Debates, 10 January 2002, column 707

⁷⁰² Evidence to Commons Select Committee on Public Administration, 24 January 2002, 477; the quotation, 471

They desired the impossible: an elected element in the Lords to offer electoral legitimacy without threatening the pre-eminence of the Commons. But this could only mean the fudge of a substantially appointed House so that while the electoral process is not its sole basis of legitimacy, nevertheless, *via* the magic mechanism of an appointment system, it would reflect the latest balance between the parties at the polls. One cannot easily institute this reform, except by fiat. But the need for fiat, supported by a Constitution Unit paper commenting on the White Paper (arguing that Constitutional reform requires leadership not consensus, and that once reform is in place, others will adjust to and accept it) elicited a rather muddled response from Robin Cook, even though it is probably the only way that such a reform could be carried out under present arrangements. Of course, this statement of current practice only goes to underline the claim so often made in these chapters that what goes for a constitution belongs to the government of the day; there is no Constitution, and there is a serious lack of constitutional theory.

The out-of-balance poise of this system has been destroyed, and the essence of the Neo-Tudor style of government was suddenly the focus of attention. However, evident divisions in the cabinet, and the apparent mood of both Houses, induced the government to postpone all action for the current session⁷⁰³ and prolong the period of “reflection”.

It was thus not surprising to find the government preparing the ground for vacillation on the basis that there was no common ground concerning Stage Two – but this could not go on for ever: see below. The Commons Public Administration Committee (2002) begged to differ and offered an alternative in their Fifth Report. They argued that, as a matter of fact, the largest number of respondents in the Commons preferred a largely-elected second chamber, that is to say, that there was a “centre of gravity”. Given this, they proposed a Second Chamber (to be so called to emphasise its inferior status) with a 60% directly-elected element (*via* single transferable vote or regional list system in large regional and national constituencies) for a fixed term of two parliaments; 20%

⁷⁰³ *The Times*, 1 March 2002 and 4 March 2002

would be independent appointed by a Commission (the latter a creature of parliament), and 20% would be appointed from party lists by the said Commission (if not, then a 70/30 split between elected and independent appointed members); it would have no additional powers or designated functions, resulting in an enhancement of parliamentary scrutiny and holding governments to account. In this, they clearly preferred the view proposed by the Wakeham Report to that of the government. They also proposed a timetable for reform, indicating that it could be in place and ready for general elections in 2005, and, after a period of transition up to *circa* 2013, the Second Chamber would have 210 elected and 140 appointed members (alternative figures for 70/30 split would be 245 and 105). There would be no Law Lords (to be expelled into the new Supreme Court) and the Lords Spiritual would have no *ex officio* presence. All well and good? Well, not quite.

They seemed to want to achieve the Wakeham *desiderata* of an enhanced parliament by opting for a largely-elected Second Chamber, refusing point-blank to give it any further or greater powers, but expecting it to be more effective in the scrutiny of legislation and of holding the government to account. They felt that the balance between the two Houses would not be disturbed, and the pre-eminence of the Commons would continue because it is not fragile and is protected by legislation, namely the 1911 and 1949 Parliament Acts; they buttressed this by repeating as though memorised (i.e. they regurgitated) the much hackneyed, boringly familiar and empty descriptions of this system. What is more, in this way, they expected not only to invest the Second Chamber with significant electoral legitimacy, but also to preserve the virtues of the Lords.⁷⁰⁴

It is common to claim that this system of government is a hotchpotch because it has grown incrementally, not systematically: well, the habit seems to have become a life-style. The Commons' Public Administration Committee seemed to make a virtue of it in actually proposing a considered reform that was obviously flawed, and were any government and parliament foolhardy enough to fall for this

⁷⁰⁴ Commons Public Administration Committee Fifth Report, February 2002, especially paragraphs 6, 36, 38, 47, 49, 51, 54, 106, 112, 136, 140-2, 146, 153, 159, 168, 174, Annex A, and Annex B.

and enact it, they would be instituting an inherently-unstable system. Others exhibited an untenable “intellectual” preference for this peculiar system: Vernon Bogdanor, praising the good work of the Lords, feared that it would disappear if its composition were to change, and recommended leaving it well alone and relegating any idea of its reform back to where it belongs – fit for discussion at empty moments.⁷⁰⁵

One fact is clear: if Commons pre-eminence and its unquestioned legitimacy as the arbiter of everything were not directly questioned, they were still raised: sooner or later, along with the problem of nationally-organised political parties as the conduit of power and instrument for the control of accountability function of a party-strapped Commons, this will demand answers.

Guarding the system?

The general argument has been that a Constitution establishes and is testimony to limitations of power: that *substantive* constitutionalism is achieved by the fact, but *procedural* constitutionalism is achieved by the application of rules and enforced through the policing activities of a constitutional court. A regular system – such as ours – is almost certain to be based upon the idea of a presumed sovereign centre. This means that *substantive* constitutionalism is discounted and made impossible, except as a result of self-restraint and good-will of those in positions of power, while *procedural* constitutionalism is actually diffused: on the one hand, it is reduced to legality, and, on the other, to the internal procedural probity in the working system – such as in parliament. This diffusion is necessary because there is no one mechanism charged with sufficiency of power to control the procedural probity of all parts of the system in the light of overarching principles enshrined in a Constitution. The discounting of *substantive* constitutionalism – i.e. the absence of a constitution in UK – defines the need for a different mechanism, generally under the rubric of “Guardian” of the system.⁷⁰⁶

⁷⁰⁵ *The Times*, 4 March 2002, p. 22

⁷⁰⁶ Some caution is due here: Peter Hennessy calls the ‘golden triangle’ (of the Secretary to the Cabinet, and Private Secretaries to the Queen and the prime minister) the ‘gilded guardians of our “great ghost”...’ (*The Hidden Wiring*, chapter 2, especially pp. 56-7). It is true that they perform important functions in ensuring the smooth transition of power from

For three rather elementary reasons, it is generally difficult to be emphatic about this function. Firstly, this function in this form is altogether a peculiar feature of the British system, but given that it is theoretically unsound, we cannot with any certainty define this function; secondly, it has not remained constant in practice over the centuries; and, thirdly, as a theoretical category and argument, it has remained closed and ignored. Indeed, while there have been many crisis of the system of government – notably in 1660 and 1688 – no one has ever described and analysed the rôle of any institution in terms of that of a guardian. Of course, our 18th century analysts had something to say on these events, perhaps Blackstone more than Bolingbroke, with Burke saying the least, but Blackstone’s account of the two Conventions of 1660 and 1688 is the closest to a conceptual argument on the topic. This only serves to exemplify the underlying fact of the absence of hard and fast rules whereby we can identify any institution performing this function. The sheer absence of a common conceptual background goes a long way to explain and support the claim that identifying different institutions performing this function at different times only serves to show that they actually perform different functions. But the difficulties are compounded by the further fact that there is no authoritative account of the nature and extent of this power, and, indeed, other than the vague idea of restoring the “constitution”, there is no statement of agreed objectives for this function. However, when government ceased to be that of the executive king, parliament lost its function of safeguarding the liberties of the subject by limiting the exercise of the authority of the king. But from the moment the system was thought to be one of sovereignty of parliament, there was a need for a guardian to protect the system – and ‘the people’ – against parliament! For a long while – probably from the middle of the 19th century and stretching as far as the latter part of the 20th – it was thought that the purpose of this function was to resolve a putative crisis by causing the electorate to express a deciding view, which meant that discharging the function

one government to the next, and making contingency preparations to enable them to cope with the consequences of a less than decisive general election. But in this, they only safeguard the apolitical position of the monarch. However, to the extent that maintaining that position is a significant part of the current system, they help maintain the system, but this hardly amounts to guarding it as such.

of the guardian would involved deliberate intervention. This intervention is informed by the desire to prevent precipitate action or change of a fundamental nature without the approval of the electorate on behalf of 'the people'. In this sense, we may consider the character of this intervention to be similar to that of the casting vote of the Speaker, which is always cast so as "not to make the decision of the House final"⁷⁰⁷ or "to give the House another chance before an irrevocable decision is taken".⁷⁰⁸ This practice echoes Aristotle:

[W]hen all the jurors have voted, the attendants take the urn containing the effective votes and discharge them on to a reckoning board having as many cavities as there are ballot balls, so that the effective votes, whether pierced or solid, may be plainly displayed and easily counted. Then the officials assigned to the taking of the votes tell them off on the board, the solid in one place and the pierced in another, and the crier announces the numbers of the votes, the pierced ballots being for the prosecutor and the solid for the defendant. Whichever has the majority is victorious; but if the votes are equal the verdict is for the defendant.⁷⁰⁹

However, intervention may not work as desired: the two general elections of 1910 failed to resolve the issue at hand, for they did not produce a clear-cut and decisive division in the Commons, and the Lords only acquiesced when it was implied that the king had promised to create new peers. This inconclusive episode notwithstanding (which in effect means that the two appeals to the electorate failed to resolve the issue), the hope is that the distribution of seats in the new House would determine whether the intervention was justified, and point to a possible solution. In January 1910, the Liberals fell from 399 MPs (in 1906) to 274, and the Conservative and Unionist Party increased from 156 to 272, depriving the Liberals of their majority. The elections in October that year did not materially change this balance. How is this to be interpreted? Surely, the obvious and logical explanation should be that the electorate did not approve of the policy of the Liberal Party in January and reduced their numbers to the largest group in parliament, without giving them a majority. This judgement was repeated in October, but the electorate further reduced their numbers by 3 seats: now the

⁷⁰⁷ Campion (Lord) and T. G. B. Cocks *Sir Thomas Erskine May's treatises on the Law, Privileges, Proceedings and Usage in Parliament*, 1950, p. 414, see pp. 414-7

⁷⁰⁸ P. Silk and R. Walters *How Parliament Works*, 1987, p. 25

⁷⁰⁹ Chapter 69 'The Athenian Constitution' in *Greek Philosophers*™ CD-ROM v4.3, 1991-5, World Library Inc, Screen 117:118

Liberal Party was not even the largest group in the Commons. What then, was the actual judgement of the electorate? I read this as nothing less than a warning to the Liberal Party to desist from introducing or enacting any major change to the system, and not to force the enactment of the 1911 Parliament Act; for, on the face of it, the electorate had decided not to change - at the very least, they did not provide an unmistakable marker for change – in the languid terminology of political parties, a mandate. Yet, significant change of the first importance was indeed the only outcome of this episode. The government of the day – and evidently others – remained clearly oblivious to any constitutional arguments. What makes this episode even more difficult to explain in terms of the working of the corrective and guarding mechanisms, is that apparently, the thought that somehow the action of the government was in no way related to the decision of the electorate did not seem to occur to anyone. There is no doubt about the validity of Parliament Act 1911 as a statute and law of the land; nevertheless, one has to seriously wonder about its constitutionality, to the extent that anything that is legal can be unconstitutional. Moreover, clearly the result of the intervention – going to the people – was not subject to interpretation according to pre-determined and well-established rules.

Over the centuries, three institutions or organs – viz. parliament as such, the Lords, and Monarch – have been thought to perform this rôle. However, it would be a category mistake to assume that these bodies have all performed – or were expected to perform – the same functions when acting in this capacity.

To my knowledge, only one historian – G. B. Adams⁷¹⁰ – has ever cast parliament in the rôle of the guardian of this system. But, in view of the arguments presented in this study, parliament cast in this rôle is nothing more or less than that institution acting to check the powers of the Crown. This takes us back to the idea and arguments about inter-institutional relationship resulting in a kind of limitation as a result of claims to co-sovereignty characterised here as constitutionalism. Generally stated, in this capacity, parliament performs the rôle of the “under-dog” seeking to control a powerful executive by asserting its position

⁷¹⁰ G. B. Adams *The Origins of the English Constitution*, 1920, chapter 7, pp. 314-5

and entering certain types of claims. No wonder that historically we associate parliament with preventing encroachments upon the liberties of the subject, and rely upon common law and legal procedure to protect the rights and liberties of the English. But the claim that parliament is the guardian of the system has become one mainstay of Whig historiography, whereby parliament is associated with the defence of liberty, and this now completely fossilised notion is projected as an indelible feature of the very idea of parliament. Yet, there is nothing to support this notion, for defence of liberty is not a necessary feature of the idea of a parliament. Indeed, as the arguments of this chapter show, parliament is an all-important element in the system, which, given systemic corruption, can become the instrument of abuse of power: clearly parliament is not a relevant candidate for this function in Neo-Tudor style of government.

Granted that the guardian of the system must be politically neutral, we may add three other characteristics: first, the function of the guardian must be clearly defined in terms of ensuring that the rules of the game are not changed without the authority of those to whom it belongs. Second, that in performing this function, a guardian must, at all times, act with absolute fairness but not in the sense of “blind justice”. Therefore, a degree of discretion is needed in the performance of this function; which serves further to underline the importance of the other characteristics here identified. Yet, third, the guardian must also heed Bolingbroke, and pay close attention to the cumulative effects of incremental change that may re-define the system. And this means that the guardian must exercise judgement and ensure that the putative crisis warrants the resulting complications and inconveniences that appeal to a measure of last resort would involve before taking action.

If the guardian is involved and the powers associated with that functions are exerted at the first sign of trouble, then the system is not working well: the rôle of the guardian is a measure of last resort. This means that we may legitimately expect a mature political system to be self-correcting to a minimal extent, such that its ordinary political processes will suffice to resolve some issues before they emerge as crisis. We need not, and in truth cannot, stipulate the procedures and

various steps involved, nor is it desirable to anticipate every move. But we do find examples of how the system has been corrected, and crisis averted: for instance, there are indications that George VI influenced the Conservative Party in their opposition to the 1949 Parliament Act. And perhaps we ought to reconsider the issue of 1910 in the light of the succession of that year.

It is hard to see how any one individual or institution in the system (including the judiciary) could ever have been thought capable of performing this function. On the other hand, the completion of the transference of the executive functions of the king/queen *regnant*, releasing him/her from political duties and, in that sense, placing him/her above the fray, produced a suitable candidate for the purpose. Indeed, we find a general and across time consensus that the king/queen *regnant* is the proper guardian of the “constitution”: at the end of the 18th century, F. S. T. Sullivan was in no doubt about it,⁷¹¹ and we find that attitude broadly reflected in much of the 20th century thinking on the topic.⁷¹² Here we move into the constitutional rôle and powers of a non-political head of state, or in the present instance, of the Monarch.

In this system, the rôle of the guardian comes into its own in a rather British sense. Parliament Acts 1911 and 1949, together with the effects of the Salisbury Convention have emasculated the powers of Lords. Consequently disagreement between the two Houses is settled in a “legal” if constitutionally dubious way. But there are still areas where the two Houses have co-equal powers, such as the duration of parliament, especially in the course of one parliament. Equally importantly, the two Houses may agree about a measure of change that is not obviously recommended, or there is reason to believe that the public might have a different view on the matter. For instance, suppose the promised Joint Committee of the two Houses had produced an agreed measure for Stage Two of

⁷¹¹ F. S. T. Sullivan *An Historical Treatise on the Feudal Law and the Constitution and Laws of England*, 1772, pp. 201-2

⁷¹² *Inter alia*, W. I. Jennings *Cabinet Government*, 1959, pp. 411-2; R. Brazier *Constitutional Practice*, 1994, p. 192; F. Mount *The British Constitution Now*, 1993, pp. 93-7; A. H. Dodd *The Growth of Responsible Government from James the First to Victoria*, 1956, p. 200; and R. Blake ‘The Queen and the Constitution’ in *The Queen*, 1977, pp. 13-27, especially p. 26. But also see V. Bogdanor *The Monarchy and the Constitution*, 1995, especially chapter 3 - Bogdanor simply wavers on this point.

reform of the Lords, but the issue was not yet properly settled in that there is reason to believe that the electorate might have a different view upon it. It is in such cases that the rôle of the head of the state or monarch as the guardian of the system comes into its own. Moreover, for the proper discharge of this responsibility, the relevant office must be invested with sufficient power to prevent the measure from proceeding and to force a general election: and the instrument appropriate to this function is assent to Bills passed in Parliament. If the queen is the present guardian of this system we must then accept that the refusal to give (royal) assent is available in such circumstances, and may be exercised even in the face of a recommendation to the contrary from the government of the day, and the fact should be made public at the time.

But the question of guarding the system and the “constitution” has received little attention, and even less treatment, in texts on British government. It is of importance, not diminished by the fact that it is ignored. Every now and again the question breaks through the still surface of the system, and is quietly dealt with and pushed into the background. However, this time, it proved to be different, and we have already entered the era of the institutionalisation of the function of guarding the system.

Three themes seemed to dominate the tone of the two-day debate in the Lords in January 2002.⁷¹³ the necessary pre-eminence of the Commons; the need for some measure of protection to ensure that the Lords could not be made less effective, and their power over the duration of parliament not be curtailed; and that the Lords should so act as to elicit re-think on the part of the executive and the Commons, thereby fulfilling the rôle of the Guardian of the constitution.⁷¹⁴ This last is in essence similar to the Conservative attitude, as examined above, and the Wakeham Report. The Royal Commissioners rather considered that the Lords should be a “constitutional long-stop” to prevent the introduction of change without full and open debate and awareness of its consequences. They felt the present powers of the Lords sufficient for the purpose, but suggested that the Lords should create a Constitution Committee to act as a focus of their concern

⁷¹³ Lords Debates, 9 and 10 January 2002

⁷¹⁴ *Ibid*, *passim*, but especially Lord Naseby’s speech, 9 January 2002, column 652

with constitutional matters.⁷¹⁵

Given that there is no Constitution, many are content to accept that there is a constitution, and proceed as though there is no difference between the two. This stance has an interesting, though not much examined, effect upon the procedure for its reform, in that certain expectations and restrictions flow from it. Indeed, in principle and in conceptual structure, this notion is akin to the common mistake that Westminster is the “Mother of Parliaments”: as a result, expectations flow from, rather than into it. Thus, an idea of Westminster Parliament is presumed to be the source of its good practices, rather than see its practices and procedures as a consequence and an effect. Similarly, when we accept our system as a “constitution”, it means that we must *begin* with it and its features, and function within its terms. This means that we accept that the system is owned at the top, and its reform is in the gift of the government of the day. In the 1980s, in reaction to the use that the Conservative governments of that decade made of the power and procedures of this system in pursuit of their agenda of reform,⁷¹⁶ many turned their attention to “constitutional” reform. Different schemes were proposed, much discussion took place, and many books were published: Charter 88 and *The Independent* newspaper even held a “Constitutional Convention” to discuss papers presented and published a compendium⁷¹⁷; others proposed ways of institutionalising reform and indicated procedures appropriate to it.⁷¹⁸ But they all appeared to share two features: in one way or another, they accepted, implicitly or explicitly that whatever reforms might be instituted, it had to be in the form of Acts of Parliament,⁷¹⁹ and, following from that, they all focused upon ways and means of getting political parties on board without making them unelectable. The

⁷¹⁵ The Wakeham Report, chapter 5

⁷¹⁶ Ferdinand Mount (*The British Constitution Now*, pp. 27-8) claims that Mrs. Thatcher’s reading of Radcliffe’s (Lord, of Werneth) *The Problem of Power* – Reith Memorial Lecture 1951 (Martin Secker and Warburg, London 1952) – goes to show her understanding of the fragility of this system. But she left no record of any attempt to strengthen it: indeed, cynics would say – probably correctly – that the lesson she drew from her reading of Radcliffe’s remarks was to learn how the system could be used.

⁷¹⁷ *Towards a written constitution. Proceedings of the Charter 88/The Independent Constitutional Convention*, Charter 88 Trust. The Convention was held at Manchester, 1-3 November 1991.

⁷¹⁸ For instance, R. Brazier *Constitutional Reform*, 1991

⁷¹⁹ For instance, see Robert McLennan’s remarks, *Ibid*, p. 92

second common feature is that they all focused upon the working system as the subject of the “debate”, including those who proposed a complete Constitution rather than specific measures of reform. Put differently, there was no constitutional theory element to the debate. This had implications in that certain topics were simply not favoured. For instance, no one seemed even theoretically aware, or raised the point, that there was an unresolved question of ownership here, and that this so-called “constitution” did not belong to the government to reform or not as it wished – for the government was a creature of it. And whereas the government has a legitimate say in certain changes to do with technical aspects of government, and structure and rules of administration that some would mistakenly upgrade to the status of “constitutional” reform, the core important issues of the constitution are simply beyond its ambit. The reform of these issues do not belong to any one part, or even the whole of the system, for the system is the creature of the application of those very core ideas and principles. Moreover, at least to the extent that technical changes influence the way general principles are interpreted and applied, they, too, may have greater significance than their technicality may present, and should be subject to the approval of the owners of the system.

It may be thought that this claim does not apply to a system based upon and characterised by the idea of parliamentary sovereignty. Well, quite; except that sovereignty of parliament is not the be-all-and-end-all that it may appear, nor, for that matter, as a concept, is it beyond fatal criticism. It is true that arguments against sovereignty advanced thus far – such as in the Celtic or “New View” – have all ended in confusion and logic-chopping, but the idea can be successfully criticised from a purely theoretical perspective, as in this study. However, since Dicey’s blinkered assertion, this idea has become the mantra of the system, with much “constitutional” evil that must flow from it. The point is that critics in 1980 and 1990s – political scientists or not – did not question this vacuous idea. Instead, because they assumed it, they were all constrained to look to Parliament, and, therefore, to the government of the day for measures of reform.

Of course, while we have no constitutional law, a good deal of what is

normally understood as constitutional is statute-based, or is such that any significant reform of it would require an Act of Parliament: that much is clear. But true constitutional reform, dealing with issues that the government of the day is unable (also very unwilling) to tackle and that the system as it operates now is incapable of reforming (like defining the powers of parliament) can simply not be achieved by an Act of Parliament.⁷²⁰ It is a great pity but also a fact that remaining within the terms of the existing system and seeking to argue for reform from within it means that certain features – truly the parts that need reforming – must be left well alone. The upshot is that there is hardly any concern with the question: “Why is the government reforming the system which is supposed to define its existence and powers?”⁷²¹ Instead, we appear to accept this as a matter of course, which means that we also accept legislation as the proper procedure for reforming this “constitution”: we are simply rendered powerless onlookers, from time to time invited to comment on this or that proposal.⁷²² This merely perpetuates the historical and structural bias of the system to the top. Indeed, the absurd idea of reform in the gift of the government was reinforced in, for instance, the Constitution Unit (University College London) “how to reform” papers, underlining the legal, thereby necessary parliamentary procedure, predicated upon the need for government action. It is very unfortunate that this skewed view has now been given institutional form, but with a twist.

As a result of recent re-organisations of responsibility between a number of government departments and the rationalisation of direction of policy, “constitutional” reform has become largely the responsibility of the Lord Chancellor’s Department. This is a logical extension of the practice since 1997, when the Lord Chancellor was placed in charge of reform policy at Cabinet

⁷²⁰ At any rate, not directly; but indirect reform is possible. For instance, replacing the simple plurality with would change the party composition and balance in the Commons, and could prevent the control of the use of its powers by the party of government. In this way, the shibboleth of Sovereignty of Parliament would remain intact, while significantly changing in practice.

⁷²¹ One Peer did: Lord St. John of Bletso likened the reform of the Lords by the government to a defendant picking his own jury. *Hansard* (Internet), House of Lords Debates, 9 January 2002, column 648

⁷²² Often in the form of a White Paper that few read, but which is always accompanied by much ministerial hype about inviting frank and open public debate.

Committee level. This may raise issues touching the multiplicity of the rôle of Lord Chancellor in this system, but that is a different story; the important point for the present purpose is that there was a government department charged with responsibility for this policy area. But government needs powers for the execution of its policies, and gets it from parliament in the form of an Act. Inevitably, parliament becomes the arena of executive policy on “constitutional” reform. But the problem runs deeper, for, over and above this, some also enter a further claim for parliament in this respect. For instance, in the debate in the Lords on the Parliamentary Referendum Bill (31 January 2001)⁷²³ Ralf Dahrendorf opined that “often ... constitutional issues are really rather technical, or appear to be so”; agreeing with Philip Norton, he rejected the idea of creating a statutory basis for calling a referendum; and, quoting Lord Russell, agreed with him that the public will probably not understand the issues involved. On his view, and that of other academic-cum-politicians, such decisions belong in parliament, presumably because as parliamentarians they do understand such issues, although, as Dahrendorf said, in this respect the House must rely upon its Constitution Committee.⁷²⁴ In other words, such decisions are better taken in than out of parliament. On this view, the people are simply excluded, and are denied even a referendum on important issues, even when the two parts of the legislature cannot agree with each other. The result is simple: *their* constitution is reformed *for them* on government proposals, with the support of the party-strapped Commons, and with the agreement of hereditary and many life peers acting as experts and honest brokers hoping to influence the nature of the change before the measure is enacted. To call this paternalistic is only a mild reaction: frankly, modesty and public decency forbid the use of choice words necessary to describe such nonsense. Be that how it may, this system *is* top-heavy, and the claim of parliamentarians also raises the question of the rôle and place of the Constitution Committee of the House.

⁷²³ This Bill was read a second time, and lost. Similarly, Parliament Acts (Amendment) Bill, 2000 was lost after its Committee stage. The fact is that such Private Bills have no chance of success without governmental support.

⁷²⁴ House of Lords debates, 31 January 2001, columns 765-7

The Royal Commission on Lords reform, quoting Kenneth Wheare, defined a constitution as a collection of rules that establish and regulate or govern the government, and made three important points⁷²⁵: firstly, they opined that the present arrangements for protecting the constitution – the Lords as a “long-stop” – are sufficient. That is because the Lords has unfettered say over the dismissal of judges and some key appointees and on the duration of parliament, and can delay government legislation. Secondly, while they saw no need for additional powers for the Lords, they recommended “the Parliament Acts should be amended to exclude the possibility of their being further amended by the use of Parliament Act procedures” (No. 19). However, to assist the House in the task of protecting the constitution, thirdly, they recommended that the House create a Constitution Committee to act as “a focus for its interest in and concern for constitutional matters (No. 21).

The Lords resolved to establish a “Select Committee on Constitution”⁷²⁶; the usual channels produced a list of members and Philip Norton “emerged” as its appointed Chair. Some features of this committee are interesting. Its terms of reference, almost to a word, reflected the view that the Labour Party presented to the Royal Commission (paragraph 5.18); viz. “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”.⁷²⁷ The Committee’s first output was a report, as it were, on itself. In its way, this was a valuable exercise, for it clarified their intended manner of proceeding. But this meant that, first and foremost, they had to clarify their substance of their subject, which they did in paragraphs 18, 20, 21 and 51. They defined the Constitution (paragraph 20) as “the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship

⁷²⁵ Protecting the Constitution’, chapter 5 of *A House for the Future*. Report of the Royal Commission on reform of the House of Lords (2000) Cmnd 4534

⁷²⁶ Resolution to appoint: 17 July 2000; formally appointed 8 February 2001; re-appointed for the new session on 28 June 2001. The title of this committee is also interesting in that there is no definite article “the” preceding the word “Constitution”, as in its reports. However, in the Lords Select Committees Weekly Agenda No 19, February 2002, on p. 11, it is listed as “Select Committee on the Constitution”.

⁷²⁷ First Report, July 2001

between the different institutions and between those institutions and the individual”, having previously (paragraph 18) accepted that it is actually in flux and ever evolving. They identified five features of it (paragraph 21, and 51):

1. Sovereignty of the Crown in Parliament
2. The Rule of Law, encompassing the rights of the individual
3. Union State
4. Representative Government
5. Membership of the Commonwealth, European Union, and other international organisations.

It might appear that there is hardly any difficulty with such a general approach: it is so wide as to be innocent if not also innocuous, and the features selected are only historical chapter headings. On the face of it, this wide-ranging approach meant that every aspect of the system was potentially within the Committee's purview, and, by implication, capable of reform through the existing powers and structures. However, we find at least two important limitations. Firstly, as with the Royal Commission on Lords reform and the White Paper subsequent to it, reform was predicated upon the preservation of the pre-eminence of the Commons. In other words, this feature of the working system was beyond the range of acceptable reform, and to that measure – and in view of the way the Committee elaborated the implications of their terms of reference – also beyond consideration by the Committee. Moreover, precisely what “Union State” and “Representative Government” may mean remained unclear, and indeed they did not elaborate upon them. The latter is a generic description and a historically understood notion; but the precise meaning of “Union State” – a phrase in use in the 19th century, but for long out of favour, and now recalled – was not clear, and its use may have a greater political rather than constitutional significance.

The next feature to notice is the choice of the Committee Chair. A number of considerations apply. Given that there are no experts on the “constitution” – although there are people with intimate, to that measure expert, knowledge of how this system works – it is hardly meaningful to rely upon supposed constitutional expertise. This means that in doing so, one is selecting and giving priority to a point of view. It is thus that we must note the political bias of the Committee Chair, upon whom, by all appearances, other members of the

committee seemed to rely and to whose views they seemed to defer (for instance, in defining the “constitution”). We must thus note that the Chair of this Committee harboured not only Conservative, but well-nigh High Tory views on the system, its reform and procedures appropriate to it and, especially, on the rôle and place of parliament in the UK. It might be argued that, for three reasons, the evident predilections of the Chair did not really matter.

Firstly, it may well be that the Committee would simply present – almost quote – a range of views to inform the debate in the House. This was the nature and tenor of their Sex Discrimination Report⁷²⁸ in which they listed various meanings of representation and refused to comment on the merits of, or justification for, any particular proposal. Secondly, it may be that they were only concerned with technical aspects of the working system (as per the “review the operation of the Constitution” part of their remit), where their attention was likely to be focused on factual detail. A cursory examination of proposed and future business (Weekly Agenda No 19, February 2002, especially p. 11) shows that the interest of the Committee concerning the issue of devolution was of this type. Indeed, the nearest to a topic of principle in this inquiry was number 5, concerning the consequences of devolution for the unity of the UK – but even this can be seen as a political rather than a constitutional argument.

Third, the Committee invited and received opinion from a range of people, and the evidence received was “likely to be published”; as a rule, submissions are published, and if they are too long for this purpose, they are made otherwise available. An invitation to submit evidence is issued and included in the Weekly Agenda, with reliance upon the broadsheet press to publicise it. But this hardly happens, and as a result only the *cognoscenti* get to know about them. In other words, the publicity was limited, and hardly enough to bring it to the attention of the “average citizen”. Moreover, it is not clear on what basis witnesses are invited to give oral evidence, for the rule is that at the *discretion* of the Committee, *some* are invited to give oral evidence, presumably always in open session. Equally at their discretion, the Committee could and did invite anyone they saw fit to appear

⁷²⁸ Select Committee on Constitution, Third Report on Sex Discrimination (election of Candidates) Bill, November 2001

before them to give oral evidence, with no need for prior or any written evidence at all. In other words, it was perfectly possible for the Committee to structure the evidence it receives. So far as witnesses are concerned, the usual suspects were all present in the Fourth Report of this Committee.⁷²⁹ But only two academics were invited to give both written and oral evidence, whereas the others were quoted. It is thus not surprising to find that the views of the two academics thus privileged dominated the Report. This, one must hasten to add, was not an accident: true, these two academics did not “write” the Report – indeed some of their ideas were actually dismissed – but on the deeper conception of public policy nature of constitutional reform and the procedures appropriate to it, their views chimed well with the general tone of the Report as it emerged. Moreover, many meetings, including some briefings, were in private. Whereas one can more easily understand the need for privacy when deliberating (even that is dubious in a *parliament*), it is very hard to understand or justify the need for privacy when the Committee is being briefed, such as by the Director of the Constitution Unit, on 6 February 2002, on their devolution programme.⁷³⁰ Just what is so secret about funded research, and more generally about the public affairs of a free people? The Committee Report was produced in draft form by the Chair, and then discussed by Committee members, also in private session. Again the issue of supposed expertise and, one must add, the capacity of an academic to present plausible arguments surface as important considerations, and in this we must not forget that its first Chair was of a very Conservative, if not of a High-Tory bent of mind: is the essentially High Tory character of the Fourth Report of this Committee a coincidence?

⁷²⁹ ‘Changing the Constitution: the process of constitutional change’, 23 January 2002.

Appendix 2 gives a full list of names.

⁷³⁰ We must also consider the changing status of the Constitution Unit. Created as a non-partisan body (indicating the absence of any formal or direct affiliation), it increasingly became an “insider interest group”, supplying advisors to the Leader of the Commons, the Constitution Committee of the Lords, and then having the dubious honour of being one of the usual suspects to give evidence on all issues even remotely “constitutional” in character. Their voice, coming from a “non-partisan” body, served to “legitimate” the views of the government: but on matters of fundamental importance, privileging one voice is a rather important matter and always a cause for concern. But, then, the British system has always been one of insiders talking to insiders – the voice of the people, or that of reasoned argument, is never heard.

In raising these points, we are concerned with two sets of arguments, both to do with the rôle and place of academic political/social scientists. On the one hand, we must have some concern with the character of Reports of this Committee. There are two types: some were rather technical, intended to inform the debate in the Lords: the Second, Third and the Fifth Reports are of this type. But the other type is contentious, of which there were only two: the First and the Fourth Reports. In this type, “they” – exactly *who* is not clear – identified the questions they wanted answered, invited submissions and received oral evidence from invited witnesses, deliberated, prepared a draft report – exactly who did this was not clear either – then discussed and agreed on a Report: but what is the character of such a Report? They were not involved in an academic exercise: their work is hardly research and report of findings, and they were not obliged – as are academics – to say what the evidence forced them to say. Even with academic reports, one sometimes has to question the manner in which the evidence was identified, and a relic was thought to have evidential purport. Selection of evidence is important, and no research is actually a report based upon all the possible evidence. An academic might have to – often does – change his/her mind in the light of evidence: even so that is not the end of the argument. But the Lords Select Committee on Constitution is not in the business of producing this kind of report. It may well be that in some cases there is less room for controversy, but were that the case, there would be no need for such a committee. On the contrary, they may well be expected to evaluate one idea against another, this argument against that, and come to a view. This is where the rôle of the academic participants became important and ought to be examined further. We must be concerned with criteria for inclusion and exclusion, the reasons and reasoning for recommending this rather than that. It is not enough for the participants to profess neutrality: there is no such thing, and knowing their predilections does not help, for the Lords received the Report of the Committee as one whole, and was not in the business of dissecting whose view had prevailed. Incidentally, everything said in this context applies to the Wakeham Report, which included two academics.

On the other hand, we must be naturally concerned with the fact that academic freedom to say and argue does not translate into licence to privilege a given point of view on matters of fundamental importance. There is something obnoxious about academic preferment in the social sciences (always suspect as any measure of validity and truth) plus party activity resulting in the translation of a citizen into a legislator. There is much talk in arguments about the composition of the second chamber as that part of the legislature where experts from all walks of life can be present and offer their good counsel, which is always presented as a positive feature. Indeed, appointees are normally those who would otherwise not seek elected office of this type; yet, once in, they tend to be active and give good service. What should their rôle be? As an appointed House, they can have only an advisory rôle: accepting the importance of good counsel as the rôle of the Second Chamber, one must hasten to underline the proviso that they ought to have no power to legislate or hold government to account, indeed do anything other than debate what is put before them and offer their best judgement. One can probably accept a wholly or even partially appointed House only if it is entirely and absolutely advisory. But this is not the case with the Lords; indeed in the debate about its reform, many claimed that it should remain an appointed House and receive further powers if it is to be an effective part of the legislature!

The concern with the appointment of political and social scientists is only indicative of the larger concern with appointed legislatures. We should certainly encourage and welcome the participation of experienced and informed people, academics or otherwise, in the working system: some, including a few well known names, have made it to the Commons – John P. Mackintosh comes to mind – but have done so through the political and electoral process and as ordinary members of parliament, not as an appointee legislature. It is quite otherwise with an appointed chamber. Perhaps the saving grace here is that, on the whole, there is not much “constitution”, and probably even less constitutional theory in political studies of British government, or, for that matter, in politically oriented constitutional law studies, and that the activities of such persons only influence the working system. But this offers little comfort for two reasons: firstly, such

“expert” appointees are thereby given a privileged voice and presence which may or may not be what the people want; and, secondly, small changes and little technical measures can significantly influence and shape the day-to-day life of the people in myriad ways that they can never know. An appointed element in the legislature – let alone an appointed second chamber – is bad enough without empowering such appointees to act in further ways, such as to guard the system, or influence and guide its reform. Their actions will help determine the shape of the system, but, *pace* all protestations to the contrary and other dubious claims, their contribution is not and cannot be benign, or self-evidently for the better. In this context, we must confront the claim that elections do not produce a properly representative mix in the legislature – hence the dubious legislation to allow for quotas or women-only lists at general elections – and that we must correct this by appointing the sort of member that would otherwise not be present; and this argument is buttressed by the further claim that legitimacy is not bestowed solely in an election.⁷³¹ These arguments are valid in their own right, but are misapplied in this context. The first sits very ill at ease with any idea of electoral democracy, and the second is simply irrelevant. Of course, there are different conceptions of legitimacy in different fields of activity, but they are not transferable without serious damage. Equally problematical is the claim⁷³² that a largely elected House – legitimated by the fact – can contain appointed members whose legitimacy is for functions other than being a legislator without subjecting the whole to questions of want of legitimacy. Finally, we must ask what sort of a person is appointed. The experience of the Stevenson Commission is relevant here: its remit was to recommend independent “People’s Peers”; it advertised, received some 3000 applications, and promptly recommended precisely the sort of person that would have been appointed anyhow. Robin Cook owned up to the difficulty thus:

... if we are looking for people who have distinction, experience and expertise then we should not ... be surprised if they have already achieved recognition in our society. Mr Prentice had (*sic*) a very effective question to

⁷³¹ Lords *Hansard* text, 9 and 10 January 2002

⁷³² Commons Public Administration Committee Fifth Report, February 2002, para 68

me the other day about the number who were knights. It is in the nature of people with distinction, experience or standing that some of them probably are going to have had that recognition.⁷³³

One rather suspects that, as the immediate effect of the Great Reform Act was not to change the composition of the Commons, given the desired requirements of appointees for the second chamber, that set of requirements would drive the process and cause members to be selected from a probably socially mobile but, nevertheless, self-perpetuating élite: no wonder that the Commons Select Committee on Public Administration refused to speculate on this (paragraph 148), and left the issue wide open for others to decide! Thus, it may not be altogether off the scent to argue that the only important result not only of recent institutionalisation of reform and existing procedures for reforming this system, but also that of an independent Appointments Commission, was to perpetuate the very ideas and practices that most concern thoughtful critics: viz. the pre-eminence of the Commons, executive “control” of the use of powers of parliament, and, no less, the absurd idea of the sovereignty of parliament, all quintessential constitutional theory arguments.

But let us move from an analytical and critical to a positive perspective, and suppose that the Lords, in its present or forthcoming incarnation – perhaps even a 60/40 (or 70/30) majority elected with no additional powers, as proposed by the Commons Select Committee on Public Administration (paragraphs 96, 129, and 133) – is actually above criticism, ever conscious of its inferior nature and careful not to over-step the mark. Precisely what can it do as the Guardian of the system?

A guardian can have no personal interest in the subject matter of his/her charge; indeed, this is better put in the form of the requirement of absolute personal disinterest. Briefly, the charge involves looking after the interests of another: this may be as a watch on behalf of an otherwise absent person (in which case the guardian discharges his/her duty by alerting the principal interest), or on behalf of a minor, which requires that the guardian should have sufficiency of powers to prevent untoward change until the principal interest achieves the age

⁷³³ Evidence to Commons Select Committee on Public Administration, 17 January 2002, 222

of majority. How do the Lords fit into this scheme of things?

It is the guardian of the “constitution” on behalf of its owners against intrusions, usurpations or, in the event of significant change, hasty action by those wielding public power, and must alert the owners of the system. It would be inappropriate in this instance to invest the second chamber with power to take any action other than what is consistent with alerting the people. However, it would be wrong not to charge the guardian with power to alert the potential wrong-doers to the consequences of their actions: a limited self-correcting procedure is necessary to ensure that a complex political system functions reasonably tolerably within limits. Indeed, we may say that some of the ordinary procedures and processes of government and parliament have this effect, even if they were not designed with such a consequence in mind. For instance, the three-stage process of legislation is a valuable and potentially effective device in preventing hasty action. We may thus see the rôle of the Lords repeating the process and if necessary inviting a re-think as a corrective to the possible misuse of the ordinary processes of legislation, especially as these processes can be truncated, and the rules governing them changed within the working practices of the parliament, often with immediate effect: procedure has constitutional relevance only when it is protected against change especially by those whose activities they are intended to regulate. Given the present powers and balance between the two Houses, it is hard to see in what real sense that august House can function as the Guardian of this “constitution”. The limitations imposed by the 1911 and 1949 Parliament Acts and the self-denying ordinance of the Salisbury Convention place the House in an awkward position: their “Lordships” can, in their sedate gentle way, make a lot of political noise and cause a good deal of public fuss (which the media love and thrive upon); they can cause some delay, but not threaten the government, reject important legislation or emasculate government policy, except fortuitously, when the immediate circumstances are in their favour and the government are prepared to concede. This may be enough in some, perhaps most, cases, and one may reasonably expect that, with the added fear of the power of the electorate – under the present conditions, the only element in the system capable of turning a

government out of office – the system is probably pretty safe. The proponents of this view will point to the fact that the system has been stable over decades, if not centuries, and that necessary change has always been peaceful and for the better. That view stands in sharp contrast to that presented in this study and particularly in the present chapter: this system has never been safe; but for at least two further reasons, we ought not to remain complacent about its future.

