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Modern Constitutional Ideas and Developments and the Challenge Posed to the British Constitution

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Abstract

Britain has the oldest constitutional and representative government in the world, but it is an unwritten, customary and un-codified constitution that has evolved over centuries. It possesses some, but not all, of the features now associated with modern democratic written constitutions widespread in North America and Western Europe. While this constitution enjoyed considerable support from the mid-nineteenth through the mid-twentieth century, in more recent decades it has been subject to much criticism and has been altered significantly by major recent developments. Membership of the European Union and the decisions taken to devolve legislative authority away from Westminster to local legislatures and executives in Scotland, Wales and Northern Ireland have together led to challenges to the long-established sovereign authority of the crown-in-parliament, made significant changes to the rule of law, and undermined the former ways in which the executive was

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accountable to parliament and people. The United Kingdom no longer possesses the constitution so admired until recently but has not yet evolved a new constitution capable of winning widespread support from all social strata and all parts of the kingdom. The result is a public sharply divided on how the United Kingdom should respond to the changes wrought by its membership in the European Union and the devolution of some of Westminster's authority to Scotland, Wales and Northern Ireland.

Key Words: constitution, parliament, sovereignty, devolution, European Union

Britain can reasonably claim to have long enjoyed, at least to some extent, some of the essential features of modern constitutionalism: namely, limited government, a representative legislative assembly, responsible and accountable government, judicial independence, and important civil liberties.¹ Of course, these principles were not operational in the late seventeenth century in ways that would meet the higher standards of today: the legislature represented men of property rather than the people as a whole and could be influenced by crown and aristocratic patronage; the government was primarily responsible and accountable to the propertied elite; magistrates were appointed by the monarch and tended to defend the interests of property rather than the rights of the individual; and, while there were such important civil liberties as freedom of movement, association, expression and belief, freedom from arbitrary arrest and judicial torture, and a right to trial by jury for capital offences, only a minority of men (and no women) could elect those who made laws and voted taxes. Nonetheless, it can be argued that Britain was the freest state in the world in the earlier part of the eighteenth century, and that she was freer than almost all other societies for a very long time afterwards. Over the succeeding centuries, moreover, Britain steadily developed a more open, liberal and democratic political system. The monarch and the landed aristocracy lost much of their political influence and more and more British people were enfranchised so that they could vote for their representatives in the House of Commons and hold them accountable for their actions. It has to be acknowledged that while Britain enjoyed substantial

¹ For an understanding of the general features of modern constitutionalism, see Dippel (2005), where he sets out what he regards as the ten essential features of modern constitutionalism. These are: 1. the sovereignty of the people; 2. universal principles; 3. extensive human rights; 4. limited government; 5. representative government; 6. responsible and accountable government; 7. the separation of executive, legislative and judicial powers; 8. judicial independence; 9. a written constitution as the paramount law; and 10. the people's right and ability to amend that constitution.

political benefits that were denied to the peoples of most other states in the world, it failed to engage seriously with the other essential features of modern constitutionalism. Britain has never possessed a written constitution enshrining the paramount law limiting what the executive or the legislature can do and, hence, the British people have never possessed the right or the means to amend their constitution by due process. The British executive and legislature have never explicitly accepted the constitutional doctrine of the sovereignty of the people and the British people have never succeeded in basing their legal rights on constitutional appeals to universal principles. Nor has Britain ever sought to achieve a complete separation of powers. Indeed, the decision-makers in the executive need to sit in the legislature and even judges have a role in the legislature.

For much of the twentieth century almost all political activists, informed public opinion and the general public in Britain were generally satisfied with the constitutional principles and political practices under which they lived and seemed to flourish. There was a deep and widespread belief that Britain was a free society and a well-governed state that enjoyed enough of the essential features of modern constitutionalism so that there was no need to press for the absent features of modern constitutionalism. In the last decades of the twentieth century, however, a number of developments occurred that gave rise to a significant constitutional debate and greater pressure for change. There has been a significant demand for constitutional reform that would introduce the most prominent features of modern American and Western European constitutionalism missing from the British constitution. This demand has not gone unchallenged as there are those who argue that such a programme of reforms would eventually destroy those excellent features of the British constitution that seem to have served the country so well for so long. Changes over the last twenty or thirty years have also raised the question of whether efforts to introduce more of the features of modern constitutionalism will renew or undermine the British

constitution which has evolved into its present form over the last three centuries and more.