Firstly, this second chamber is a lesser but, for all that, part of the legislature: the requirement of absolute disinterest is not satisfied. Indeed, as argued in this section, we are also faced with the implications of the fact that its appointed composition hides a significant problem. It is true that their “Lordships” belong to different parties, inhabit the cross-benches, sit as Law Lords or Lord Spiritual, and are to that measure different, but they all tend to subscribe to at least a minimally conservative view of the system. The processes of preferment and the system of appointment see to that: the radicals in thought and mind, the “unreasonable” men and women (always the engines of progressive change) do not have a voice in this august House, or indeed this type of parliament. Such radicals who do somehow make it to the Commons are weeded out: they do not receive preferment, and are hardly likely to be elevated to the “Elysian Fields” for living politicians. This narrowing of the field to what the Romans used to call the *boni*,⁷³⁴ this continuous process of weeding out those that do not subscribe to the “ruling ideas” about the system, has many implications other than the obvious one of selecting only the type of person that can succeed in it, but also in “forcing” them to behave in a certain way if they wish to succeed: it is unfortunate that the word “sleaze” has gained currency, for the real danger is not of “tastelessness by virtue of being cheap and vulgar” but opportunism, of doing what it takes to get on, in plain language, of sheer corruption. On this reading, then, an appointment procedure is likely to self-serve and perpetuate albeit a broadly conservative point of view. Indeed, one may well argue that a wholly appointed second chamber is less likely to contain a cross-section of the population than a hereditary one: at least the accident of birth is not geared to guaranteeing a certain type of political

⁷³⁴ Meaning the “good” people, accepting the *status quo* – the broadly conservative minded.

disposition. If a largely appointed Lords is the Guardian of the “constitution”, it is so only on behalf of the proponents of this system of government – its apparent, not real friends – and within the limitations of a certain political disposition.

Secondly, as it is, the Lords has no power to appeal beyond parliament. This simple fact is a familiar, and, probably for that reason, unquestioned integument for a hideous truth. When their “Lordships” disagree with a Bill or government policy, they are in conflict with the Commons and thereby government, or what amounts to exactly the same thing, the government and thereby the Commons, and rejecting, amending or vociferously disagreeing, they will certainly bring significant moral and political pressure to bear. In so doing, they can inform the public – the media will see to that – and alert the wielders of power to the possible consequences of their action. But the ugly truth is that their “Lordships” only hope of changing things lies in the government heeding Falstaff when he said

[T]he better part of valour is discretion; in the which better part I have saved
my life⁷³⁵

in order to avoid electoral defeat at a later stage, except that matters do not quite work out like that. When and if the government heed Falstaff, it is mostly because they may consider the game not worth the candle, or because they are pressed for time and would prefer to push ahead with other business considered more important, but hardly ever because they concede that they were wrong. At any rate, the government of the day – through the Commons – can and often does get its way, and pretty well scot-free. But this is not all, for in so doing they also employ and put on display the stale centre-view of the system and deploy the language of moral rectitude: the Commons expresses the voice of the people and when they sanction government policy, the un-elected Lords must not stand in their way, and at any rate the people will decide. The point is that the Lords can be overridden precisely on the issues that they consider may be a problem and by precisely the wielders of power who may be extending themselves. That this is patently against the most basic and fundamental rule of equity or natural justice requires no emphasis. But beyond that, clearly the efficacy of the rôle and

⁷³⁵ W. Shakespeare *Henry IV Part 1*, Act 5, scene 4

function of the Lords as the Guardian of the system is seriously in doubt. Indeed, we must go further and say that to be effective in discharging this function, the House must have the unequivocal power to appeal, at the time, to a *third* element who can restrain the potential culprits; that is to say the owners of the system, the people acting through its active element, the electorate. This is not a new argument or concept: it has been invoked many times when it suited, albeit always by those opposed to some change, and soon forgotten when a change of government put them into office. One thinks of Henry Brougham's idea of appeal to the electorate as the resource of the constitution to resolve a dispute between the two Houses (discussed in the preceding section); one also thinks of many arguments advanced at the turn of the last century concerning the use of referenda as a device in this regard; one might add, without putting too fine a point on it, that the Labour Party committed itself in its 1992 manifesto to create a second chamber with sufficient power to delay designated legislation for the duration of a parliament; and indeed one must think of Lord Campbell of Alloway's Parliamentary Referendum Bill 2000.⁷³⁶ He envisaged powers for the Lords (upon the advice of its Constitution Committee) to call for a referendum on the basis that certain provisions of a particular Bill would substantially affect the constitution. But this was subject to the concurrence of the Commons, and "until the result of a referendum held under this Act is known, the Bill subject to the referendum shall not receive Royal Assent" (article 5). The Parliamentary Referendum Bill was read a second time on 31 January 2001, committed to the Committee of the Whole House (which never took place) and then lost at the end of the session. It is instructive to consider two views expressed in the second reading of this Bill. Philip Norton⁷³⁷ laid out the essentially Tory view that it is for parliament as the assembly of the nation to decide, and that is that; whereas Lord Falconer for the government argued that the decision should be on a case-by-case basis, and that the provision to create power to call for a referendum was unnecessary and inappropriate, for the power of initiative belongs and should rest with the

⁷³⁶ Parliamentary Referendum Bill (HL) 2000, second reading, House of Lords *Hansard*, 31 January 2001

⁷³⁷ Lords *Hansard* text for 31 January 2001, column 770

government. Referring to manifesto commitments and government policy, he was centrally concerned to defend the right of the government of the day to decide in which case and for what reason a referendum might be appropriate. Moreover, creating a statutory power of initiative could lead to unnecessary deadlock between the two Houses, whereas

[i]n the case of a major disagreement of principle over government legislation, the Government would argue that the Commons must have its way under the Salisbury convention. I beg leave to doubt that any government would act differently.

Indeed, it might mean more frequent resort to the provisions of the 1911 and 1949 Parliament Acts. But he also conceded that there is no need for statutory powers for this purpose, for there is always the option of amending a Bill to require a referendum⁷³⁸ – which is true, but certainly does not apply to Bills subject to the 1911 and 1949 Parliament Acts.

Alas, the “long-stop” function that Wakeham assigns to the Lords, thereby charging it with the function of guarding the system, is nothing more or less than a delaying mechanism which will allow the “will” of the government of the day as expressed in a decision of the Commons to be done. To be somewhat ungenerous, it is like ensuring that the dog gently barks as the thief escapes. Perhaps one can argue, with some merit, that a delay may actually be all that is needed: better-informed debate in the Lords as a result of the work of the Constitution Committee,⁷³⁹ dissemination of further detail, media interest and publicity hopefully eliciting public reaction, providing a delay in which to conduct public opinion surveys, are thought to induce the government of the day and the Commons to think of the consequences of their actions, presumably not only for the country but also their own party and future political rôle. “Sobering effect” is the name of the game here, and sobering effect is always good, but is this what is meant by guarding the system? So it would appear, especially where the starting point in any attempt to deal with the system at its core is prefaced by and geared

⁷³⁸ Lords *Hansard* text for 31 January 2001, columns 780-2

⁷³⁹ In their Second Report (22 November 2001 on the Anti-Terrorism Bill), the Constitution Committee addressed a number of questions to the government, where in their Third Report (22 November 2001 on the Sex Discrimination (election candidates) Bill) they offered a number of definitions of “representation”.

to preserving the pre-eminence of the Commons,⁷⁴⁰ which, given the executive capture of parliament, means nigh the pre-eminence of the executive. In the circumstances, the powers of the Lords as the guardian of the system are rather very limited; and if this is the only or even main safeguard for this system of government, then this “constitution” is not safe. This manner of guarding the system does not derive from effective powers of the second chamber, but from the recognition of self-interest, and exercise of good sense of the members of the government and of the Commons. Exercise of power in Britain is checked contingently, not constitutionally for there are no constitutional safeguards for this system; no wonder that its history has been one of incremental and relentless degeneration but in long steps.

Some might well wish to argue that despite all the shortcomings detailed above, we should, *in the circumstances*, be happy with the long-stop function that the Wakeham Report assigned to the Lords assisted by its Select Committee on Constitution, because that is the best that can be hoped for. Alas, even that is hardly likely to be the case, because, in view of what has been said so far about the type of person that makes it in this system, not surprisingly the Committee on Constitution aligned itself rather closely with the centrist top-heavy view of the system. Let us, then, reconsider the matter. In their First Report (as discussed above) the Committee on Constitution defined the “constitution” as a “set of laws, rules and practices that create the basic institutions of the state”, and proceeded to declare that they saw their function as one of reviewing the operation of the system and examining the compatibility of new legislation with it. They thus adopted a rather narrow view, the nature of which was made very clear in their refusal (Fourth Report) to examine fundamental questions (they mentioned the use of referenda, but fundamental questions must include such basics as the false notion of sovereignty of parliament) and sought to lay bare what they called “the process of constitutional change”. They also defined their function in respect of the process of change as, firstly, examining whether the present (governmental) process was fair and open and, secondly, whether parliamentary

⁷⁴⁰ For an example, see the terms of reference of the Royal Commission on the Future of the House of Lords (2000) Cmnd 4534

scrutiny of this process was adequate for the purpose. Taking the First and the Fourth Reports together, it is clear that by “constitution”, they meant the working system. This enabled them to declare constitutional reform to be a matter of public policy, which may occur for more than one reason. There is no gainsaying that the government of the day had a legitimate interest and rôle in the reform of the institutions of government and processes of governance. These *are* matters of public policy, although not of a partisan kind, for the object of the exercise has to be the better formulation and delivery of policy. That much is clear and uncontroversial. But it is equally clear that such matters of public policy are at best only *quasi*-constitutional in nature, in that they do not touch fundamental issues of the nature and limitation of power and their control. Yet, the Committee on Constitution defined its rôle and purpose in the reform of the “constitution” so as to equate it with this aspect of public policy. In this, they showed a clear failure to understand the meaning of a Constitution, or the relevance of any constitutional theory argument to the British system. To emphasise, keeping an eye on aspects of public policy is a necessary and legitimate function, which must be distinguished from *constitutional reform*, properly speaking. But obfuscating and confusing (though it would appear not purposefully, for they seemed genuinely not to understand the difference between a Constitution and the British “constitution”) was apparently not enough, and the Committee on Constitution went much further.

In their relatively brief Fourth Report, they examined some suggestions for reform and batted them away, in essence making two points. They considered the present (governmental) processes to be fair, with perhaps the need for a little more openness, and declared the present processes and level of parliamentary scrutiny of such measures to be adequate. In the process, they refused to differentiate between constitutional and ordinary bills – one must say, accidentally but for the right reason, for the measures that go through the system under this process and head are *not* of constitutional reform – and refused to entertain and recommend special legislative procedures for them. This does not mean that they did not want to see any change in the legislative process, but rather that they

considered the hoped-for reform of the legislative process (including such steps as the introduction of draft publication of bills, non-sessional bills, and so on) as general improvements that would benefit the passage of *all* bills. They saw no reason to differentiate measures of constitutional reform and stipulate special procedures for their enactment, also because they suggested it would be altogether very difficult to define such measures. However, they endorsed (pre- and post-legislative) parliamentary scrutiny as an important function, and in this emphasised the rôle and importance of the Lords, although they did not mention the effects of its composition upon this function, or that *this* House or – if the government had its way – any future House (including one with an elected element) is likely to be one of a predominantly appointee members.⁷⁴¹ Furthermore, arguing that there is already a virtual minister for the Constitution (in the person of the Lord Chancellor, especially in its incarnation since the 2001 elections), they could see no need for a separate department to deal with issues of this kind, and while they acknowledged the pre-eminence of the Commons, they also refused to entertain the idea of a minister responsible for the Constitution to be a member of that House: on their view, the Lords (however composed) would do nicely for the purpose, thank you. But in order for the Lords to fulfil its rôle in this respect, it needed support and, humbly, they recommended their Committee as suitable, ready and willing. In this, they also rejected the idea that a standing Royal Commission be created to keep the “constitution” under review, arguing that there is no need for it, and it would lead to confusion, especially now that there is a Committee on Constitution in the Lords! In short, they recommended a slightly tweaked *status quo*.

The net effect was to endorse and legitimate the present process and, with it, the centrist view of the meaning of the British “constitution” and its reform. On this account, the “constitution” is clearly owned at the top and its future and fortunes are in the gift of the wielders of power. This centrist view chimes well with and reflects an understanding that has for long been a silent hallmark of this system: namely that the public, as the electorate, and the nation as ‘the people’ are the

⁷⁴¹ Perhaps the elected element too, especially if it is on a party list basis, can also be adequately and properly described as party appointed.

subject of policy, they are *given* rôles and functions, and whereas government is said to be theirs and for them, their *necessary* ownership is not recognised. We might add here that the government would prefer parliament be a reactive rather than a pro-active partner in all this, which is clearly not the view of some parliamentarians who, naturally, would see their position differently. Yet, so far as constitutional theory and the question of ownership are concerned, whether the government or parliament own it can make altogether rather little difference, for two reasons.

Firstly, whoever may be said to own it and have the power to reform it, it is not “them”, ‘the people’ as such. So far as they are concerned, ‘the people’ are bystanders, onlookers, waiting to see what new rôle and function they will be assigned – to be told what their rights are. That this has implications for the way in which the public see the political system, and that it may be directly related to the crisis of electoral democracy (i.e. falling turnout rate at elections and generally failing participation) is evidently not a point that the wielders of power seemed to understand.

Indeed, we may exemplify the issue of ownership by briefly examining the fortunes of the process of reform of the Lords. The government decided to set up the promised Joint Committee of the two Houses (announced by the Leader of the Commons, 13 May 2002), this Committee (members to be selected through the usual channels, of course) was expected to consider alternatives to be submitted to a free vote in each House to determine the most desired option, whereupon (assuming that a clear line was thereby established),⁷⁴² the Joint Committee would prepare a more detailed plan to form the basis of a bill.⁷⁴³ To emphasise, the important point is that there was no rôle in any of this for ‘the

⁷⁴² The Commons – at any rate that democratic element in it that does not naturally belong to the *boni* and does not find a natural home in or expectation of “elevation” to peerage – would prefer a wholly or mostly elected second chamber. But appointee “Lordships” are not lining up to vote themselves out. Yet the composition of the second chamber matters a great deal more than is readily accepted.

⁷⁴³ There was no guarantee or even reasonable expectation that the government of the day would automatically endorse and adopt the outcome of the deliberations of the committee. As argued before, in the final analysis the sticky point is the relationship between the executive and the legislature, touching upon the delicate imbalance that underpins the Neo-Tudor style of government.

people': there was no mention of a referendum, not even the promise of a sham consultation exercise. Put differently, once the government had accepted a line that parliament would support, the die will have been cast and that would be that; it is their business, not ours. At that stage, we would be told what sort of a second chamber and with it parliament we would have. Lucky us!

But there is a second, theoretical reason why this manner of proceeding is abhorrent, to do with the fact that whether the government or parliament, they are both the beneficiaries of the system of power that only the owners of the system can put in place. They are the very subject of a Constitution properly speaking; they are the personnel running the institutions, the powers of which we must define and limit: they can have no say in any of this, for government is ours and for our benefit. The present manner of proceeding simply offends perhaps the first axiom of constitutional theory (and natural justice), namely that the beneficiaries of power may have nothing to say on the structure of the power they are given, the nature and form of the limits we are pleased to place upon it, and so on. In short, the present manner of proceeding, so clearly endorsed and given theoretical support by the unwise words of the Fourth Report of the Committee of Constitution (buttressed by the support of academics, *some* of whom would probably think again when presented with this kind of analysis) went against everything that is meaningful about the nature, rôle and functions of a proper Constitution, and the idea of making or reforming it.

Three features of this present situation are interesting but also hugely disturbing. Firstly, we must seriously examine the rôle and the place of the Constitution Unit and its input into processes of reform. If ever it was, it clearly ceased to be an academic research unit dedicated to the study of the British "constitution". Its clear centrist bias and focus on the working system made it an obvious ally of some in government and parliament, who found in its apparent academic integrity and supposed independence a source of external support for and validation of their ideas. Alas, clearly and indubitably, the Constitution Unit became an insider group.

Secondly, the proximity of the views of the Constitution Unit and the Lords

Committee on Constitution was surprising, but goes a long way in explaining the close relationship that rapidly developed between the two bodies. Not only did they serve to validate each other's views and pronouncements, but also they shared a clear disdain for any theoretical analysis, focussing sharply instead upon the working system. From an academic and analytical point of departure, it is hard to understand how one can deny the need for theory and yet claim to utter meaningful statements about the system, other than by pretending to a sense of the innocence of undefined concepts – such as reliance upon the idea of a historically received “constitution” the fundamentals of which are not at issue. However, the important point here is that self-conscious denial of the relevance of theory always harbours an incalculable capacity for mischief.

Aspects of this notion have already been discussed and there is no need to rehearse the arguments further; yet there is a need to emphasise at least one point – which takes us to the third interesting feature. In denying the relevance of fundamentals, one denies the possibility of understanding the system. This means that one defines an impoverished and limited outcome into one's activities from the start and, to that measure, which can be considerable, the effort is devalued. Given its limited scope, did the Lords Committee on Constitution at least have the virtue of being useful? At the time of writing, it had produced five Reports: the First and the Fourth were contentious and have been examined here. But they do not exemplify the work of the Committee as proclaimed in these same Reports. On the other hand, the Second, Third and the Fifth Reports (the last dealing with aspects of Justice (Northern Ireland) Bill placed before the House in 2002) – seemed to be the kind of output that their self-proclaimed stance would lead us to expect. Alas, one wonders why the need for this elaborate – and costly – procedure to produce so little. The Committee meant to inform the relevant debate in parliament, rather than influence and structure it: whether such a neat distinction can ever be drawn in practice is debatable, although it is at least conceivable on strictly technical matters. However, if these three informing reports set the standard, the portents may not be so good, and the effort may not be worth the expense, especially so since the Committee on

Constitution seemed to have other far reaching effects upon the way we may understand the system. All said and done, they underscored ideas about this system that in the course of this study I have argued are either plainly wrong or, at best, doubtful. Textbooks on British government are not renowned for their critical approach: instead, they tend to repeat and perpetuate unfounded myths of this system of government, and thus keep alive the misconceived Dicey-syndrome.⁷⁴⁴ The First and Fourth Reports of this Committee on Constitution would probably, unfortunately, provide further “authoritative” support for that misconceived approach.⁷⁴⁵ Frankly, one dreads to think of the influence that even the outpourings of this Committee so far will have upon the teaching of British Government, especially at lower level of analysis.

Exactly what were the Lords (with the support of its select Committee on Constitution) actually guarding? Well, not any meaningful sense of a Constitution, but – recall the arguments about the Roman *boni* – a certain centrist, essentially conservative view of this system of government and its working arrangements, preserving intact the false idea of sovereignty of parliament. But, then, what can we expect in and from a system that is so very top-heavy?

⁷⁴⁴ For this reason, if no other, 20th century texts on British government are generally not relevant to any constitutional theory study of this system.

⁷⁴⁵ At the time of writing, the Committee was (in its *Devolution: inter-institutional relations in the United Kingdom*), investigating how well devolution was functioning.

Chapter Six: The Character of British polity

Lord Ewing of Kirkford:	My Lords, will the Minister accept that I share his commitment to the integrity of the United Kingdom? As a Scotsman, I ask a Welshman why the English want a referendum on a parliament for England when they already have one.
Lord Williams of Mostyn:	My Lords, as a Welshman replying to a Scotsman, I cannot pretend to understand the unfathomable depths of the English mind. ⁷⁴⁶

Particularism

It is only that which exists materially that exists without excuse, whereas what the mind creates has some vital justification.⁷⁴⁷

It may well be that the history of each nation is the story of their excuses for the atrocities they have committed primarily in the name of nation-building, unification and statehood, but also in pursuit of elusive objectives such as national glory, or *pax* this or that. It is, indeed, possible to write the history of the nations of the United Kingdom to tell a story of this kind, but that is not the object of the exercise here. Moreover, it is also clear that every country is conditioned primarily by its geography and geo-history, and in many important ways, we can only begin to understand the character of a polity when we locate our understanding within this larger frame. However, normally speaking, political geography is susceptible of change – annexation, federations, unions, alliances and so on can change the shape and the size, thus the economic and political capability of the state in question – while events in one state have an impact upon its immediate neighbours. There are few instances in which political geography ceases to be susceptible of change and reaches a fixed limit, but when it happens we must treat it as a fact of material importance in how we ought to understand its history. The history of England-cum-United Kingdom is a case in point, and although

⁷⁴⁶ House of Lords questions (on devolution and English parliament) 11 November 1997, column 85

⁷⁴⁷ G. Santayana 'Occam's Razor' in his *Soliloquies in England, and later soliloquies*, 1922, p. 197

some other states also fall into this category – Japan and Australia come to mind, but they are single states each on one island⁷⁴⁸ – ours is somewhat different, and we must begin with the conditions for this particularism.

We see the importance of this geography and its effects upon the geo-history of the peoples of these islands most clearly in accounts of earliest life, here long before the Romans appeared on the scene: that is to say, in an account of a period shorn of familiar history such that we can perhaps see the causes, so to say, in the raw. For instance, Cyril Fox⁷⁴⁹ in an interesting, and in respect of our concerns here, even seminal study lays bare some enduring consequences of the physical and economic geography of the British Isles. He traces the impact of highland-lowland division of Great Britain upon the pattern of settlement and also its consequences in determining the pattern of cultural contact and change upon invasion. Incidentally, he also suggests that a highland-lowland division south of the Forth-Clyde isthmus with similar consequences is a feature of England, and its boundary runs roughly from Teesmouth to Torquay in Devon.⁷⁵⁰ This effect is intensified because, as it happened, the more habitable, agriculturally productive parts of the land are adjacent to the shores whence invaders are likely to come, albeit that climatic conditions also favour settling in these regions rather than in the highlands. The general outcome is a tendency to concurrency of cultures along geographical lines, not only between Scotland and England, but also between high- and lowlands of England. Put differently, invasions of England have tended to isolate the highland parts of the land from fresh cultural contact: Roman influence and legacy in England – especially pronounced in respect of roads, mines and location of forts and cities – stands in sharp contrast to the fact that they did not invade and “Romanise” Scotland. Moreover, invaders brought their own culture, but never arrived in sufficient numbers to be able to forgo the co-operation and services of the conquered, even if in slavery and serfdom, and, given that they married locally, they tended to absorb *some* local culture. But this

⁷⁴⁸ Even here, geography has an interesting rôle to play: co-prosperity zone is not an Australian notion or policy, although the view from New Zealand and some other neighbours of Australia might be somewhat different.

⁷⁴⁹ C. Fox *The Personality of Britain*, 1959, pp. 28-41

⁷⁵⁰ *Ibid*, p. 87

pattern is not replicated in the highlands, and the longer-term result is a pattern of replacement of culture in the lowlands, with aspects of local culture showing, whereas in the highlands the pattern is more one of fusion and absorption such that the alien culture is less distinct, with the consequence of greater continuity of local culture. This helps in part explain the survival of Celtic languages,⁷⁵¹ racial stock, tribal customs and, underpinning it all, a strong sense of individuality and tendency to empiricism. A further important outcome is a gradual widening of the gulf between the culture of the lowland and that of the highlands, where that of the latter changes at a slower rate than that of the former, with the consequence that the culture of highlands shows greater and more distinct unity and persistence over time.

Moreover, just as the island of Great Britain is susceptible to invasion from the continent but no massive invasion has occurred, so Ireland is susceptible to invasion from Britain but no massive invasion has occurred.⁷⁵² Ireland is isolated from the continent, and its (commercial and other) contacts with the continent took place *via* Britain: her trade in metals, gold and copper with the continent went *via* a kind of early “*entrepot*” trade. As it happened, the highland zone of Britain increased the isolation of Ireland; indeed Cyril Fox rather considers that we can easily speak of the highland cultural invasion of Ireland such that, based upon the Irish Sea, Wales, northern England, Scotland and the shore regions of Ireland it formed a kind of cultural province, but this culture did not cross the mountain barriers and penetrate England.

Perhaps these features are simply far too familiar for us any longer to pay close attention to them, but as Fox’s study makes clear, they have had an important determining impact on some historical features of these islands. That

⁷⁵¹ Putting the point this way is not to imply that “Celtic” is a closed category referring to the original Britons. But how far back do we need to go? The development of pre-Roman Britons is an interesting subject in its own right. See L. & J. Laing *Celtic Britain and Ireland*, 1990; and H. J. Massingham *Downland Man*, 1926. Equally importantly we must bear in mind that the Augustine myth – that Christianity reached Britain late, *circa* the seventh century – is a travesty: the pre-Roman network of trade meant a good deal of important contact with the non-Roman world, and Christianity was already here before the end of the Roman period, although it may be too big a claim to say that there was at this time a “Church of England”.

⁷⁵² C. Fox *The Personality of Britain*, 1959. See pp. 42-53 for this part of the account

being so, if certain effects are to any significant measure conditioned by “objective” factors rather than determined by human volition, then we may not be justified in holding the inhabitants of these islands responsible for those developments, although we may reasonably argue that when they could have done something about it they perhaps failed to do so, and may in that sense have exacerbated the condition. Indeed, once we understand the extent to which some developments are truly “objectively” conditioned, to that measure we are liberated from irrelevant arguments and can focus upon the more directly relevant historical developments. This is not to underestimate human agency, but to point out that, to be effective at the “national” level, agency requires capacity, technology, resources and much else besides (including a defined territory and governmental mechanisms to identify problems and give effect to proposed solutions). That is to say, an awareness of the limitations of the conditions may help the construction of a better, more plausible interpretation. Indeed, Fox’s study contributes to our understanding of a number of elements that are normally part of the stock in trade of the description of the historical features of these islands.

His contribution on the background to English/British history helps contextualise the effects of geographic insularity and the rôle of chance in the development of the now distinctly English/British features, such as liberty, empiricism and common law. For instance, Richard Law⁷⁵³ considers that the relative insularity of these islands makes a direct contribution to the development of the primacy of the individual and more generally the attitude to liberty. Indeed, we can take this one stage further and relate it to the tolerance by the government at the centre of local, regional and “national” differences (see below). In a somewhat related sense, K. B. Smellie⁷⁵⁴ suggests a direct relationship between this sense of insularity and the preference for empiricism as the ordinary and essential mode of thought and action of the English/British. On the other hand, R. C. van Caenegem points to the rôle of chance against the general background of the relative insularity of these islands and identifies six “stages” of

⁷⁵³ See his ‘The Individual and the Community’ in E. Barker (Ed) *The Character of England*, 1947, especially pp. 31 and 33

⁷⁵⁴ K. B. Smellie *The British Way of Life*, 1955, pp. 121 and 174-5

its developments: England was largely united by the end of the Anglo-Saxon period, when the Normans invaded; they developed a modern system of law, but this excluded Roman law; only after common law had been established did Roman law penetrate and develop here; and it was fortuitous that Stephen left the system in chaos, presenting Henry II with the opportunity to reconstruct it.⁷⁵⁵

The Romans left behind a power-vacuum at the centre, which was not filled until the time of Alfred. It is thus that the formative stage in the political development of the English begins with the Angles and the Saxons (and the Jutes), such that their legacy becomes the constant background against which any future change is to be understood. Indeed, we may argue that from this time, we can apply Fox's analysis only in a modified sense: each wave of invasion into lowland England had to take account of the existing culture, and we find that whereas the invaders brought their culture with them, they were increasingly constrained to acknowledge local culture and accommodate their own into it, rather than the other way round.⁷⁵⁶ There still is a large difference between the more insular and continuing identity of the local culture of the highlands and that of the changing culture of the lowlands, but the pattern of change in the culture of lowlands as a result of invasion is no longer as Fox suggests it was before, for the speed of change of the culture of the lowlands is now much reduced. Thus, while still different from highland culture, lowland culture is now marked by a rather "fixed" identity such that invaders are more absorbed into it than they manage to impose their own upon it. This nuanced change is important, for it also means that after the Romans we have a degree of continued "English" identity. Moreover, what we recognise as the "English" is the result of changes in the ethnic composition as well as the political high culture of England as a consequence of

⁷⁵⁵ R. C. van Caenegem *The birth of English common law*, 1973, *passim*, especially pp. 107-108

⁷⁵⁶ One need not go as far as J. and C. Hawkes when they claim that because of the sea, the necessary selectivity of what they could carry with them ensured a greater part to the natives such that, despite many invasions (by Romans, Saxons, Vikings, Dutch or Normans), the invaders were assimilated rather than established and developed a cultural group of their own. The difference between the two views is one of degree. J. & C. Hawkes 'The Land and the People' in E. Barker (Ed) *The Character of England*, 1947, pp. 7-8 and 20-21

the invasion by the Danes and the Normans: that is to say, that, broadly speaking, the English are a mix of races⁷⁵⁷ now with a distinct culture, whereas the Celts, as well as the Cornish south of the Tamar, have retained their ethnic identity and culture. But the claim that the English are a mix of races is far too general and begs many questions; importantly, we must underline the fact that this mix is essentially from a limited number of sources: Angles, Saxons, Jutes, a dash of Scandinavians and Danes, and, of course Normans, who were yet from much the same broad Nordic stock.

We have thus elements of continuity largely conditioned by the physical geography of these islands and its relative distance and isolation from the nearest continental landmass. Moreover, it is relatively a small island where important resources are, for the most part, located in the more central regions of England. In the event, in terms of size of land, resources and population, there could, in truth, be no contest between England and the other nations of this island for superior power status: England has always been the major power on the island, with Scotland as a formidable but never equal foe. We can perhaps understand the lure of Whig interpretation here: given the protection of the “moat”, the island was too small for more than one major power on it, but its security could be seriously threatened if another part of the island became a base for, or formed a league with a major continental foe.⁷⁵⁸ In the circumstances, it was perhaps

⁷⁵⁷ *Ibid*, p. 20

⁷⁵⁸ “The sea had always been England’s greatest source of danger from an invader. With the accession of James I ... it became the only one. The classic “postern gate” ... into the kingdom ... was at last closed.” (N. Longmate, *Island Fortress*, 1991, p. 3). Of course, the reasons that motivated England to annexation and union a century later have not altogether disappeared. If there is no fear of invasion from an independent Scotland, there is still a concern to deny a base on British Isles to an enemy (of England) by a hostile, or weak, Scotland and Wales: Ireland in 1939-1945 is a case in point. After all, since the tenth century, there have been 44 attempts to land somewhere on these islands in order to attack England (*Ibid*, pp. 370-1; but see *Ibid*, p. 249, concerning the argument that Ireland is the weak point of British defence). For K. B. Smellie, the sea was the source of danger and means of defence of these islands: it was a natural frontier with all its consequences, meanwhile the fact of its geographic feature shaped her character: the sea could buy time but not isolate. But this also meant that for Smellie the focus was on Great Britain, for he goes on to say that incorporation of Ireland was an advance of the continental type, and a disaster (*The British Way of Life*, 1955, respectively pp. 174-5, 4-5, 1-2 and 175). Arguably the conditions and means of warfare have changed sufficiently to render such arguments much less relevant, as does British membership of the

inevitable, if not also a good thing that, at some stage, the whole should be united under one government. Not only is the temptation to say this simply too strong, but, because these are also part of the history of the unification of these nations under one government, with hindsight, one can see a certain geo-historical logic in the Whig view.

As Vitalis⁷⁵⁹ points out, if the Norman invasion of England was relatively easy, it took them some three months to conquer the English, but they had to conquer in order to bring them under the control of the government of the Norman, rather than to impose a different way of life upon them. That is to say that the so-called insularity as a result of being an island,⁷⁶⁰ where the invaders could not come in large numbers, meant that they had to compromise with the locals in order to keep their newly-won domain and power. But, as already pointed out, not being able to come in large numbers also meant that they did not come with their families; invaders stayed and married local women, which fact has significant implications for the development of the English. In other words, deeper change was slow-fused. At least two of these are important.

The various invasions re-defined the English stock increasingly away from the “untouched” Celtic stock. It is possible that in the process of nation- and state-building this difference could have been removed. True, no nation-building process has ever produced a uniform culture for any nation-state, not even in countries that went through deliberate and organised phrases of unification (such as Germany and Italy). Although there are exceptions – such as the continued identity of the Basque with demands for political recognition of their nation-hood – it is generally the case that the extent of difference tolerated in the outcome elsewhere is not as great and the preservation of difference not as distinct as

European Union, which reflects a change in the nature of a European “threat”– even if some still do not recognise it as fact.

⁷⁵⁹ O. Vitalis *Historia Æcclesiastica*, Book IV, in volume 2, 1969

⁷⁶⁰ Arguments against a Channel tunnel are relevant: the 19th century response was that God had cut England off from the continent, and that a tunnel would create a potentially dangerous new land route to invaders who could now come in numbers. Along this, ran the argument that the destiny of England was in distant waters, but the air strikes of the First World War put a question mark against the whole debate. See N. Longmate, *Island Fortress*, pp. 345-361 and 428.

found in the UK. This is so probably because the process of unification in England was far more political in the sense of bringing the various parts within the writ of the authority of the king⁷⁶¹ than in building a national identity so as to mark it off against the “other” across some border.⁷⁶² So long that the writ of the king ran, the centre could and did tolerate local and/or cultural differences, including dialect and, importantly, custom as local law. Some find it so difficult to digest this historical oddity that they try to force it into a mould, even if they have to create a category of one, and call it a “union state”, while for others this may represent an imperfect nationalisation of politics. Indeed, it is not only the Celts and others that have historically retained their identity after they came under the authority of the English centre but always in a newly designated form – from England and Wales to the United Kingdom of Great Britain and Ireland, later only of Northern Ireland, where each change of name signified a further enlargement of the geographic writ of the king and the authority of his government at the centre – but this lack of uniformity in unity is also a feature of English regions. More than that, the attitude of accepting difference below the level of government at the centre – we shall examine a central feature of this notion in the next section – is replicated in respect of non-geographic differences too.⁷⁶³ For instance, in the wake of experiments with extremes under Edward VI and Mary I, Elizabeth I established the Church of England (the very essence of *via media*) which resulted in legal restrictions on Roman Catholics that took centuries to be erased. Meanwhile, the Church of England developed a high-low church distinction, and occasional conformity was accepted as sufficient indication of adherence to matters English to remove religion-based disabilities. Great Britain and later the UK became a nation with four established churches, where the king/queen *regnant* was in effect the head of each, which is indicative of a rather English attitude to matters of form

⁷⁶¹ England was where the writ of the king ran, even if by 1066 England was a political unity. See E. John ‘*Orbis Britanniae* and the Anglo-Saxon kings’ in his *Orbis Britanniae and other studies*, 1966, p. 62

⁷⁶² The English-Scottish distinction pre-dates the formal entities England and Scotland.

⁷⁶³ We have yet to articulate the theory of ‘structural corporatism’ (my phrase) and write its history. The point of such an exercise would be to demonstrate the extent to which the centre was prepared to tolerate self-regulation and self-governance provided its authority remained intact.

while underlining the fact that religion has been so fiercely depoliticised that it counts for very little.⁷⁶⁴ Indeed, we must go further and proclaim this attitude to accepting difference as a rather distinct feature of English thought and practice, for we find this idea replicated and applied with slight variation not only in respect of the nations of the UK, but also the Empire.

Within the United Kingdom, we may note that whereas Wales was never accorded any degree of exceptionalism and, indeed, its southern regions became integrated into the English economy to such an extent that it is now different from its northern regions, Cornwall was accorded a degree of exceptionalism that gradually withered, such that in 1883, in the re-organisation of local government, it was treated as no different from any other part of England.⁷⁶⁵ This is certainly not the case with Scotland: its exceptionalism stems in part from the recognition of its distinct Scottish features as detailed in the Act of Union, and is reflected in the fact that, when it was safe, Scotland was represented by a Secretary of State (with cabinet rank), and administered *via* an omnibus department in Edinburgh; this level of recognition came to Wales nearly a hundred years later. Two systems of law *etc* in one state, actively fostered by the government at the centre – *provided that authority remained firmly at the centre* – is the hallmark of this historical oddity, without which it would have been far more difficult to foster Scottish culture and perpetuate her separate identity. As Philip Payton puts it, homogenisation is simply not relevant to the history of the nations in the development of the United Kingdom.⁷⁶⁶

This attitude of tolerance, if not actually encouraging the perpetuation of local differences, is also reflected in the way the centre viewed local government for a long time: when local government ceased to be fully and properly independent, so Jim Bulpitt argued, the attitude was one of using local magnates as proxy for the authority of the centre; local government was *through* local élites.⁷⁶⁷ And even

⁷⁶⁴ The king's authority to make final ecclesiastical appointments dates back to Alfred, and was intended to prevent abuse rather than select an incumbent. See E. John 'Orbis Britanniae and the Anglo-Saxon kings', pp. 57-60

⁷⁶⁵ P. Payton *The making of the modern Cornwall*, 1992, parts 1 and especially 2

⁷⁶⁶ *Ibid.*

⁷⁶⁷ J. G. Bulpitt *Territory and Power in the United Kingdom*, 1983, *passim*, but especially chapters 3 and 5

when this came to an end because of the reform of local government in the latter part of the 19th century, it was still possible for Bulpitt to speak of a dual polity as late as the middle of the 20th century.

On the Empire front, the picture may appear a little different, but when examined in any detail, it becomes clear that using the local élite in order to govern from a distance while retaining control at the political level (thereby seeking to influence and direct the economy, but all the while avoiding direct rule of the “colony”) is a rather strong feature of the history of the British Empire. Once we conceptually distinguish between Imperialism and Empirialism (where the former is understood by its nature as culture-clash, while the latter is no more than the policy of Empire – *inter alia* for gain, access to economic resources, security or merely control in order to secure lines of trade or communication)⁷⁶⁸ we can see how an attempt to keep political control while governing through the local élite may contribute to the continuity of the identity, the perpetuation of local culture, and the way of life of the colony, without colonising and in the process changing the very essence of their identity. The difficulty is that directing the economy, especially when it means creating new economic activities, is tantamount to changing the local economy, and with it a great deal more, and this feeds back into the issue of the type of political rule acceptable to a people who now think and live differently. In other words, it is clear that because there is a fundamental affinity between Imperialism and Empirialism, in practice it is very difficult, if not impossible, to avoid running the two together, and that even when one self-consciously pursues a policy of Empirialism⁷⁶⁹ one cannot avoid the pitfalls and, in the end, one is liable to damage the local culture.⁷⁷⁰ That this broad approach failed to preserve local culture out in the Empire – and the fact that the implantation of the so-called “Westminster Model” failed in practically every case is historical testimony to it – but, *mutatis mutandis*, succeeded in Scotland,⁷⁷¹ is an indication that the idea is theoretically sound, but the major requirement of a

⁷⁶⁸ For an extended discussion of Imperialism, see my *Meta-Imperialism*, 1994

⁷⁶⁹ See S. Olivier (Lord) *Dual Ethic in Empire*, 1938

⁷⁷⁰ See M. Staniland *The Lions of Dagbon*, 1975

⁷⁷¹ Indirect rule meant separate legislation for Scotland, not using the local élite.

strong, self-assured local culture, with enough people not only desiring it but also capable of and willing to defend it, marks the difference between the fortunes of the nations of the UK and those of the Empire. One must hasten to add that this is not all that can and ought to be said about it: for despite differences and local senses of nationalism, the fact that both English and Scottish cultures belonged to and found their deeper roots in the broader context of European consciousness is of material importance and goes a long way to underline the claim that Imperialism is a culture clash. But that topic belongs elsewhere. So far as the UK is concerned, we may indeed look upon Scotland since devolution (but not Wales) as an example of the application of the Dominion Concept,⁷⁷² which is not, strictly speaking, a case of or a variation of indirect rule, and also consider that the idea of a federal Britain (even a Federal Empire, or an Imperial Federation, for a while much in the vogue) has never been a practical proposition,⁷⁷³ mostly because of the historically important place of the centre in this system.

The fact that the English Monarchy continued unabated, and was instrumental in the further enlargement of the polity under the rule of the centre is surprising for some,⁷⁷⁴ but in the process, it became progressively stronger. For Rees Davies, the tendency to unitary central rule was born of the fear of disorder and civil war, and this, he argues, encouraged unitary kingship in England.⁷⁷⁵ This tendency was much buttressed by the fact that the government of the king also meant *his*

⁷⁷² This remains a much-neglected concept. For an early analysis see my '*Salutem adferre reipublicæ* (Cicero): the Dominion Concept and the Empire.' Paper presented at the Dominion Concept Conference, University of Warwick, 21-25 July 1998

⁷⁷³ Even though Federalism as such was not a full-fledged concept, the idea of two governments in a certain "constitutional" relationship" was mooted by the Scots and rejected by the English at the time of negotiations for union with Scotland. It was also rejected as a solution at the time of union with Ireland: see, for instance, J. J. W. Jervis *A Letter addressed to the Gentlemen of England and Ireland on the inexpediency of a federal-union between the two Kingdoms*. London (?) 1798. For a general history of this idea, see M. Burgess *The British Tradition of Federalism*, 1995. J. C. Banks offered it as a solution in preference to devolution (*Federal Britain?* 1971), and, oddly, now even some conservatives accept it (see J. Barnes *Federal Britain. No longer unthinkable?* Centre for Policy Studies, 1998). For a more pointed discussion, see my 'After Devolution: J. C. Banks and "progressive federalisation"' in A. Dobson and J. Stanyer (Eds) *Contemporary Political Analysis 1998*, PSA-UK, University of Nottingham

⁷⁷⁴ G. R. Elton speaks of "surprising continuity". See his *The English*, 1992, pp. 213-4

⁷⁷⁵ R. Davies *The Matter of British and the Matter of England*, Inaugural Lecture, Oxford, February 1996, especially 5 and 14.

administration and *his* justice, which for the ordinary people meant a defence against the power of the local baron and earl: the top and the bottom came together to squeeze out and destroy the power of the feudal middle. But the particularity arises from the fact that this did not get out of hand: the fact that there is no “Royal Army” (the king’s battalions, guards and regiments were a few among many others of his “men”, the barons, so that even today there are some Royal and many non-Royal regiments) tells an important story both about the development of the power of the centre and the expansion of its authority, and the rather important fact that it was not sustained by the exertion of force. Moreover, apart from the fact that a standing army was not favoured and support for it not made available, the English fought their wars outside these isles, which meant that their attitude to war was not defined by the perceived threat of a powerful enemy. They *went* to war for other reasons, and consequently many military terms in the English language are of foreign origin, and English songs of war are mostly about coming home.⁷⁷⁶ J. A. Williamson relates this absence of a powerful and permanent military force on the British Isles to the emphasis on sea power and relates the two to the development of attitude to liberty and the way it has been sustained.⁷⁷⁷ As E. L. Woodward has argued, “moat defensive” was more than a mere geographic fact, for safety of England depended upon protecting this moat: “Only an island power can lose all battles except the last.”⁷⁷⁸ On this George Savile, the first Marquis of Halifax, writing about *England* before the end of the 17th century, shared a sentiment with Shakespeare. Halifax praised the sea for more than its relevance for safety and trade: rather, he ascribed significance to it for the very existence of England: to be saved, look to the moat, he said. The English are confined to this island not as punishment, but as Grace and happy confinement, and it is this island position that made England free, rich and a “fair portion in the world”. Indeed, Halifax elevated its island position to a virtue, England’s one advantageous feature that others cannot imitate. After

⁷⁷⁶ E. L. Woodward ‘The English at War’ in E. Barker (Ed) *The Character of England*, 1947, pp. 529-30 and 537

⁷⁷⁷ J. A. Williamson ‘England and the Sea’ in *Ibid*, especially pp. 19-20

⁷⁷⁸ E. L. Woodward ‘The English at War’ in *Ibid*, p. 532

England was reduced to within her limits – i.e. loss of Calais – and ceased to give laws to others, Halifax thought her proper rôle overseas was one of keeping the balance between other powers, especially France and Spain. The implication of his argument is that Britain would cease to be a fair portion when she takes sides and ceases to be “an international trimmer”. For Halifax, this meant that seeking greatness abroad by land conquest was wrong, difficult, unlikely to last long, and altogether unnatural to the English.⁷⁷⁹ John of Gaunt has no doubt about all of this, and more:

This royal throne of kings, this scepter'd isle,
This earth of majesty, this seat of Mars,
This other Eden, demi-paradise,
This fortress built by Nature for herself
Against infection and the hand of war,
This happy breed of men, this little world,
This precious stone set in the silver sea,
Which serves it in the office of a wall,
Or as a moat defensive to a house,
Against the envy of less happier lands,
This blessed plot, this earth, this realm, this England,
This nurse, this teeming womb of royal kings,
Fear'd by their breed and famous by their birth,
Renowned for their deeds as far from home,
For Christian service and true chivalry,
As is the sepulchre in stubborn Jewry,
Of the world's ransom, blessed Mary's Son,
This land of such dear souls, this dear dear land,
Dear for her reputation through the world,
Is now leased out, I die pronouncing it,
Like to a tenement or pelting farm:
England, bound in with the triumphant sea
Whose rocky shore beats back the envious siege
Of watery Neptune, is now bound in with shame,
With inky blots and rotten parchment bonds:
That England, that was wont to conquer others,
Hath made a shameful conquest of itself.
Ah, would the scandal vanish with my life,
How happy then were my ensuing death!⁷⁸⁰

It is simple historical fact that the enemy have consistently failed to land and bring the war to England. The last successful invasion was that of William of

⁷⁷⁹ 'A Rough Draft of a New Model at Sea' pp. 168-169; and 'The Character of A Trimmer', pp. 87-8; both in *The Complete Works of First Marquis of Halifax*, 1912. The phrase “international trimmer” is not by Halifax.

⁷⁸⁰ W. Shakespeare *Richard II*, Act II, Scene I

Orange, with its rather singular circumstances. The primary defence strategy consisted of preventing a successful landing (a role assigned to the navy and not the army), that required the control of “the straits” (which was not defined in strictly geographic terms). Millar averred that, having no need of an army, the king was deprived of the opportunity to assume powers and act as the general of the national forces, affording an opportunity to develop an autocratic state. Others echo this point, especially in the history of the development of Constitutional Monarchy: but a negative point is hard to argue, nor is there much point in so doing. However, Millar further argues that this left one avenue open to the king; his path to glory was paved with attempts at undermining the power and position of the nobility and aristocracy, for which he needed the help and support of the “communes”.⁷⁸¹ But refusing to maintain a standing army at times of peace does not mean that there were no armies and no internal conflicts. Excluding the eventful 17th century, from the end of the wrongly-named period of Heptarchy, the history of the creation of an English kingdom is that of conflict and war between various parts, including the need to maintain peace on the Marches and against the Scots. The need for such military action does not formally end until 1707 (and for Ireland until 1800), although there is also the Jacobite movement, and especially the events of 1745-6. As a matter of fact, the defeat of the Jacobite army – raised on this island, not brought in from overseas – had but nothing to do with English military prowess, and remains an enigma: it is not at all clear why, on 6 December 1745, the successful Jacobite forces turned back when they had advanced as far south as Derby without having met the enemy. The Battle of Culloden Park (16 April 1746), the penultimate battle, is correctly identified with the ending of this movement, but it is not Culloden but the decision to turn back which is in need of an explanation.

Equally, it must be remarked that the so-called “moat” did not mean that England/Britain was not involved in wars with countries on the other side of the moat, including Spain. Rather, the point is that firstly England (and later Britain) was not involved in continental wars as such, and, secondly, that engagements

⁷⁸¹ John Millar *An Historical View of the English Government*, 1803, vol 3, pp. 124-5

were naval: equally importantly, many years of “being at war” often meant a few naval engagements each lasting a few days. But it does mean that England and later Britain did not have experience of land wars as such, and that inter-state conflicts happened only on the other side of the moat.⁷⁸² This historical fact is important: the people of these islands did not suffer invasion and occupation from overseas, contributing to the development of, and reinforced, a sense of presumed security and insularity. On the other hand, the English or British State was actively involved in much conflict overseas, without this fact turning it into a military state. This is presented as a paradox of a strong military state abroad without the expected concomitant of absolutism and militarism at home. This “paradox” is explained, especially in the context of the 18th century, in terms of a military-fiscal state, rather than a military-administrative “Absolutist State”. Too poor⁷⁸³ to become involved in active conflict on the continent up to the 1680s, England could only do so by raising loans guaranteed by parliament, which meant that military service abroad could now be bought, and any military service organised at home could be paid for.⁷⁸⁴ But this introduced an important element of “parliamentary control” over the size and use made of the organised forces of the “State”. There is much in the notion that lack of resources defined a trajectory for this country different from that of the continental Absolutist States. However, though an attractive interpretation, this view is predicated upon the accuracy and veracity of a theory of modern European State contingently based upon the role of war in its development. Indeed thus defined,⁷⁸⁵ there is no such British State at all, which may be the only valuable contribution emerging from that debate. Of course, such a “definition” of the Modern European State is significantly circular: the historical development of one central notion associated with the idea of Absolutist State and its history is reflected back upon the history of specific

⁷⁸² K. B. Smellie *The British Way of Life*, 1955, p. 165

⁷⁸³ The role of money, and the manner in which the fiscal requirements of the “monarchy” (the “State”) was satisfied right up to the end of the 17th century, were two rather important points of focus in the changes now identified as the development of “limited Monarchy”.

⁷⁸⁴ Lawrence Stone ‘Introduction’ in L. Stone (Ed) *An Imperial State at War*, 1994

⁷⁸⁵ John Brewer ‘The 18th Century British State: Context and Issues’ in *Ibid*, especially pp. 54-55

European states, leading to the necessary conclusion that they are absolutist! What is missing in this kind of interpretation is the fact that the armed forces were instruments of foreign policy, they had an essentially external face with practically no internal face and relevance.

England developed a steady but political monarchy: invaders came, and whatever else they changed, the system of government continued, and, more often than not, they also promised to protect the laws and liberties of the English. And although there was no actual invasion after 1066, the fear of one remained a very powerful motif. We need to recognise that whatever else we may say about the way this particularism is defined, in important respects – as argued in various parts of this study – from perhaps not later than the 13th century, the internal dynamics in this country were sufficiently strong to determine the conditions that defined the development of its system of government; its relation to the Scots; and with others overseas. We may add that the last element necessary here was the loss of Calais (in 1558, under Mary Tudor): English power, and with it the English kings/queens *regnant*, were now definitely confined to England. This defined the ultimate territoriality of these islands, and fixed its political geography beyond any doubt.

The character of a polity is defined by its geo-history, its relations with other powers, but, importantly, also by the character of its people and by the interaction between the people and the constituted authority. In examining the development of the character of this polity we are deeply concerned with the character of its largest population.

It is commonplace in most studies to point out that the liberties and the freedoms of the English are the creation of common law. This is often asserted and ignored. The point is that whatever liberties and freedoms (rights as such) the English may claim were never the result of any grant from an authority, be that God, the king or whoever. It is thus that Blackstone emphasises rights as co-eval with the form of government here.⁷⁸⁶ This puts rights and liberties beyond government and authority. True, over the centuries, common law decisions have

⁷⁸⁶ See *supra* Chapter Four, section 3

defined the limits of such rights and freedoms, but they have never created them, nor has the king or government at the centre granted rights. This has changed much, and it is really no longer meaningful to say that today rights are in that sense prior to authority, for the simple reason that over the centuries many new, especially social and economic rights, have been created by statutes, or statutory provisions have been used to modify accepted rights and liberties. The picture is no longer simple, but the meaning of the change has to be tested and understood against the important fact that for the English, government was nothing less an interference with *their* freedoms. This has important and hugely interesting implications.

The English are said to be a hard people to govern:⁷⁸⁷ if rebellion marked the history of the English from the Peasants Revolt to the Gordon Riots, we may think of the long 19th century as one of agitation and protest for the reform and extension of the franchise with the motif of universal suffrage at the end of the line, and the 20th century as one marked by the right to withdraw labour.⁷⁸⁸ It is perhaps a trait of character of the English that the stories of their many rebellions have not become part of their legend. But rebel, protest and strike they did, and often, but none of it was of a revolutionary kind: one wonders if they ever knew what they should do if authority at the centre were to collapse; they would probably be sorry and find it hard to do anything other than to re-construct it. This is not only to underline the fact that each major change was actually marked by a Restoration – or called such even when it was not – but rather to say that one finds it difficult to think that they could do otherwise. Hard to govern but – so it would appear – they still accepted their government. As John Reeves puts it, the English are jealous of power but not ambitious to take it: the system is Monarchy, but they would only accept qualified power; when the law making power of the king is *qualified* by parliament; or the power to execute the law is *qualified* by the jury. Indeed Reeves was so taken with this advanced system of government that

⁷⁸⁷ See for instance G. R. Elton *The English*, 1992, p. 89

⁷⁸⁸ We may think of political parties as means of channelling one type of energy, and of trade unions that of another. We may further consider the breakdown of both as the backdrop against which to understand the rise in pressure group activity, then direct action, especially the Poll Tax riots.

he thought those who found fault with it must suffer from a “defect of mind” showing “aberrations from the national character”, prejudiced or mad, and must “contrary to the genius of Englishman, hate *peace* and *quiet*”.⁷⁸⁹ In short they are probably corrupted by French principles! Halifax did not think any less of the others, but also thought that his Trimmer would look around but prefer to keep England with all its faults.⁷⁹⁰ For Santayana:

[t]he truth is that the British do not wish to be well led. They are individualistic and aristocratic at heart, and want no peers in ultimate things; the inner man must be his own guide. If they have to live under the shadow of a splendid monarch, or a masterful statesman, or an authoritative religion, or a deified state they would not feel free, they wish to peck at their institutions, and tolerate only such institutions as they can peck at.⁷⁹¹

He even thought that they would consider a degree of ineptitude necessary aptitude for office, for it would keep the official from acquiring too great an ascendancy. In short, that the English genius in all matters including, perhaps especially in government, is anti-professional. But this is the consequence of another English trait: as John Hervey, back in early 18th century put it “...a simple people will always do the simple things, and in a simple manner; ...”, which for Santayana was the expression of something deeply English:

[t]he Englishman does in a distinguished way the simple things that other men might slur over as unimportant or essentially gross or irremediable; he is distinguished – he is disciplined, skilful and calm – in eating, in sport, in public gatherings, in hardship, in danger, in extremities. It is in physical and rudimentary behaviour that the Englishman is an artist; he is the ideal sailor, the ideal explorer, the ideal comrade in a tight place; he knows how to be clean without fussiness, well-dressed without show, ... this is why although he is the most disliked of men the world over (except when people need someone they can trust) he is also the most imitated. After all, this imitation of the physical distinction of Englishman is not absurd; here is something that can be imitated: it is really the easiest way of doing easy things, which only bad education and bad habits have made difficult for most people. There is nothing impossible in adopting afternoon tea, football, and boy scouts; what is impossible, and if possible very foolish, is to adopt English religion, philosophy, or political institutions. But why should any one wish to adopt them? They have their merits, of course, and their propriety at home;

⁷⁸⁹ J. Reeves *Thoughts on the English Government*, 1795, *passim*, pp. 5 and 9-17

⁷⁹⁰ “Character of A Trimmer”, in *Complete Works of First Marquis of Halifax*, p. 64

⁷⁹¹ ‘Distinction in Englishmen’ in G. Santayana *Soliloquies in England, and later soliloquies*, p. 53

but they are blind compromises, and it is not in their principles that the English are distinguished, but only in their practice, their accents are more choice than their words, and their words more choice than their ideas.⁷⁹²

Indeed, he also felt the English “has a cage called the constitution, and a whole parliament of keepers with high wages and cockney accent; and he submits to all the rules they make for him, growling only when he is short of raw beef.”⁷⁹³ It is fitting to end this section on this note, for as Smellie averred, the peculiarity of British politics stems from the tendency to find solutions to economic problems, rather than balance of interests. And every thing that has been said in this section goes to demonstrate why the English have never bothered to make a Constitution. But is that still the case now? Can we really say that the particularism selectively described here obtains today?

The sad truth is that, whereas in the essentials, particularism as described here has not changed, since the early 1950s this country has undergone a major social revolution. The reasons for this are many and varied and require separate analysis. They have to do with the changing nature of the mix of the population: it is a truism – and as such simply essentially meaningless – that the English are a race of in-migrants. But this says nothing about the make-up of that population. For a very long time, the in-migrant population was of essentially the same stock, and, more importantly, from essentially the same culture and social consciousness. Since the 1950s, this has been decidedly otherwise. Religious difference was within the larger family of Christendom, and the Jewish element, seeking the safe harbour of religious tolerance, tended to keep a low profile. This is not the case with some other religions, and the seeds of discord are well sown. We may say much the same about the type of in-migrant population since the 1950s, and from the places whence they came. The result is the visible presence of difference, subjected to attempts at control by legislation of the recognition of difference and its consequences. On the other hand, the indigenous British population was also subjected to forces of social change, mostly American:

⁷⁹² *Ibid*, pp. 53-4

⁷⁹³ ‘The Lion and the Unicorn’ in *Ibid*, p. 39

McWorld was on the march and Britain was not spared. Alas, whereas other nations reacted more fiercely at an earlier stage, the British did not, and have only lately awakened to the fact, when it was too late. One unfortunate consequence is a rather peculiar form of selfish individualism, associated with loss of trust – dirigism is everywhere. This may not be entirely just due to social changes alluded to here, but also the fact that the human element has been replaced with computers, especially in economic relations. In my lifetime, I have witnessed the change from a time when an envelope received in the post was sufficient proof of one's identity for practically every purpose, but now proof that conforms to certain standards is needed – for instance a letter certifying the fact from one's employer, or a public service bill not more than three months old. And the tragic tendency is that such dirigism is on the increase, and will find its Apotheosis in the computerised identity card with retinal recognition pattern. The sea of bowler hats marching to the underground in the morning rush-hour soon became mixed with a smattering of jeans; now the bowler hat is an oddity and the most important aspect of the jeans is the designer label attached to them.

One good way of presenting the scale of this change and hinting at its consequences is to point out that the question of English identity did not arise: indeed the question would not have arisen, for the answer was intuitively felt and understood (albeit differently) by each "class"; put simply, they knew who they were. But now the question has been put, and we find it cannot be answered. It is not so much that the British have lost their unspoken sense of identity, but that they have lost their sense of community; selfish individualism has a counter-part in the de-personalised person: we are now all user-names, passwords and numbers. Suddenly, it is very difficult to focus upon any feature as essential identity, for if previously identity was a social matter with a sense of the political attached, now it is almost all but a political matter with implications for social and economic rights. The result is not so much that we speak of dual identity (English or Scottish *etc* and British) but that we have lost our sense of who we are – my passport declares my right of abode with all its implications, and that is in practice all the identity I need: Burke's small platoons are no more. It is plausible that a

people essentially at one may not require a statement of its first ruling principles. If ever this was how the British managed their affairs, it is evidently no longer true. The consequences of such a change are patent, and feed into the need to define the basic arrangements with which to attend to the common affairs of this people.

The centre perspective

The UK Union is a vast subject inviting separate extended treatment,⁷⁹⁴ which would take us into the interesting history of how it came about, from the early 16th to early 20th centuries; it would require an extended treatment of the Jacobite Union (of the Crown) and, even if only briefly, the history of government and politics in Scotland and England; it would take us into the fascinating fertile two decades prior to 1707 when constitutional ideas were clearly to the fore, but almost exclusively in Scotland. This would lead, on the one hand, to an analysis of Scottish constitutional ideas at the turn of the 18th century, and, on the other, to the examination of 1688 from a Scottish perspective. But such a detailed study would take us away from the purpose in hand.

If, for England, 1688 was a moment of significant real change, even if at the time its nature was uncertain (hence a number of further Acts in the following decade and half) and appeared only to have restored the “constitution” rather than innovated, it was quite otherwise for Scotland. Indeed we may argue that 1688-1706 represents a revolution for the Scots, in the proper sense of that term,

⁷⁹⁴ It is also a subject that has been rather badly served, mostly because theory has been constrained to conform to or support political inclinations. It is thus difficult to understand what the claim that this is a “Union State” (Michael Keating ‘What is wrong with asymmetrical government?’ unpublished paper, PSA British Territorial Politics Group, University of Newcastle, 1997) adds to our understanding of the subject, since “Union State” is no more than a generalised account of the development of the UK. The stages of that development depict the accretion of new parts at different times and on different terms. But many – such as the Constitution Unit– have accepted this as a definitive description, and use the phrase as though it means something. More than that, they use the argument implicit in it that, as a result, devolution will also be asymmetrical, without giving any arguments as to what it ought to be instead. On the other hand, there is the argument that this is not a union, but the result of a number of amalgamations, an imperfect union with imperfect integration, showing “imperfect nationalisation of British politics”. (A. Lee ‘Political Parties and Elections’ in P. Payton (Ed) *Cornwall since the war*, 1993, especially p. 253). True, but do they mean to say that this asymmetry or imperfection is a vice or a virtue? In view of the preceding section, surely, a virtue: but this is not the natural and obvious import of either description.

in that by 1707 Scotland no longer had its own government and was governed distinctly differently from before 1688. We may note some of the differences: the system retained its overall character of Constitutional Monarchy (even if there were doubts about the dynasty), now under one Crown and one government, with a bicameral system in which, for the first time, the peers of Scotland had a separate voice,⁷⁹⁵ and where Scottish members of Parliament from Scotland generally spoke in one voice in pursuit of Scottish interests, even if this meant supporting the government of the day. For Scotland, this period was a prolonged “constitution moment”, but the Scottish Acts, or the English Act of Union as such, was not a Constitution for Great Britain.⁷⁹⁶ However, the extent of this change went beyond its effects upon Scotland: absorbing a “Scottish layer” changed the governance of England, even though government at Westminster remained institutionally and structurally untouched.⁷⁹⁷

At the end of the 17th century, the choice lay between peaceful union and war.⁷⁹⁸ “Federation” was the preferred solution for some in Scotland, which would have required a “proper” Constitution of some sort, but the English negotiators would have none of it, and considered anything other than complete absorption less than adequate, far too small a return for giving Scotland commercial access to English markets and beyond;⁷⁹⁹ the *sine qua non* for the English was the sort of security that two-government solutions – no matter how closely inter-related – could not provide. In the event, the English view that the two countries should be

⁷⁹⁵ 16 elective peers of Scotland were admitted to the parliament of Great Britain, but an attempt was made to raise this to 25, while also introducing a mechanism to control the creation of English peers. See the 1719 Peerage Bill, in W. C. Costin and J. S. Watson *The law and the working of the constitution: documents 1660-1914*, 1961, pp. 213-6

⁷⁹⁶ MacCormick would contend otherwise. See his ‘Does the United Kingdom have a Constitution? Reflections on MacCormick v Lord Advocate’ in *Northern Ireland Legal Quarterly*. 29/1 (1978) pp. 1-20

⁷⁹⁷ This effect appeared but in reverse with devolution to Scotland, although not all its consequences, especially for parliament in Westminster, have yet been realised.

⁷⁹⁸ R. L. Mackie *A History of Scotland*, 1916, pp. 468-9. The century-long history of the “coming” of this union is a fascinating subject in its own right, but out of place here. See B. P. Levack *The Formation of the British State*, 1987. For a brief discussion of the main developments see J. Robertson ‘Union, State and Empire’ in L. Stone (Ed) *An Imperial State at War*, 1994

⁷⁹⁹ The importance and role of an economic crisis in Scotland in the years immediately preceding the Union must not be overlooked. See Peter Laslett *The World We Have Lost*, 1971 edition, especially pp. 119-120

under one government and one parliament at Westminster prevailed.⁸⁰⁰ This settled the issue of its form: there was to be no union but the *incorporation* of Scotland into the English system. The agreement recognised different Scottish and English religious, educational, local government traditions, and systems of law, and ensured their continuity; it provided for a transitory mechanism for the admission of a number of existing members of the (now defunct) Scottish parliament to the English Commons, and provided the framework for elections to the parliament of Great Britain; it settled the question of succession; it created a single economy, stipulating in some detail its finer arrangements, including the immediate recognition of the existing English Mint as the sole single currency of Great Britain. The actual incorporation was at the level of political and economic “élite”, which explains its general unpopularity in Scotland,⁸⁰¹ even though it was to their economic advantage. However, by this agreement two countries, albeit for a century under a joint king, were set to become politically and economically one. The procedure used – namely a Treaty between the two, sanctioned by parliament in each – was not unusual or otherwise remarkable, except to the extent that it was a Treaty between two governments under the same Crown, and this one Crown had to sanction both! Even so, technically it was a Treaty between two independent countries. Some implications of this procedure are worthy of comment. As a matter of fact, the Treaty and all the Acts passed in Scotland relevant to it were laid before Parliament at Westminster as one Bill, and passed as one Act of Parliament, which means that the wording of the Treaty and the Acts in the two countries was identical. However, as T. B. Smith points out, the Treaty was executed, and because separate Scotland and England were replaced by a single Great Britain, there could be no further International law perspective to it: once executed, the Treaty was simply no more. An implication of this approach is that, to the extent to which this claim is true, it must also be true that Acts of Parliament of both sides, but especially in Scotland, resulting in

⁸⁰⁰ For an account of the benefits of the Union see George Clark *The Later Stuarts 1661-1714*, 1956, pp. 288-393, albeit that, in the words of Stone, this Union did not create a “psychological nation” and unity. L. Stone (Ed) *An Imperial State at War*, 1994, p. 27.

⁸⁰¹ T. F. T. Plucknett *Taswell-Langmead's Constitutional History*, tenth edition, 1946, p. 527

“Great Britain”, also disappeared with the two separate states, and in the absence of a clear successor to each could not be amended or repealed. Whereas a history of the “union” – how it came about – is not a problem, the actual course of the change cannot easily be made intelligible in terms of law and rules of legal argument: law is distinctly inadequate in explaining that element of unpredictable, radical creativity that sets human social and political systems apart from all others. It is thus that constitutional law explanations of the process of this incorporation end in logic-chopping, and fail to account for the fact that Great Britain was not governed according to the meaning and the terms of the “union” as lawyers would see them. We might add that this radical creativity is precisely what we expect at a moment of constitution-making where there are no existing rules,⁸⁰² although we must also repeat that despite its tremendous attraction as a prolonged period of “constitution moment”, what emerged in 1707 was not a Constitution, and that period was only a “constitution moment” in a figurative sense. That is to say, much that lawyers would expect to have happened did not happen, and the “political” terms of the Treaty did not assume the status of superior law beyond ordinary repair; but much else that was detailed in the process was honoured almost to a fault. It is thus that we see tremendous continuity in civil and legal institutions and practices – which underpinned the continuity of an identifiable Scottish nation, recognisable even today. The two states and nations became one but only politically, with one common market and a unified economy, but the idea that they would become one people, that somehow this “union” would mean *integration*, was conspicuously absent, if not also positively rejected.

The language of the negotiations and process was one of a Treaty, written in the ordinary and customary style of such documents for the time. And, like marriage, it is the customary language of treaties to declare friendships and alliances to be perpetual. In other words, the fact and wording of the Treaty (and the Acts) is entirely incidental. Indeed, there is some historical evidence that the

⁸⁰² In accepting that the ultimate rule is not that of law, and therefore with no legal probity, they accept as a dictum that from a bad (legal) source, good law can result: *quod fieri non debet, factum valet*. See J. W. Salmond *Jurisprudence*, 1924, pp. 154-5

incorporation was expected to collapse, for serious dissatisfaction and discontent continued. Moreover, the two periods of intense conflict issuing from the supposedly settled question of succession underlined continuing political difficulties and determined the fortunes of factions in England: just what would have happened to Great Britain had the Jacobite movement succeeded in 1715 or 1745-6 is not at all clear, or a question worthy of serious attention.

We must not be distracted into the argument about whether the parliament of Great Britain was born fettered or not, or whether the manner of creating Great Britain also created a fundamental law: these and related arguments, also to do with Northern Ireland (but never Wales or Cornwall) – what I have called the “Celtic View”⁸⁰³ – have no conceptual implications, are of historical interest only, and belong elsewhere. But, briefly, on the “Celtic View”, parliament after 1707 is not sovereign because it was born fettered.⁸⁰⁴ However, proponents of this argument do not make a convincing case, and their claim falters; and they have no answer to the obvious fact that both parliaments were thought to have sufficiency of powers to give effect to a change in the political status and system of government both in Scotland and, less obviously, in England.

Proponents of the Act of Union as fundamental law emphasise its declaratory features, claiming that its declarations identified existing features of the Scottish system, and – as one might say in contemporary language – reserved these matters and, to that degree, placed them beyond the competence of the nascent parliament. But in so doing they ignore both contemporary practice and style of the language of politics, and, indeed, the more relevant articles in the Treaty which may tell a different story.

⁸⁰³ The basic texts expressing the “Celtic View” are: T. B. Smith ‘The Union of 1707 as Fundamental Law’ in *Public Law*, 1957, pp. 99-121; J. B. D. Mitchell *Constitutional Law*, 1968; Harry Calvert *Constitutional Law in Northern Ireland*, 1968; B. Hadfield ‘Learning from the Indians? The Constitutional Guarantee Revisited’ in *Public Law*, Autumn 1983, and her ‘The Northern Ireland Constitution’ in B. Hadfield (Ed) *Northern Ireland: Politics and the Constitution*, 1992

⁸⁰⁴ This a variation on the “New View” argument (see R. F. V. Heuston *Essays in Constitutional Law*, 1964); they have close affinity with each other in invoking something higher to control parliament – respectively the Union and common law – that they both are saddled with the wrong baggage of concepts and that in both cases their arguments run into the mire of logic-chopping.

On style and language, “forever”, “fundamental” “ancient”, “indubitable rights” and the like were used as a matter of routine in legislation, treaties and so on. Indeed unless otherwise stipulated, every Act of Parliament was – still is – timeless, in that it is valid forever, which only means until such time that parliament should amend or repeal it! That is to say, we ought not to put any emphasis upon this particular type of word or phrase. The use of such words emphasises the importance of certain matters, but since such apparently enduring-sounding words (it would be plainly wrong to say “words of entrenchment”) were, from *Magna Carta* on, used and promptly ignored, it is hardly meaningful to claim that the case of the Act of Union with Scotland is the clear exception that probes the rule. What is more, the category of “powers of new parliament” is conspicuous by its absence in the Treaty: there are no exclusions from the simply unspecified competence of the new parliament in the Act of Union. This lacuna is important.

Generally classed as technical in nature, Articles 22 and 23⁸⁰⁵ are often overlooked in analyses of this Act, settling the number of Scottish peers and members of the Commons in the new parliament. It is true that these matters are central to the articles, but that is not the whole story. Closely reading these articles shows that the parliamentary practice of England was to be the norm: peers of Scotland were to join and be treated the same as peers of England; if a parliament was to be called on or before the inception of the Union – i.e. First Day of May 1707 – sixteen peers and forty five members of the Scottish parliament were to join the existing English parliament. Moreover, the duration of the first new parliament was declared to be “for such time only as the present parliament of England might have continued if the Union of the Two Kingdoms had not been made”, or sooner if dissolved. Furthermore, until the “Parliament of Great Britain shall otherwise direct”, the Oath of Allegiance was tied to that of the English Revolution Settlement.

These brief references point to a high degree of continuity of English concepts and practices into the “Parliament of Great Britain”, including the succession,

⁸⁰⁵ C. G. Robertson *Select Statutes, Cases and Documents to illustrate English Constitutional History 1660-1832*, London, 1904, pp. 97-100

English parliament of two chambers, and English parliamentary practices, duration, and the Oath. In this sense, it is a myth to claim that two parliaments, as it were, extinguished themselves, and a new parliament was created. Far more, it is the case of a practical continuity and with it a good deal of carry-over of essentially English concepts. If so, then it would be paradoxical to assume that arguably the greatest “gain” of the Revolution Settlement, namely (the false idea of) Supremacy of Parliament, was also the only sacrifice and exception in this process of transformation. Indeed, the paradox is greater than might at first appear; it was precisely because each parliament was thought competent and adequate to the task that they could create an enlarged state, in the form of Great Britain. This was an act of “sovereignty”, on the part of *both* parliaments, of England and Scotland. What reason is there to believe that the resultant parliament should be any less “sovereign” than its two progenitors?

Casting doubt over the meaningfulness of the claim that “forever” and “fundamental” must amount to the “entrenchment” of certain principles and institutions, and establishing the principle that there was a significant degree of continuity in the capacity and competence from institutions of England to those of Great Britain, one is inevitably led to the view that the Act of Union was an ordinary Act.⁸⁰⁶ However, the success of the process of dissolving Scotland and England into Great Britain, together with the perceived legitimacy of the outcome served to disallow questions about sovereignty of parliament, and that was that: one can only wonder about the extent to which this single contingent historical instance underpinned the idea and contributed to its longevity. It probably helped secure the fruits of Revolution Settlement better than any other device. This point can and must be made in the context of the Scottish experience as well: the fact of the “union” was deemed sufficient answer to the doubt cast, for instance, by John Nisbet about the capacity of (members of) Parliament to enact certain changes without reference to its electorate.⁸⁰⁷

⁸⁰⁶ Within the year, the Scottish Privy Council was abolished by an Act of Parliament. See A. L. Murray ‘Administration and law’ in T. I. Rae (Ed) *The Union of 1707*, 1974, p. 32

⁸⁰⁷ Nisbet argued that the power of elected representatives did not extend to “altering Fundamentals and the Constitution of the Government either of the Church or the State”, for which it needed special authority (*Doubts and Questions in the Law of Scotland*, 1698,

The upshot is simple: Great Britain, and, subsequently the United Kingdom, despite the turn of phrase and repeated use of the word, is not a Union. In all its manifestations, the British-cum-UK system has been a *united* kingdom with a centralised system of government, where “United” refers to the fact that two (later three) Crowns became one, and the unitary system of government – characteristic of both Scotland and England – remained the hallmark of the new: one Crown, one government, one parliament, all based at Westminster, and all in the shape of the erstwhile English government! But this has interesting implications in that it helps define a view of the nature and characteristics of this government as the benchmark level of government and the repository of sovereign authority. The result is a view of the centre about itself, which defines its relations with other levels of government – up and down.⁸⁰⁸ we may identify some eight features:

1. The UK is a unitary Parliamentary democracy: sovereign powers resides in “Queen-in-Parliament”,
2. It is composed of four “nations”, but all are contained, in an undifferentiated and unsegregated sense, within one unitary sovereign authority,
3. Some Scottish identity remains; in Wales this is “dormant”; in Northern Ireland identity and allegiance are problems: but, in all cases, they are the nations of this state, with no separate voice.
4. The centre does not tolerate loss of sovereign power to the periphery,
5. Parliament may grant devolved powers, but this does not affect the sovereign power of parliament,
6. Policy is directed from the centre; in effect there is no subsidiarity but a good deal of de-concentration,
7. The economy is directed and managed from the centre, with Sterling as the currency
8. GNP is the result of an un-differentiated UK economy, to be used for the benefit of whole of the UK as directed by the government at the centre.

This centre perspective is not defined or to be found in any single text anywhere, but one arrives at it by observing and examining the behaviour of the “abstract centre” since (at least) the early 18th century. Thus we see the progressive steps

p. 17). Stuart responded by saying “[t]he question being determined otherwise by the parliament in 1706, in the Union of the two kingdoms, there is no Place now, for any further Reasoning upon it.” J. Steuart *Dirleton’s Doubts and Questions in the Law of Scotland Resolved and Answered*, 1715, p. 31

⁸⁰⁸ The following arguments are based upon and adapted from part 2 of my ‘The Centre and “Union”; the problem of explanation’ *Strathclyde Series on Government and Politics*, No 99, September 1994

whereby the independence of local bodies – an interesting if not also unique form of the pluralism – was gradually but surely whittled away at the altar of direction from the centre, associated with the grant of new powers and, no less important, funds. Equally, this perspective helps define the response of the centre to the Irish problem in the 19th century – and the bracketing of Northern Ireland to the extent that it was almost pushed off the agenda of British politics until it erupted in violence – as well as the management of the Scottish nation with a “super ministry” but within the frame of the United Kingdom government.

The thrust of these eight points is to define a view of a unified authoritative centre in the British state, which means resisting any incursion into the integrity of the power at the centre from bodies outside it. That is to say, resisting union at the level of Europe must be set against the background of refusing to diffuse real power at the level of the British Isles: from the perspective of the centre, both these developments are necessarily corrosive of the power and integrity of the “state”. In examining these two issues, we must cope with the fact that describing the UK government as “unitary” hides the reality that this is so purely at the political and economic levels, and that in terms of nationhood, the UK contains at least four historically-identifiable national components that have never been integrated; every nation involved, including the English, has resisted integration, thus fostering the continued identity of each, with much regional variation within England to boot. In an important sense, the UK was fiercely and deeply multi-cultural within its larger frame of European consciousness long before the phrase “multi-cultural” came into fashion. But the reality and importance of this notion is simply not recognised, and the fact received practically no attention until relatively recently. Alas, the Scots did not contribute a great deal here in that, for long they politicised their culture and identity and used it as a platform for claims to devolution, even separation; perhaps the fact of devolution will now allow greater focus upon these aspects: the quarterly *Scottish Affairs* is an interesting focal vehicle for such research, and nearly every issue contains articles on politics, government, culture and so on. The Welsh and, more recently, the Cornish have

taken decidedly more of a cultural approach, making significant contributions.⁸⁰⁹ Similarly, regional identity in England became an increasingly live issue, even if academics still pay less attention to it than it merits and tend to treat it as subsidiary to “Territorial Politics”. We still have no English Studies in its proper sense, although there is a great deal of research into English history, language and related topics. Curiously, we still do not have a properly funded Institute of British Studies.

The rôle and place of the British centre when seen in this way contributes to – and makes intelligible – the essential features of the British attitude, as it were, upwards, towards the European Union, and, downwards, to local government and devolved institutions. In all cases, the attitude is one defence of centre, and the use of the features and attributes of the centre as the benchmark for the idea of government. In all cases, the centre will only allow the loan of power to any *infra-* or *supra-*national body, such that – even if as default position and in theory – it can re-patriate power to the centre whence it was loaned. Within this larger political context and framework, the centre appears well disposed to delegate functions to various bodies, supply the necessary powers and funds, with rather little direct control. The test comes when a relationship with an *infra-* or *supra-*national body goes beyond this, and we have examples of both.

British association with what is now the European Union was and remains predicated on the basis of the default position of sovereignty of parliament. Clearly the history of British membership has been marred with difficulties and disagreements over finance, Common Agricultural Policy, Common Fisheries Policy, and, no less, ideological disputes over the overall shape of policy at the European level. But these are disagreements that in no way touch the terms of our membership; extension of the qualified majority vote for a while threatened this equipoise, but that was – mistakenly or not – seen as the necessary *technical* decision-taking mechanism if the objectives of the common market were to be achieved. More than that, there was no obvious sense in which this particular

⁸⁰⁹ The Welsh output does not have a single voice and is not brought together under the rubric of a focused research centre, but the activities of the Institute for Cornish Studies, based at Truro, are interesting.

decision-taking device could be seen to contradict the essential basis of British membership, *viz.* the continued political authority of the government at the centre. This was for two rather large reasons: firstly, the European Union did not touch – except indirectly – foreign and defence policies. In this sense, British political independence, and military cooperation with the United States of America – the so-called “special relationship” – was left untouched. Moreover, the reins of economic control remained in the hands of the British government, even if since 1997 monetary control has been shared with the Bank of England. But enter the idea of a single currency, which is only the next and logical stage in the process of creating a truly single competitive market, and, suddenly the tone of the debate and nature of the concern changes. Curiously while most informed analysts and commentators saw and spoke of this in terms of its underlying political complications, and considered it a political decision with “constitutional” implications, the government insisted upon economic tests and persisted in its view that the issue concerned whether joining the Euro would be good for the British economy. This is a sticky issue precisely because there is no formula at hand that, as in 1972, can help contain, and thus locate as still within the powers of the British centre, European decisions as British decisions taken upon the basis of delegated power, even if only theoretically and in terms of a default position. A European central bank would seriously alter the capacity of the Bank of England and government to control the economy; a single currency would tie the British economy far too intimately into the European system such that the possibility of re-establishing a British currency would be a nightmare; and at any rate the need for convergence and the fact that economic policy would be on the basis of many different economies also means that the British government would have to accept defined limitations upon its freedom in certain areas, specifically setting the budget within limits and maintaining government finances within agreed parameters. This amounts to a real as well as theoretical loss of control and the British centre would find it very hard to cope with if they fail to find a way of disguising the fact, and presenting as intact the default position of British sovereignty (of parliament) – else the British “constitution” would simply wither

away. This also applies to the possibility of a single European defence and foreign policy. Incidentally, we find an odd echo of this refusal to yield “sovereign powers” in what the English expected the Scots to yield as the price of union: in 1707 Scotland lost precisely the sort of control that the British centre now refuses to yield to the European Union.

This inherent and characteristic resistance to yielding power (i.e. with no direct control over it, and no clear way of recalling it) to a *supra*-national body mirrors the attitude of intolerance to *infra*-national pluralism. Here, too, the centre will happily delegate power, predicated upon the power of the centre to amend it, change its terms or simply recall it, almost at will – but subject to the procedures of the political process and keeping up the probity of its appearances. But this is delegation, not the creation of new centres of power; the creation of sub-ordinate levels of government, not recognition of *their* original powers; it is multiplying levels of government within the larger unitary structure all receiving their power from the centre, not even the beginnings of a “federal” system. Notice the division of responsibility between the government and the office of Mayor: the centre would set policy, for instance, for the London underground system, and the Mayor has the responsibility to apply it. We must also notice the near-fiasco of the Mayoral election in 2000, when the government at the centre feared the election of a man with ideological baggage they would rather not have in office. The centre perspective cannot tolerate *infra*-national pluralism.

But here, too, we find interesting deviations and less than clear conditions. Despite all else, devolved government is not on a par with local government. Yet, in so far as both receive their powers from the government at the centre and are subject to it, they are in the same class. They are all subordinate levels of government, hardly separate, different and independent centres of power. Yet, the distinctly subordinate nature of devolved government to Scotland⁸¹⁰ remains somewhat ambiguous: why the need for royal assent to its measures? If this was meant to appease the Scots, it certainly is not a benign point and has

⁸¹⁰ See Scotland Act 1998; also see ‘The *Scotland Bill*: some operational aspects of Scottish Devolution’, House of Commons Research paper 98/2, January 1998, and R. Rawlings ‘Concordats of the Constitution’ in *Law Quarterly Review*, 116, April 2000, pp 257-286.

implications: were the implications intended? Other aspects, too, are odd: why create an involved and distinctly unstable financial arrangement? Or complicate the future shape of its parliament and government? Using the same constituencies for the directly elected members of Scottish parliament (MSPs) and members for parliament at Westminster makes sense, in that it reduces the number of constituencies for different elections – there are also local government districts and European Parliament constituencies. But it does not make much sense when another necessary objective is to reduce the number of MPs from Scotland, which requires re-drawing the parliamentary constituency boundaries. But because the same constituency is used for elections to both parliaments, such an exercise will, by default, reduce the number of directly elected MSPs, with important knock-on effects upon the size of parliament, its working, and indeed the shape of government in Scotland. The first purpose defeats the other, and one must wonder why it was done in this way.

The centre perspective appears to be a fairly well established feature of the system, and conformity to it imposes odd features upon new arrangements. This condition is exacerbated by the fact that reform is not the result of systemic constitutional theory analysis of the problem and is often simply not thought through at all – the quagmire reform of the Lords is a case in point (*supra* Chapter Five). Indeed, these oddities serve to underline the absence of proper constitutional forethought. In case of devolution, they reflect a deep ambiguity about the character of the British State post-devolution, place a question mark against the nature and the rôle of parliament at Westminster, and, not least, make us wonder about the last point and the question most directly associated with it, namely the absence of any government at the level of England.

Finally, how does the idea of “defence of centre”, or the “centre perspective”, relate to the Neo-Tudor style of government? This is a rather complex question: as argued here, the idea finds its origins in Revolution Settlement and the union with Scotland, which clearly predates even the emergence of the mechanisms necessary for the development of the Neo-Tudor style of government. In this, and to this extent, the centre perspective is not a feature of it, but the fact of this

feature contributes to the focus upon the centre and, with the capture of the legislative powers of parliament, goes a long way in underlining the basic problems of this system of government: focused and concentrated authority of government, jealously defensive of its power and position, with no constitutional check upon it. As McKechnie saw it⁸¹¹ in 1912, government had already moved away from its prime function of a controller to actually governing almost as a despot with no controls, such that the idea of government moderated by talk was no longer meaningful. For McKechnie, the problem was the power of parliament, now in the hands of the government, but unlike Blackstone, he sought safeguards against parliament.