I. The British Constitution in Need of Reform?

Britain has the oldest constitutional and representative government in the world, but it is an unwritten, customary and un-codified constitution, unlike almost all others in the developed world. This does not mean that no parts of it are written: there are, indeed, dozens of written constitutional laws that set out, for example, the composition of the legislature. There are also many written documents and judicial procedures explaining how laws are passed and what civil liberties the people possess (Moran, 2005: 71, 85; Oliver, 2003: 6, 9). Nevertheless, it is the case that many aspects of the constitution are prescriptive conventions and customary practices that are accepted without being backed up by written statutes, formal declarations or judicial decisions. These cover such crucial issues as the tacit abandonment of the royal veto since 1708, the way the Prime Minister is appointed by the crown, and the recognition that he or she ought to sit in the House of Commons. Important elements of the royal prerogative still survive, although these powers are now exercised by the Prime Minister (Oliver, 2003: 11). As head of the government, the Prime Minister appoints other government ministers, has considerable influence over who is elevated to sit in the House of Lords, and can make war, peace and international treaties without necessarily securing the express approval of parliament. What the United Kingdom clearly lacks is a single, codified constitutional document that sets out in quite short compass the main rules and regulations by which a legitimate form of government is created and can function. The Federal Constitution of the USA, for example, runs to about 8000 words; as such, it is much shorter than Britain's Great Reform Act of 1832 or the Municipal Reform Act of 1835. A written constitution of this kind possesses superior legal status to all

normal legislative measures and the US Supreme Court has the power to strike down a new law if it is held to be contrary to the Federal Constitution. In Britain, by sharp contrast, all constitutional laws can be passed, amended or repealed by a simple majority in the two houses of parliament and no constitutional law is superior to any other act of parliament (Johnson, 2004: 1). Constitutional changes do not require a particular means of ratification by means of a larger majority in the legislature or popular support through a referendum.

As the British constitution is made up of many laws passed in the normal way, and because it is composed of many customary procedures and prescriptive powers, it can never be clearly defined or strictly interpreted at any particular moment in time (Johnson, 2004: 9-11). It is continually adapting to changing circumstances and constantly evolving, if only imperceptibly. Aspects of the British constitution are almost always open to debate and can be contested without an authoritative or judicial body being able to provide a definitive interpretation. The best that can be done at any stage of its evolutionary and organic development is to describe the dominant features generally accepted over a period of time and to point out those that remain open to differing interpretations. It is the case, nonetheless, that certain features of the constitution have been entrenched for a very long time. These include three features central to the argument presented in this essay: the sovereign authority of the crown-in-parliament, the rule of law, and the accountability of the executive directly to the legislature and indirectly to the people at large (Moran, 2005: 77-78; Oliver, 2003: 9; Peele, 1995: 26). The doctrine that ultimate sovereignty lies in the combined legislature of crown, House of Lords and House of Commons gradually developed after the Glorious Revolution of 1688-1689 and until quite recently it has been regarded as a principal feature of the British constitution. William Blackstone in the 1760s (1765-1769) and A.V. Dicey in the 1880s (1885) wrote authoritative works that stressed the omnipotence of the crown-in-parliament. They both agreed that

the combined legislature could make or unmake any law whatsoever and that no person or institution had the right to set aside or over-ride the legislation so enacted. The legislature could not even bind itself or its successors because a later meeting of parliament could repeal or amend any previous statute, even one of great constitutional significance (such as the Act of Union between Great Britain and Ireland in 1800). Even the highest law court in the land could not disregard a parliamentary statute or strike it down on the grounds that it was incompatible with the constitution (Bradley, 1996: 84; Peele, 1995: 23, 33, 35).

Blackstone and Dicey, while stressing that the crown-in-parliament had sovereign, absolute and unlimited authority, still maintained that Britain was governed by the rule of law: views that have, until recently, gone unchallenged. They stress that no British government could legitimately breach the law and that government decisions could be overturned in the courts if they were held to be based on a power not properly conferred by law. No British subject could suffer physical or financial punishment unless found guilty in the ordinary courts of breaching the law. Judicial torture, arbitrary arrest, punishment without trial and retrospective laws were all illegal acts and all subjects had the right to be treated equally and fairly before the law. No subject was above the law and all were subject to the ordinary law of the realm and to the jurisdiction of the ordinary courts. Judges were independent of the executive and the legislature, and were appointed during good behaviour, but they could not challenge the authority of the crown-in-parliament or declare acts of parliament to be unconstitutional (Bradley, 1996: 85-89). Judges did not indulge in abstract statements about the powers of the executive or the legislature and did not challenge parliamentary legislation because they regarded it as contrary to superior constitutional laws, principles of natural justice or fundamental human rights. They did not review the legitimacy of the law, but rather its application and interpretation. Their general pronouncements were confined to administering and interpreting the laws passed by the legislature and they sought to reach

decisions about the private rights of specific individuals. Over time judges built up a body of precedents on how laws should be put into effect. Thus, although the crown-in-parliament was sovereign and omnipotent, it was expected to operate within known laws and according to well-accepted conventions and procedures that had legitimacy because they were prescriptive.