Terms of government discourse

Given that whatever stands for a constitution in the United Kingdom is actually so transparent that we never see it but only see the government, for us the terms of government discourse are also the terms of constitution discourse. To the extent that in most cases, terms of government discourse take their conceptual meaning from terms of constitution discourse, this is not an issue; but this also means that those aspects of the constitution discourse that remain outside the ordinary discourse of government are generally at a discount. Moreover, we suffer from a complicating historical difficulty in the study of the British system in that the words of its discourse continue into a “different” era where the practice is different, but we fail to see that this denudes the terms of their essential meaning. We fail to recognise the importance of this fact for three reasons. Historical accounts do not usually deal with this kind of issue, and, at any rate, in the present condition of fragmented disciplines concerned with this subject, historians and only a few from across the disciplines read such texts. Secondly, analysts attempting conceptually oriented studies often focus their attention upon far too limited a historical period: for instance Dawn Oliver⁸¹² confines herself to the post-1945 period; and Rodney

⁸¹¹ W. S. McKechnie *The New Democracy and the Constitution*, 1912, pp. 56-7 and 132, 58-9 and 192, 158-9, and 173-4

⁸¹² D. Oliver *The Government of the UK*, 1991

Brazier,⁸¹³ making many references to distant historical instances, admits to the focal influence of the period since 1979. A limited historical context makes it in practice impossible even to begin a proper theoretical examination of the changing meaning of the terms and concepts, and is liable to collapse into logic-chopping examination of words and their related concepts. Indeed, the prevalence of such a limited-horizon approach goes a long way to explain the empirical generalisations nature of “theorising” about this system. Lastly, most analysts who mean to deal with constitutional issues rapidly lose sight of “it” and focus upon government. Constitutional theory is concerned with office and powers, not incumbent and policies: such an analysis may appear less topical, interesting or immediately relevant and rewarding – it certainly requires self-restraint and patience, and the will to resist the lure of “politics” – but it is probably essential for teasing out nuances of difference over time and laying bare their inner importance.

For diverse reasons, this approach is not favoured, and the various requirements placed upon Universities (especially relating to research assessment exercises etc), have made it even less likely that any department will tolerate a member who proposes to spend years working on one dusty project. The result is an almost general neglect of the constitutional theory approach; but sidestepping it amounts to wilful neglect, resulting in self-imposed ignorance and entailing confusion. The undesirable consequence is that we do not really *know* our very *familiar* system of government, a condition exacerbated by the evident continuity of terms of its discourse as the necessary medium and integument for the continuity of its legitimating concepts. This means that a significant change in the *practice* of government, not reflected in or the result of any institutional change, apparently stands in no need of a new concept and a new set of terms of discourse; and this only goes to further justify the lack of interest in constitutional theory. Put differently, because institutions of English/British government continue from one mode of political rule to another, such that we are apt to see continuity and mistakenly assume that what continues is substance rather than form and

⁸¹³ R. Brazier *Ministers of the Crown*, 1996

appearance, the terms of constitution discourse are not seen as the proper subject for critical analysis. Consequently, our familiar political system remains a mix of fossilised institutional forms (e.g. parliament) and empty catch phrases (e.g. fundamental law, or rule of law) that survive and hide real change. The ruling principles of action in each epoch, the ruling ideas according to which the system works – for some the “conventions” of the constitution – change from one epoch to another, sometimes even within a matter of decades. But these “conventions” embrace and render acceptable precisely the modes of action that adjust the reality of the structure of power to the “constant” terms of its discourse, its legitimising terms. With us “for all time” – i.e. timelessness – is a feature of the form, not the reality of its principles, and is only achieved in the contentless fossilisation of an institution, rather than by protecting its *idea* against change – which means ensuring the continuity of the constitutional order – thereby preserving the working system in a recognisably legitimate form. In other words, we have no permanency and no guarantee against fundamental change, even when this is a declared and desirable objective. Indeed, a system given to pragmatism cannot be based upon preservation, except when it suits: to preserve on principle rather than on convenience has always been out of English/British character. However, this way of proceeding also serves to empower⁸¹⁴ the coming generations, in that what we bequeath to them is the sum-total of our pragmatic responses. We may take the argument full-circle and say that it is precisely this haphazard⁸¹⁵ character of our approach that licences limited generalisations nature of “theory” in the study of the system, ensuring that we shall never come to *know* this system. Moreover, in their very nature, such generalisations cannot be established or defeated, and it is a waste of time to argue for or against them: the

⁸¹⁴ A 15th century word meaning to make “poorer”; used here in a sense directly opposite to that of “empower”, in preference to “dis-empower”.

⁸¹⁵ Haphazard because it contains contradictory claims. For instance, the very idea that one generation is not entitled to fix the principles of government for the next stands in sharp contrast to the implications of the claim that there was an original contract – which is, surely, nothing less than binding many generations over centuries to a particular view and system of government. Indeed, properly understood, “original contract” displays some of the more fundamental characteristics of a Constitution.

argument is liable to become a story without an end.⁸¹⁶ This fact helps underline the incredible openness of the “theory of the constitution” plane of arguments about the system, and the general irrelevancy of such studies. Meanwhile, the system continues in a recognisable form such that, for instance, Kenneth Wheare can say the British constitution does not so much “exist” as “persist”.⁸¹⁷

In the preceding chapters, various changes in the nature and practice of government over the years haven been laid bare; the question facing us here is to consider whether the sum-total of the changes involved evokes a different theoretical explanation for the system. The long journey from 1688 tells the story of a formless royal government developing into parliamentary government by the mid-19th century. And this form has not much changed since: despite the shift (*circa* turn of 20th century) from “parliamentary” to “representative” as the ordinary tag for the system, an account of the general outlines of parliamentary government still describes the system of representative government (or parliamentary democracy) rather well. As a touchstone of changes associated with the Neo-Tudor style of government, we may begin by getting a measure of parliamentary government from probably its best exponent, Henry Grey, supplemented with arguments from an equally good analyst, Henry Brougham.

Accepting that Blackstone had already clarified the fundamentals, Grey⁸¹⁸ identified four defining features of this system:

- executive powers (of the Crown) are exercised *through* ministers
- the cabinet meets without the king/queen *regnant*
- both executive and legislative powers are located within parliament, and are “virtually united” in the same hands
- executive power is limited by law, and legislative by public opinion

Grey, like so many before and since, accepted that the (working) system had faults, but that they were due to human nature. Despite its (working) imperfections, he associated this system, *inter alia*, with internal peace, economic

⁸¹⁶ F. Nash ‘Political Science and the Study of British Government and Politics: *una storia che mai finisce*’ in I. Hampsher-Monk and J. Stanyer (Eds) *Contemporary Political Studies* 1996

⁸¹⁷ K. C. Wheare ‘Does it really exist? Some reflections upon the contemporary British constitution’, in Books section, *Parliamentary Affairs*, 31-2, Spring 1978, p. 220

⁸¹⁸ H. G. Grey (Third Earl) *Parliamentary Government considered with reference to a Reform of Parliament*, 1864 edition, chapters 1-3

prosperity, liberty and security. And, in this sense, it was a decidedly successful system. Moreover, it had singular advantages: the fusion of executive and legislative powers made for harmonious working, where the executive could only propose and had to elicit the support of the legislative power to carry its measures and give effect to its policies. This meant that any proposed policy was subject to question and review by the representatives. Moreover, the system guaranteed peaceful competition for political power in the form of contests for the favour of the people, and change of government was swift and decisive. The form of this contest – debates in parliament – served to inform and instruct the public on matters of importance, and, he might have added, serving in the House of Commons was also good training and recruiting ground for future leaders such that when they assumed office they knew how it worked.⁸¹⁹

Every free system of government, including this one, is exposed to certain dangers particularly corruption and pursuit of selfish interest; but, Grey thought, it is also a characteristic of a free system that it is capable of exposing such dangers and correcting its deviations. Furthermore, such a system is prone to become party government, which means that ministers are likely to be influenced by party considerations. This can also mean that bestowing patronage on party supporters can increase and intensify the contest for power within the party and encourage factionalism. Party government may also mean that not always the best talents, but only the best talent available within the party and subject to its internal vagaries will be at the helm. Despite these “evils”, he argued, free government is always better than not free.

Grey⁸²⁰ defended the “virtually united” nature of power in the British system and considered that representation was a check upon the tendency for

⁸¹⁹ Until the 1960s, the expectation that a prime minister (generally from the great and the good) would have had many years in parliament, and would have served in at least some of the top offices, was not disappointed, even if for understandable reasons the Wilson government of 1964 (as the Blair government of 1997), did not have many experienced people at the helm. However, the rule concerning the prime minister was certainly breached with Margaret Thatcher, and John Major had only served in parliament for a decade before assuming that high office, while his experience of other high offices was extremely limited: Tony Blair had no experience of office at all.

⁸²⁰ H.G. Grey *Parliamentary Government*, 1858, chapter 4

concentrated power to become tyrannical. He focused upon the ascendancy of the upper classes⁸²¹ and claimed that they understood that to continue to exercise power they had to act moderately. This would not be the case in a parliament that was the organ of “popular will”: acting for themselves they would lack the inhibiting factor of having to explain their actions. In this, Grey recognised that the House of Commons had potentially tremendous powers, but thought that as long as representation remained on the same basis that Burke thought it was, the Commons, too, would act moderately and the system of government could not be corrupted. In other words, Grey identified a systemic tendency to moderation and avoidance of precipitate action as a central feature of a largely élitist parliamentary government.

Echoing Burke’s concern with the use of dissolution as a threat,⁸²² Grey thought that the dissolution of parliament should not be used as an instrument of policy and in this he placed some confidence in the rôle of the Queen. Indeed, Grey⁸²³ tended to be rather conservative about the rôle of the electorate and the extension of the franchise, and wondered if such reforms could contribute to good government. He was not convinced that they would, and feared that “good government” and “justice for all” could not be achieved if power was in the hands of the numerical majority. By moderately extending the franchise, instituting a proportional electoral system, and maintaining non-constituency seats (i.e. Universities) he rather thought, one could avoid the preponderance of sheer numbers, and veer to quality and knowledge, without losing the benefit of strong government.

We may supplement this account with aspects of Henry Brougham’s views on representation.⁸²⁴ In an interesting adoption of Burke’s view, he argued that the people possess the power of making laws and choosing administrators, but exercise this power *via* the modern device of representation, where

⁸²¹ Writing in 1858, with a second edition in 1864, it must be noted that at this time, members of parliament and of the government were not paid.

⁸²² ‘A Presentation to His Majesty, moved in the House of Commons, 14 June 1784’ in E. Burke *The Works*, London, 1801, vol 5, pp. 20-21

⁸²³ *Ibid*, chapters 6 and 7

⁸²⁴ H. P. Brougham (Lord) ‘The British Constitution: its history, structure and working’ in his *Works*, Volume 11, 1861, chapters 3-6

representatives in exercising the power of the people are guided by their own discretion. Such a system has many advantages: it makes free popular government possible in a big country; prevents mob rule; and, importantly, because representatives do not decide for themselves, it makes for more responsible government. Brougham also considered that representatives have qualities that distinguish them from the masses and this give a pledge of their greater fitness for office. To achieve this, Brougham had to argue that “the ignorant, the heedless, the stupid (and) the profligate” are, nevertheless, capable and in fact do make the right – good – choice of representatives, for selecting a representative was easier than deciding on complex issues of government. For Brougham, education rather than property was the better defining factor of the electorate, for property on its own as a qualification would exclude too many good people. He also averred that whereas the character and composition of the electorate could determine the character of the government, the ill effects of this were not present in England because the largest, most numerous classes, lacked solidarity and did not act as one, especially against the propertied classes. For him the best electoral system would include all the classes – approximating universal suffrage – to choose their representatives, but where the electoral system is not proportional and the vote is not in secret.⁸²⁵

Brougham understood the essence of a mixed system to be the separate and independent power of each element (estate?), marked by the fact that they remained unaccountable to each other.⁸²⁶ Such a system would work because they would co-operate, and crises would be avoided because each would act with circumspection. If this fails, the system fails, then the people would be free to change it, but not unless and until the evil has become intolerable. We may note here that this ties in with and echoes his view of the “constitutional” rôle of the electorate already discussed.⁸²⁷ But, more importantly, he identified a source of

⁸²⁵ Again we must note that politicians were at this stage not paid, which meant they came from a narrow economic class and restricted social élite.

⁸²⁶ H. P. Brougham (Lord) ‘The British Constitution: its history, structure and working’, in his *Works*, Volume 11, 1861, pp. 104-8

⁸²⁷ *Supra*, Chapter Four. Brougham also argued that the people would surrender all their powers to their representatives, except for freedom of the press, the right to public meetings and to jury service. *Ibid*, chapter 9

danger to the system from interference with the exercise of the rights of the electors by parties or powerful individuals. Such interference, he argued, would weaken the hold of popular principles on them, and infringe the purity of the representative system, leading, ultimately, to a change in the nature of the government.⁸²⁸

That neither Grey nor Brougham laid any special emphasis upon the position and the powers of the prime minister, or anticipate the growth of this office into the focal feature of the system, is by no means surprising. If it is too much to expect that 18th century analysts should pick on this,⁸²⁹ we might more reasonably expect 19th century analysts to have done so. But we find that, for instance, Walter Bagehot, for whom the prime minister was the focal point of the efficient secret of the system and the central feature of its “republican” element, did not identify the office of the prime minister as the new and necessary centre from which to view the entire political system: instead he rather feared the power of the cabinet.⁸³⁰ In the same vein Ramsey Muir, accepting the prime minister’s elevated position, nevertheless feared the dictatorship of the cabinet and a dominated Commons – for it should represent the *whole* nation – and hoped that the cabinet would know when and how to bow to the wishes of parliament.⁸³¹ In part, one rather suspects, this was so not because they failed to appreciate the potential of the office, but because they failed to anticipate the effect of the symbiosis between nationally-organised political parties and the office of the prime minister. This failure is particularly striking in the case of Ramsey Muir who saw rather clearly the early effects of nationally-organised political parties upon parliament but feared that they would lead to the dictatorship of the cabinet.⁸³² He saw the symbiosis, but failed to see how it worked. The focal place of the cabinet is only a stage, for the forces that would bring that about would continue to push

⁸²⁸ *Ibid.* p. 99.

⁸²⁹ Jones is rightly critical of Dicey for saying that Blackstone did not focus on the cabinet *etc*, for at the time these were non-issues. W. Blackstone *The Sovereignty of the Laws*, 1973, pp. xlii-xliii

⁸³⁰ W. Bagehot *The English Constitution*, 1872, pp. 108-9

⁸³¹ R. Muir *How Britain is Governed*, 1933, chapter 3, but especially pp. 83-5, 155/65 and 166, especially p. 172

⁸³² *Ibid*, chapter 4, especially p. 119

for a further stage: arguably without the institutional support of this type of political party, it is unlikely that the office of the prime minister could have become such a unique centre of power. We must recognise that no equilibrium is possible, and the end-result of this historical symbiosis is to establish the sole authority of the prime minister. In a sense, Burke had foreseen this when he expressed a fear, that instead of parading their talent, leadership would soon begin to bid for popularity; he was equally adamant that an assembly not based on law would derive its authority from those who elected it.⁸³³ But what no one seems to have noticed is the incredibly retrogressive nature of the end-result of this symbiosis, almost back to the position that Revolution Settlement was “meant” to defeat: *viz.* unbridled monarchic power, albeit now of the prime minister as a surrogate “king” for the duration.

If Grey and Brougham did not foresee this outcome, nevertheless, echoing earlier analysts and commentators, they expressed some concern with the possibility of the corruption of the representative system: indeed, Brougham feared that such a corruption would change the very nature of the political system, even if he had no idea of the meaning of the change. No one saw, they could not see the whole effect, which is only visible with hindsight. But this effect and the manner of its development are intelligible because of what individual analysts contributed: Bolingbroke demonstrated the imperceptible manner in which the system could be corrupted; Burke provided ideals against which to measure the system; Blackstone underlined the issue of sovereignty but left it open; Brougham and Grey identified the danger areas; and Grey supplied the enduring “catch-phrases” that would prove useful in hiding the many changes that occurred in it. We can now see that the systemic corruption that is the Neo-Tudor style of government was the outcome, and looking back we can see how, in the circumstances and given the tendencies of the system, this outcome was probably inevitable.

Yet, the actual terms of government discourse have not changed. We still speak of ministerial responsibility and some even take “Questions of Procedure

⁸³³ ‘Reflections on the Revolution in France’ in E. Burke *The Works*, 1801, volume 5, pp. 484-5, and p. 348

for Ministers” and its later manifestations very seriously – and so they should. But it is hardly the case that the rhetoric is actually valid and still relevant. Not only the development of the executive agencies (Next Steps), but also the proliferation of quasi-autonomous non-governmental organisations serve to raise serious questions about this apparently central organising idea of the British system of government. However, there is no clear answer to it: politically, only ministers are responsible (to parliament), but this is only a default position, for in reality the line of responsibility is no longer linear and clear. Furthermore, we may agree with Burnham⁸³⁴ that a multiplicity of factors have resulted in the “politics of depoliticisation”, placing serious strain upon the idea of ministerial responsibility and, hence, of responsible government. But we must take care not to underestimate the importance of the default position in any description – always with legitimising import – of this system: for instance, European Communities Act 1972, Human Rights Act 1998 and, indeed, Scotland Act 1998, give a fresh boost to the false idea of sovereignty of parliament as the only default position.

If the actual terms of discourse have not changed, their meaning and import have. Of course, ordinarily, the meaning of words is always contextually re-defined, but here we are concerned not with ordinary words in everyday use, but with specific, descriptive terms of this system of government. Unspecified and unrecognised change of meaning is significant, for it serves to hide real change in practice. We can identify two ways in which this can and has happened.

Some terms are devalued in such a way that we have to pay really very close attention to a long historical span to notice the change. For instance, it is commonplace, especially since Dicey, to say that parliament can “make or unmake” any law. *Prima facie* this is only a clumsy way of placing emphasis upon the supposed sovereignty of parliament, and to the extent that to “unmake” one has to “make” a new Act, the phrase is redundant. However, locate this phrase in a much longer historical context and its import changes: unmake can make sense when it refers to the legitimate capacity of parliament, thought to be invested with the false idea of sovereign power, so as to say that parliament can change *any*

⁸³⁴ ‘New Labour and the politics of depoliticisation’ in *British Journal of Politics and International Relations*, 3/2, June 2001, pp. 127-149

law, including that which is not of its making; thus, not only common law, but also received law, which, for instance, in the 13th century was thought of as the law of God, eternal and unchangeable, not made by any human agent but only found by the law-finder, are subject to the law-making powers of parliament. Seen this way, the power to “unmake” imparts to the proposed view of sovereignty of parliament a significant dimension that truly emphasises its absolute superiority. Yet, if the true meaning, this is altogether lost in the haze of time and buried by ignorance bred of apparent familiarity. Similarly, Britain is still said to be a nation governed by law, but when law-making power is also in the gift of a few appointees⁸³⁵ it is surely governed by men/women, not laws – yet we continue to use this notion and positively respond to its very high emotive chime. We attach importance to the idea of manner and form – which is a feudal notion⁸³⁶ – of legislation, but have lost sight of the fact that “manner and form” was not just a procedure, a ceremony, but that its various provisions and implications symbolised the binding of the king and the barons together – manner and form would seal and legitimate an agreed outcome.⁸³⁷ But now “manner and form” is only a fossilised test of the validity of a piece of legislation – for none can inquire into the actual procedure in parliament, which remains the exclusive preserve of each House, a privilege that each jealously guards!

If the historically devalued sense of some terms have become part of the obscure furniture of the system and play a leading rôle as its mantra, we also find that a large number of terms of discourse necessary for a description of the system evoking its general legitimating ideas and practices have been devalued in a systemic way as a direct consequence of the Second Revolution. These include, organic growth, pragmatism, convention, precedent, and mandate, but above all, accountability and consent, which together define the notion of responsibility. The actual terms of government discourse have not changed for

⁸³⁵ See *infra* Chapter Seven, *excursus on common law and the judges*. *Mutatis mutandis*, this notion also applies to an appointed second chamber.

⁸³⁶ F. S. T. Sullivan *An Historical Treatise on the Feudal Law and the Constitution and Laws of England*, 1772, pp. 66/7

⁸³⁷ For an indication of the extent to which much that we accept as our everyday mode of action is actually feudal, see *supra* Chapter Three.

centuries and, other than the idea of mandate as a positive and good notion, are recognisably part of the way Grey, and Brougham, among others, would describe the system. However, it will suffice to examine the meaning and the fortunes of the phrase “responsible government” – which better than any other encapsulates the lofty principle of our system – and the terms associated with it to demonstrate the claim that Neo-Tudor style of government is marked by the systemic devaluation of the important terms of government and constitution discourse.

It is easy to fall prey to much confusion in seeking to lay bare the meaning of this notion. We cannot ascribe any meaning to “responsible government” without reducing and translating it into other terms; and here two terms, namely accountability and consent, stand out above all others. It is in the processes of accountability and consent that we can identify the essential meaning and presence or absence of responsible government. But we must also take note of the further fact that accountability and consent have an intrinsic affinity, and in an important sense feed off each. This approach runs counter to the usual expectation that in seeking to lay bare the real sense of the notion we must see it in its various applications, and that by classifying its various forms⁸³⁸ we are actually rendering the concept intelligible and enhancing our understanding of the topic. In an important sense, such an exercise is only a surrogate for understanding, serving to hide the fact that the notion eludes us. On the other hand, to get a real sense of the meaning of accountable, and the related notion of consent, ultimately, thereby, of responsible government, we ought to focus upon the inner relationship between them.

It is generally difficult – perhaps even irrelevant – to look at the period before 1688 for any manifestation and application of the idea of responsible government. This is despite the fact that this study has argued strongly in favour of the view that the period to 1688 was one of constitutionalism. But Revolution Settlement serves as a divide, for, as argued in previous chapters, the system changed at its core in such a way that the mechanism of exacting responsibility – in the form of an Act of Attainder or Impeachment – was no longer relevant. We must note here

⁸³⁸ For instance as in D. Oliver *The Government of the UK*, 1991, chapter 2; R. Brazier *Ministers of the Crown*, 1996

that attainting was the legislative way of imposing a judicial decision without judicial process, resulting in the cancellation of one's civil rights; and impeachment was a *quasi*-judicial process, whereby the Commons would prosecute at the bar of the Lords, usually for high treason but in order to control the exercise of the executive powers of the king. It is commonplace to say (as do Bolingbroke and others) that the last political process of this kind took place in 1715-1717, whereas the last attempt at impeachment was in 1804; but such a statement, while true, misleads. In fact, with the impeachment of Sacheverell, this mechanism was employed for political reasons other than responsibility for office or advice tendered.⁸³⁹

In the era since 1688, closely associated with the development of political executive, responsibility is seen in political terms, and loss of office deemed sufficient ultimate punishment. This is precisely as it should be, and we should hasten to say that this is the only civilised way to proceed. That much said, loss of office is only the ultimate sanction: political power is more effective while it is potential rather than realised; exacting responsibility by holding the holder of high office accountable to the body that can sanction his actions (such as parliament) can serve the desired purpose by effecting a change in policy. It is thus that holding to account is said to be explanatory and amendatory.⁸⁴⁰ this is fine as far as it goes, but at best it only serves to reinforce the claim that when an action does not receive the approval of whomever must sanction it, a change is likely to be introduced in order to elicit approval and establish a "consensus". Failing that, or if the 'neglect' is too great to allow for amendatory action, confidence is withdrawn, followed by a parting of the ways.

Political resignation has become increasingly rare: the resignation of the Secretary of the State for Foreign and Commonwealth Office and his ministerial colleagues in relation to the Falklands War remains a refreshing exception that probed and served to mark the absence of such resignations for a long while.

⁸³⁹ For a succinct account, see T. P. Taswell-Langmead *English Constitutional History from the Teutonic conquest to the present time*, 1946, pp. 590-601

⁸⁴⁰ See for instance C. Turpin *British Government and the Constitution*, 1985, pp. 345-6; also D. Oliver *The Government of the UK*, 1991, chapter 2, especially p. 22

Accountability of ministers, eliciting the consent of the Commons, thereby emphasising that this is still “responsible government”, is now strictly conditioned by the fact that the “consensus-seeking” body controls the “consensus-consenting” body. Loss of office is now only an option if absence of it would harm the government: the case of Cecil Parkinson in mid-1980s for sexual indiscretion, and the two high-profile cases of Peter Mandelson within one parliament (1997-2001), first for financial involvement and later indiscreet use of ministerial influence, are cases in point: Parkinson was soon appointed to high party office, and not long thereafter ennobled; and Mandelson was re-instated after the first incident, only to have to resign for a different offence, but with no expectation that his career was fatally damaged. Indeed individual ministerial responsibility has lost its edge because no minister now has a voice other than that of the government collectively, which means that unless the prime minister has to sacrifice a colleague, he/she is safe. In other words, loss of office is a sanction if the absence of it will threaten the prime minister and, in the longer run, the party, and that is that! But this is not the only dimension in which the meaning and import of accountability has changed; there is another important one.

As a matter of course, we ignore the importance of the change that paying our politicians has made to our system of government. The fact that some pay was introduced is usually offered as a by-the-way point, and promptly neglected.⁸⁴¹ Moreover, how pay, severance and pension are calculated have also been successfully depoliticised: politicians now do *not* vote for their *own pay*, but in approving of pay for the civil servants – usually accepting the recommendations of an ‘independent pay review commission’ – they re-scaled their own pay.⁸⁴² However, the fact of pay makes a difference to the meaning of responsibility, and the actual meaning and effect of the ultimate sanction of loss of office.

Before they were salaried, loss of office meant loss of opportunity for

⁸⁴¹ But see R. Brazier *Ministers of the Crown*, 1996, who, exceptionally, devotes chapters 7 and 17 to the topic. However, he is more concerned with the legal basis for pay and severance, and how it functions, than the political implications.

⁸⁴² The level of pay for MPs in Edinburgh was pegged at a percentage of pay of MPs at Westminster, upon which they vote. Accepting the increase in March 2002 provoked a good deal of controversy: see the (Leverhulme-funded) Constitution Unit Quarterly Report, Scotland, May 2002, p. 11

significant gain. In between the time when ministers were in the pay of the Crown and received a pension from the king, and the time when they are paid out of public funds, is the period in which politicians would happily spend a fortune getting elected and getting into office, knowing full-well that office would give them the opportunity to benefit disproportionately for the duration. Thus loss of office was expensive for the office holder. Now, loss of high office means, firstly, an opportunity for numerous non-executive directorships with considerable pay attached, and, secondly, generous pension for life. Loss of office now means just that, loss of office,⁸⁴³ and even then probably not for long. The more prominent come back into office after a period long enough for political rehabilitation, else they are given other important political positions – e.g. in the party machine – or they are elevated into the peerage and become an elder statesman! ‘You win when you lose’, in the memorable advertising phrase of Margolis and Ridley, the bookmakers, for a two-way bet in the 1960s.

Seen this way, the change is simply beyond imagination, but that does not stop the continued use of this and other important words and phrases. The brief discussion here makes the point that the inner mechanism of the Neo-Tudor style of government has systemically changed the meaning of its terms and denuded them so completely that they are now, for all meaningful intents and purposes, irrelevant. This one example should suffice, but this can also be said of the many other terms, in particular of the idea of the mandate. Somehow, votes cast to elect members of parliament are seen as legitimating the proposed party policy contained in its manifesto, usually a collection of chapter headings without any significant detail spelt out. But this Midas touch is thought to give the winning party – now the government – a licence to carry out the programme upon which it was elected. Moreover, this claim to receiving a mandate also determines the relationship between the two Houses of Parliament, in effect making Parliament a one-chamber legislator in respect of matters contained in the party manifesto. Incidentally, this Midas touch is not a new feature of our government: the touch of

⁸⁴³ The fact that our politicians are not full-time professionals means that they have previous and existing sources of professional income that they need not shed for the duration and will be there after they are out of office, as is clear from the register of members’ interests.

the king was sufficient to turn a Bill into an Act, and make the matter the law of the land. Finally, lest it be forgotten, until perhaps the early part of the 19th century, the idea of the mandate was seen as a serious incursion into the freedom of elected members, who were expected to exercise their best judgement on behalf of their constituents but always for the good of the nation. The new idea of the mandate does not just disable the Lords as part of the legislature, but also changes the meaning to being a member of parliament.

We can now see that the optimism of Grey and Brougham was misplaced: precisely the condition they identified as the rock of the stability of this system, namely the nature of representation, proved susceptible to significant change in practice as a result of the development and activities of nationally-organised political parties. As argued in *supra* Chapter Five, this was one of the twin pillars of the development of the Neo-Tudor style of government. Indeed, the practice of government now so deviates from the standard description of its nature that anyone in the least familiar with it will find the description risible. But, alas, the mantras and terms of discourse of our system have such a lure for, and hold, on the majority for whom government is still a distant élite activity, that they seem to believe them, and those who rightly point out that this system is still one of the most free in the world mislead them into a sense of complacency. Does the practice of the Neo-Tudor style of government mean we must now re-think the terms of its discourse? In view of the arguments of this study, we do not so much need a new discourse as a new system of government. That said; the problem is not that the terms of this discourse do not apply, but that they aptly describe the surface and fossilised relationships, and in this they serve to hide the reality. As a matter of fact, we can describe this system succinctly as a grand electoral process: government is created and dismissed at general elections; government thus elected claims a mandate to carry out the programme that the electorate approved; they thus claim a moral and political right to enact their programme almost irrespective of parliament and other institutions of the system; opposition is only a government-in-waiting preparing for the next election; thus the process of discussion and consent to policy is at a discount, which invites the media to

step into the breach; this feeds back into the loop, for the government also treats the life of any one parliament as merely the process of preparing for the next election, and the media play a large part in this too. Meanwhile, whatever does not directly contribute to this cycle is at a discount, as are arguments about the nature and legitimacy of power thus placed at the disposal of the party in government.

Two points defy this description. First, in between elections, a fragile process of accountability, still with an eye upon the next election but in a highly constrained way, exerts some influence upon naked exercise of naked power. And, second, we must also acknowledge the important fact that, if the practice of government is skewed and distorted, the fundamental principle that there will be another general election, no matter how often postponed – but always for a good reason – is honoured, not breached. But, one has to say that in tolerating the Neo-Tudor style of government, we fail the political genius of the British, which is capable of producing a far better system of government, but only if we try and pay some serious attention to constitutional theory arguments.

Chapter Seven: British Government and the Idea of Constitution

In vain you tell me that artificial government is good, but that I fall out only with the abuse. The thing! the thing itself is the abuse. Observe, my Lord, I pray you, that grand error upon which all artificial legislative power is founded. It was observed that men had ungovernable passions, which made it necessary to guard against the violence they might offer each other. They appointed governors over them for this reason! But a worse and more perplexing difficulty arises, how to be defended against the governors? *Quis custodiet ipsos custodes?*⁸⁴⁴

The relevance of a Constitution for the UK

It is commonplace to say that an army always prepares for the last war it fought. The “lessons” drawn from any analysis of its last conflict are spurs to the commitment of precious resources to the correcting of its perceived inadequacies: against this background, but in view of an imagined foe and a possible future conflict, the “nation” prepares for the next war. Equally, legislation is always inadequate for it is most clear about the known cases it seeks to control but, try as they might, they cannot anticipate instances that have not arisen: only some legislative loopholes are the result of sloppy drafting; amendments and subsequent changes are very often needed because legislation is never complete and comprehensive. But the fact that legislation always needs further enactments has never been advanced as an argument against legislating on any topic. Yet, the main argument against a Constitution is often based upon the obvious notion that it cannot provide for unknown circumstances, and is made into the proverbial ogre by the “fear” that it will be difficult to change when necessary. But this type of argument is not convincing: the objection is far too general, ignores the reasons for a Constitution, and, in the event, serves to make a vice out of a virtue; it is ill-informed, and misleading.

Amongst notions that have historically changed in substance but the change has been little noticed is also the nature and purpose of government and political power. We have come a long way from the time when government was that of the king, *his* business, to do with *his* realm. Equally, we have come a long way from

⁸⁴⁴ E. Burke *A Vindication of Natural Society* (1756) 1858 edition, pp. 31-32

the time of Henry VIII when the entire governmental machine was located within Whitehall. Exactly when, and why, the change occurred is of largely historical interest. But the *fiduciary* nature of political power became obvious when the private realm of the king no longer coincided with the public realm of the State, and we moved from a time when the king was the essence of government and it was thought he held power to govern as trust from God, to one in which, as the current rhetoric has it, power is held in trust from ‘the people’.

Parliament is now the effective vessel of sovereignty. Its power and its exercise of sovereignty springs from the democratic mandate granted it by the people through the ballot box. But sovereignty does not belong to parliament. It stems from the people, it belongs to the people and it cannot be alienated without the consent of the people. In theory and in practice the Crown in Parliament hold national sovereignty in trust for the people of Britain.⁸⁴⁵

Such rhetoric, and its confusing but rich mixture of metaphors notwithstanding, the nature of power in this system remains the otherworldly sovereign power of God, albeit presented in a new garb: despite much talk about democracy, we have yet to establish a system based upon power as trust from ‘the people’. This is not a simple matter of changing descriptive terms: the difference is in its ownership, necessary limitations of power of delegates (reflected in the nature and extent of power delegated) and control of its exercise. It is clear that at some stage, certainly by early to mid-19th century – with inklings apparent from the mid-18th century – greater emphasis was placed upon the idea that political power and government functions were *for* others, ‘the people’, and government was *on behalf* of the nation, when incumbents held elected office and pursued impersonal objectives; the new rhetoric of “on behalf” was added because the ambit of government had changed, yet the nature of governmental power remained intact. In considering the rôle and relevance of a Constitution, we must begin with this notion, and go on to consider the question of government and its form.

It is undeniable that an increasingly complex, impersonal government system has been a necessity ever since the king and proverbial “thousand families” no

⁸⁴⁵ Michael Ancram ‘Sovereignty and the nation state in the 21st century’, speech to the Commonwealth Club, London, 30 January 2002

longer owned the whole. It may appear superfluous to say that a complex social and economic structure requires complex government, but it serves to underline the important fact that if being under government means subjection to rules and regulations, now (especially with multiple levels of governance), we are subject to myriad rules and regulations of a magnitude that touch just about every aspect of how we live. Because we are born into the stream of increasing complexity and must begin with it as our condition of necessity, we are naturally oblivious to the extent to which our system is different from that of previous generations. Formerly civil institutions, from religious bodies to the family, regulated much that is now in the purview of government. But the nature and methods of the institutions of civil society are different from the nature and methods of the regulatory powers of government. Moreover, there is also an important longer-term effect of the increasing involvement of the government in aspects of society, in that such involvement has a rather peculiar singularly permanent effect such that “rolling back the state” (and similar rhetoric) has to reckon with the fact that when government regulates a particular process or activity once, it can never divest itself of the power and responsibility for it. It is all too easy for government to become involved, it is in practice impossible for this involvement to be wiped out. *Status quo ante* is not an option and, in the least, the need to regulate the now-divested activity continues, even if in the form of creating and empowering a “non-governmental” body to regulate the process or activity; but this then entails the need to regulate this new body, necessarily by government! The ratchet-effect of increasing government involvement in daily life seems almost a law of history.⁸⁴⁶

This is the lot of our kind, but it has implications. Naturally, we are entitled to know how we are ruled and why we are ruled in this way. And knowing the “how” and the “why” entails the possibility that we may not like and wish to change it: if government is a fact, the form of government is not a foregone conclusion. More

⁸⁴⁶ This has intriguing implications for government policy, especially “progressive” measures, which almost always mean further incursions into the ambit of civil society. Caution is the key here, but that is often thrown to the wind because of ideological commitment. But when the effects become apparent – supposing that a direct causal relationship can be demonstrated, which is generally contentious – it will be too late and re-instating civil society only a dream.

than that, if government is given, only those who own it can define it. Historically this was the preserve of a limited number of people: now government is *for* the multitude, and they are said to own it. It may be thought that this claim runs counter to research findings on the topic: for instance more than one survey of public opinion⁸⁴⁷ has shown that typically the system of government (constitutional reform) has little salience for the public. The survey analysts infer that this may be because the public do not understand the nature of the issues and the relevance of constitutional arguments – in that they often give ambivalent or even contradictory answers – or see it as a typically élite activity. We must take note of the fact that there are issues concerning the wording of the question and the immediate circumstances in which a survey is conducted, but, even making such allowances, it appears that most consider this constitution and government a matter for the “chattering classes”. Two interesting points emerge from such studies. Firstly, this lack of clear focused interest reflects the further fact that political parties normally do not give sufficient priority and attention to issues of this kind. The experience of the general election in 1997 is relevant here; the Labour Party raised the issue but sought to diffuse it by promising referenda on specific items. Secondly, even where interest is apparently intense, it soon wanes, as in, for instance, Scotland and Wales immediately before and in the couple of years after devolved institutions were created.⁸⁴⁸ However, these findings only serve to underline the extent to which constitutional problems are simply transparent in this system, rapidly reduced to problems of government, so that the immediate and independent relevance of such issues in their own right is not perceived. Furthermore, because the general but empty rhetoric of the Labour governments of 1997 onwards in presenting devolution and other institutional reform (they called it constitutional, although probably the only candidate for that was reform of the Lords) as “modernisation” evoked a positive response, it fatally drained it of any political content. Moreover, and in part because of this absence

⁸⁴⁷ See J. Curtice and W. Rüdiger ‘Do Attitudes to constitutional reform matter?’ in H. Kastendlick & R. Stinshoff (Eds) *Changing conceptions of constitutional government*, 1994

⁸⁴⁸ See J. Curtice ‘Hopes dashed and fears assuaged?’ in A. Trench (Ed) *The State of the Nations 2001*, Imprint, 2001

of immediacy and direct interest, and because of the further obvious fact that the public does not see how it can have any effective say on the matter, they simply leave it to the political élite: the dismal response of the public to much activity by interested groups in the late 1980s and early 1990s, and indeed in the run-up to the 1997 general election merely demonstrates the verity of these claims. The upshot is that the rhetoric of “democratic ownership” serves only to stultify.⁸⁴⁹

If the public do not see it as belonging to them, they are not entirely to blame for their rather obvious resigned acceptance, for this system of government encourages the attitude. For example, when “sleaze” was all the rage after nearly fourteen years of Conservative government, the very affable prime minister John Major created the Committee on Standards in Public Life, under Lord Nolan, a judge. At the time, in 1993, this seemed just the right move, but by 2002, it was still there, still going strong, now under its third chair (Nigel Wilks, not a judge)⁸⁵⁰ and it had announced yet a new enquiry! This Committee was set up on the initiative and authority of the prime minister, but there is no clear indubitable basis for this authority other than the woolly general powers of the king to govern, which have, in an undefined sense, devolved upon the office of the prime minister. This Committee is advisory – technically it can only advise the prime minister; its selected members are invited to join, and invitations are issued on behalf of the prime minister; it has no statutory nor, for that matter, constitutional basis whatever; its remit is rather open-ended and there is no way of knowing how long it was meant to run: because it deals with standards in public life, disbanding it would be politically costly and invite the wrath of the media and others. So it goes on, and has become part of the system: it has touched, and the signs are that it

⁸⁴⁹ For some, this merely reflects a lack of proper civic education and culture, leading to civic studies in school curricula and induction packages for in-migrants). I seriously doubt the relevance of such courses and worry that they might just induce the wrong sort of outcome, and effectively close the mind to civic issues of an important kind. Indeed, this process, much influenced and guided by the well-meaning Bernard Crick is probably nothing more than treating the symptoms, even if it evokes a vision of S. T. Coleridge’s “clerisy” teaching us our rights and duties. See B. Crick ‘In defence of Citizenship Order’, two papers presented to the PSA Annual Conference, London, April 2000.

⁸⁵⁰ That Nolan was a judge was a material fact in giving his Committee a sense of “independence” and probity, although it was never presented as a “judicial” committee. Does it matter that it was later chaired by a former administrator? Or is the nature of the Committee a “moveable feast”?

will continue to touch, all aspects of the system. Technically it produces reports for the prime minister and can make no recommendations, or see to it that they are given effect, but its reports are influential and, indeed, on at least one occasion it has followed up the “voluntary” implementation of its report. It has had a significant reforming effect upon aspects of the working system (not its the underlying structure), touching the Commons, the Lords, political parties, political advisors etc. It is out of sight and usually functioned without much publicity – with very few and often brief media reporting of its activities – and while the source of its finances and lines of accountability were as clear as mud, it became an important part of the furniture at the centre with important implications for the functioning and reform of the system. Incidentally, the status of this Committee is so odd that it appeared not to belong analytically in any of the substantive chapters of this study, yet it is an important but out of sight institution with much serious effect: small footprint and large shadow is clearly applicable to it. Is there any wonder that the poor citizen should see the processes of this government as essentially closed, and consider government élite activity?

In fact, this system of government inherently encourages such remoteness. Majesty, Bolingbroke rightly said, is reflected, not inherited light, which is the sensible construction of majesty as fiduciary power; but he also derided the paraphernalia of majesty as of interest only to the vulgar, and ridiculed peers as commoners with coronets in their coat of arms.⁸⁵¹ This is all true, but Bolingbroke also knew that this is not how it works. It has been an abiding fear that letting light into the recesses of monarchy will destroy it, for the rather simple reason that the vacuity of the idea and all that goes with it (specifically, the Godly nature of power exercised by the king as its temporal vicar, albeit as a mortal ‘elected’ to the office), in short the singular idiocy of the notion, will be exposed. Majesty and claims to sovereign power evaporate in the face of simple but impossible questions, such as “why?” and “how?” That is to say, to maintain this kind of spurious, debilitating and enslaving notion of power, it is necessary to maintain the darkness of the idea. This kind of power trades on fear, faith, acceptance of a

⁸⁵¹ See *supra* Chapter Four.

higher unseen authority made visible through the representative paraphernalia of majesty, and submission to it exacted on pain of retribution including capital punishment: the crown, the orb, exaggerated displays of jewellery, grandiose style, suitably impressive architecture, pomp and ceremony and, no less, the wig and robe of the judge, and 'respect' exacted for (monarchy and) law in ritual behaviour of a deferential kind, all serve this dark purpose. They inspire awe and exact silent submission: they enslave by banishing reason, just as do the paraphernalia and regalia of religious authority, including the purple colour, robe and "crown", and, no less, the ring and crosier of the Bishop.

There is an increasing recognition that language and behaviour of this kind can only provoke incredulous laughter, and that is right. In the face of this possibility, those in authority attempt discrete retrenchment by "modernising" the monarchy and stripping it of some of its sillier pomp and ceremony; but the pomp and ceremony of state opening of parliament is maintained. And if Lord Bloggs of King's Cross – till yesterday, Mr. Joe Bloggs – affects modesty and insists on not using his title too blatantly, he and others like him, nevertheless, accept and participate in the ritual of social elevation into the peerage which, turning their blood a slight shade of blue, gathers them in their "Lordships" House. Indeed, maintaining the idea of difference is probably the minimum necessary to maintain the awe-inspiring façade of power, but the pressure for change is waxing. Moreover, it would be impolitic not to employ the language of democracy and mime the idea of the sovereignty of 'the people', even when it is mere talk; this system, based as it is, on the received idea of sovereign power now lodged in "Queen-in-Parliament", and executive power of the king now exercised by the prime minister, is not geared to function in any other way. Of course any attempt to give a better appearance to this defunct system of power – to talk it up into "modernity" – is only an attempt to hide its reality. And it might work in respect of certain "distant" features that quintessentially "represent" the legitimising concepts of the system: monarchy and the false idea of sovereignty of parliament do not *directly* touch the great unwashed, who continue in their happy ignorance of it as *mere subjects*. But, where exercise of this kind of power touches the individual in

a direct way – as in the process of dispensing justice – “new-speak” has no rôle to play: one cannot successfully cover the naked reality of this power by a new rhetorical integument and present it in a better light.

An excursus on common law and judges⁸⁵²

Common law, and (common law) judges belong to this nonsensical tradition of power, and function in the same vein even today. Our concern here is not with the judiciary, the courts and the administration of justice, or even with the appointment of judges, and the multi-function rôle and powers of the Lord Chancellor: these are important in their own right and in need of serious critical analysis⁸⁵³ and reform, but belong elsewhere. We are concerned here with the nature – necessarily also the legitimation – of common law. But we cannot treat common law as a separate and distinct topic without dealing with the rôle and the power of the judges. These are so closely intertwined that, for purposes of this study as well as in many other significant respects, they are one and the same.

As a preliminary point, we must comment upon and set aside some apparent features of this system of justice. We must here note that the ancient-looking paraphernalia and regalia of the courts and the judges – the wig and the robe, the pomp and ceremony of all in the court standing when the judge enters, and so on – are all part of an infantile theatre of power meant to exact deference,⁸⁵⁴ but

⁸⁵² This *excursus* deals with a limited range of ideas: it does not emphasise the notion that the higher judiciary are also drawn from the *boni* (see *supra* chapter 5), a point that J. H. A. Griffith so well analysed and established in his *The Politics of the Judiciary* (1977, see also his *Judicial Politics since 1920: a chronicle*, 1993). As Griffith puts it, he was concerned to examine the remarkable consistency of approach of judges concentrated in a fairly narrow part of the spectrum of political opinion – close to traditional Toryism but not beyond into the reaches of the far right (*The Politics of the Judiciary*, p. 31). If at the time the claim of the essentially political nature of the more important judicial decisions and the fact that judges make law was novel and contested, they are now well established). For references to the UK and elsewhere, especially Canada, see J. L. Black-Branch ‘Parliamentary Supremacy or Political Expediency?: the constitutional position of the Human Rights Acts under British Law’ (*Statute Law Review*, 23/1, pp. 59-81); for the United States of America, see L. M. Seidman *Our Unsettled Constitution: a new defense of constitutionalism and judicial review*, 2001

⁸⁵³ D. Woodhouse (Ed) *The Pinochet Case* (1999) and D. Woodhouse *The Office of the Lord Chancellor* (2001) offer a good start in this area. M. Elliott’s *The Constitutional Foundations of Judicial Review* (2001) is a flawed start.

⁸⁵⁴ In this respect, the power to commit for contempt of court, and to decide the court’s

have nothing to do with the quality of the law and of the justice dispensed. They are the core-part of the package of respect for the law, inviting all to have faith in the system of justice, and to defer to it as something above the ordinary: judges are mortal but dispense immortal justice. The broad similarity between this and the idea that a mortal king exercises immortal powers – the sovereign power of God – is not accidental, even if, for some, common law pre-dates the king. But herein lies a circularity: the king was king by (common) law, which means “ancient law” and tradition: but it is ancient law and tradition that feed into what becomes, under the spur of the king, common law, dispensing king’s justice by his judges. However, these wonderfully woolly, hazy historical categories are meant to underline the invaluable idea of blind justice, although they have naught to do with it. That much said; the theatre of judicial power is not our concern here.

Montesquieu is reputed to have said that the British parliament (it was not fashionable in those days to speak of sovereign parliament!) is both legislature and constituent assembly – which only means that it can legislate on any matter that it deems fit, including the rules of the system; famously, by the Septennial Act of 1716, parliament prolonged its duration to seven years in its own lifetime, which Coleridge had no hesitation in calling a usurpation as parliament was omnipotent but not sovereign,⁸⁵⁵ whereas it so mesmerised Dicey that he considered it proof-positive of its sovereignty. That for Dicey this also meant that

competence to hear a case, are singularly important. In principle, no court should be suffered to exercise either power in its own right and in respect of its proceedings. A claim that the court has no competence is either a matter of law – i.e. statute law, for common law is always suspect – or else it should be dealt with by a higher court; commitment for contempt of court should only be allowed after a hearing by a higher court: else, in both cases, a court is actually sitting in judgement in its own cause – a simple absurdity by any measure. The case of Arundhat Roy, imprisoned and fined 2000 Indian Rupees for “criminal contempt of court” against the Supreme Court of India, is an interesting example (*The Times*, 7 March 2002, p. 19). The original charge of contempt was dismissed, but the Court took exception to the terms of her affidavit and convicted her of criminal contempt. The sentence was one day in jail because the Court took a “magnanimous” view of the matter. There are three interesting aspects to this: rather curiously, she was “advised” not to dabble in politics, and keep to literature; even the judges knew that they had to tread with care: a more severe sentence would probably have caused a good deal of trouble; but the light symbolic sentence probably caused more damage than her words and actions, and with greater publicity. This kind of infantile “naked” power is only useful as a threat: when used, it becomes risible, and its vacuity revealed.

⁸⁵⁵ S. T. Coleridge *On the Constitution of the Church and the State according to the idea of each*, 1972, p. 83

parliament owned the system is too obvious to require further comment. This all-purpose approach to parliament also applies to the judiciary: we may say that judges dispense justice according to law, but judges of the High Court can make new law(s) if they think it necessary in order to dispense justice *in an instant case under consideration*. The problem is that in so doing two distinct functions that ought to be performed separately, by different bodies and at different times, are actually combined in such a way as to make nonsense of some rather important principles, at least one of which is a primary rule of natural justice/equity. We need not engage in convoluted discourse to make the point; fortuitously some recent cases⁸⁵⁶ exemplify almost everything that is wrong with this way of proceeding. There is really only one issue to consider, *viz.* the relationship between common law and parliament – in other words, law-making powers of the judges, as exemplified by *Thoburn and others v Sunderland City Council* and others, heard before the High Court in 2002.

Lord Justice Laws (henceforth the judge) stated the principle of implicit repeal in its present form (paragraph 37), and alluded to the notion that without it, one parliament may be thought to have bound its successor. He then proceeded to make two rather large claims: namely that

[T]here are now classes or types of legislative provision which cannot be repealed by mere implication. These instances are given, and can only be given, by our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided. (Paragraph 60)

But the meaning of this passage is not clear; and the last phrase in the last sentence only serves to make an additional but important point. The pivotal word in the passage is “confided”: and based upon the meaning of that word⁸⁵⁷ we may re-write the passage thus:

[T]here are now classes or types of legislative provision which cannot be repealed by mere implication. Only our own courts can give examples of these provisions; and the nature and scope of parliamentary sovereignty

⁸⁵⁶ *Thoburn and others v Sunderland City Council and others*, High Court, 18 February 2002 (Relevant sections of this judgement are in *infra* Appendix 3: all paragraph references are to this Appendix); see also *B & C v A*; and *R. v Shayler*.

⁸⁵⁷ *Oxford Dictionary of English*: to repose confidence *in*, to have faith or trust *in*; to impart in confidence *to*, to entrust an object, a task, *etc.* *to* a person with reliance on his/her fidelity or competence. The first dates back to 1455 and the second only to 1861.

are ultimately entrusted to the same courts.

But this does not sufficiently clarify the point, and further expanding the last point in the passage, we get this:

[T]he nature and the scope of parliamentary sovereignty are in the hands of our courts, and our courts look after them – i.e. the courts are the “guardians” of the same and this means that ultimately it is they who allow changes to them.

In other words, sovereignty of parliament is a matter for common law, a common law concept. If this is the true construction of the idea, then it is also one false claim. Recall the argument (*‘An excursus on sovereignty’*, *supra*, Chapter One) to the effect that sovereignty of parliament is a category mistake; and also recall the notion that parliament is the highest subordinate institution of ‘the people’ and for that reason above all other institutions and organs. This simply means that as far as the courts, and, for that matter, any other institution or organ is concerned, interposed between its principal, ‘the people’, and organs and institutions below it in the working system, parliament is subordinate to ‘the people’ but superior, and to that measure omnipotent over other organs and all the institutions of the working system. The nature and rôle of parliament and its powers is not a matter *of* or *for* common law; it is not even a legal concept, if it is a concept at all: as far as constitutional arguments are concerned, it is a first principle, and as far as the courts, and other institutions, are concerned, a matter of fact – it is the condition of constituted necessity with which they must begin. This has implications.

First and foremost, no court may question an Act of Parliament, or lay down conditions under which the courts, will accept or reject, apply or refuse to apply the terms of any Act or indeed one Act in preference to another. It is not for a subordinate institution to make so bold. But this also means that parliament is not controlled or conditioned by anything or anybody other than ‘the people’. Notice that this is where one important reason and need for a Constitution surfaces: to ensure that an innately limited parliament remains within its powers, and to create the mechanism and confer the necessary powers upon another institution to declare that a given subject or procedure is not in the gift of parliament, that the putative Act in question is not a valid piece of legislation according to the

principles of the Constitution, and that parliament must refer the issue back to its principal, 'the people'. This supervisory, *procedural* constitutionalism must be established and clearly asserted. But in the UK, the desideratum of a Constitution is not satisfied: so how does implicit repeal stand in relation to this argument?

The courts have a duty to apply the law, and cause it to be enforced: thus the question turns on what is recognised as law. Clearly all Acts of Parliament are law, and all are to be applied and enforced. However, if parliament has legislated on one or an aspect of one issue at different times, and there is a conflict between the two, *in the absence of some statute-based rule*, the courts can have no option other than to apply the latest will of parliament. This is the simple logic of the situation, and there is no need or room for the claim that implicit repeal is the creation of common law, except if the courts and the judges of the High Court acting as self-appointed legislatures wish to interfere with the basic arrangements of power. But to do so they must claim ownership; and in claiming ownership and authorship of the rule of implicit repeal, they enter the silent claim that they are the only body empowered to make alterations to them. In the instant case, the judge entered precisely such a claim: in paragraph 60, we are told that the rule of implicit repeal is a creation of common law, and that recently common law has allowed/created exceptions to it by stipulating a new class of Acts that are not subject to implicit repeal. Incidentally, notice the sudden use of impersonal language: it is not the judge saying it; it is common law creating and making exceptions! However, whence the exception? Well, he has two arguments. Firstly, that there is a class of Acts that have always been different: such as *Magna Carta* (this is an Act?), the Bill of Rights, Act of Union with Scotland, devolution measures, and so on. The judge also averred that the European Community Act 1972 belongs in this class; even though it is clear to everyone else that there is a material difference between that Act and all the others mentioned – including the Human Rights Act 1998 – in that it contains a rather unique provision concerning its status, how it may stand in relation to future Acts of Parliament and, indeed, to European law. Secondly, according to this judge, this category of Acts may not be repealed other than by express purpose, for judges will not accept it. But “on what

basis?"; clearly not on that of any statutory rule. Far from it: for here, Lord Justice Laws is simply defying parliament with impunity, not only in one instance but also in all such instances to come until another judge changes the rule. Indeed, this "rule" has naught to do with parliament or its supposed sovereignty: if a judge is faced with a statute-based rule of recognition, (s)he may not avert his attention; in the absence of one in our adversarial system, he is in duty bound to attend to the reasoned argument of counsel, and decide the matter according to law *as it stood at the time the alleged wrong was committed*;⁸⁵⁸ and (s)he may have to include laws and rules of law to which the counsel may wish not to draw attention, although in large part it is the job of the opposing counsel to correct such omissions. What, then, is the rôle and relevance of the rule of implicit repeal? It is an internal judicial rule, a code of practice that serves the purposes of legal proceedings; but we have to take care not to allow the pretence that it is anything more. As a code it has to be clear, understood and remain fixed in the course of any given proceeding. As a matter of legal practice it should be left to opposing counsels to invoke arguments as to what the law to be applied in a given case is, and rely upon the supervisory powers, ultimately of the Judicial Committee of the House of Lords, to correct matters of *application (and interpretation) of existing law*. That being the case, and *pace* this judge and others like him, we might as well ignore the common law rule of implicit repeal because it has no constitutional

⁸⁵⁸ Note the principles applied in the Human Rights Act 1998: retrospective application of that important Act is disallowed. Hence:

7. - (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act...

22. - (1) This Act may be cited as the Human Rights Act 1998.

(2) Sections 18, 20 and 21(5) and this section come into force on the passing of this Act.

(3) The other provisions of this Act come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes

(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.

meaning and significance, except to the general extent that the behaviour of the judiciary can have an impact upon the rights of 'the people'. Equally, we might as well leave the rule of interpretation in the singular European Communities Act 1972, and the important Human Rights Act 1998, which require positive, purposive construction in respect of individual instances, out of this argument: where Parliament has provided a specific rule of interpretation, the judges are bound by its implications.

But notice that the judge went further. He argued that in its "present state of maturity"(wherein lies an wonderfully perplexing evolutionary theory) common law (which is of course, actually the judgement of some judges in named cases) recognises that "there exist rights which should properly be classified as constitutional or fundamental". From the "insight" that there are fundamental or constitutional rights follows a further idea; namely, that there must be fundamental or constitutional statutes (paragraph 62). Suddenly we have two classes of statutes – "ordinary" and "constitutional" – differentiated on the basis of applicability of the rule of implicit repeal to their provisions. Thus "ordinary" statutes are subject to implicit repeal, but "constitutional" statutes are not, and can only be repealed by express words (Paragraph 63). An obvious comment is that if these categories and restrictions are allowed to stand, then parliament has been bound not by a previous parliament – not even rhetorically by 'the people' – but by this judge in the name of common law, thus nullifying its supposed sovereignty. Indeed, if we allow this view to stand we must also accept that not only may judges of the High Court make new law when, in the course of a proceedings, they deem it necessary, but also that in the instant case we have allowed two judges to make "constitutional law" on the hoof, without even the theatre of legislative stages, but in private, and subject to review only in the event of an appeal. But this is not all: such a change can itself be changed in the same unprincipled way; Lord Denning's rejection of literal interpretation of statutes in favour of discovering and giving effect to the *will of parliament* in 1951 was at the time rejected and condemned as "constitutional heresy", but this approach is now

the norm!⁸⁵⁹ Anyhow, two further comments are relevant. Firstly, there is a leap in logic in this argument: recognition of fundamental rights was a common law finding, from which the judge inferred the existence of statutes, “[t]he special status of constitutional statutes *follows* the special status of constitutional rights” (paragraph 62, emphasis added). This is far from an adequate basis and manner of proceeding to introduce major change into the system. Secondly, if parliament is “controlled” by fear of general elections, what controls the judges and common law? In the absence of clear rules of law and binding decisions – except that, *by its own decision*, the House of Lords is no longer bound by its previous decisions, and would not recognise binding precedents if it feels it right to do so⁸⁶⁰ – our judges and common law are controlled by their own reasons.⁸⁶¹ But this mimics the notion that God controls its definitely sovereign power by its own infinite wisdom and superior reason!

In short, one judge has opined⁸⁶² into existence (and defined) a new category

⁸⁵⁹ See Anthony Lester ‘Pepper v. Hart Revisited’ in *Statue Law review*, 15/1, 1994, pp. 12-3

⁸⁶⁰ “Earl of Halesbury, L.C.; I adhere in terms to what has been said by Lord Campbell [etc.] that a decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was *res integra*, and could be re-argued, and so the House be asked to reverse its own decision. That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries, and I am therefore of the opinion that in this House it is not competent for us to re-hear, and for counsel to re-argue, a question which has been recently decided.” (London Tramway Co. v London C.C., 1898) O. Hood Phillips *Thomas and Hood Phillips’ Leading Cases in Constitutional Law*. Sweet and Maxwell, 1947, p. 476. The Lords modified this in a 1966 Practice Statement: they would consider previous decisions as normally binding unless it appeared right not to do so. See Practice Statement (judicial precedents) 26 July 1966 in [1966] 1 *Weekly Law Report* 1234. But this new power was used with due care to the basis of existing contracts and financial arrangements, and “the need for certainty as to the criminal law”. (For a general discussion of this change within a larger context of the Lords’ judicial functions – and law-making powers of the judiciary – see R. B. Stevens *Law and Politics*, 1979, relevant sections but especially pp. 471-4). The situation was further clarified in 1998; now the Lords “has inherent jurisdiction to correct an injustice caused by its own earlier decision, and that, in the absence of legislative limitation, this jurisdiction remains intact.” E. Grant ‘Pinochet 2: the questions of jurisdiction and bias’ in D. Woodhouse (Ed) *The Pinochet Case*, 1999, especially pp. 43-4

⁸⁶¹ It is important to emphasise that in so deciding, the Judicial Committee of the Lords, albeit in the name of the House as such, acted as a sole legislator.

⁸⁶² This raises the question of the panel of judges: Robertson argues that a differently empanelled bench would probably have reached a different decision in Pinochet 1 in 1998. See D. Robertson ‘The House of Lords as a Political and Constitutional Court: Lessons from the Pinochet case’ in D. Woodhouse (Ed) *The Pinochet Case*, 1999

of statutes on the basis of an apparent inference from claimed effect to (presumed) cause: because some judges have in previous cases⁸⁶³ identified “fundamental” or “constitutional” rights, there must also exist “fundamental” or “constitutional” statutes. The second judge, Mr. Justice Crane, simply agreed (paragraph 83). This manner of reasoning is akin to the argument that the world exists, but we do not know the cause for this: however, since nothing can exist without a cause, there must be a first cause for the world, therefore there is a God. The judgement in question is just as bad and the reasoning just as risible. Moreover, at the time when the case was placed before this judge, there was no talk about “constitutional statutes” not subject to implicit repeal; the judge made this up and changed the *content* of the law as he was applying it; the law before and after the case is different, and new law is made and applied to a case in the course of his judgement. Does this not resemble parliament extending its own life? And does it not, therefore, mean that judges are claiming sovereign legislative power? The painful truth is that this way of proceeding makes nonsense of the idea of rule of law, which is always predicated upon the idea of known rules of law *beforehand*. We abhor retrospective legislation even when it is accepted as necessary, let alone this kind of effectively uncontrolled retrospective legislation that a judge manages to spring upon an unsuspecting public; and to cap it all, we are expected to proclaim and respect this judiciary and these judges as the protectors of our liberties.⁸⁶⁴

It may be thought that this is altogether too harsh on the judges, and that too much is being inferred from one case. Let us take another, that of *B and C v A* (Court of Appeal, 11 March 2002). A number of issues are of interest here: the court claimed a duty to strike a balance between Article 8 (essentially privacy) and 10 (essentially freedom of expression) of Human Rights Acts 1998 and that

[t]he court is assisted in achieving this because the equitable origins of the action for breach of confidence mean that historically the remedy for breach of confidence will only be granted when it is equitable for this to happen.

⁸⁶³ Such as *R v Secretary of State for the Home Office, ex parte Simms* [2002] 1 AC 115.

⁸⁶⁴ It is equally disturbing when a judge reserves his judgement pending the determination of another case, in a different court and by another judge. See ‘Footballer’s affairs are judged to be fair game for the press’ in *The Times*, 12 March 2002, p. 8

(sic; paragraph 5).

Ah... yes, quite. Moreover, quoting authority – a 1967 decision – the judge entered the claim that “the court in the exercise of its equitable jurisdiction would restrain a breach of confidence independently of any right at law”. In other words, this undefined equity is invoked over and above any relevant law that may apply – but at least they did not claim that equity could be invoked against the application of an existing law!

Their “Lordships” did not find any major fault with the decision against which the appeal was being heard, but found many little faults that collectively meant the judge in the original trial had come to the wrong decision. Because these faults are actually buried in the discussion of the fifteen points that are now the guidelines for future cases, we are liable to miss their importance. For instance, in the original trial, the judge was concerned with the problem of the rights of a third party not represented in the action but whose interests were directly involved. But in paragraph 43 v, their “Lordships” disagreed with this and suggested that it was not for the courts to decide whether it was in the interest of this other absent party to be informed or be kept in ignorance of the material facts which publication would place in the public domain – except that by deciding that the information could be released, *ipso facto*, they decided that the third party should be informed whether she would so desire it or not, and irrespective of whether public disclosure would be in her interests or not. In other words, the court of appeal decided precisely on the issue that they thought the lower court should not have decided upon! One wonders why rules of equity do not apply to this absent but clearly interested party, and why, in the name of equity if not humanity, she was not invited to give her views, but was treated as a non-person.

In their Guidelines (“possible to construct now that the law is clear at least *below* the level of the House of Lords”; para 8, emphasis added) their “Lordships” averred that any attempt to interfere with publication must be on a justified basis: but because “public interest” is not always obvious, if it could be shown to exist it must be decisive, just as if a duty of confidence is shown to exist, the courts must protect it (paras 11, v-ix). But what of cases where the grey is too grey for any

clear decision to be justified? In common law, where there is no principle or rule of law available, judges resort to an “arbitrary” view of the rules of equity: it is a maxim of common law that where there is a wrong there is a remedy – not that where there is a rule of law, there is remedy; the difference is crucial.

However, in seeking to strike a balance between articles 8 and 10, their “Lordships” argued that

[t]he courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media. (11, xii)

And they proposed that useful guidelines to help find this balance are to be found in the Council of Europe Resolution 116 5 of 1998. However, it is very hard to see how that Resolution provides any indication that in this instance disclosure/publication would be in the public interest. Indeed it is not surprising to find that their “Lordships” did not rely upon this Resolution but advanced other arguments, such as that those in public life must expect greater exposure even if they have not courted publicity, the nub of the argument being that one holding such a public position (which only means being in the public eye) “was inevitably a figure in whom a section of the public and the media would be interested” (para 43, VI), even though he/she was entitled to a private life.

Bringing these strands together, we get this: more newspaper titles is in the public interest; this can happen if they sell, which means if they publish what interests the public. However, in disclosing information, they are subject to the law of defamation (11, xiii), but the courts must not act as arbiters of taste, and not interfere with the form of publication (48). Any problem with what they publish is subject to the codes of practice and rulings of the Press Complaints Commission. In the event, they also refused leave to appeal to the Lords.

A number of points stand out. Refusing leave is of course denial of justice, even when there is a way round it, namely by application for leave to appeal, inviting the Lords, in effect, to overrule the lower court and allow an appeal to be heard. More than that, we still do not know the precise nature of public interest. Indeed, their “Lordships” confused *Public Interest* with what *might interest the*

public; they confused an abstract political concept that potentially touches all, whether they know it or not, and a private concept that touches only a few. But that is not all: they also failed to understand or give any weight to the fact that the media and the press are not uniformly defined right across the spectrum, and that there is a difference between the “quality” press who take care in what they publish and the “not-quality” press who publish what will sell. Why is the survival of both types in the Public Interest? Their reasoning here is clearly suspect – it is not even good enough to be circular. Where *Public Interest* is not decidedly clear (underlining press freedom to publish almost anything provided they do not fall foul of laws of defamation or findings of the Press Complaints Commission), it is altogether very difficult to see why the need to protect privacy⁸⁶⁵ should be compromised. In other words, in the absence of some clear *Public Interest*, privacy is the overriding concept: disclosure that may serve the interests of some only is not disclosure in the Public Interest. We must draw a distinction between that which is undeniably in Public Interest – for instance information concerning holders of public office, such as ministers and other politicians, judges, and in view of the power of the press, also newspaper editors – and refrain from the assumption that *the* public has a right to know the facts about a figure in the public eye.⁸⁶⁶ “of interest to whom?” is a supremely important question here, and it is hardly meaningful to generalise the extent of interest in a figure in the public eye into that of *Public Interest* and ascribe an interest in their affairs to an undifferentiated public. Is the outcome of conflating the two a free press? Hardly, but it certainly means a press licensed to be licentious. However, as if to underline the claim that common law is in reality not law properly speaking, Mr. Justice Morland decided that a public figure – a person in the public eye – had a right to have her confidence respected, and awarded damages (£3,500) and costs (said to be around £200,000). Clearly Justice Morland’s judgement

⁸⁶⁵ Clearly there is no privacy law; however, if individual rights and liberties are primary – not the result of grant from authority – then we do not need one, but need to ensure that judges understand this simple point. However, much has changed such that this historical point is really no longer relevant: a Constitution would provide the appropriate vehicle for enshrining this kind of principle.

⁸⁶⁶ Indeed Mr. Justice Morland makes this assumption in his judgement. See *Campbell v MGN Ltd*, Queen’s Bench Division, Judgement, 27 March 2002

underlines the significance of an aspect of the Woolf judgement, namely his references to the law of confidence, such that some may see this as amounting to a re-writing of the law of confidence and enlarging of its remit. Some might even see this as an attempt to create a law of privacy but by stealth. The problem is that common law is incapable of producing either a law of freedom of the press or one on privacy: they are far too important and contentious, and decisions in the face of given facts is not an appropriate vehicle for propounding general rules of law about them. And in both a law of privacy, and the freedom of the press, the present law could yet be changed in an appeal to the Lords. We need responsible press with legal protection of its freedom of expression in pursuit of Public Interest, balanced by hefty penalties for transgression or invasion of privacy. We might add that Public Interest as defined by the Council of Europe includes

(III) Preventing the public from being misled by some statement or action of an individual or organisation. (Paragraph xiv).

Their “Lordships” in *B and C v A* did not invoke this in their arguments, even though they quoted it. But now consider the case of *R. v Shayler*⁸⁶⁷ in which the Lords refused the defence that disclosure of unlawfulness, irregularity, incompetence, misbehaviour and waste of (public) resources was in the public interest – even though one would have reasonably thought that this defence came pretty close to the terms of the concept as defined in the Resolution of the Council of Europe, quoted above. But the decision of the Lords does not provoke controversy or create uncertainty because an Act of Parliament – a piece of statute law – allows the prevention of disclosure in defined instances.⁸⁶⁸ This stands in sharp contrast to the decision of their “Lordships” in *B and C v A*, discussed above: in the one, the law is clear, whereas in the other, tentative law is made while it is being applied, and this on the basis of dubious argument and even more dubious political theory – but all this remains subject to the decision of the Lords, on appeal or in the course of a different case touching the same rules.

Lawyers are notoriously bad at political theory. Legal training hardly touches this complicated topic, and any student of law who strays into it will find it more

⁸⁶⁷ House of Lords, speeches 21 March 2002

⁸⁶⁸ See a brief report of this case in *The Times*, 22 March 2002, p. 51

difficult to succeed. Inns of Courts are not geared for this, and, generally, at Universities, law is isolated and located in a separate faculty. Joint degrees in law and other subjects are now more available than before, but that is not the normal path to legal practice. Yet, a certain type of law is rather closely linked to political theory. The result is an oddity: because their actions are of the highest importance in determining rules of common law – actually making new law – and they cannot avoid political theory especially in cases that touch rights, or some important public concept, they bring to bear dubious political theory. At any rate, a court of law is hardly the place to discuss political theory, even if the judges cannot avoid it in arriving at their judgements. Curiously there are no political theory advisors to the judges even though our judges are clearly inadequately trained in the matter and are in need of much help; perhaps we should have such advisors, but that would be to apply the wrong remedy. Indeed this sheer absence of trained capacity to think in theoretical terms is also a feature of the training and the range of capabilities of the teachers of the subject: a simple perusal of the works of a few academic lawyers will suffice to demonstrate the point;⁸⁶⁹ like judges they “philosophise” rather than invoke well-rehearsed controversies from which they could draw sustainable inferences. And given the significance of the number of lawyers in politics – in parliament and in political office – one can only guess at the cumulative ill effects of their rather limited approach to matters that require clear, wide but essentially theoretical thinking.

We really have to remove the law from the pedestal upon which it has been placed for simply far too long, and stop revering it. We are here concerned with laws that have a general impact upon society, those that some are keen to call “constitutional”; they include any law that touches freedom, rights, define our privacy, security, and the like. Law is an instrument, albeit a very important one, not a reflection of some incredible wisdom now inscribed on stone. And the closer we get to law, or for that matter political theory, the less solid it all becomes:

⁸⁶⁹ *Inter alia*, see C. Harlow ‘Disposing of Dicey’ in *Political Studies*. 48/2. Special Issue 2000: Political Ideas and Political Action, pp 356-369; G. Ganz *Understanding Public Law*, 1994; M. Loughlin *Public Law and Political Theory*, 1992, and especially his *Sword and Scales*, 2000; and even the influential H. L. A. Hart *The Concept of Law*, 1994

indeed, we only have to read a judgement in full also to see how frequently the whole is actually incoherent. Often rules of law are contentious – even if for now they are enshrined as law. There is no necessity why they should prescribe this rather than that idea of freedom or privacy, except what we can morally support and argue to be “good”. Law is no more than a generalised set of rules made on the basis of certain assumptions, which we accept as legitimate because of a pre-existing set of rules – these are prior rules, and have naught to do with law – that define the probity of law-making institutions and procedures. This view of law has significant implications for the way in which it is to be made, and it is certain that common law made by judges does not qualify: rules of common law suffer from want of constitutional legitimacy. The idea of judge made law would be funny if it was not such a tragically serious matter.

As matters stands, judges are allowed to act as legislators:⁸⁷⁰ this is contrary to every rule of reason and, indeed, to every basic and known principle that one might invoke in a constitutional argument. The British judiciary may be far better than most, but that is not the point, just as it is not an argument to say that the Lords does really good work; in both instances, the problem is fundamental and constitutional, and has to do with legitimacy of power. And in this respect, two issues can be identified.

Firstly, the power for the judiciary to legislate and create rules of law is abhorrent and in practice goes counter to the ideal and rules of (natural) justice; and they can only be blind servants to justice if they are truly impartial adjudicators, *applying existing rules*.⁸⁷¹ But, secondly, we must also take note of

⁸⁷⁰ We must not ignore the rôle and importance of Practice Statements that the head of the civil or criminal divisions may issue from time to time, including Judges Rules concerning admissible confessions. While not statute-based, they are yet not arbitrary rules: they are considered but *internally generated* rules promulgated upon the advice of some committee, intended to clarify practice and regulate the workings of the judiciary; however, albeit indirectly, they affect individual rights and duties, printed in the *Weekly Law Report*.

⁸⁷¹ This point may mislead: the application of the law is not mechanical, and the true rôle of the judiciary is revealed when nuance is involved: information that a client divulges to his legal advisor is privileged; else justice cannot be served. Wording in an Act of Parliament that on the face of it contradicts this will – if at all possible – be interpreted in such a way so as to avoid damage to this first principle. See *R. Inland Revenue Commissioners, ex parte Morgan Grenfell* [2002] UKHL 21. If it cannot be done, then it is the will of Parliament, and that is that: the remedy would be another Act of Parliament.

the provenance of this power to make law. It is residual and vestigial, and comes from the power of the king to make and declare the law, which in the interest of impartiality (and practicality) meant that *only his judges* would perform this function. The law-making power of the judges mimics and gives living expression to the notion that the word of the prince is never opposed to law, for it is the law, that justice is in the breath of the king, and, curiously, also that the law exists independent of authority – it is higher law – and is only “found”,⁸⁷² but this view of the law also discounts the need for any higher “constitutional” law. Curiously when the law-making power of the king was divested from him and repaired to the legislature, this residual and vestigial power was ignored, but it is high time that we removed it. And when we consider that in allowing judges so to legislate, we are actually blindly accepting a few appointed servants of justice as legislators, and by allowing this historical system to continue we are actually enabling them to make law in private albeit based upon the reasons they would have to give, the extent of this enormity becomes clear. Yet, often the reasoning is patently defective such that, frequently, upon appeal, another judge finds faults with it and gives a different judgement, this time supported by *his* reasons. Would that this was the extent of it: legislation is always on contentious topics and in the event privileges a view, but this choice and the privileging is made the bone of contention in the debates that mark the stages of a Bill in parliament even under the present highly skewed system. Judge-made law is not any less contentious, but there is no debate, or pretence of an agreed position on the basis of an established procedure. The consequence is simple: not only dubious reasoning but also bad political theory is often the hallmark of judge-made law. The unfortunate fact which none is in a hurry to recognise is that common law provides remedies which are in essence only palliatives; it is incapable of providing definitive rules of law. There are many Acts of Parliament that we consider misguided, draconian, unnecessary, plainly wrong, but we can *try* to change them not when they affect us, but because they are there and in this they diminish our society and us. We can try to do something about them through the

⁸⁷² Book IV, *The Statesman's Book of John of Salisbury. Being the 4th, 5th, 6th, and selections from 7th and 8th of the Policraticus*, 1963

ordinary political process. Contrast this with common law: here, judges create rules of common law in specific cases, not in the abstract and in advance – so we do not really know the full extent of the rules of law to which we are subject – and we cannot challenge them, or mount some sort of organised activity to make the point. It is not that the judgement applies the rule that is actually made in the course of the case only to the case, and that is that: far from it, for from that moment it is part of the law of the land, we are all subject to it. Moreover, we are automatically subject to these rules but cannot challenge them: the fact that we are subject to them is not deemed (by the judges) sufficient *locus standi*, and only those involved in a case can mount a challenge, and that by way of an appeal. But the appeal is to a higher court and will also be heard by another Panel of judges of the same rank or above – and in view of the arguments of Chapter Five, they too come from the same social background – and if the appeal has reached the Lords, then there is no possibility of any change from their decision other than by legislation, which is pretty well an impossible proposition in view of the way government and parliament work, and their misunderstanding of the meaning of the independence and probity of the judiciary and high reverence for this funny body of so-called law. As mentioned before, the House of Lords can change the rules of common law in instant cases, including rules propounded in its previous judgements, which merely reflects the further oddity that their “Lordships” are not bound by their own previous decisions. Even more interesting, they have bestowed this freedom upon themselves! We cannot even be sure that they will not replace a previous decision upon which we may have relied in determining our rights. The legislative process in the making of common law rules puts us at the mercy of a rather odd process and idea of justice that, in any sane understanding of the matter, should have no rôle and purpose other than to adjudicate on the basis of rules and laws known *beforehand*, and *made in advance of our actions*. Judges, plaintiffs and defendants should only argue about a body of law that is objective to all of them: the legality of our actions depends upon the existence at the time when we act of a body of rules that are known to us: it is thus that we can readily accept the notion that ignorance of the law is no

defence, for they are within our grasp, and we need not ask a judge whether at the time we acted we were in the right. The argument can be put somewhat differently: the British system is ordinarily described as adversarial, where the judge listens to the two sides and decides. But this is not strictly speaking accurate, for the judge is also a law-maker, has an interest in the content of the law, and might have to give a fresh interpretation or indeed define a new rule: incredibly, there are three sides to the process of administration of justice.

However, other than the legitimacy of the power of judges to make (common) law, attention must also be paid to the consequence of having two active sources of positive law making – parliament and judges. If Lord Donaldson was concerned to remove a possible source of conflict between the legislature and judiciary because the validity of certain Acts of Parliament passed under the terms of Parliament Act 1949 might at some time be questioned (see *supra* Chapter Five, section on the Lords), we find that placing the Thoburn case – discussed in this *excursus* – against the recommendations of the Fourth Report of the Constitution Committee of the Lords, it is now very likely that the two will come into conflict. In the Thoburn case, the judge defined a new category of constitutional law protected against implicit repeal (and change) by the proviso that the judges will only recognise repeal or change in such statutes when it is the undoubted will of Parliament to do so – i.e. on express repeal and change. However, according to the arguments of the Fourth Report, which – as argued in *supra* Chapter Five – accorded with the accepted views of the executive and the legislature, there is no such category of statutes: in the Report, they pointedly refused to allow the Speaker of the Commons to identify and certify a bill as constitutional, and thought that all legislation should be subject to the same parliamentary procedure, which each House may decide to change from time to time. Thus, the category of statutes that the judge in the Thoburn case defined as constitutional is subject to the same parliamentary procedures and rules as any other “ordinary” bill, which means that the judicial code of implicit repeal applies – must apply – to any and every Act of Parliament irrespective of content or import. One must wonder what sort of “constitution” allows two legislative procedures with such

obvious potential for conflict: the working of this unprincipled system simply invites confusion.

The need for removing this leftover from the days of darkness is obvious, and its conceptual shortcomings make more urgent the need for ending the law-making powers of judges.⁸⁷³ Like the Lords, Common law and the power of judges to make law are historical oddities, now out of their time. They must go not because these bodies and processes do not yield good work – which they may and often do⁸⁷⁴ – but because it is wrong to have such a system. Our system of justice is not corrupt, even if it is cumbersome, expensive and often painfully slow, and it is available if one can access it. That often the outcome is not satisfactory is not the same as miscarriage. Indeed, miscarriages are usually the result of other causes, such as bad investigation or corruption outside the judicial system – even if they are commonly called miscarriages of justice. The idea of separating the investigation from prosecution – making the former the task of the police, and the latter that of a separate and independent body – is a welcome notion and would certainly help. But that has nothing to do with the problems arising out of the nature of common law, and the rôle and place of judges as legislators. The need for this important reform does not arise from any failing of the working system, but is defined by fundamental conceptual arguments and constitutional principles. Indeed, we must say as much about the office of the Lord Chancellor: he might do good work, but it is plainly wrong to have a Lord Chancellor (who need not be a lawyer at all, let alone an experienced judge) who may sit in judgement including in cases to which the government may be a party. It is plainly wrong to have such a system even if it has never been abused, for in this, as in that of common law and the Lords, we are bound to agree with Burke that “the thing, the thing itself is the abuse”. This helps define the need for reform, which in this instance, but especially in view of the false idea of sovereignty of parliament,

⁸⁷³ The study of law and rôle and place of lawyers in the historical and conceptual development of this present system of government is immensely important, but belongs elsewhere. Suffice to say that since the Middle Ages, lawyers have been important in parliament, and that they are the product of a legal training based on fragmented disciplines - lawyers as much as judges are bad theorists: at best, their understanding of political theory is flimsy and feeble.

⁸⁷⁴ One must say this because we cannot argue an “as if” case.

strengthens the need for a Constitution.

It may appear paradoxical to some that this *excursus* has focused exclusively upon the rôle of judges in common law: alas, the judiciary, common law and the judges are generally taboo subjects in this kind of analysis, and if judges are mentioned at all, as a rule the argument turns on their relatively recent presence and participation in the legislative functions of the Lords. That topic is important, and an all too obvious anomaly: in any second chamber based on constitutional theory principles, the judges (along with prelates) would have no rôle to play and hence, it was unnecessary to waste time and space arguing the case.

The need for a Constitution

When a Man looketh upon the Rules that are made, he will think there can be no faults in the World; and when he looketh upon the Faults, there are so many he will be tempted to think there are no Rules.

They are not to be reconciled, otherwise than by concluding that which is called *Frailty* is the incurable *Nature* of Mankind.⁸⁷⁵

Rhetoric and spin notwithstanding, it is not really possible to make us, the public, see *this* system as “our own”. Buttressed by the incredible paraphernalia of the idea of a historical and ancient constitution, the numerous ceremonials and rituals of power play of the working system are used to flaunt the quite evident durability and longevity of the régime over the centuries. The end-game is to present a picture of a system that combines liberty, authority and effectiveness. And when this picture of near-perfection is combined with the soothing effect of the decidedly tamed nature of our politics, the outcome is a potent mix that effectively robs us, ‘the people’, of our innate freedom to be governed according to a system we devise, empower and control. We are thus silenced; but our silence is deepened because we are governed by a labyrinthine system that successfully wards off outsiders from peering into its processes. The chances are that any future Freedom of Information Act will serve to protect more than reveal: after

⁸⁷⁵ ‘Moral Thoughts and Reflections – Of the World’ in Halifax *The Complete Works of George Savile, the first Marquis of Halifax*, 1912, p. 230

decades of dissatisfaction with the catch-all nature of section 2 of Official Secrets Act 1911, it was replaced⁸⁷⁶ with the Official Secrets Act 1989, which sought to protect information even more effectively, such that the change was hardly even a gesture in the direction of openness.⁸⁷⁷ The use of the internet, and the idea of “UK online”, both serve to make accessible what was already available: whether this process will continue and eventually provide more serious information is, at this stage, a matter only for speculation. We may surmise that this secretive feature is a legacy of our traditional and historically received system of government, which is always presented with an attractive gloss – in the form of transient, not quite chameleon-like but periodically changing rhetoric of legitimacy – that discounts any rôle for the governed.⁸⁷⁸ It can be further surmised that whereas the British have always exhibited a tendency to political rather than other means of arriving at collective decisions and resolving problems, at a national level they have been and remain distinctly apolitical, accepting without much ado almost any working system within the empty rubric of “Constitutional Monarchy”. This attitude is tinged with almost a sense of fatalism: for centuries, it has been a leitmotif of comments about this system that it is basically sound (Coleridge comes to mind)⁸⁷⁹ but it does not work so well because of local reasons defined

⁸⁷⁶ Mostly, it appears, because of the unexpected acquittal of Clive Ponting in 1985, after prosecution for disclosing sensitive information to an MP. The jury accepted his defence of public interest. See O. Hood Phillips and P. Jackson *O. Hood Phillips' Constitutional and Administrative Law*, 1987, p. 485

⁸⁷⁷ See *R. v Shayler*, discussed in the preceding section

⁸⁷⁸ Notice that, for instance, both Peelite and Whig views discount any rôle for ‘the people’: see A. Beattie ‘Ministerial Responsibility and the Theory of the British State’ in R.A.W. Rhodes and P. Dunleavy (Eds) *Prime Minister, Cabinet and Core Executive*, 1995, pp. 159-178. See also M. Flinders (‘Shifting the Balance? Parliament, the Executive and the British Constitution’ in *Political Studies* 50/1, 2002, pp. 23-42) for an attempt to apply these theories to the contemporary scene: here too ‘the people’ seem to have no place whatever.

⁸⁷⁹ S. T. Coleridge *On the Constitution of the Church and the State according to the idea of each*, 1972. Most analysts have praised the strengths of the English/British system, but also feared its possible corruption: thus Millar thought the French possession of kings of England a corrupting influence (J. Millar *An Historical View of the English Government*, 1803, Volume II, pp. 161-4); echoing Burke’s concern with the corrupting effect of governing India on British government as expressed in his speeches on the impeachment of Warren Hastings, J.S. Mill identified overseas empire as such a source of corruption (J. S. Mill *Utilitarianism, Liberty and Representative Government*, 1910). On the other hand, whereas Bolingbroke felt that a society based on true natural religion could tolerate other religions and would not be corrupted by them, for Mill, the uncivilised would always lose to

differently in each age; so each age leaves a legacy of its corrective measures.

The broad adaptability of this system of government has meant that it has never really collapsed or become an issue in its own right; when in trouble, its “owners” have acted, carefully placing the solution within an accepted familiar rhetoric. All this lulls the governed into the flimsy belief that all is well, whereas critics are dismissed as belonging to the chattering classes engaged in idle talk: but as Bolingbroke understood so well, the only real basis of good, i.e. free government is the vigilance of the people – which requires openness of government processes – although he also feared that when they become corrupt then the system is liable to implode – and we must add, self-imposed ignorance about the system is a serious kind of corruption. But what is “good government”? We may take our cue on this from Halifax:

[O]ur *Trimmer* admireth our blessed Constitution, in which Dominion and Liberty are so well reconciled; it gives to the Prince the glorious Power of commanding Freemen, and to the Subjects, the satisfaction of seeing the Power so lodged, as that their Liberties are secure; it doth not allow the Crown such a Ruining Power, as that no grass can grow where e'er it treadeth, but a Cherishing and Protecting Power, such a one as had a grim Aspect only to the offending Subjects, but is a joy and the Pride of all the good ones;⁸⁸⁰

In short, the first quality to define “good government” is “limited” power exercised with care and prudence. Back to Halifax: “the good-will of the governed will be starved if it is not fed by the good conduct of the governors.”⁸⁸¹ But as the arguments of this study show, at the very core of the system now this limitation is all but completely absent, and the mishaps and problems of the working system – inefficiency, the increasingly less clear and ineffective lines of political responsibility, large salaries, “sleaze”, extravagance, expensive justice, and difficulty of access to the judiciary except for the well-off, and much more – have destroyed the good-will of the governed. Recent serious concern with persistent

the civilised and, for that reason, Britain had nothing to fear from free intercourse with others. See his ‘A few words on non-intervention’ in *Fraser’s Magazine*, December 1859, reprinted in *Dissertations and Discussions*, Volume III, 1867.

⁸⁸⁰ Halifax *The Complete Works of George Savile*, 1912, p. 62

⁸⁸¹ *Ibid*, p. 216

low turnout at elections (considered by the beneficiaries of the system as a threat to democracy and classified as apathy) is based upon the assumption that participation – the rôle assigned to ‘the people’ – is a good thing. Apathy is thus presented as the fault of the people who do not understand the importance of their rôle in casting a vote. But no one seems capable of considering that this apathy may be a symptom of a gradual realisation that this system of government is out of its time, and that its pomp and ceremony only serve to underline the absolute separation between the world inhabited by the politicians and the “great and the good”, and that of ordinary citizens, for whom government is a burden. Apparently no-one considers that because the processes of democracy are ineffective, participation serves to empower and, at the same time implicate the electorate, making them the innocent authors of policies and processes they do not wish to have. For the beneficiaries of the system, the democratic process is necessary to make it work, and to lubricate the mechanism of its legitimation, and has little if any other consequence. Local democracy is dead: local elections have no bearing on local taxation or provision of services. Installing Mayors has so far done little to stem this tide of disillusionment, and may yet fail to revive the fortunes of sub-national government. The system is coming to a phlegmatic halt, and its process of legitimacy is gradually ceasing to function. It is true that abuse is not rife, and a kind of political limitation marks the working system: elections are held within the terms of the law; the government is often defeated in the courts; judicial review is a restraint, and so on. But, *inter alia*, an innately-limited parliament pretends to sovereign authority and this power is made available to the government of the day through the “octopus” effect of nationally-organised political parties (which are still private bodies).⁸⁸² We have an undefined but focal office of the prime minister that is invested with the legacy of prerogative powers⁸⁸³ the extent of which is evidently not known even at the apex of the

⁸⁸² This interesting topic has many ramifications: in the wake of publicity concerning private donations and problems associated with donations and political favours in return, public funding received serious consideration.

⁸⁸³ Care is needed here. Prerogative powers of the Crown are now limited and at any rate may even be removed by statute. But the bundle of executive powers attached to the office of the prime minister is not of this kind: we miss the importance of this because, when and if necessary, the government of the day can obtain the sanction of *its*

system; and the equally undefined nature of common law and the power of the judges, combine to make a powerful case for re-constructing this system of government, which means creating a Constitution. We may further emphasise this need by underlining the fact of the incredible complexity and magnitude of governance that we have to endure; moreover, given that especially interventionist government is always that of ‘the people’ and they own it, unless they have an *effective* say on how they are governed,⁸⁸⁴ they will be governed according to the will of others, which is the worst form of slavery. But the British have for long feared the idea of a Constitution for the nation. The qualification is important: indeed, as a nation we have relied upon a Constitution in every walk of life *except* in that of government: every charity and corporation, all the (Next Steps) executive agencies, British Medical Association, Law Society, Bar Council, trade unions, every friendly society *etc.*, including local and devolved governments, all have some sort of Constitution, and all concerned are required by law to abide by its terms. However, we ought not to be distracted by this apparent multiplicity of Constitutions of various sorts, for the rather important reason that they deal with *limited purposive* bodies created according to, located in and intended to function *within* a given legal system – their constitutions cannot put them above the law of the land. The one exception that might throw some light upon this complex situation is the history of Freemasonry. But even here the first point to emphasise is that Freemasons do not purport to be outside the British legal system: indeed, the requirement to pay “proper respect to the Civil Magistrate ...” (the laws of England, although the United Grand Lodge of England contains Lodges in some former parts of the Empire, like India and Barbados) is presented as a fixed element of their ‘Antient Charges and Regulations’.⁸⁸⁵ But

parliament; else power is exercised in a way that does not offend existing rules but is, for all that, very important and with great effect: the obvious example is the rôle and the place of the Question of Procedure for Ministers in its different incarnation at the start of each ministry, or, better still, the Nolan-Neil-Wilks Committee on Standards in Public Life.

⁸⁸⁴ This does not mean more or better democracy, or better put, more effective participation: put very briefly, truly limited government is the only sure basis of good government, which requires only an element of electoral participation to choose its personnel for the duration.

⁸⁸⁵ The United Grand Lodge *Constitutions of the Antient Fraternity of Free and Accepted Masons*. 1815, 27th edition, 1970, p. VI (henceforward cited as *Constitutions*).

actually Freemasons recognise another superior body of “law”.

Whereas a Constitution, the creation of its owners laying down the basic structure of its governance and the source of legitimacy particularly in matters that affect rights and duties created by that Constitution, is generally a self-contained document that defines the nature of the powers it bestows and the objectives for which they are to be used, in the case of the United Grand Lodge of England we find that it begins with the recognition of an other-worldly basis of the Craft, and creates a structure of power to function within the terms of that recognition serving to preserve it: hence “...it is not in the power of any Man or Body of Men to make innovations in the Body of Masonry”.⁸⁸⁶ What is that Body? It is hard to say, for no one seems to know. In 1723, Anderson (who produced the first Constitution when the Grand Lodge was established) made a single reference to its “old Landmarks” that must be preserved, now reflected in articles 4 and 55 of *Constitutions*; the first declares the all-purpose power of the Grand Lodge to make any change “always taking care that the antient Landmarks of the Order are preserved”, whereas article 55 ensures that the Grand Master may refuse the discussion of any resolution if it is contrary to the Landmarks.⁸⁸⁷ But we still do not know what these Landmarks are, and we shall not. They are presumed to be principles that have existed from time immemorial,⁸⁸⁸ are identified with the form and essence of the society of Masons which, “the great majority agree”, cannot be changed and every Brother Mason is expected to preserve intact. But the difficulty is that no one seems to know precisely what they are, and this is made more complicated by the interesting notion that if the *Constitutions* can approve of them, it can also disapprove, whereas Landmarks are declared to be unchangeable⁸⁸⁹ and, for that reason, cannot be defined, or even listed. The Grand Lodge and the United Grand Lodge of England needed a Constitution for the simple reason that these are two important stages in their history signifying structural change, but *Constitutions* serves to create a system of power that

⁸⁸⁶ *Ibid*, p. VII

⁸⁸⁷ *Ibid*, pp. 14 and 36

⁸⁸⁸ The religious nature of all this is indubitable, but that, too, tends to dissipate into unknowable generalities.

⁸⁸⁹ See B. E. Jones *Freemasons' Guide and Compendium*, 1956, especially chapter 20

preserves an avowedly indefinable and unknowable idea. The Landmarks are only “recognised”, they are not a collection of agreed principles enshrined in a Constitution: the deed came before the word; and now the word protects the deed as unutterable word!

Does this sound familiar? Well, recall Burke's notion that the British constitution is an unchanging patrimony that each generation receives intact and must pass it on intact, for it is the patrimony of all generations, past, present and future. Its features are there for us to respect, they define our government, and while we can and must, when necessary, reform the government, we may not touch the British constitution, for it is beyond us to know and reform. Indeed the proponents of the idea that we have a constitution willy-nilly promote this phantom-like approach to protecting the wonderfully otherworldly set of unknowable and indefinable ideas as the permanent fixtures against which the “unwritten constitution” functions. Measures proudly offered as constitutional reform function at this level only: indeed, to the chagrin of many, especially in the “periphery” (for this is distinctly true of measures of devolution to Scotland and Wales, as well as the central feature of European Communities Act 1972, and Human Rights Act 1998), such changes to the working system also serve to preserve and perpetuate its unfathomable essential notions, such as the false idea of sovereignty of parliament. Frankly, the very idea of a Constitution is anathema to a system that is supposedly based upon and geared to the false notion of the sovereignty of an institution. Indeed, under conditions where the system is accepted as settled – exhibiting fixity and resulting in regular government – there is no *apparent* need for any re-think. And given that, typically, discontinuities in the British system have all been moments of crises of the régime at the top, never the result of an implosion,⁸⁹⁰ and that interruptions and moments of crisis in British history have never provoked an absolute collapse of government creating the proverbial state of nature, so the idea of a Constitution has not taken root. The reform-minded in the UK are in some difficulty, because in these circumstances a Constitution can only be introduced from *within* the system

⁸⁹⁰ This is as true of the War of Roses (J. Hervey (Lord) *Ancient and Modern Liberty, stated and compared*, 1734, p. 15) as it is of Revolution Settlement.

and according to its terms, but the terms of the system do not allow for any significant shift of paradigm resulting in real change in the system at its core – except perhaps by misadventure, such as the grand folly of the Labour Party in the 1990s (discussed *supra* Chapter Five). In an important sense, this explains the rather thin meaning of British constitution and constitutional theory in Britain: measures of reform here deal with aspects of the working system, including certain rights – such as the franchise - lesser institutions and practices, but not fundamentals. The second stage of Lords reform became so phlegmatic because it touched near-fundamentals which the government wished to avoid, and the whole episode was oddly reminiscent of the 13th century conflict between the king and the feudatories who desired to limit his powers and control the exercise of it (discussed in *supra* Chapter Three). More than that, the absence of examination of this system based on constitutional thought is aided and abetted by the oft-repeated claim that the British are not inclined to abstract analysis.⁸⁹¹ Thus we have little, practically no, principled examination of change in terms of constitutional theory. There has been one (defective) Constitution, The Instruments of Government, which was never applied: the Restoration meant returning to the old idea of government and the Revolution Settlement significantly modified the substance of the restored system and prepared the ground for the development of systemic corruption that is the Neo-Tudor style of government. The idea of a Constitution for Britain was never mooted, and any claim that the Act of Union had in fact created a constitutional framework was disappointed when, soon, the terms of the Act were ignored, and that was that. How right was Tom Paine when he claimed “[I]n England it is not difficult to perceive that everything has a Constitution, except the Nation.”⁸⁹²

⁸⁹¹ Even the Queen said so, somewhat proudly in her address to Parliament on 30 April 2002 (reported *The Times*, 1 May 2002, p. 4). But facetiously, if it is true, it may well be that we know that the theory of this system does not stand up to any theoretical examination – which happens to be true. Seriously, there is no evidence to support this claim: if the system is not actually based upon any one set of coherent ideas deduced from first principles, we have had many whose contribution to the idea of a constitution and theory of government has led the way. Some torchbearers of enlightened constitutional thinking are examined in this study.

⁸⁹² ‘Rights of Man’ in *The Selected Works of Tom Paine*, 1948 edition, p. 213

The argument so far amounts to this: when the need for reform is defined by the deficiencies of the working system and the response is confined to correcting those deficiencies, reform will serve to perpetuate the essential features of this system at its core. This is hardly constitutional reform, and the result will not be a Constitution in any meaningful sense. On the other hand, principled constitutional theory analysis of this system of government points to the need for a Constitution in a proper sense. This kind of argument usually runs into the sand of the criticism that our system has not collapsed, that not only is it viable, but it is, by far, better than most, and creating a Constitution will mean fixing its principles in response to the problems of yore. But refusing to think about this system in fundamental terms is tantamount to entertaining the view that basic faults here identified are nothing of the kind. Such an essentially High Tory attitude will also entail that we should continue to work this system without probing into its recesses or enquiring about the provenance and proclivity of the ideas upon which it is based. But *pace* the dyed-in-the-wool defenders of this system, the constitutional theory case for a Constitution is overwhelming. However, any argument is, in the first instance, as good as its presuppositions: if constitutional theory arguments invite attention, we must then consider the question of the fixity as a feature of a Constitution, and enquire about the sort of government that a Constitution may portend.

Hood Phillips⁸⁹³ favoured a codified constitution (and a Bill of Rights, because it would limit the powers of Parliament and of the government of the day, and clarify important principles), and sought to answer the concern with fixity: however, his larger objective was to rid this system of the ambiguities that plague it, not to innovate or otherwise construct the system anew, and to avoid complications associated with a constitution that may be difficult to adjust. Attachment to “flexibility” is an abiding feature of comments on our system, and the fear of things “fixed” is a phobia much played on: Hood Phillips meant to achieve a balance by devising a procedure that would allow, well-nigh mandate, flexibility. Thus he proposed that the manner of amending different parts of a

⁸⁹³ For this aspect of Hood Phillips’s view, see his *Reform of the Constitution*, 1970

codified constitution should be stated in elaborate detail such that its provisions can be changed, some more readily than others, but none at the whim of anyone. According to this scheme, the process of amendment would increase in complexity according to the relative importance of the principle involved. This would entrench the more central provisions and fundamental features of the system while allowing relatively easy adjustment to its working arrangements when needed.

At this stage, we must briefly re-visit the argument against a Constitution: it is thought that by enshrining and entrenching the important principles, a Constitution fixes the nature of the system, and this is seen as a disadvantage. Those who think of Revolution Settlement as a constitution revere it because it established Constitutional Monarchy and fixed that principle of British government beyond recall once for all. Of course this is a delusion, for Revolution Settlement was not a constitution but a closure of certain specific events: as has already been argued, Revolution Settlement left the system completely formless. This formlessness of theory and practice of government had consequences, for it allowed for the gradual onset of a systemic corruption that eventuated into the Neo-Tudor style of government. We cannot avoid the inference that we have come to this pass, firstly, without willing it and, secondly, because we have not had any means of protecting the better features of the system, so to say, the gains of the Revolution Settlement, namely limited government. Alas, Revolution Settlement looked back, not to the future, and this is enough to discount it as a constitution. The consequence is that we are ruled in an odd way that we cannot intellectually sustain, and the supposed “principles” of this system fall apart upon examination. As a remedy some propose that we entrench the more important matter through legislation: thus

[w]e support a change to the law to entrench the Parliament Acts to prevent further unilateral reduction of the Upper House's powers by the Commons. This could be done by inserting the words “to amend this Act or” after “provision” in Section 2 (1) of the 1911 Act.⁸⁹⁴

⁸⁹⁴ Strathclyde (Lord) and E. Forth *The House of Lords: Completing the Reform. Response to the White Paper*, The Conservative Party, London, February 2002, para 6.12

That this can only have declaratory effect – for there is no way they can be enforced other than by the courts defying an Act of Parliament – seems to be all but lost upon the two parliamentarians behind this suggestion. The desire to fix so as to prevent precipitate change is not absent in British thought – especially that of the opposition – but it is meaningless in the face of the false idea of sovereignty of parliament. Indeed, fixing the first and more important principles of the system is a virtue, not a vice: it means that we will have a degree of certitude that we will be ruled by a system of government that no one, especially those working the system, can change; our 18th century analysts readily understood and subscribed to the ethos of this view. Historically enshrined constitutions or principles fixed in statutes do not work; on the other hand, fixing the rules does not mean freezing them. Rather, it means that we will be governed by a system based on well-defined principles, which we can examine and to which we can give or withhold consent, or change the principle or the system when and if necessary, but not at will, and certainly not from within the working system. It also means that any important change can only be as a result of deliberate effort, thereby precluding inadvertent and incremental corruption that can change the nature of the system in our ignorance.

Hood Phillips's scheme is a clear improvement upon the usual arrangements whereby the Constitution as such, and every provision in it, is subject to the same necessarily cumbersome procedure of change. The differentiated manner that Hood Phillips offers is an interesting gesture to flexibility, and answers some of the concerns of those who fear the political implications of a fixed and difficult to change Constitution. But, how is one to “entrench” such a Constitution under the terms of the existing structure of power? Indeed even Hood Phillips was rather pessimistic about the prospects, and considered that the only way in which we could successfully reconstruct this system and establish the principle of parliament with limited, defined authority would be to extinguish this parliament and create another such that there can be no possibility of continuity between the two.⁸⁹⁵ But in this Hood Phillips was confronted with the dire reality that the British

⁸⁹⁵ Hood Phillips *Reform of the Constitution*, 1970, pp. 156-158.

system does not provide any mechanism to achieve such a change, and that almost any proposed procedure comes to standstill in a frozen stare at the claim of Sovereignty of Parliament. There is then little wonder that for many the ultimate solution is a change of mind about this “principle”, especially on the part of the judges. But this is a bad solution, for it actually ignites the same kind of issue that a claim to any otherworldly and necessarily *ab initio* idea of power raises – be it that of sovereign power of God, king, parliament, or the exaggerated and simply meaningless claim about the superiority of common law.

The upshot is that whereas we can think of technical solutions to certain types of problems, such as that of differentiated amendment mechanism, the solution to the larger problem of creating a Constitutional system of government must begin elsewhere, with constitutional principles. This requires the admission that for too long we have lived under the false idea of sovereignty of parliament; exit this counterfeit notion, and much else will suddenly become easier to handle.

The first effect will be to put paid to the quite incredible notion that Parliament is both the legislature and constituent assembly in an undifferentiated capacity. Parliament conceived in this intellectually and conceptually abhorrent sense is capable of legislating, thereby changing and amending the system as it pleases any time, and, not withstanding the recent innovation of a judge discussed earlier, very often by simple default or even misadventure. And given the reality of the Neo-Tudor style of government, this means that the rules of the game are at the mercy of the government of the day – actually at the mercy of precisely the subject matter of a Constitution! This, too, will cease.

If parliament is not sovereign, then what is its rôle and power? Thus the second effect would be to force us to clarify the answer to this question. But this also means that we must – as the third effect – clarify the rôle and powers of the government in the broader sense. That the judiciary will simply shrink to its proper subordinate but functionally independent rôle and place is beyond question; it will become a statutory body, with no pretension to being a constitutional organ. However, aspects of that body, too, will have to be clarified, most urgently the process of appointment of the judges – subject to a hearing and positive vote in

both Houses – and no less important, the rôle and place of the Lord Chancellor. This will end the tyranny of common law, and with it that of the judges. Finally, the police force will have to be placed on a statutory – not constitutional – basis: Chief Constables will be appointed upon recommendation by the Home Secretary and approval by parliament after a hearing, and they may be removed in the same way, as well as after a hearing and a vote in parliament upon a call for such a procedure by a requisite number of members of parliament.

The net effect would be a change from the position in which it is meaningful to say the British system may best be described as a system of government that evokes a certain constitutional view, to one in which we can only understand it in terms of given and established principles set in its Constitution.

It may be argued that perhaps it is no longer really necessary to go this far, for in the usual inadvertent way, we have ignited a slow-fused process of change whereby at some point we shall discover that, as a matter of fact, we have a Constitution. In other words, that British membership of the European Union has created a slow, third revolution. There is no denying the fact that association with Europe has meant certain changes, and continued association will incrementally add to them. But do these changes amount to a Constitution? As always in this system, the only meaningful answer is twofold: for as long as they last, they certainly have a kind of constitutional character, but do not amount to a Constitution, for the very foundation upon which these changes have effect in Britain is at the mercy of the core idea and central element of the system i.e. the false idea of sovereignty of parliament. Here we may note that the primacy of EU legislation is predicated upon the continued presence upon our statute book of the European Communities Act 1972, and while it has become increasingly difficult even to contemplate the possibility of withdrawing from this somewhat novel inter-state system, the fiction of the essential primacy of British law continues intact such that, technically, it is possible to withdraw by simply repealing the relevant statute: indeed withdrawal is only possible if we repeal that statute. For decades, we subscribed to the European Convention on Human Rights, albeit with a chequered history; that Convention was then incorporated

into British law. The *minutiæ* of the case are not so important as is the fact that, yet again, the superior status of the principles promulgated in that Convention and incorporated into British law are actually made to fit and be compatible with the idea of sovereignty of parliament. Thus, there is now a presumption that Parliament will not legislate against the principles of this Convention, except deliberately: if so, then the deliberate deviation will have effect. On the other hand, the judiciary is expected to interpret existing law in such a manner as to conform to the requirements of the Act and the ethos of the Convention; and, should they find that that is not possible, they are only empowered to bring the matter to the attention of parliament, albeit that the Act also provides for a fast track procedure to amend the offending legislation if Parliament (read the government of the day) sees fit. It is perhaps a tribute to the political – actually constitution-making genius – of the British that they have managed to contain and accommodate changes of such magnitude within the false notion of sovereignty of parliament.⁸⁹⁶ As the arguments about the UK Union (*supra*, Chapter Six) show, this is as true of the basis of the relations between the government of the United Kingdom and the European Union as it is between the government at the centre and the newly instituted devolved institutions.

The point is that the British membership of the European Union and the incorporation of the European Convention on Human Rights into domestic law, important and of practical consequence though they both are, do not amount to a Constitution, in that they are subject to, rather than change, the presumed basis of the structure of power in this country, namely the false idea of sovereignty of parliament. The “third revolution”, if such it is, does not ameliorate the case for a Constitution.

⁸⁹⁶ Not everyone will agree with this. See J. L. Black-Branch ‘Parliamentary Supremacy or Political Expediency?: the Constitutional Position of the Human Rights Act under British Law’ (*Statute Law Review*, 23/1, pp. 59-81) for a critical account of this development. Black-Branch considers the fact that the judiciary cannot strike down existing legislation a serious weakness, and argues that creating such a power need not necessarily conflict with the (false) idea of sovereignty of parliament. In view of the argument of the *excursus* in this chapter, granting such an important extra power to the judiciary is a problem unless it is part of a larger package of change, in which that function is assigned not to the judiciary as such but to a ‘constitutional court’.

Given that the process of making a constitution is different from the processes that a constitution engenders, we may note that the need for a Constitution that belongs to ‘the people’ is further defined by the need to create a system that is not in its essence and processes patriarchal. The increasingly dubious measures designed to change present imbalances in the system (such as women-only short lists or quotas and measures to ensure or introduce a greater ethnic diversity into parliament) are mere palliatives and fail to correct it where it needs correction, at its core. Starting anew affords us a chance to create a better system more suited for present conditions – and whatever the faults of the resulting system of government, we shall know that we are responsible for them and have the means to correct its shortcomings at source.

As Burke understood so well, reform should always be made in good time and in cold blood. We should recall Halifax: “Men are not hang’d for stealing Horses, but that Horses should not be stolen”;⁸⁹⁷ we need a Constitution not because this or that government has behaved badly, but that governments should not behave badly. But we must add to this the further thought that we need a Constitution because at least since the middle of the 19th century the expansion of the ambit of government has meant that no one can live in spite of government, that increasingly our daily lives, including life in private are regulated by this or that legislation, regulation or code of practice. This makes government far more important to, and in, our lives than ever before, which is good enough reason to assert our ownership of it. But this requires fundamental reform: reforming on the basis of, and in, response to immediate problems mimics the bankrupt process of making or discovering new law in response to a plea by a plaintiff; it also reflects a wider more important point, namely that *the* constitution is good but not this particular expression and instance of it. But ... what constitution? This means that we must take note of the faults of the working system as symptoms and think in terms of larger constitutional theory arguments: at this point, we must also face the fact that the core principles of the existing system have been exposed for what they are, and the sense in which they are unacceptable are patently clear;

⁸⁹⁷ Halifax *The Complete Works of George Savile*, 1912, p. 229.

we should think in terms of first principles and acknowledge the theoretical requirements of a good system in order so to construct a Constitution⁸⁹⁸ such that it will spawn and support truly limited government dedicated to pursuit of Public, so to say, National Interest. In doing so, we must also re-think the ambit and reach of government, and may well decide to make it less total. Because most of our problems arise from the fact that we do not have a constitutional form of government, persistent and nuanced immediate problems serve to underline the need for one: in making a Constitution, we cannot avoid the fact that we are also disposing of unacceptable practices and relations of power. That much said, we must yet recognise that no system of government is perfect and without defect: like marriage, the important question is what sort of imperfection is perfect for us.

A new style of government?

The argument has been that reforming in response to the problems of the working system and thus changing the practice of government, we leave untouched the fundamental, constitutional problems. Yet it is inevitable that we must begin with the faults of the working system as we find them, but focus on fundamental reform. We need a Constitution in order to establish limited government, with defined powers and clear lines of accountability back to us, the owners of the system: government is for us, we are not for the government. However, the object of the exercise is not to create the perfect Constitution, but to devise one that would spawn and sustain a desirable form of government. The precise shape and form of such a Constitution is not an issue at this stage, and for present purposes it suffices to offer an outline only of the *form* of government we may wish to institute. At any rate, it is not for an analyst, especially one so concerned with theory, to do any more than that.

To recall Burke, we glean from the criticism some idea of the desired reform. It is thus that, in a sense, what follows is no more than a number of short-hand

⁸⁹⁸ A Constitution is but a collection of words; it is not the end of the matter, and we must take care not to misread the idea or the terms of the Constitution. In this, we may call upon Socrates: written words, he thought, are but reminiscences of what we know; true knowledge is communicated orally, and is graven in the soul. See Plato's 'Phaedrus' in *Greek Philosophers*TM CD-ROM v4.3, 1991-5 World Library Inc, Screen 100:104

ripostes, almost rejoinders and epitomes, to the substantive criticisms offered in the earlier chapters, especially chapters Four and Five. I have identified some features of a desirable style of government in the preceding section; it remains here to describe in brief outline constitutionally significant and focal features.

The elected Head of State will have two sets of responsibilities and functions: ceremonial/representative, and Constitutional. Elected at a joint session of the two Houses – for this purpose only the President of the Constitutional Court will preside – in December of the second year of Parliament, the president will serve for a (maximum of two) term of four years from January. Former politicians, civil servants, indeed all public servants – including the members of the armed forces – are disqualified unless at least four years have elapsed since their last active service. Similarly a former Head of State will not be eligible for any public office, and obtaining gainful employment nullifies his pension related to the office of the Head of State, except for one *ex gratia* payment of the pension for one year. This rule of prohibition applies to all holders of high public office, including the members of the government, parliament, the higher echelons of the judiciary, and top civil servants.

The constitutional duties of the Head of State are twofold: he/she inaugurates the new parliament, and starts the process of governance by convening and presiding over a three-day joint session of the two Houses. The sole function of this session is to receive the prime minister who will introduce his cabinet and place his policy proposals before parliament. The Head of State will preside over the ensuing debate on topics that the members of parliament select to examine, but upon the demand of at least ten members a policy proposal may be subjected to a vote, which may mean that it will be lost. This process of a joint session is repeated at the start of each new session of parliament. The second constitutional duty of the Head of State is to guard the Constitution: the office will be invested with defined powers to call for a referendum, new elections, or simply to reserve a Bill pending the next elections. The Head of State will have a department and permanent support staff, and a number of constitutional advisors, including the head of the constitutional Court.

In this scheme, the government is separate from parliament: the fusion between the executive and the legislature in the Commons that has for too long been the mainstay of arguments about the strength and the principle reasons for the stability of this system of government is constitutionally abhorrent. Some might find the idea of ending this fusion difficult to bear, but this is where real change begins to show. Moreover, this fusion is also symbolic of systemic corruption that defines the Neo-Tudor style of government, and by ending it, in one fell swoop we rid this system of government of much that in terms of constitutional theory remains simply unacceptable, and can lead to further corruption. Thus the government will no longer be a by-product of parliamentary elections: the Commons will no longer give rise to and sustain a government in office, or enable it to control its powers. We can achieve this by separating the construction of government from the process whereby members are elected to sit in parliament.

This means directly electing the top echelon of the personnel of government. Thus there is a separate national vote for the office of the prime minister, one each for the first and second deputy prime minister – respectively to preside over the upper and the lower chambers of parliament until called upon to fill the post of the prime minister in event of need. Equally, the first twenty – i.e. those with the highest national vote elected from a different list – form the pool from which cabinet-rank ministers are selected. This may or may not mean single party government – the chances are that it will mean a government composed of leading politicians from across the parties. It also means that each minister has a separate and definite claim to the office, and does not owe his/her office to the prime minister, but to the electorate. This also means that government policy is no longer in the gift of a party, and subject to the almost innate if not irresistible pressure to focus this power in the prime minister. The latter can still lead, but now as the head of a team. All these benefits will accrue from the fact that the formation of government is the result of negotiation between elected ministers: the power of the prime minister in this regard is limited to the distribution of portfolios. Incidentally, the two deputy prime ministers are not members of the

cabinet, but must meet with the prime minister at least once a month, when the prime minister will fully brief them about government policy: this is a measure of contingency preparedness in the event of the need to fill the office of prime minister – temporarily, due to illness etc, or in the event of vacancy.

The prime minister must, with advice and consent of the cabinet, propose junior appointments (from minister of state to unpaid parliamentary private secretary, the latter being the only cross-over of personnel between the executive and legislature), but all such appointments are subject to a hearing and approval of parliament – hearing is by a joint committee of the two Houses, and separate division in each House. Such appointees can be removed upon a vote of censure in parliament – when ten members or more call for a hearing and at least one House approves. All government ministers must attend relevant debates etc. in either House, announce new measures etc. in both Houses – relayed to the other House – and periodically answer questions in both Houses.

The prime minister and cabinet ministers may appoint political advisors – ten for the former and three each for the others. Appointment is upon approval by the upper House, within three weeks from the announcement of the proposed appointment. Advisors must meet the relevant select committee of each house separately each year, are removed upon a vote of censure, and are thereby disqualified from public office for the duration of that parliament.

Parliament consists of two Houses, elected at the same time for a fixed term of four years. The election for the lower House is in single-member constituencies, while that of the upper House is in larger constituencies with multiple members: maximum term allowed is three consecutive parliaments. The legislative powers of parliament are defined in the Constitution: *inter alia*, restrictions include any change to the standing orders of the two Houses, pay for all public offices, alterations to constituencies, and the size of each House. Such measures will only take effect after the next general election, and may be subject to electoral scrutiny, which means that the incoming parliament may cancel the changes with immediate effect.

Legislation is subject to the approval of both Houses, and comes into effect

when the parliamentary commissioner for legislation certifies that procedure in both Houses accords to the rules and relevant standing orders. At that stage, he must recommend that the legislation be formally adopted – which is done when the Head of State signs the first copy to be kept in the library of parliament. However, this procedure is not a mechanical one in that if the Head of State, upon consultation with his constitutional advisors, is of the opinion that the legislation does not accord with the Constitution, he/she must return it to parliament for reconsideration, or, in the event of a final disagreement, reserve the proposed legislation pending the next election. The constitutional rôle of the Head of State is a sensitive one, and requires much discretion and fine judgement.

Given that the Constitution is not law, although it may create a special kind of law, its custody is not a matter for the law or the judges. Indeed, given that the Constitution is only the instrument of the people in instituting and controlling their system of government, they must directly control and preserve it. It follows that the members of the constitutional court need not be judges and lawyers – indeed it is necessary that they should not be from the legal profession. Members of this court are directly elected by the people, probably on a staggered basis for relatively long terms of office. To ensure that lawyers do not colonise this important body, it may be necessary to stipulate that no more than two lawyers can be members at any one time, but with no restrictions on any other profession.

Finally, the appointments and removal of senior judges are subject to parliamentary approval in the same manner as that of junior ministers and advisors. The Lord Chancellor – now only Minister for the Judiciary – shall propose appointments from serving members of the judiciary.

Enough has now been said to give a flavour of what a constitutional government of the UK should look like. The object of the exercise is to enshrine the more important principles necessary for any constitutional government, and to remove the theoretically abhorrent features that could enable systemic, slow-fused corruption of the system. But above all this, the primary objective has been to think of limited government such that the government cannot pursue private

party interest and must direct the finite and limited resources of the nation into the service of the nation. This one can say even though public interest is not always clear and indubitable.

The argument has been that it is not enough to reform in order to rid the system of its apparent problems, and that, in the British case, proper reform is really only fundamental reform. But once a constitutional system has been instituted, reform may be only of the working system in order to ensure its better conformity with the letter and ethos of the Constitution.

This discourse has played much on the felt-powerlessness of the 18th century analysts considered above, Bolingbroke, Burke and Blackstone, in that they saw a problem but could offer no solutions: they wanted to tame power, but could not see how to do so. Of the three, only Burke really puts the question directly, and it is now time to answer it: *Quis custodiet ipsos custodes?* A Constitution, dear fellow, a Constitution.

Appendix 1

Medieval and Modern conceptions of Law

The question “what is law” does not arise until rather late in European history, and even then only as a technical rather than a fundamental question. In a sense, the reasons for this are understood when it is recalled that, for long, power and law were understood only as attributes of God, which obviously entailed obedience rather than questioning. But acknowledging this historically says but little about its truth. If there is a God, and all the features and attributes claimed for it are true, then the idea of power and law as claimed will also stand. But if there is any such entity, it is only possible to know it through the mediation of another human being, supported by the altogether ridiculous claim that uniquely they validate their *link* position. It may still be possible to leave the story there and accept it as historical fact, even though plainly it is ideational nonsense, except that these ideas of power and law issue into and validate the changes that take place in the 15th and 16th centuries and are rapidly established as defining features of the idea of sovereign state. A manifestation of this incredible process is the fact that soon the problem of the mark by which a statute, or more generally the law, may be known becomes an issue for which there is no answer.

The word of God has always needed a voice, and that voice has always been that of a human somewhere, a pope, a prince or a king enunciating or, better, “interpreting” (as John of Salisbury suggested), the true law: thus the word of some man *qua* the pope or the prince, which also pleases him, is the law. *Mutatis mutandis*, this is the rôle that the king used to play in the making of statutes on petition. Yet, even this stark contrast serves to hide the true scale of change that occurred in the following century: for not only is the king – now the king/queen in parliament – the only lawmaker, there is nothing upon which this body cannot legislate. In other words, looking back, three significant changes can be identified: when law is no longer seen as comment on “good and old” law, but positive law is at least as good even if, as late as the 15th century, there is no doctrine of absolute authority of statutes;⁸⁹⁹ then, in the 16th century, law making is wholly naturalised to the realm of the secular; whereas in the 17th century it is understood as the sovereign feature of an institution. The scale of the difference might be emphasised by pointing out that in arriving at the new structure of power, we have moved from a point in time when it was at least half-true to say (as did Fortescue) that the king was subject to the law, to one in which government is that of the king but according to law. But, whereas from a narrative history point of view this is an accurate statement, nevertheless, to the extent that the message it conveys trades on an unspecified continuity in the meaning of law, it is also misleading. As a matter of fact, the essential meaning of law in the 13th century bears no resemblance whatever to that in the 17th century, and the only point that they have in common is the implicit assertion of a duty of obedience. In

⁸⁹⁹ S.B. Chrimes, *English Constitutional Ideas in the 15th century*, 1936, p. 49

an important sense, the concern here is with a category change: from law as objective, essentially negative, to law as a positive instrument – except that this change is never actually stated, explained or justified. That is to say, the presumed legitimacy of the old is simply carried over to legitimate the new. To help put the extent and scale of the change in sharp relief, it is worth juxtaposing a number of features at two points centuries apart: taking 1215 and 1603 as symbolic points of reference, eight areas of significant difference can be identified: Kern⁹⁰⁰ contrasts the notion of the law in the modern era with that in the Middle Ages: in tabular form, the main features of the argument are:

Middle Ages	Modern Era
Law is OLD and GOOD.	Law needs an attribute: it is sanctioned by the State; thence it exists and age is irrelevant to it.
Bad law is not law; it need not be obeyed.	There is no such thing as bad law; all laws are enforced.
It is Customary and Immemorial.	Local customary law is recognised, but it is regulated: it has to have been practice before the time of legal memory, i.e. 1189 (Statute of Westminster, 1275), and at any rate it is not beyond reform. Before 1189 is “time immemorial”.
Law is discovered; its validity is not subject to any other consideration; enactment is not possible.	Law is made; it is unified, closed and its validity derives from sovereignty of the State.
The immemorial is equitable; Old law is reasonable; Law, politics and conscience together make for justice: right and justice are always in tandem.	Positive law is amoral; ethics is a part of the legal order only when positive law touches moral sentiment; moral law is an element in law, and can be changed if needed.
Law is primary; the king – or the State - only the instrument of putting it into effect.	The State is primary.
The State cannot change the law.	Law derives its validity from the sovereignty of the state, which can change any and all law; valid law is that which, for the time being, remains enacted.
Good law is not enacted, it is unwritten, and is timeless, found in the conscience of the people, and expressed in their being lawful people.	Good law?! It is good if it is procedurally correct; it is good if it serves a positive purpose and is accepted as such, and it is also good if it is obeyed.
Old law is superior to new: “Old law” is not determined by age, but by quality; better law is older law.	Positive law over-rides all else. PS. Only in the intermediate period between the medieval and the modern when neither

⁹⁰⁰ F. Kern *Kingship and the Law in the Middle Ages*, 1939

	the old or the enacted can hold sway, is it possible to claim that customary law breaks positive law. But this notion has no place in the modern era of Sovereign State.
Legal innovation is only restoration of old law, and revelation of true law.	Legal innovation is part of the law making process.
Legislative procedure: <i>legem emendare</i> : freeing the law from its defects.	Legislative procedure: means whereby new enactments are made.
Law may be discovered by the judgements of the doom.	Common law decisions state legal principles.
Recording the law is legal fixity	All, especially positive law is recorded.
Law is clumsy, impractical, warm-blooded, confused, but also creative, sublime and suited to human need.	It is cold and impersonal.

Appendix 2

Contrast between “1215” and “1603”

“1215”	“1603”
Power of the king is limited and generally negative; positive action (initiative) needs consent.	Positive powers of initiative – this becomes almost a necessity in later centuries.
The king and “governing” are subject to “objective” law.	Rule is according to human law.
Sovereignty of the king, but expressing a technically limited ultimate voice.	(Technically unlimited) sovereign voice of king in parliament.
Direct or mandated presence of all affected: no abstract power to bind.	Token, almost “virtual” presence of all, where everyone is subject to the binding power of parliament as one body, not of their representatives.
Highest office: king, but no monarchy.	Highest office: a hereditary king in a “constitutional monarchy”.
Reciprocal duties regulate relations between king and feudatories.	Allegiance and fealty is owed to the Crown, in effect the king in person; the king carries the burden of office for the good of the people, and is responsible for it to God, but holds the office with the “consent” of the people.
One sovereignty (of God); many nations.	Many sovereign states.

Appendix 3

Thoburn & others v Sunderland City Council & others

Neutral Citation Number: [2001] EWCH Admin 934

IN THE SUPREME COURT OF JUDICATURE, QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice, Strand, London, WC2A 2LL

Date: 18 FEBRUARY 2002

Before: **LORD JUSTICE LAWS and MR JUSTICE CRANE**

AND BETWEEN: Case Number: CO/3308/2001

STEVE THOBURN (Appellant) and **SUNDERLAND CITY COUNCIL**
(Respondent)

BETWEEN: Case Number: CO/3639/2001

COLIN HUNT (Appellant) and **LONDON BOROUGH OF**
HACKNEY (Respondent)

AND BETWEEN: Case Number: CO/3993/2001

JULIAN HARMAN & JOHN and **Cornwall COUNTY COUNCIL**
DOVE (Appellants) (**Respondent**)

AND BETWEEN: Case Number: CO/4100/2001

PETER COLLINS (Appellant) and **LONDON BOROUGH OF SUTTON**
(Respondent)

...

THE ARGUMENTS

(1) Implied Repeal

37 Mr Shrimpton made much of the doctrine of implied repeal. The rule is that if Parliament has enacted successive statutes which on the true construction of each of them make irreducibly inconsistent provisions, the earlier statute is impliedly repealed by the later. The importance of the rule is, on the traditional view, that if it were otherwise the earlier Parliament might bind the later, and this would be repugnant to the principle of Parliamentary sovereignty.

...

Third Conclusion: the European Communities Act is a Constitutional Statute which by Force of the Common Law Cannot Be Impliedly Repealed

60 The common law has in recent years allowed, or rather created, exceptions to the doctrine of implied repeal: a doctrine which was always the common law's own creature. There are now classes or types of legislative provision which cannot be repealed by mere implication. These instances are given, and can only be given, by our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided. The courts may say – have said – that there are certain circumstances in which the legislature may only enact what it desires to enact if it does so by express, or at any rate specific, provision. The courts have in effect so held in the field of European law itself, in the *Factortame* case, and this is critical for the present discussion. By this means, as I shall seek to explain, the courts have found their way through the *impasse* seemingly created by two supremacies, the supremacy of European law and the supremacy of Parliament.

61 The present state of our domestic law is such that substantive Community rights prevail over the express terms of any domestic law, including primary legislation, made or passed after the coming into force of the ECA, even in the face of plain inconsistency between the two. This is the effect of *Factortame (No 1)* [1990] 2 AC 85. To understand the critical passage in Lord Bridge's speech it is first convenient to repeat part of ECA s.2(4):

“The provision that may be made under subsection (2) above includes... any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of the section.”

In *Factortame (No 1)* Lord Bridge said this at 140:

“By virtue of section 2(4) of the Act of 1972 Part II of the [Merchant Shipping] Act of 1988 is to be construed and take effect subject to directly enforceable Community rights... This has precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC.”

So there was no question of an implied *pro tanto* repeal of the ECA of 1972 by the later Act of 1988; on the contrary the Act of 1988 took effect subject to

Community rights incorporated into our law by the ECA. In *Factortame* no argument was advanced by the Crown in their Lordships' House to suggest that such an implied repeal might have been effected. It is easy to see what the argument might have been: Parliament in 1972 could not bind Parliament in 1988, and s.2(4) was therefore ineffective to do so. It seems to me that there is no doubt but that in *Factortame (No 1)* the House of Lords effectively accepted that s.2(4) could not be impliedly repealed, albeit the point was not argued.

62 Where does this leave the constitutional position which I have stated? Mr Shrimpton would say that *Factortame (No 1)* was wrongly decided; and since the point was not argued, there is scope, within the limits of our law of precedent, to depart from it and to hold that implied repeal may bite on the ECA as readily as upon any other statute. I think that would be a wrong turning. My reasons are these. In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental: see for example such cases as *Simms* [2000] 2 AC 115 *per* Lord Hoffmann at 131, *Pierson v Secretary of State* [1998] AC 539, *Leech* [1994] QB 198, *Derbyshire County Council v Times Newspapers Ltd.* [1993] AC 534, and *Witham* [1998] QB 575. And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998. The ECA clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional statute.

63 Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's *actual* – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. I should add that in my judgement general words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute, by reference to what was said in Parliament by the minister promoting the Bill pursuant to *Pepper v Hart* [1993] AC 593. A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and State, by unambiguous words on the face of the later statute.

64 This development of the common law regarding constitutional rights, and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes, and now, applying the HRA) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand. Nothing is plainer than that this benign development involves, as I have said, the recognition of the ECA as a constitutional statute.

65 In dealing with this part of the case I should refer to a passage from the speech of Lord Bridge of Harwich in *Factortame (No 2)* [1991] 1 AC 603, 658 – 659, on which Miss Sharpston relies:

“Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty... it was certainly well established in the jurisprudence of the European 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. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgement, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.”

66 This reasoning does not, I think, touch the conclusions which I have expressed. As Lord Bridge makes crystal clear, its context was the requirement (stated by the Court of Justice on a reference under Article 177) that the courts of member states must possess the power to override national legislation, as necessary, to enable interim relief to be granted in protection of rights under Community law. The “limitation of sovereignty” to which Lord Bridge referred arises only in the context of Community law’s substantive provisions. The case is concerned with the primacy of those *substantive* provisions. It has no application where the question is, what is the legal *foundation* within which those substantive provisions enjoy their primacy, and by which the relation between the law and institutions of the EU law and the British State ultimately rests. The foundation is English law.

67 Miss Sharpston relied also on what was said by Lord Keith in *Ex p. Equal Opportunities Commission* [1995] 1 AC 1 at 26G – 27F:

“It is argued for the Secretary of State that Ord. 53, r. 1(2), which gives the court power to make declarations in judicial review proceedings, is only applicable where one of the prerogative orders would be available under rule 1(1), and that if there is no decision in respect of which one of these writs might be issued a declaration cannot be made. I consider that to be too narrow an interpretation of the court's powers. It would mean that while a declaration that a statutory instrument is incompatible with European Community law could be made, since such an instrument is capable of being set aside by certiorari, no such declaration could be made as regards primary legislation. However, in the *Factortame* series of cases (*R v Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 AC 85; *R v Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 AC 603; *R v Secretary of State for Transport, Ex parte Factortame Ltd. (No. 3)* (Case C 221/89) [1992] QB 680) the applicants for judicial review sought a declaration that the provisions of Part II of the Merchant Shipping Act 1988 should not apply to them on the ground that such application would be contrary to Community law, in particular articles 7 and 52 of the EEC Treaty (principle of non-discrimination on the ground of nationality and right of establishment). The applicants were companies incorporated in England which were controlled by Spanish nationals and owned fishing vessels which on account of such control were denied registration in the register of British vessels by virtue of the restrictive conditions contained in Part II of the Act of 1988. The Divisional Court (*R v Secretary of State for Transport, Ex parte Factortame Ltd.* [1989] 2 C.M.L.R. 353), under article 177 of the Treaty, referred to the European Court of Justice a number of questions, including the question whether these restrictive conditions were compatible with articles 7 and 52 of the Treaty. The European Court... answered that question in the negative, and, although the final result is not reported, no doubt the Divisional Court in due course granted a declaration accordingly. The effect was that certain provisions of United Kingdom primary legislation were held to be invalid in their purported application to nationals of member states of the European Economic Community, but without any prerogative order being available to strike down the legislation in question, which of course remained valid as regards nationals of non-member states. At no stage in the course of the litigation, which included two visits to this House, was it suggested that judicial review was not available for the purpose of obtaining an adjudication upon the validity of the legislation in so far as it affected the applicants.

The *Factortame* case is thus a precedent in favour of the EOC's recourse to judicial review for the purpose of challenging as incompatible with European Community law the relevant provisions of the Act of 1978.”

This reasoning also touches, and touches only, our law's treatment of substantive rights arising under EU law. It does not speak to the presence, absence, or degree of Parliament's power to alter the basis of the UK's legal relationship with Europe. The same is true in my judgement of the decision of their Lordships' House in *Pickstone* [1989] AC 66, cited by Miss Sharpston, a case which illustrates the lengths our courts will go in construing Acts of Parliament to uphold the supremacy of substantive Community rights.

...

82 If my Lord agrees, these appeals will be dismissed. Counsel will no doubt agree what in those circumstances should be the appropriate answers to the questions asked in the case stated in each appeal.

Mr Justice Crane:

83 I agree.

NB. Spelling/grammatical style as per original text on Courts of Justice website.

Appendix 4

A writ of 1295

REX vicecomiti Norhamtesire. Quia cum comitibus, baronibus et ceteris proceribus regni nostri, super remediis contra pericula quae eidem regno hiis diebus imminent providendum, colloquium habere volumus et tractatum, per quod eis mandavimus quod sint ad nos die Dominica proxima post festum Sancti Martini in hyeme proxime futurum apud Westmonasterium, ad tractandum, ordinandum, et faciendum qualiter sit hujusmodi periculis obviandum ; tibi praecipimus firmiter injungentes quod de comitatu praedicto duos milites et de qualibet civitate ejusdem comitatus duos cives, et de quolibet burgo duos burgenses, de discretioribus et ad laborandum potentioribus, sine dilatione eligi, et eos ad nos ad praedictos diem et locum venire facias : ita quod dicti milites plenam et sufficientem potestatem pro se et communitate comitatus praedicti, et dicti cives et buegenses pro se et communitate civitatum et burgorum praedictorum divisim ab ipsis tunc ibidem habeant, ad faciendum quod tunc de communi consilio ordinabitur in praemissis ; ita quod pro defectu hujusmodi potestatis negotium praedictum infectum non remaneat quo- quo modo. Et habeas ibi nomina militum, civium et burgensium et hoc breve. T. Rege apud Cantuariam III. die Octobris.

Literal translation by Mrs. Helen Mawson, M.A. (Oxon), Tutor in Latin, Open University, May 2002

The King to the Vicecomes of Northamptonshire. Because we wish to have a discussion and consultation with the earls, barons and other leading men of our kingdom, on taking measures against the dangers which threaten the same kingdom in these days, for this reason we have given them instructions to be in our presence on the Sunday following the festival of St. Martin in winter. Which will be held at Westminster, to discuss, arrange and take steps how to avoid such dangers ; we instruct you and make it your strict duty (to see) that from the previously mentioned shire two soldiers, and from any town of the same shire two citizens, and from any Burg two burghers be chosen without delay from those who are distinguished and capable of work, and (to see) that they come to us at the previously mentioned date and place ; also that the said soldiers should have full and sufficient power on behalf of themselves and the community of the shire (county) mentioned above and the said citizens and burghers should likewise have power for themselves and the community of the towns and burgs mentioned above separately for themselves, then, to do what shall then be arranged in the preliminary decisions (literally things uttered by way of re preface) from the communis (joint national?) council ; likewise that the previously mentioned task should on no account remain unachieved because of a lack of this kind of power. And you should have there the names of the soldiers, citizens and burghers, moreover shortly.

Author's notes:

1. While the translation of "milites" to "soldiers" is literally accurate, as a matter of fact, there were never soldiers in parliament, but knights (of the shires).
2. The word parliament is not mentioned in the writ, but reference is to decisions in "communis" (or national council). This is interesting, in that it was at such meetings that they talked: *parlement* was thus not a place but an activity. Exactly when it becomes a Parliament and a place is not clear.

Bibliography

- G. B. Adams & H. M. Stephens (Eds) *Select Documents of English Constitutional History*, Macmillan, 1901, reprinted 1908
- G. B. Adams *The Origins of the English Constitution*, enlarged edition, Yale UP 1920
- G. B. Adams *Constitutional History of England*, Jonathan Cape, 1921, new edition 1935
- I. Adams & B. Jones *Concepts and Doctrines in British Politics*, Sheffield Hallam 1996
- J. Agnew *Place and Politics: The Geographical Mediation of State and Society*, Allen and Unwin, Boston 1987
- M. Albrow *The Global Age*, Polity 1996
- G. Allen *The Last Prime Minister. Being honest about the UK Presidency*, Imprint 2001
- P. Allott 'The Courts and Parliament: Who Whom?' in *Cambridge Law Journal*, 38/1, 1979, pp. 79-117
- P. Allott 'The Theory of the British Constitution' in H. Gross and R. Harrison *Jurisprudence: Cambridge Essays*, Oxford UP 1992
- J. D. Alsop 'The Act for the Queen's Regal Powers, 1554' in *Parliamentary History*, volume 13 (1994) pp. 261-276
- L. S. Amery *Thoughts on the Constitution*, Oxford UP, 1947, second edition 1953
- H. Arendt *The Human Condition*, 1958
- H. Arendt *Between Past and Future*, Faber and Faber 1961
- Aristotle 'The Athenian Constitution'; 'Nichomachean ethics'; 'Politics' and 'Categories' in *Greek Philosophers™* CD-ROM v4.3, 1991-5 World Library Inc.
- J. Austin *Lectures on Jurisprudence*. Fifth edition by R. Campbell, London 1885
- 'The Contemporary Relevance of Westphalia to the Third World', "keynote" speech at 350th anniversary of the Peace of Westphalia, University of Twente, July 1998
- M. Ayooob *The Third World Security Predicament: State Making, Regional Conflict, and the International System*, Boulder 1995
- C. Babbage *A Word to the Wise. Observations on Life Peerage*, John Murray 1856
- A. Babington *The Rule of Law in Britain from the Roman Occupation to the present day*, Barry Rose Publications 1978
- F. Bacon *The Works of Francis Bacon*, Edited by J. Spedding et al, London 1968
- W. Bagehot *The English Constitution*, new edition, Kegan Paul 1872
- J. H. Baker *An Introduction to English Legal History*, second edition, Butterworth 1979
- T. Baldwin 'The Territorial State' in H. Gross and R. Harrison *Jurisprudence: Cambridge Essays*, Oxford UP 1992
- A. J. Balfour *The Constitutionalism Question. A Speech*, Primrose League, London, 11 May 1911
- A. J. Balfour *The Constitutional Question*. October 1913. Balfour Papers, The British Library Manuscripts, 49869, folio 123-132
- A. J. Balfour *Nationality and Home Rule*, Longmans 1913
- A. J. Balfour 'Introduction' in Bagehot, *The English Constitution*, Oxford UP 1928
- J. C. Banks *Federal Britain*, George Harrap, London 1971
- J. Barber *The Prime Minister since 1945*, Institute of Contemporary British History, Blackwell 1991
- E. Barker *Political Thought in England from Herbert Spencer to the present day*, Williams and Norgate 1919
- E. Barker (Ed) *The Character of England*, Oxford UP 1947
- E. Barker *Essays on Government*, second edition, Oxford UP 1951
- E. Barker *The Study of Political Science and its Relations with Cognate Subjects* (inaugural lecture)
- J. Barnes 'Federal Britain. No longer unthinkable?' Centre for Policy Studies, 1998
- A. Barnett *This Time. Our Constitutional Revolution*, Vintage 1997

- H. Barnett *Constitutional and Administrative Law*, Routledge, second edition, London 1998
- B. Barry *Political Argument*, Routledge & Kegan Paul 1965
- T. Beamish *Battle Royale*, London 1965
- J. Beaton (Ed) *Constitutional Reform in the United Kingdom: Practice and Principles*. University of Cambridge Centre for Public Law, Hart, Oxford, 1998
- A. Beattie 'Conservatives, Consensus and the Constitution' in *LSE Quarterly*, volume 3/2, Summer 1989, pp. 123-148
- A. Beattie 'Ministerial Responsibility and the Theory of the British State' in R.A.W. Rhodes and P. Dunleavy (Eds) *Prime Minister, Cabinet and Core Executive*, Macmillan, 1995, pp. 159-178
- Bede *Ecclesiastical History of the English People etc*, revised edition, Penguin 1990
- D. Beetham (Ed) *Defining and Measuring Democracy*, Sage 1994
- R. Bellamy and D. Castiglione (Editors) 'Constitutionalism in Transformation: European and theoretical perspectives' in *Political Studies*, Special Issue, Volume 44, 1996
- J. Bentham *A fragment on government*, with Introduction by W. Harrison, CUP 1988
- M. Bentley *Politics without Democracy 1815-1914. Perception and Preoccupation in British Government*, second edition, Fontana 1996
- R.N. Berki *On Political Realism*, JM Dent 1981
- C. Bigham *The Prime Ministers of Britain 1721-1921*, John Murray 1922
- A. H. Birch *Representation*, Macmillan 1971
- "Black Acts" *The Acts and Constitution of the Realm of Scotland*, Edinburgh 1566
- J. L. Black-Branch 'Parliamentary Supremacy or Political Expediency?: the constitutional position of the Human Rights Acts under British Law' in *Statute Law Review*, volume 23/1, 2002, pp. 59-81
- R. W. Blackburn 'Dicey on the teaching of Public Law' in *Public Law*, Winter 1985, pp. 679-694
- R. W. Blackburn and R. Plant *Constitutional Reform. The Labour Government's Constitutional Reform Agenda*, Longman 1999
- W. Blackstone *Commentaries on the laws of England*, Volume 1, Oxford UP 1765
- W. Blackstone *Sovereignty of the Laws. Selections from Blackstone's Commentaries on the Laws of England*, edited with Introduction by G. Jones, Macmillan 1973
- R. Blake *The Office of the Prime Minister*, The British Academy 1974
- R. Blake 'The Queen and the Constitution' in *The Queen*, Penguin 1977, pp. 13-27
- R. Blake *The Conservative Party from Peel to Thatcher*, Fontana 1985
- P. B. M. Blass *Continuity and Anachronism. Parliamentary and Constitutional Development in Whig historiography and in the anti-Whig tradition between 1890 and 1930*, Martins Nijhoff 1978
- V. Bogdanor *Devolution*, Oxford UP 1979
- V. Bogdanor *The Monarchy and the Constitution*, Oxford UP 1995
- V. Bogdanor *Politics and the Constitution*, Dartmouth 1996
- Bolingbroke *Contributions to the Craftsman*, edited by S. Varey, Oxford UP 1982
- Bolingbroke *Political Writings*, edited by D. Armitage, Cambridge UP 1997
- R. L. Borthwick and J. E. Spence *British Politics in Perspective*, Leicester UP 1984
- W. J. Bouwsma 'Intellectual History in the 1980s: from History of Ideas to History of Meaning' in *Journal of Interdisciplinary History*, Volume 12 (Autumn 1981), pp. 279-291
- R. Brazier *Constitutional Reform. Re-shaping the British Political System*, Oxford UP 1991
- R. Brazier *Constitutional Practice*, second edition, Oxford UP 1994
- R. Brazier *Ministers of the Crown*, Oxford UP 1996
- M. V. Brett (Ed) *Journal and Letters of Reginald, Viscount Esher*, Volume 2, 1903-1910, Nicholson and Watson, London 1934
- R. B. Brett (Viscount Esher) *Footprints of Statesmen During the Eighteenth Century in England*, Macmillan 1892

- R. B. Brett (Viscount Esher) *The Influence of King Edward and Essays on other subjects*, John Murray 1915
- R. Britnell *The Closing of the Middle Ages? England 1471-1529*, Blackwell, 1997
- C.D. Broad *Five Types of Ethical Theory*, corrected edition, Kegan Paul, Trench, Trubner & Co 1934
- H. P. Brougham (Lord) 'The British Constitution: its history, structure and working' in *Works*, Volume 11, 1861
- H. P. Brougham (Lord) *Substance of Speech on Life Peerage*, 15 February 1856, James Ridgway, London
- P. H. Brown *et al The Union of 1707. A survey of Events*, Outram, Glasgow 1907
- P. H. Brown *The Legislative Union of England and Scotland*, Oxford UP 1914
- J. Bryce, *The American Commonwealth*, Macmillan 1893
- J. Bryce *Studies in History and Jurisprudence*, Oxford UP 1901
- I. Budge *et al The New British Politics*, Longman, 1998, new edition 2001
- H. Bull *The Anarchical Society. A Study of Order in World Politics*, Macmillan 1977
- J. G. Bulpitt 'The making of the United Kingdom: aspects of English Imperialism' in *Parliamentary Affairs*, volume 31/2, Spring 1978, pp. 174-189
- J. G. Bulpitt *Territory and Power in the United Kingdom*, Manchester UP 1983.
- J. G. Bulpitt 'The Discipline of New Democracy: Mrs. Thatcher's domestic statecraft.' in *Political Studies*, volume 34/1, March 1986, pp. 19-39
- J. G. Bulpitt 'Historical Politics: Macro, In-Time, Governing Régime Analysis' in *Political Science Discourse* 1995, University of Southampton
- J. Bulpitt and P. Burnham 'Operation Robot and the British Political Economy in the early-1950s: The Politics of Market Strategies' in *Contemporary British History*, volume 13/1, Spring 1999, pp 1-31
- M. Burgess *The British Tradition of Federalism*, Leicester UP 1995
- E. Burke *A Vindication of Natural Society* (1796) London, Holyoak & Co 1858
- E. Burke *The Works*, 1801, in 8 volumes, London
- E. Burke *The Works*, 1899, in 12 volumes, Nimmo edition
- E. Burke *The Works of Edmund Burke*, edited by F. H. Willis, Oxford UP 1906
- P. Burnham 'New Labour and the politics of depoliticisation' in *British Journal of Politics and International Relations*, volume 3/2, June 2001, pp. 127-149
- J. H. Burns 'Bolingbroke and the concept of Constitutional Government' in *Political Studies*, volume 10/4, 1962, pp. 264-276
- J. H. Burns (Ed) *Cambridge History of Medieval Political Thought*, Cambridge UP, 1988
- J. H. Burns *Lordship, Kingship and Empire. The Idea of Monarchy 1400-1525*, OUP 1992
- J. H. Burns with Mark Goldie (Eds) *Cambridge History of Political Thought 1450-1700*, Cambridge UP 1991
- N. Burrows *Devolution*, Sweet and Maxwell 2000
- M. G. Burton and J. Higley, 'Elite Settlements' in *American Sociological Review*, 52/3, June 1987, pp. 295-307
- D. Butler *et al* (Eds) *The Law, Politics and the Constitution. Essays in Honour of Geoffrey Marshall*. Oxford UP 1999
- R. Butt *The Power of Parliament*. Constable 1967
- H. Butterfield *The Whig Interpretation of History*, W.W. Norton, New York 1965
- J. Cable *Political Institutions and issues in Britain*, Macmillan 1987
- R. C. van Caenegem *The birth of English common law*, Cambridge UP 1973
- H. Calvert *Constitutional Law in Northern Ireland. A study in regional government*. London and Belfast, Stevens and Sons 1968.
- Campion (Lord) and T. G. B. Cocks *Sir Thomas Erskine May's Treaties on the Law, Privileges, Proceedings and Usage in parliament*, 15th edition, Butterworth 1950
- F. P. Canavan s.j. *The Political Reason of Edmund Burke*, Duke UP 1960

- D. A. Carpenter *The Reign of Henry III*. Hambledon Press 1996
- J. Carswell *The Dissent on England. A Study of the Revolution of 1688 and its European background*, Barrie and Rockliff 1969.
- B. E. Carter *The Office of Prime Minister*, Faber 1956
- J. Carter 'The Revolution and the Constitution' in G. Homes (Ed) *Britain after the Glorious Revolution*, Macmillan, 1969, pp. 39-57
- P. P. Catterall, W. Kaiser and U. Walton-Jordan (Eds) *Reforming the Constitution: Debates in Twentieth Century Britain*, Frank Cass, London 2000
- Hugh Cecil *Conservatism*, Williams and Norgate 1912
- S. Chan 'An ontologist strikes back: a further response to Hollis and Smith' in *Review of International Studies*, volume 24/3, 1998, pp. 441-443
- S. B. Chrimes *English Constitutional Ideas in the Fifteenth Century*, Cambridge UP 1936
- S. B. Chrimes *An Introduction to the Administrative History of Medieval England*, Oxford 1959
- S. B. Chrimes 'Richard II's Questions to the Judges, 1387' in *Law Quarterly Review*, volume 72, 1956, pp. 365-390
- Cicero 'Cato'; & 'Laelius' in *Greek Philosophers™* CD-ROM v4.3. 1991-5 World Library Inc
- Charter 88, *Towards a written constitution. Proceedings of the Charter 88/The Independent Constitutional Convention*. Charter 88 Trust, 1991
- C. Clapham 'Degrees of statehood' in *Review of International Studies*, volume 24/2, April 1998, pp. 143-157
- G. Clark *The later Stuarts 1660-1714*, second corrected edition, Oxford UP 1961
- J. D. C. Clark *English Society 1688-1832. Ideology, social structure and political practice during the ancien régime*, Cambridge UP 1985
- S. T. Coleridge *On the Constitution of the Church and the State according to the idea of each*. Edited with an introduction by J. Barrell, Dent & Sons, London 1972
- J. Coles *Making Foreign Policy. A Certain idea of Britain*, John Murray 2000
- R. G. Collingwood *Speculum Mentis or The Map of Knowledge*, Clarendon, London 1924
- R. G. Collingwood *An Autobiography*, Oxford UP 1978
- R. G. Collingwood *The Idea of History*, first published 1946, revised edition 1993
- S. Collini, D. Winch and J. Burrow *That noble science of politics. A study in nineteenth century intellectual history*, Cambridge UP 1983
- W. E. Connolly *The Terms of Political Discourse*, second edition, Martin Robertson, 1983
- Constitution Unit Quarterly Reports on devolution: <http://www.ucl.ac.uk/constitution-unit/>
- Cornish Studies*, University of Exeter Press, Exeter
- W. C. Costin and J. S. Watson *The law and the working of the constitution: documents 1660-1914*, second edition, London 1961
- L. Courtney *The Working Constitution of the United Kingdom and its outgrowths*, Dent and Co, London 1901
- G. W. Cox *The Efficient Secret. The Cabinet and the development of political- parties in Victorian England*, Cambridge UP 1987
- H. Cox *The British Commonwealth, or a Commentary on the Institutions and Principles of British Government*, Longman, Brown, Green and Longmans 1854
- M. Cox, T. Dunne & K. Booth "Empires, systems and states: great transformations in international politics" in *Review of International Studies* Special Issue, vol.27, Dec 2001
- B. Crick *In Defence of Politics*, Penguin 1964
- B. Crick *The Reform of Parliament. The crisis of British government today*, Weidenfeld and Nicolson, 1964, second edition, 1968
- B. Crick *Political Theory and Practice*, Allen Lane 1971
- B. Crick (Ed) *National Identities. The Constitution of the United Kingdom*, Blackwell 1991
- B. Crick 'In defence of Citizenship Order', two papers delivered to Political Science Association Annual Conference, London, April 2000

- S. Cripps 'Can Socialism Come by Constitutional Methods?' in *The Socialist League*, 1933, pp. 1-14
- Cromer, Lord *Ancient and Modern Imperialism*, John Murray, London 1910
- R. H. S. Crossman 'Introduction' in W. Bagehot *The English Constitution*, New Thinkers Library, 1964
- R. H. S. Crossman 'The Theory and Practice of British Freedom' in *Planning for Freedom*, Hamish Hamilton 1964
- R. H. S. Crossman *Inside View. Three Lectures on Prime Ministerial Government*, 1972
- J. Darwin *Britain and Decolonisation*, Palgrave MacMillan 1988
- G. Davies *The Early Stuarts 1603-1660*, second edition, Oxford UP, 1959
- R. Davies *The Matter of British and the Matter of England*, Inaugural Lecture, Oxford, February 1996
- J. D. G. Davies and F. R. Worts, *England in the Middle Ages. Its problems and legacies*, A. A. Knopf 1928
- J. Dearlove 'Globalisation and the study of British Politics' in *Politics*, 20/2, May 2000, pp. 111-117
- J. Dearlove and P. Saunders *Introduction to British Politics*, second edition, Polity 1991
- A. V. Dicey *An Introduction to the study of the Law of the Constitution*, 1885, sixth edition, 1902, eighth edition 1915
- A. V. Dicey *An Introduction to the study of the Law of the Constitution*, first published 1885, ninth edition revised and edited by E. C. S. Wade, 1939
- A. V. Dicey and R. S. Rait *Thoughts on the Union between England and Scotland*. Macmillan 1920
- J. C. Dickinson *The Great Charter*, The Historical Association, London 1968
- T. Dickinson & M. Lynch (Eds) *The Challenge to Westminster*, Tuckwell Press 2000
- G. M. Dillon *The Falklands, Politics and War*, Macmillan 1989
- M. Dockrill *British Defence since 1945*, Institute for Contemporary British History, Blackwell 1988
- A. H. Dodd *The Growth of Responsible Government from James the First to Victoria*, Routledge and Kegan Paul 1956
- M. Donelan (Ed) *The Reason of States. A study in International Political Theory*, Allen and Unwin 1978
- G. Drewery and T. Butcher *The Civil Service Today*, second edition, Blackwell 1991
- H. Drucker (Ed) *Developments in British Politics*, Volumes 1 and 2, Macmillan, respectively 1983 and 1988
- W. H. Dunham Jr. 'Regal Power and the Rule of Law: a Tudor Paradox' in *Journal of British Studies*, volume 3/2, 1964, pp. 24-56
- P. Dunleavy (Ed) *Developments in British Politics*, Volumes 3 to 6, Macmillan, respectively 1990 to 2000
- J. Dunn (Ed) 'Contemporary Crisis of the Nation State?' in *Political Studies*, Special Issue, volume 42, 1994
- W. A. Dunning *A History of Political Theory*, Macmillan 1938
- R. Dworkin *Law's Empire*, Fontana 1986
- R. Eccleshall *Order and Reason in Politics. Theories of Absolute and Limited Monarchy in early modern England*, Hull Publications, Oxford UP 1978
- A. Edel. *Method in Ethical Theory*, Routledge and Kegan Paul 1963
- M. Egermont *Balfour. A Life of James Arthur Balfour*. Collins 1980
- M. Elliott *The Constitutional Foundations of Judicial Review*, Hart Publications 2001
- G. R. Elton *The Tudor Revolution in Government. Administrative change in the reign of Henry VIII*, Cambridge UP 1953
- G.R. Elton *England under the Tudors*, Methuen 1955
- G. R. Elton *The Tudor Constitution. Documents and Commentary*, Cambridge UP 1960

- G. R. Elton 'Administrative History in the Tudor period' in *Journal of British Studies*, 4/2, May 1965, pp. 18-28
- G. R. Elton *Studies in Tudor and Stuart government and politics*, Cambridge UP 1974
- G. R. Elton *The Parliament of England*, Cambridge UP 1986
- G. R. Elton *Return to Essentials. Some reflections on the present state of historical studies*, Cambridge UP 1991
- G. R. Elton *The English*, Blackwell, Oxford 1992
- Esher (Viscount) *After the War*, John Murray 1918
- A. B. Ferguson 'The Tudor Commonwealth and the sense of change' in *Journal of British Studies*, volume 3/1, 1963, pp. 11-35.
- H. Fichtenau, *The Carolingian Empire*, translated by P. Munz, Basil Blackwell 1968
- J. N. Figgis *The Divine Right of Kings*, second edition, Cambridge UP 1914
- N. J. Figgis *Studies in Political Thought from Gerson to Grotius, 1414-1625*, second edition, Cambridge UP, 1916
- R. Filmer *Patriarcha and other writings*, edited by J. P. Sommerville, Cambridge UP, 1991
- S. E. Finer 'The Individual Responsibility of Ministers' in *Public Administration*, Volume 34, Issue 4, December 1956
- M. I. Finley *Democracy Ancient and Modern*, Chatto & Windus 1973
- C. H. Firth & R. S. Rait *Acts and Ordinances of the Interregnum, 1642-1660*, three volumes, London 1911
- P. J. Fitzgerald (Ed) *Salmond on Jurisprudence*, twelfth edition, London 1966
- A. Fletcher of Saltoun *An historical account of the ancient rights and powers of the Parliament of Scotland*. Edinburgh, 1703, reprinted with Appendix, Aberdeen 1828
- A. Fletcher of Saltoun *Selected Political Writings and Speeches*. Edited by D. Daiches, Scottish Academic Press 1979.
- A. Fletcher *Tudor Rebellions*, Longmans 1968
- I. C. Fletcher "This Zeal for Lawlessness": A. V. Dicey, *The Law of the Constitution*, and the Challenge of Popular Politics' in *Parliamentary History*, volume 16, 1997, pp. 309-329
- M. Flinders 'Shifting the Balance? Parliament, the Executive and the British Constitution' in *Political Studies*, 50/1, March 2002, pp. 23-42
- M. Foley *The Silence of Constitutions*, Routledge 1989
- M. Foley *The Rise of the British Presidency*, Manchester UP 1993
- M. Foley *The Politics of the British Constitution*, Manchester UP 1999
- A. S. Foord *His Majesty's Opposition 1714-1830*, Oxford UP 1964
- J. Fortescue *De Laudibus Legum Anglie*, edited with introduction by S. B. Chrimes, Cambridge UP 1942
- J. Fortescue *The governance of England*, revised edition with introduction by C. Plummer, Oxford UP, 1885
- J. Fortescue *On the Laws and Governance of England*, edited with an introduction by S. Lockwood, Cambridge UP, 1997
- 'Forum on Alexander Wendt' in *Review of International Studies*, 26/1, Jan 2000, pp. 123-180
- C. Fox *The Personality of Britain. The influence of inhabitants and invaders in Prehistoric and Early Historic times*, fourth edition, Cardiff 1959
- M. Francis with J. Marrow 'After the Ancient Constitution: Political Theory and English Constitutional writings, 1765-1832' in *History of Political Thought*, 9/2, Summer 1988, pp. 283-302
- H. Frankfort "Kingship" and the Gods. *A Study of the ancient Near Eastern religion as the integration of society and nature*, University of Chicago, 1948 and 1978
- J. G. Frazer *The Golden Bough. A Study in Magic and Religion*, abridged edition, Macmillan 1922
- M. Freedman *Ideologies and Political Theory: A Conceptual Approach*, Oxford UP 1996

- K. J. Friedrich (Ed) *The Philosophy of Hegel*, New York 1953
- M. Fulbrook *Piety and Politics. Religion and the rise of Absolutism in English, Württemberg and Prussia*, Cambridge UP 1983
- W. B. Gallie 'Essentially Contested Concepts' in *Proceedings of the Aristotelian Society*, 1956, pp. 167-198
- B. Galloway *The Union of England and Scotland 1603-1608*, John Donald, Edinburgh 1986
- F. L. Ganshof *Feudalism*, third edition, Longmans 1964
- G. Ganz *Understanding Public Law*, second edition, Fontana 1994
- N. Gash 'The English Constitution in the Age of the American Revolution' in his *Pillars of Government, and other essays on State and Society c1770-c1880*, London 1986
- D. J. Gifford & J. Salter *How to understand an Act of Parliament*, Cavendish, London 1996
- G. Vasari *Lives of the Artists*, first published 1550, a selection translated by George Bull, Penguin 1965
- W. E. Gladstone *The Gleaning of Past Years*, John Murray 1879.
- Goethe *Faust*, Britannia Great Books, Volume 47, *Encyclopaedia Britannica*, London 1952
- J. Goldsworthy *The Sovereignty of Parliament. History and Philosophy*, Oxford UP 1999
- A. L. Goodhart and H. G. Hanbury (Eds) *Essays in Law and History*, Oxford UP 1946
- J. W. Gough *Fundamental Law in English Constitutional History*, Oxford UP 1955
- M. Granovetter 'Economic action and social structure. The problem of Embeddedness', in *American Journal of Sociology*, volume 91/3, November 1985, pp. 481-510
- H. Grass and R. Harrison *Jurisprudence: Cambridge Essays*, Oxford UP 1992
- M. A. R. Graves 'The Management of the House of Commons' in *Parliamentary History*, 2, (1983), pp. 11-38
- M. A. R. Graves *Tudor Parliaments. Crown, Lords and Commons 1485-1603*, Longman 1985
- H. R. G. Greaves *The British Constitution*, Allen and Unwin 1938
- J. R. Green *A Short History of the English People*, Macmillan, 1874, new edition 1888
- W. H. Greenleaf *Oakeshott's Philosophical Politics*, Barnes & Noble, New York 1966
- H. G. Grey (Third Earl) *Parliamentary Government considered with reference to a Reform of Parliament. An Essay*, first published 1858, new edition, John Murray 1864
- J. A. G. Griffith *Judicial Politics since 1920: a chronicle*, Blackwell 1993
- J. A. G. Griffith *The Politics of the Judiciary*, Fontana 1977
- H. Gross and R. Harrison *Jurisprudence: Cambridge Essays*, Oxford UP, 1992
- B. Hadfield 'Leaning from the Indians? The Constitutional Guarantee Revisited' in *Public Law*, Autumn 1983, pp. 351-365
- B. Hadfield (Ed) *Northern Ireland: Politics and the Constitution*, Open UP 1992
- M. Hale *The History of the Common Law*, edited by D.C. Yale, Seldon Society 1976
- M. Hale *The Prerogatives of the King*, edited by D.C. Yale, Seldon Society 1976
- Halifax *The Complete Works of George Savile, the first Marquis of Halifax*, edited with Introduction by Walter Raleigh, Oxford UP 1912
- T. Hames & M. Leonard *Modernising the Monarchy*, Demos Report, September 1998
- I. Hampsher-Monk *The Political Philosophy of E. Burke*, Longmans 1987
- H. J. Hanham *The Nineteenth Century Constitution. Documents and commentary*, Cambridge UP 1969
- I. Harden and N. Lewis *The Noble Lie. The British constitution and the rule of law*, Hutchinson 1988
- S. Harding *The science question in feminism*, Open UP 1986
- C. Harlow 'Disposing of Dicey' in *Political Studies*, 48/2. Special Issue 2000: Political Ideas and Political Action, pp 356-369
- J. Harrington *The Commonwealth of Oceana*, Cambridge UP 1992
- B. Harrison *The Transformation of British Politics 1860-1995*, Oxford UP 1996
- H. L. A. Hart *The Concept of Law*, Oxford UP 1961, second edition 1994

- R. Hazell (Ed) *Constitutional Futures. A history of the next ten years*, Oxford UP 1999
- Y. Hazony *The Jewish State: The Struggle for Israel's Soul*, Basic Books, New York 2000
- W. E. Hearn *The government of England. Its structure and its development*, first published 1867, second edition 1887
- S. Heffer *Power and Palace. The Political Consequences of King Edward VII*, Weidenfeld and Nicolson 1998
- S. Heffer *Nor Shall My Sword. The Reinvention of England*, Weidenfeld and Nicolson, London 1999
- G. W. F. Hegel *Lectures on the Philosophy of History*, translated by J. Sibree, Bohn's Philosophical Library, volume 3, H. G. Bohn, London 1857
- G. W. F. Hegel *The Phenomenology of Mind*, translated with introduction by J. Bailie, second edition, London 1949
- D. Held *Democracy and the global order: from the modern state to cosmopolitan governance*, Polity 1995
- P. Hennessy *Cabinet*, Blackwell 1986
- P. Hennessy *Whitehall*, Seeker and Warburg 1989
- P. Hennessy 'The Pleasures and Pains of Contemporary History' in *History Today*, Volume 44, March 1994
- P. Hennessy *The Hidden Wiring*. Victor Gollancz 1995
- P. Hennessy 'Searching for the 'Great Ghost': The Palace, the Premiership, the Cabinet and the Constitution in the Post-War Period' in *Journal of Contemporary History*, volume 30, 1995, pp. 211-231
- P. Hennessy *Muddling Through*, Indigo 1997, first published Victor Gollancz 1996
- P. Hennessy 'The Blair Style of government: an historical perspective and an interim audit' in *Government and Opposition*, volume 33/1, Winter 1998, pp. 3-20
- P. Hennessy *Prime Minister: The Office and its Holders since 1945*, HarperCollins Penguin 2000
- J. Hervey (Lord) *Ancient and Modern Liberty, stated and compared*, London 1734
- R. F. V. Heuston *Essays in Constitutional Law*, Stevens and Sons, second edition, London 1964
- G. Hewart (Lord Hewart of Bury) *The New Despotism*, London 1929
- J. Higley and M. Burton 'Elite Settlements and the Taming of Politics' in *Government and Opposition*, volume 33/1, Winter 1998, pp. 98-115
- F. H. Hinsley *Sovereignty*, Watts 1966
- A.M. Hocart *Kings and Councillors. An Essay in the comparative anatomy of human society*. Printing Office Paul Barbey, Cairo 1936
- A.M. Hocart *Kingship*, Oxford UP 1927
- P. S. Hodge *Scotland and the Union*, David Hume Institute Papers on Public Policy, 2/2, Summer 1994, Edinburgh UP
- W. S. Holdsworth 'The Conventions of the Eighteenth Century Constitution' in *Iowa Law Review*, 17/2, January 1932, pp. 161-180
- W. S. Holdsworth 'The influence of the legal profession on the growth of the English Constitution' in A. L. Goodhart and H. G. Hanbury (Eds) *Essays in Law and History*, Oxford UP 1946, pp. 71-99
- I. Holliday, A. Gamble and G. Parry *Fundamentals in British Politics*, Macmillan 1999
- C. Hollis and S. Smith 'A Response; why epistemology matters in International Relations' in *Review of International Studies*, volume 22/1, 1996, pp. 111-116
- O. Hood Phillips *Thomas and Hood Phillips' Leading Cases in Constitutional Law*, Sweet and Maxwell 1947
- O. Hood Phillips *Constitutional and Administrative Law*, third edition, Sweet and Maxwell 1962
- O. Hood Phillips *Reform of the Constitution*, Chatto & Windus 1970

- O. Hood Phillips and P. Jackson, *O. Hood Phillips' Constitutional and Administrative Law*, 7th edition, Sweet and Maxwell 1987
- A. G. Hopkins 'Quasi-states, weak states and the partition of Africa', in 'Forum' in *Review of International Studies*, volume 26/2, April 2000, pp. 311-320
- W. Hutton *The State We're In*, Vintage, revised edition 1996
- C. Ilbert and C. Carr *Parliament. Its History, Constitution and Practice*, third and further revised edition, Oxford UP 1953
- V. Jabri and S. Chan 'The ontologist always rings twice: two more stories about structure and agency', in *Review of International Studies*. 22/1, 1996, pp.107-110
- R. H. Jackson *Quasi-states: Sovereignty, International Relations and the Third World*, Cambridge UP 1990
- R. Jackson (Ed) 'Sovereignty at the Millennium' in *Political Studies*, volume 47/3, Special Issue 1999
- L.L. Jaffe and E.G. Henderson 'Judicial Review and the Rule of Law: Historical Origins' in *The Law Quarterly review*, 72, 1956, pp. 345-364
- James 1 *Basilicon Doron (1599)*, Scolar Press 1969
- J. C. Jenkins 'Pepper v. Hart: A Draftsman's Perspective' in *Statue Law Review*, volume 15/1, 1994, pp. 23.30
- R. Jenkins *Mr Balfour's Poodle*, Heinemann 1954, second edition, William Collins 1968
- S. Jenkins *Accountable to None. The Tory Nationalization of Britain*, Hamish Hamilton 1995
- W. I. Jennings *Parliamentary Reform*, Victor Gollancz 1934
- W. I. Jennings *A Federation for Western Europe*, Cambridge UP 1940
- W. I. Jennings *The British Constitution*, first published Cambridge UP 1941
- W. I. Jennings *Parliament must be reformed. A programme for Democratic Government*, Kegan Paul 1941
- W. I. Jennings *Parliament*, Cambridge UP 1948
- W. I. Jennings *The Queen's Government*, Penguin 1954
- W. I. Jennings *Cabinet Government*, Third edition, Cambridge UP 1959
- W. I. Jennings, *The Law and the Constitution*, Fifth edition, London UP 1959
- J. J. W. Jervis *A Letter addressed to the Gentlemen of England and Ireland on the inexpediency of a federal-union between the two Kingdoms*, London 1798
- E. John *Orbis Britanniae and other studies*, Leicester UP 1966
- N. Johnson *In Search of the Constitution. Reflections on State and Society in Britain*, Pergamon Press 1977
- N. Johnson 'Opposition in the British Political System, in *Government and Opposition*, volume 32/4, Autumn 1997, pp. 487-510
- N. Johnson 'Then and Now: the British Constitution' in *Political Studies*, volume 48/1, March 2000, pp. 118-131
- J. E. A. Jolliffe *The Constitutional History of Medieval England from the English settlement to 1485*, second edition, London 1947
- B. E. Jones *Freemasons' Guide and Compendium*, revised edition, Harrap 1956
- B. Jones, D. Kavanagh, M. Moran and P. Norton (Eds) *Politics UK*, Longman, fourth edition 2001
- B. Jones and L. Robins 'For the Guidance of Martians: A reply to Martin Smith on the politics of teaching politics' in *Politics*, volume 20/2, May 2000, pp. 105-109
- D. L. Jones *A Parliamentary History of the Glorious Revolution*, HMSO 1988
- E. Jones *The English Nation. The Great Myth*, Sutton Publishing 1998
- G. Jones 'Cabinet Government since Bagehot' in *LSE Quarterly*, Autumn 1989, volume 3/3, pp. 236-254
- G. Jones 'Mrs. Thatcher and the Power of the PM' in *Contemporary Record*, April 1990
- G. Jones 'The Study of Prime Ministers: A Framework for Analysis' in *Western European Politics* 1991, volume 14/2

- G. W. Jones 'The Prime Minister's Power' in *Parliamentary Affairs*, xviii, Spring 1965, pp. 167-185
- P. Jones 'A start of a New Song: the 1997 devolution referendum campaign' in *Scottish Affairs*, 21, Spring 1997, pp. 1-16
- W. Jones and B. Lewis 'The Welsh Referendum' in *Politics*, volume 19/1, 1999, pp. 37-46
- J. Jowell and D. Oliver (Eds) *The Changing Constitution*, Oxford UP 1985
- D. Judge *The Parliamentary State*, Sage Publications 1993
- D. Judge *Representation. Theory and Practice in Britain*, London 1999
- M. A. Judson *The Crisis of the Constitution. An Essay on Constitutional and Political Thought in England 1603-1645*, Rutgers UP 1949
- W. Kaiser *Using Europe and Abusing European Britain and European Integration 1945-1963*, Macmillan with Institute for Contemporary British History 1966
- E. K. Kantorowicz *The King's Two Bodies. A study in Medieval Political Theology*, Princeton UP 1957, reprinted 1997
- H. Kastendick and R. Stinshoff (Eds) *Changing conceptions of constitutional government. Developments in British politics and the constitutional debate since 1960s*, Brockmeyer, Bochum 1994
- D. Kavanagh 'Why Political Science Needs History' in *Political Studies*, 39/3, Sept 1991
- D. Kavanagh and A. Seldon *The Powers behind the Prime Minister. The hidden influence of Number Ten*, Harper Collins 1999
- P. Keating *Kipling. The Poet*, Secker and Warburg 1994
- M. H. Keen *England in the Middle Ages. A Political History*, Routledge, 1973
- M. Keens-Soper 'The practice of a States System', chapter 1 in M. Donelan (Ed) *The Reason of States. A study in International Political Theory*, Allen and Unwin 1978
- D. L. Keir 'The British Constitution in 1951' in *Parliamentary Affairs*, 1951-2, number 5, pp. 425-437
- D. L. Keir *The Constitutional History of Modern Britain since 1485*. first published 1938, ninth edition A & C Black 1969
- J. P. Kenyon *The Stuart Constitution. Documents and Commentary*, Cambridge UP 1966
- J. P. Kenyon 'The Revolution of 1688: Resistance and Contact' in N. McKinderick (Ed) *Historical Perspectives: Studies in English Thought and Society in honour of J. H. Plumb*, Europa Publications 1974, pp. 43-69
- F. Kern *Kingship and the Law in the Middle Ages*, Blackwell 1939
- B. K. Kimberton *The Scotland Bill: Some Operational Aspects of Scottish Devolution*. Research Paper 98/2, House of Commons, January 1998
- A. King *Does the United Kingdom still have a constitution?* Sweet and Maxwell 2001
- P. King and B.C. Parekh (Eds) *Politics and Experience*, Cambridge UP 1968
- R. Kipling *Rudyard Kipling's Verse. The Definitive Edition*, Hodder and Stoughton 1940
- B. Kohler-Koch 'Catching up with change: the transformation of governance in the European Union' in *Journal of European Public Policy*, 3/3, September 1996, pp. 359-380
- E. R. Kruschke *Introduction to the Constitution of the United States*, American Book Co, New York 1968
- D. Kynaston *The Secretary of State*, Terence Dalton, Suffolk 1978
- L. & J. Laing *Celtic Britain and Ireland. The Myth of the Dark Ages*, Irish Academic Press 1990
- J. Laird *The Device of Government. An Essay in Civil Polity*, Cambridge UP 1944
- I. Lakatos and A. Musgrave (Eds) *Criticism and the Growth of Knowledge*, CUP 1970
- N. Langmate *Island Fortress. The Defence of Great Britain 1603-1945*, Hutchinson 1991
- P. Laslett *The World we have lost*, second edition, Methuen 1971
- G. Lawson *Politica: sacra et civilis*, Edited by C. Condren, Cambridge UP 1992
- P. Lawson 'Parliament, the Constitution and Corn: the embargo crisis of 1766' in

- Parliamentary History*, 5 (1986), pp. 16-37
- G. H. L. Le May *The Victorian Constitution. Conventions, Usages and Contingencies*. Duckworth 1979
- C. H. Lee *Scotland and the United Kingdom. The economy and the union in the twentieth century*, Manchester UP 1995
- J. Lees-Milne *The Enigmatic Edwardian. The Life of Reginald, 2nd Viscount Esher*, Sedgwick and Jackson 1986
- A. Lester 'Pepper v. Hart Revisited' in *Statute Law Review*, volume 15/1, 1994, pp. 10-22
- B. P. Levack *The formation of the British State. English and Scottish Union 1603-1707*, Oxford UP 1987
- J. Loach *Parliament and the Crown in the Reign of Mary Tudor*, Oxford UP 1986
- J. Locke *Concerning Civil Government Second Essay*, 1690
- R. Lockyer *Tudor and Stuart Britain 1471-1714*, Longmans 1964
- M. Loughlin *Public Law and Political Theory*, Oxford UP 1992
- M. Loughlin 'The constitutional dimension to central-local government relations', LSE Public Service Seminar Series, June 1997
- M. Loughlin *Sword and Scales. An examination of the relationship between Law and Politics*, Hart Publishing 2000
- S. Low *The Governance of England*, third edition, Fisher Unwin 1910
- A. L. Lowell *The Government of England*, two volumes, Macmillan 1908
- H. R. Loyn *The Governance of Anglo-Saxon England, 500-1087*, Edward Arnold 1984
- N. Lyell 'Pepper v. Hart: The Government Perspective' in *Statute Law Review*, 15/1, 1994, pp. 1-9
- J. Lynn and A. Jay Yes, *Prime Minister. The Diaries of Right Hon. James Hacker*, in 2 volumes, BBC Books 1987
- N. MacCormick 'Does the United Kingdom have a Constitution? Reflections on MacCormick v Lord Advocate' in *Northern Ireland Legal Quarterly* 29/1 (1978), pp. 1-20
- N. MacCormick 'The Concept of Law and The Concept of Law' in R. P. George (Ed) *The Autonomy of Law. Essays in Legal Positivism*, Oxford UP 1996
- N. MacCormick 'The English Constitution, the British State, and the Scottish Anomaly' in *Scottish Affairs*, special issue on Understanding Constitutional Change, 1998
- N. MacCormick *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford UP 1999
- John MacCunn *The Political Philosophy of Burke*, Russell & Russell, New York 1913
- O. MacDonagh 'The Nineteenth-Century Revolution in Government: A Reappraisal' in P. Stansky (Ed) *The Victorian Revolution. Government and Society in Victorian Britain*, New York 1973, pp. 5-25
- J. P. MacIntosh *The British Cabinet*, third edition, Stevens & Sons, London 1977
- A. MacLynre *Against the Self Images of the Age*, Duckworth 1971
- G. MacKenzie *A Friendly Return to a letter (by Robert Wylie) concerning Sir George MacKenzie and Sir John Nisbet's observations and response on the matter of the Union*, Edinburgh, August 1706
- J. D. Mackie *The Earlier Tudors 1485-1558*, Oxford UP, 1952, corrected edition 1957
- R. L. Mackie *Scotland*, London 1916
- J. P. MacKintosh *The Devolution of Power. Local democracy, Regionalism, and Nationalism*. Penguin 1968
- I. Maclean 'The Jenkins Commission' in *Government and Opposition*, 34/2, Spring 1999, pp. 143-160
- H. Macmillan *Riding the Storm 1956-1959*, Macmillan 1971
- T. B. Macaulay *The History of England from the accession of James the second*, Leipzig, Bernhard Tauchnitz, 1849, in 6 volumes
- G. Maddox *Australian democracy in theory and practice*, second edition, Melbourne,

Longman Cheshire 1991

- P. J. Madgwick *Introduction to British Politics*, third edition, Hutchinson 1984
- F. W. Maitland *Constitutional History of England: A Course of Lectures*, Cambridge 1908
- K. Mannheim, *Ideology and Utopia*, translated by L. Wirth & E. Shils, Routledge 1936, reprinted 1968
- H. C. Mansfield Jr. *Statesmanship and Party Government. A Study of Burke and Bolingbroke*, Chicago 1965
- J. Margach *The Anatomy of Power. An inquiry into personal leadership*. Allen and Co, 1981
- A. Marr *Ruling Britannia. The failure and the Future of British Democracy*, Michael Joseph, 1995
- J. A. R. Marriot *English Political Institutions. An Introductory Study*, Oxford UP, 1925
- N. S. Marsh 'The Rule of Law as a Supra-national concept' in A. G. Guest *Oxford Essays in Jurisprudence*, Oxford UP, 1961, pp 223-264
- G. Marshall, *Constitutional Theory*, Oxford UP, 1971
- G. Marshall and G. A. Moodie *Some problems of the constitution*, Hutchinson, 1959, third edition 1964
- H. J. Massingham *Downland Man*, with Introduction by G. E. Smith, Jonathan Cape, London 1926
- J. H. B. Masterman *A History of the British Constitution*, Macmillan, 1912
- W. L. Mathieson *Scotland and the Union. A History of Scotland from 1695 to 1747*, Glasgow, 1905
- J. P. W. B. McAuslan and J. F. McEldowney 'The Constitution under Crisis' in *Parliamentary Affairs*, 39, 1986, pp. 496-516
- J. F. McEldowney *Public Law*, second edition, London 1998
- C. H. McIlwain *Constitutionalism, Ancient and Modern*, second edition, Ithaca, 1947
- W. S. McKechnie *The New Democracy and the Constitution*, Murray 1912
- N. McKendrick (Ed) *Historical Perspectives: Studies in English Thought and Society in honour of J. H. Plumb*, Europa Publications 1974
- Th. McKenna *A memoire on the questions respecting the proposed union of Great Britain and Ireland*, Dublin 1799
- J. Mill 'The Ballot' in *Westminster Review*, July 1830
- J. S. Mill 'A few words on non-intervention' in *Fraser's Magazine*, December 1859 ; reprinted in *Dissertations and Discussions*, Vol. III, second edition, Longmans 1867
- J. S. Mill *Utilitarianism, Liberty and Representative Government*, Dent & Co 1910
- J. Millar *An Historical View of the English Government*, first published 1786, London 1803
- J. Miller *The Glorious Revolution*, first edition, Longman 1983
- Milner (Viscount) *Imperial Unity*, London 1907
- K. Minogue (in review of a book by D. Marquand) 'Hard choices' in *Government and Opposition*, 33/2, Spring 1998, pp. 253-260
- J. Mitchell 'The Evolution of Devolution: Labour's Home Rule strategies in Opposition', in *Government and Opposition*, 33/4, Autumn 1998, pp. 479-496
- J. B. D. Mitchell *Constitutional Law*, second edition, Green, Edinburgh 1968
- T. L. Moir *The Addled Parliament of 1614*, Oxford UP 1958
- B. Moore *Social Origins of Dictatorship and Democracy. Lords and peasants in the making of the modern world*, Penguin 1967
- F. Mount *The British Constitution Now. Recovery or Decline*, Mandarin 1993
- R. Muir *How Britain is Governed*, third edition, London 1933
- T. Nairn 'Virtual liberation: or British Sovereignty since the election' in *Scottish Affairs*, special issue on Understanding Constitutional Change, 1998, p. 14
- F. Nash 'The Centre and "Union"; the problem of explanation' in *Strathclyde Series on Government and Politics*, No 99, September 1994
- F. Nash 'With Eyes To See What Is New'. Unpublished paper given at

- Frankfurt/Southampton link seminars, Riezlern/Kleinwalsertal, Austria, August/September 1994
- F. Nash *Meta-Imperialism: A Study in Political Science*, Avebury, Aldershot 1994
- F. Nash "Political Science" and "Morality", paper given at the University of Southampton Study Weekend, Cumberland Lodge, Windsor, 3-5 February 1995
- F. Nash "A Discourse on "Universality": Being an Account of the Particularity of its Relativity". Paper given at MCIS Seminars on Globalisation, University of Southampton, 9 March 1995
- F. Nash 'Political science, history, contemporary history, and Politics', PSA Annual Conference York, April 1995
- F. Nash "*The UK and EU: Reflections on the Problem of Explanation*", BISA Annual Conference, December 1995, University of Southampton
- F. Nash "*A Degree of Meaning: The idea of Political Science and the teaching of politics*", PSA Conference, Glasgow, April 1996
- F. Nash 'Political Science and the Study of British Government and Politics: *una storia che mai finisce*' in I. Hampsher-Monk and J. Stanyer (Eds) *Contemporary Political Studies 1996*, PSA-UK, Queen's University, Belfast, 1996
- F. Nash 'After Devolution: J. C. Banks and "progressive federalisation"', in A. Dobson & J. Stanyer (Eds) *Contemporary Political Analysis 1998*, PSA-UK, University of Nottingham
- F. Nash '*Salutem adferre reipublicæ* (Cicero): the Dominion Concept and the Empire.' Paper presented at Dominion Concept Conference, University of Warwick, 21-25 July 1998
- F. Nash 'Medievalism of the Modern: the Non-Rational as the organising principle of the state', unpublished paper given at Southampton/Frankfurt link seminars, Goethe University, Frankfurt, 1-5 September 1998
- F. Nash 'British International Relations at the millennium: a rejoinder to "Sovereignty at the Millennium"', unpublished paper, September 1999
- C. Navari 'Knowledge, the State, and the State of Nature' in M. Donelan (Ed) *The Reason of States. A study in International Political Theory*, Allen and Unwin 1978
- J. E. Neale *The Elizabethan House of Commons*, Fontana/Collins 1949
- A. D. Nicholls *The Jacobean Union. A reconsideration of British civil policies under the early Stuarts*, Greenwood Press 1999
- H. Nicolson *King George the Fifth. His Life and Reign*, London 1952
- J. Nisbet *Doubts and Questions in the Law of Scotland*, Edinburgh 1698
- O'Hear (Ed) *Faking it. The Sentimentalisation of Society*, Social Affairs Unit, 1998
- N. O'Sullivan 'Political Integration, the Limited State, and the Philosophy of Postmodernism' in *Political Studies* Special Issue, The End of "isms"?, Vol 41, 1993, pp. 21-42
- M. Oakeshott, *Experience and Its Modes*, Cambridge UP 1933
- M. Oakeshott *Rationalism in Politics and other essays*, Methuen 1962
- M. Oakeshott *On Human Conduct*, Oxford UP 1975
- M. Oakeshott *Hobbes on Civil Association*, Blackwell 1975
- M. Oakeshott, *On History and other essays*, Blackwell 1983
- M. Oakeshott *Rationalism in Politics and other essays*, Liberty Press 1991
- M. Oakeshott *Religion, Politics, and the Moral Life*, edited by T. Fuller, Yale UP 1993
- D. Oliver *The Government of the UK. The search for Accountability, Effectiveness and Citizenship*, Oxford UP 1991
- D. Oliver 'Regulating the conduct of MPs. The British experience of combating corruption' in *Political Studies*, 45/3, Special Issue 1997, pp. 539-558
- S. Olivier (Lord) *Dual Ethic in Empire*, Typescript, Rhodes House Library, Oxford, 1938
- A. Page *The Executive in the Constitution; Structure, Autonomy and Internal Control*, Oxford UP 1999
- T. Paine 'Rights of Man' in *The Selected Works of Tom Paine*, edited by Howard Fast, Bodley, London 1948

- J. J. Park *The Dogmas of the Constitution. Four Lectures*, London 1832
- H. Parris 'The Nineteenth-Century Revolution in Government: A Reappraisal Reappraised' in P. Stansky (Ed) *The Victorian Revolution. Government and Society in Victorian Britain*, New York 1973, pp. 29-57
- G. Parry *John Locke*, Allen and Unwin 1978
- G. Parry, G. Moser & N. Day, *Political Participation and Democracy in Britain*, CUP 1992
- D. Parsons (Ed) *Medieval Queenship*, Sutton Publishing 1993
- L. Paterson *The Autonomy of Scotland*, Edinburgh UP 1994
- P. Payton *The making of the modern Cornwall. Historical experience and the persistence of "difference"*, Dyllansow Truran, Redruth 1992
- P. Payton (Ed) *Cornwall since the war. The contemporary history of a European region*, Institute of Cornish Studies and Dyllansow Truran, Redruth 1993
- G. Peele *Governing the UK*, third edition, Blackwell 1995
- C. Pilkington *The Politics Companion to the British Constitution*, Manchester UP 1999
- H. F. Pitkin *The Concept of Representation*, California UP 1972
- R Plant *The Plant Report on democracy, representation and electoral reform*, London 1991
- Plato 'The Republic'; 'Gorgias'; Phaedrus, and 'The Laws' in *Greek Philosophers™* CD-ROM v4.3. 1991-5 World Library Inc.
- Plato *Dialogues*, Britannia Great Books, Volume 7, *Encyclopaedia Britannica*, London 1952
- J. H. Plumb *The Growth of Political Stability in England 1675-1725*, Macmillan 1967
- G. Plumtree *Edward VII*, Pavilion 1955
- J. G. A. Pocock *The Ancient Constitution and the Feudal Law. A study of English Historical thought in the seventeenth century*, Cambridge UP 1957
- 'Burke and the Ancient Constitution in *The Historical Journal*, III, 2 (1960), pp. 125-143.
- J. G. A. Pocock *The Machiavellian Moment. Florentine political thought and the Atlantic Republican Tradition*, Princeton UP 1975
- G. Poggi *The Development of the Modern European State. A Sociological Introduction*, Hutchinson 1978
- G. Poggi *The State. Its Nature, Development and Prospects*, Polity 1990
- A. F. Pollard *The Evolution of Parliament*, Longmans, 1920, new impression 1968
- F. Pollock *History of the Science of Politics*, revised edition, Macmillan 1930
- A. L. Poole *From Domesday Book to Magna Carta 1087-1216*, second edition, OUP 1955
- K. R. Popper 'Towards an Evolutionary Theory of Knowledge' in his *A World of Propensities*, Thoemmes Continuum 1990
- G. J. Postema 'Law's Autonomy and Public Practical Reason' in R. P. George (Ed) *The Autonomy of Law. Essays in Legal Positivism*, Oxford UP 1996
- R. Pound (Ed) C. J. Grant's 'Political Drama'. *A Radical Satirist Rediscovered*, UCL, London 1998
- Radcliffe (Lord, of Werneth) *The problem of Power*, Reith Memorial Lecture 1951, Martin Secker and Warburg, London 1952
- G. Radice *What Needs to Change. New vision for Britain*, Harper Collins 1996
- T. I. Rae (Ed) *The Union of 1707. Its impact on Scotland*, Blackie and Son 1974
- R. Rawlings 'Concordats of the Constitution' in the *Law Quarterly Review* 116, April 2000, pp 257-286
- C. Read (Ed) *The Constitution Reconsidered*, Columbia UP 1938
- J. Reeves *Thoughts on the English Government*, London 1795
- D. Reynolds, *Britannia Overruled*, Longman, London 1991
- R. A. W. Rhodes and P. Dunleavy (Eds) *Prime Minister, Cabinet and Core Executive*, Macmillan 1995
- R. Rhodes James 'The Monarchy: its changing rôle' in *The RSA Journal*, 142, pp. 21-32
- F. F. Ridley, 'Who is the Civil Servant's Master?' in *New Society*, 14 June 1985.
- F. F. Ridley 'There is no British constitution: a dangerous case of the Emperor's clothes' in

- Parliamentary Affairs*, 1988, number 41, pp. 340-361
- F. F. Ridley 'What happened to the constitution under Mrs. Thatcher?' in B. Jones and L. Robins *Two Decades in British Politics*, Manchester UP 1992, pp. 111-128
- G. Ridpath *A Discourse upon the Union of Scotland and England*, Edinburgh 1702
- P. W. J. Riley *The Union of England and Scotland*, Manchester UP 1978
- C. Roberts 'The Constitutional significance of the financial settlement of 1690' in *The Historical Journal*, 20/1 (1977), pp. 59-76
- J. Robertson (Ed) *A Union for an Empire. Political Thought and the British Union of 1707*, Cambridge UP 1995
- W. Robson (Ed) *Man and the Social Sciences*, Allen and Unwin 1972
- J. E. T. Rogers (Ed) *Speeches on questions of public policy by Rt. Hon. John Bright MP*, Macmillan 1869
- R. Rorty (Ed) *The Linguistic Turn*, California UP 1967
- J. J. Rousseau *The Social Contract*, 1762
- J. J. Rousseau *Emile*. Translated by Barbara Foxley with introduction by P.D. Jimack, Everyman Library, Dent, London 1974
- The Statesman's Book of John of Salisbury. Being the 4th, 5th, 6th, and selections from 7th and 8th of the Policraticus*, translated with introduction by John Dickinson, first published New York, A. A. Knoff, 1927, re-issued Russell and Russell, 1963
- J. W. Salmond *Jurisprudence*, seventh edition, London, 1924
- A. Salter *Personality in Politics. Studies of Contemporary Statesmen*, Faber & Faber, 1947
- A. Sampson *The Sovereign State. The Secret History of ITT*, Coronet Books, 1973
- G. Sampson *An End to Allegiance. Individual freedom and the new politics*, London, 1984
- R. Samuel 'Reading the Sings' in *History Workshop Journal*, 32, Autumn 1991, pp. 88-109
- G. Santayana *Soliloquies in England, and later soliloquies*, Constable & Co, 1922
- G. Sartori 'How Far Can Free Democracy Travel?' in *Journal of Democracy*, 6/3, July 1985, pp. 101-111
- M. Saward 'Cosmopolitan Democracy: a selective critique of Held's Democracy and the Global Order', unpublished paper delivered at the University of Reading conference on Global Democracy, January 1997
- M. Saward *The Terms of Democracy*, Polity 1998
- L. G. Schorer 'The transformation of the 1689 Convention into a Parliament' in *Parliamentary History*, volume 3 (1984), pp. 57-76
- P. H. Scott *1707: the Union of Scotland and England*, Edinburgh 1979
- P. Seaward *The Restoration 1660-1688*, Macmillan 1991
- J. Seeley *The Expansion of England*, second edition, Macmillan 1895
- L. M. Seidman *Our Unsettled Constitution: a new defense of constitutionalism and judicial review*, Yale UP 2001
- S. Seldon 'The Sound of Silence: Constitutional Law without a Constitution' in *The Law Quarterly Review*, volume 110, 1994, pp. 270-291
- A. Sharp (Ed) *The English Levellers*, Cambridge UP 1998
- A. Sharp *Political ideas of the English civil wars 1641-1649*, Longman 1983
- D. Shell 'Labour and the House of Lords: a case study in constitutional reform' in *Parliamentary Affairs*. 53/2, April 2000, pp. 290-310
- J. H. Shennan *The Origins of the Modern European State 1450-1725*, Hutchinson UP, 1974
- P. Silk and R. Walters *How Parliament Works*, Longman 1987
- Q. Skinner *The Foundations of Modern Political Thought*, Cambridge UP 1978, volume 2
- K. B. Smellie *A Hundred Years of English Government*, revised edition, Duckworth & Co, London 1950
- K. B. Smellie *The British Way of Life*, Heinemann 1955
- A. G. R. Smith *The Government of Elizabethan England*, Edward Arnold 1967
- D. L. Smith *The Stuart Parliaments 1603-1689*, London 1999

- S. de Smith and R. Brazier *Constitutional and Administrative Law*, sixth edition by R. Brazier, Penguin 1989
- G. B. Smith *The Prime Ministers of Queen Victoria*, Routledge, London 1886
- M. Smith *The Core Executive in Britain*, Macmillan 1999
- M. Smith 'Institutionalising the "eternal return": textbooks and the study of the British politics' in *British Journal of Politics and International Relations*, vol 1/1, April 1999, pp. 106-118
- M. Smith *The Core Executive in Britain*, Macmillan 1999
- S. Smith 'The Discipline of International Relations: still an American social science?' in *British Journal of Politics & International Relations*. 2/3, Oct 2000, pp. 374-402
- T. Smith *De Republica Anglorum. A discourse on the commonwealth of England*, edited by L. Ashton, Cambridge UP 1906
- T. B. Smith 'Constitutional Law, Fundamental Law' in *The Laws of Scotland, Stair Memorial Encyclopaedia*, volume 5, 1987, pp. 137-62
- T. B. Smith 'The Union of 1707 as Fundamental Law' in *Public Law*, 1957, pp. 99-121
- J. P. Sommerville 'History and Theory: the Norman Conquest in early Stuart Political Thought' in *Political Studies* volume 34/2, 1986, pp. 249-261
- H. St. John (Bolingbroke) *The Works*, eight volumes, London 1809
- M. Staniland *The Lions of Dagbon: Political Change in Northern Ghana*, 1975
- P. Stansky (Ed) *The Victorian Revolution. Government and Society in Victorian Britain*, New York 1973
- W. Steere *Resolution of the House of Lords versus the Constitution*. T. Day, London 1856
- S. Steinmo, K. Thelenm and F. Longstreth *Structuring Politics*, Cambridge UP 1992
- C. Stephenson and F. G. Marcham *Sources of English Constitutional History. A selection of documents from A.D. 1600 to the present*, Harper & Row 1937
- J. Steuart *Dirleton's Doubts and Questions in the Law of Scotland Resolved and Answered*. Edinburgh, 1715, second edition 1762
- R. B. Stevens *Law and Politics: the House of Lords as a judicial body, 1800-1976*, Weidenfeld and Nicolson 1979
- J. L. Stokesbury, *Navy and Empire*, William Murrow and Co, New York 1983
- H. M. Stout *British Government*, Oxford UP 1953
- S. Strange *The Retreat of the State. The diffusion of Power in the World Economy*. Cambridge UP 1996
- Strathclyde (Lord) and E. Forth *The House of Lords: Completing the Reform. Response to the White Paper*, The Conservative Party, London, February 2002
- J. R. Strayer *On the Medieval Origins of the Modern State*, Princeton UP 1970
- W. Stubbs *Select Charters and other illustrations of English constitutional history from the earliest times to the reign of Edward I*, 1870, ninth edition by H. W. C. Davis, Oxford UP 1929
- O. P. Stutchbury *Too Much Government? A Political Aeneid*, Boydill Press 1977
- F. S. T. Sullivan *An Historical Treatise on the Feudal Law and the Constitution and the laws of England*, J. Johnson, London 1772
- K. Sutherland (Ed) *The Rape of The Constitution?* Imprint Academic, Exeter 2000
- J. R. Tanner *English constitutional conflicts of the seventeenth century 1603-1689*, Cambridge UP 1928
- J. R. Tanner *James II*, Eyre and Spottiswood 1948
- J. R. Tanner *Tudor Constitutional Documents A.D. 1485-1603 with an historical commentary*. Cambridge UP 1930
- T. P. Taswell-Langmead *English Constitutional History from the Teutonic conquest to the present time*, first published 1875, tenth edition by T.F.T. Plucknett, Sweet and Maxwell, London 1946
- B. Taylor *Scottish Parliament*, Polygon, Edinburgh 1999
- G. R. Taylor (Ed) *The Impact of New Labour*, Macmillan 1999

- H. Taylor *The Origins and Growth of the English constitution*, New York 1889
- G. Teubner *Law as an autopoietic system*. Translated by A. Benkowska et al. Blackwell 1993
- H. Van Thal (Ed) *The Prime Minister*, two volumes, Allen and Unwin 1975
- B. Tierney *Foundations of the Conciliar Theory*, Cambridge UP 1955
- C. Tilly 'Reflections on the History of European state-making' in C. Tilly (Ed) *The Formation of National States in Western Europe*, Princeton 1975
- C. Tilly *Coercion, Capital, and European States, AD 990-1990*, Basil Blackwell 1990
- M. Tindall *Four Discourses*, London 1694, reprinted 1709
- A. Todd *Parliamentary Government in England. Its origins, development and practical operation*, abridged edition, Sampson Law, 1892
- J. E. Toews 'Intellectual History after Linguistic Turn: the Autonomy of meaning and the Irreducibility of Experience' (a review article) in *American Historical Review*, 92/4, October 1987, pp. 879-907
- A. Tomkins *The Constitution after Scott*, Oxford UP 1998
- A. Trench (Ed) *The State of the Nations 2001*, Imprint Academic, Exeter 2001
- G. M. Trevelyan *The Life of John Bright*, Constable, London 1925
- G. M. Trevelyan *England under the Stuarts*, fifteenth edition, 1930
- G. M. Trevelyan *English Social History*, second edition, 1946
- J. R. Turner *James II*, Eyre and Spotswoode, London 1948
- C. Turpin *British Government and the Constitution. Texts, Cases and Materials*, Weidenfeld and Nicolson 1985
- W. Ullmann *The Medieval Idea of Law as represented by Lucas de Penna*, Methuen 1946
- W. Ullmann *A History of Political Thought: The Middle Ages*, revised edition, Penguin 1970
- W. Ullmann 'This Realm of England is an Empire' in *Journal of Ecclesiastical History*, 30/2, April 1979, pp. 175-203
- D. Underwood *A Freeborn People. Politics and the Nation in seventeenth-century England*, Oxford UP 1996
- The United Grand Lodge *Constitutions of the Antient Fraternity of Free and Accepted Masons*. 1815, 27th edition, 1970
- J. Vernon 'Who's afraid of the 'linguistic turn'? The politics of social history and its discontents' in *Social History*, 19/1, January 1994, pp. 81-97
- J. Vernon (Ed) *Re-Reading the constitution*, Cambridge UP 1996
- F. Vibert (Ed) *Britain's Constitutional Future*, Institute of Economic Affairs, London 1991
- C. Vicenzi *Crown Powers, Subjects and Citizens*, Pinter 1998
- M. J. C. Vile *Constitutionalism and the Separation of Powers*, Oxford UP 1967
- O. Vitalis *Historia Aecclesiastica*, two volumes edited by M. Chibnall, OUP, 1969
- E. C. S. Wade & G. G. Phillips *Constitutional Law*, fifth edition by E.C.S. Wade, Longmans, London 1955
- H. W. R. Wade 'The Basis of Legal Sovereignty' in *Cambridge Law Journal*, 1955, 13, pp. 172-197
- H. W. R. Wade *Constitutional Fundamentals*, Hamlyn Lectures 1979, revised 1989
- H. W. R. Wade 'Horizons of Horizontality' in *The Law Quarterly Review*, Volume 116, April 2000, pp 217-224.
- H. Wainwright *Labour: the tale of two parties*, Hogarth Press 1987
- Wakeham Lord, *A House for the Future*, Royal Commission on the Future of the House of Lords (2000) Cmnd 4534
- W. Waldegrave 'Contrasting styles of Premiership: Heath, Thatcher and Major', unpublished paper, Institute of Contemporary British History, 10 December 1997
- G. Walker 'Scotland and Ireland: constitutional questions, connections, and possibilities' in *Government and Opposition*, 33/1, Winter 1998, pp. 21-37
- J. M. Wallace-Hadrill *Early Germanic Kingship in England and on the continent*, Ford

Lectures 1970, Oxford UP 1971

- W. H. Walsh *The Proceedings of the Aristotelian Society*, London 1888 onwards
- A. J. Ward 'Challenging the British Constitution: The Irish Free State Constitution and the External Minister' in *Parliamentary History*, 9/1, 1990, pp. 116-128
- J. T. Ward (Ed) *Popular Movements c. 1830-1850*, Macmillan 1970
- T. Ward, *England's Reformation*, 1630
- C. M. Warner 'A Reply to A. G. Hopkins' in 'Forum', *Review of International Studies*. 26/2, April 2000, pp. 321-326
- C. Weber *Simulating Sovereignty*, Cambridge Studies in International Relations 1995
- T. D. Weldon *The Vocabulary of Politics*, Penguin 1953
- Westminster Review*, incorporating *London Review*
- C. C. Weston and J. R. Greenberg *Sovereigns and Subjects. The grand controversy over legal sovereignty in Stuart England*, Cambridge UP 1981
- K. C. Wheare 'Does it really exist? Some reflections upon the contemporary British constitution' in Books Section, *Parliamentary Affairs*, 31/2, Spring 1978, pp. 213-220
- K. C. Wheare *Modern Constitutions*, Oxford UP 1952
- A. B. White *Self-Government at the King's Command*, Minnesota UP 1933
- S. D. White *Sir E. Coke and the grievances of the Commonwealth*, Manchester UP 1979
- M. Wilks *The Problem of Sovereignty in the later Middle Ages*, Cambridge UP 1963
- C. H. Williams *The Making of the Tudor Despotism*, Thomas Nelson, second edition, 1935
- D. Williams 'Aid and Sovereignty: quasi-states and the international financial institutions' in *Review of International Studies*, 26/4, October 2000, pp. 557-573
- D. G. T. Williams 'The Constitution of the UK' in *Cambridge Law Journal*, 31/1, 1972, pp. 266-292
- P. Williams *The Tudor Régime*, Oxford UP 1979
- H. Wilson *The Governance of Britain*, London 1976
- P. Winch *The Idea of A Social Science and its relation to Philosophy*, Routledge and Kegan Paul 1958
- N. Winn 'Who gets what, When, and How? The Contested Conceptual and Disciplinary Nature of Governance and Policy-making in the European Union' in *Politics*, 18/2, pp. 119-132
- G. Winterton 'The British Grundnorm: Parliamentary Supremacy re-examined' in *Law Quarterly Review*, 1976, volume 92, pp. 591-617
- D. M. Wolfe (Ed) *Leveller Manifestos of the Puritan Revolution*. Nelson & Sons 1944
- L. Wolf-Phillips (Ed) *Constitutions of Modern States*, Pall Mall Press 1968
- L. Wolf-Phillips *Comparative Constitutions*, Macmillan 1972
- L. Wolf-Phillips 'How 'unwritten' is the 'unwritten' constitution?' in *Local Government Chronicle*, 14 March 1975, pp. 266-267
- D. Woodhouse (Ed) *The Pinochet Case. A legal and constitutional analysis*, Hart Publications, Oxford 1999
- D. Woodhouse *The Office of the Lord Chancellor*, Hart Publications, Oxford 2001
- D. C. M. Yardley *A Source Book of English Administrative Law*, 2nd edition, London 1970
- D. C. M. Yardley *Introduction to British Constitutional Law*, sixth edition, Butterworth 1984

Index of selected terms and authors discussed

1910 general elections: 374-76

Act of Security 1703: 244

Act of Settlement 1701: 83, 142, 244, 250, 253, 255-6 & 279

Act of Supremacy 1535: 163 & 25

Act of Union (with Scotland) 1707: 55, 295, 411, 427-32 & 486

Anti-Terrorism, Crime and Security Act 2001: 341 & 395

Appellate Jurisdiction Act 1876: 328-9

Appellate Jurisdiction Act 1887: 329

Aristotle: 38, 41, 201 & 374

B & C v A, Court of Appeal 2002: 468-72

Bagehot Walter: 60, 83, 138-42 & 445

Blackstone William: 251, 258, 277-88, 292-3, 309, 322, 418 & 439

Blair Tony: 50, 341 & 351-2

Bill of Rights 1690: 227, 252, 254-6 & 506

Bolingbroke Henry: 43, 72, 102-3, 133, 254, 257, 260-277, 281-2, 284-7, 209, 315, 337, 344, 376, 444, 448, 458 & 499

Brougham Lord: 294-6, 328, 333-4 & 442-4

Burke Edmund: 39, 94-96, 110-7, 119, 150, 154, 176-9, 209, 257, 260-77, 283-6, 290, 293, 338, 441, 444 & 478

Coke Edward: 19, 176, 225, 245, 258 & 315

Common law and judges: 460-479

Conservative Party: 14, 24, 95, 348, 365-7 & 488

Constitution Unit: 14, 249, 370, 381, 386, 402, 425, 449

Constitutionalism: 72-106

Convention parliament 1688: 159-60

Co-sovereignty: 239-47

Crossman Richard: 108-9

Crown & Parliament Recognition Act 1689: 227

'Declaration of Rights': 80 & 252-5

Dicey AV: 67-8, 86, 94, 139, 145-6, 152, 225, 287-95, 473

Edward I: 113, 157-8, 199 & 303

European Parliamentary Elections Act 1999: 334

European Communities Act 1972: 445, 466, 485, 491 & 505

European Convention on Human Rights: 46-7 92 & 491-2

European Court of Justice: 181

European Union: 322, 368, 384, 432-3 & 491-2

Freemasons (constitution of): 484-5

Hale Matthew: 134, 154-5, 176-9 & 251

Hood Phillips O: 77, 90, 148, 225, 300, 334, 467, 480, 487 & 489

Human Rights Act 1988: 57, 340, 445, 464-8, 485 & 492

Industrial Relations Bill 1968: 341

Jennings Ivor: 90, 146-7, 247, 295 & 377

Jolliffe JEA: 121-2, 143, 210 & 213

Judicial Committee of Privy Council: 57

Keir DL: 47, 121-2, 126-8, 138 & 223

Kilbrandon Commission 1969: 139

Labour Party: 13-4, 98, 122, 126-7, 249, 334, 341, 346, 350-1, 357, 367-9, 445 & 456

Life Peerage Act 1958: 53 & 329

Locke J: 70, 129, 133-5, 203 & 302

Lords reform: 353-72

Magna Carta: 188-9, 197, 206-8, 212, 220, 279, 252, 428, 464 & 506

Magnum Consilium: 182-3, 197-8, 207-9, 213-4 & 219
Maitland FW: 119
Medieval/Modern conceptions of Law: Appendix 2, 502
Modes of Trial Bill 2001: 341
Mother of Parliaments: 62-5, 251 & 379

Newcastle Programme 1891: 348

Official Secrets Acts 1911 & 1989: 480

Parliament: 319-336
Parliament Act 1911: 294, 330, 334-5, 339, 352-4, 357-59 & 375
Parliament Act 1949: 334, 359-60 & 477
Parliament Act 1949 (Amendment) Bill 2001: 334 & 358
Parliament Acts (Amendment) Bill 2001: 333, 358 & 382
Parliament (No. 2) Bill 1968: 339

Parliamentary Referendum Bill 2000: 394
Parliamentary Referendum Bill 2001: 382
Particularism: 403-23
Peerage Bill 1719: 144 & 424
Peerage Act 1963: 340

Peerages Act 1958: 355
Periodisation (of British history): 117-28
Place Bill 1694: 142
Place Act 1707: 143
Plato: 37, 41, 131, 201 & 494
Primitive democracy: 191-2
Proclamations Act 1539: 230
Provisions of Oxford 1258: 143, 174, 206, 241, 247 & 254

Recissory Act 1660 (in Scotland): 154
Redcliffe-Maud Commission 1966: 139

Regency Act 1706: 84, 143 & 244
***Regnans in Excelsis* (Papal Bull) 1570:** 79 & 228
Representation of the People Act 1948: 325
Royal Assent by Commission Act 1541: 223
Royal Commission on the Future of the House of Lords (2000): 360-8, 383-7 & 396-402
Royal veto 1707: 145-7

Salisbury Convention 1947: 355, 357-8, 365, 377 & 391
Salmond JW: 93 & 298-301
Scotland Act 1998: 343, 345, 434, 445 & 506
Septennial Act 1716: 55, 257, 276, 289 & 463
Single European Act 1986: 181

Statute of Marlborough 1267: 143 & 241
Statute of Westminster 1269: 118, 143, 228 & 241
Statute of York 1322: 242
Sovereignty: 65-72, 187-239 & 302-315

Tamworth Manifesto 1834: 348
Thoburn and others v Sunderland City Council and others, 2002: 462-4, 477 and Appendix 3, 504-7
Treason: 79-81
Triennial Act 1641: 257 & 280

War Crimes Act 1991: 334
Wilkes John: 257-8, 275-6 & 282
William III: 147
Witan: 182, 193, 196, 205, 207-13 & 219

Copyright © Dr Fred Nash, 2002, all rights reserved.
Printed and bound by Imprint, www.imprint.co.uk/digital