Blackstone and Dicey stressed that the executive was accountable to the legislature and Dicey, in particular, went further in stressing that parliament was accountable to the expanding electorate. He believed that: "The electors can in the long-run always enforce their will" (Bradley, 1996: 80). This is perhaps the nearest Britain has come to enunciating the sovereignty of the people. From 1689 onwards parliament has met in session every single year, and ever since that year executive action has been heavily dependent on taxes annually voted for by parliament. Holding the purse strings, parliament was increasingly able to call the executive to account for actions undertaken and policies pursued. Increasingly it became accepted that the House of Commons was much the superior body in voting taxes and since it was the elected chamber the voters themselves could seek to hold its members to account. In the eighteenth century the electorate was a small minority of property-owning adult males, but a series of parliamentary reform acts from 1832 to 1969 resulted in all men and women aged eighteen and over being able to vote in parliamentary elections. The electorate does not govern and does not pass laws or vote taxes, but it can change the composition of the House of Commons and hence the composition of the government. Without ever stating that the British people are sovereign, the British constitution in practice increasingly operated on the basis that the electors chose their representatives in the House of Commons and the dominant group in that chamber largely formed the government (Johnson, 2004: 31).

For at least three centuries most British politicians and many British people have praised the British constitution and have welcomed the benefits it has brought. Despite its peculiarities,

ambiguities and uncertainties, it has generally produced reasonably good government. Among the more developed political nations of the world it has produced the longest period free of violent revolution, bloody civil war, an imposed dictatorship or foreign occupation. Nonetheless, from about the 1960s and certainly from the 1980s, there has been growing criticism of the British constitution and concern about how it is developing (Johnson, 2004: 162-165; Moran, 2005: 83; Oliver, 2003: 7, 12).² These concerns were raised in part by the rising tide of modern constitutionalism, and the recognition that most other modern constitutions were written documents clearly establishing the rights of the people and the limits on executive and legislative power. But, the constitutional concerns of most British politicians and political commentators have been raised more often by serious practical political problems. These practical concerns have been expressed in parliamentary debates, media discussion and opinion polls, in the activities of pressure groups such as Charter 88, Liberty and the Scottish Convention, and in Royal Commissions and parliamentary committees on the constitution. Many different issues have been raised: the declining role of, and even reduced respect for the monarchy; the composition and legitimacy of the House of Lords; falling voter turn-out in elections; the decline in public respect towards authority in general and politicians in particular; fear that sleaze and corruption in politics is becoming endemic; concern about the prerogatives and patronage power of the Prime Minister; a lack of concern among the English majority for the concerns of Scotland, Wales and Northern Ireland; the fact that a minority of the popular vote in a general election can result in a government with a huge majority in the House of Commons; and the ability of a majority government to drive policies through parliament despite widespread popular hostility to such measures (Moran, 2005: 84-85). There have even been claims—under different prime ministers of different parties—that Britain in the later twentieth

² Crick (1964) provided something like an initial manifesto.

century has become “an elected dictatorship” (Johnson, 2004: 214-215, 308-309). These criticisms and concerns have had a very significant effect. A variety of constitutional changes have been enacted or seriously discussed in recent years. Some of these changes, particularly the policy of devolving powers to Scotland, Wales and Northern Ireland have had considerable effect on political practice in Britain and on the operation of the British constitution. More serious still have been the constitutional changes wrought by Britain’s entry into the European Community in 1973. It is impossible to look at all the changes and challenges wrought by these developments over recent years. This essay therefore concentrates on their impact on the three features of the British constitution that were largely unchallenged from the later eighteenth through until the later twentieth century: the sovereignty of crown-in-parliament; the operation of the rule of law; and the means of holding the government to account by parliament and people.

II. Challenges to the Sovereignty of Crown-in-Parliament

The United Kingdom sought entry to the European Community because of the perceived economic benefits it would bring. Many leading politicians who pressed for entry claimed that membership would not alter the British constitution or its most important political practices. For instance, Prime Minister Edward Heath, a major advocate of entry, claimed that it would not entail “an erosion of national sovereignty” (Tebbit, 2000: 291). This was disingenuous at best, and untruthful at worst. Immediately on passing the European Community Act in 1972 and upon entering this supra-national organization, parliament accepted a wide body of legislation, and even more regulations and directives that henceforth had to be given the force of law in the United Kingdom even though it was not the supposedly sovereign crown-in-parliament that originally initiated and approved of all of

these measures (Johnson, 2004: 129-130). Since the United Kingdom's entry, the number of laws, regulations and directives issuing from the European Community (now the European Union) has expanded massively. The European Union has very considerable influence over the market for goods and services, the market for labour, regional and environmental policies, and foreign economic policy. It has been estimated that about fifty per cent of domestic legislation operating in the United Kingdom originates in Europe and that eighty per cent of the rules and regulations governing British trade originate in some European body or institution (Johnson, 2004: 265-266; Moran, 2005: 81, 99). These measures largely originate in the European Commission or the European Council of Ministers, but parliament is now expected to pass legislation to bring into effect decisions taken by a body in Europe, meaning that its formerly free choice as to what to enact has been eroded (Peele, 1995: 35). The United Kingdom has accepted this constitutional arrangement and hence a growing percentage of British legislation begins its life in Europe and the freedom of the Westminster Parliament to legislate as it sees fit in many areas of life has been seriously restricted.

The United Kingdom has had to accept that the crown-in-parliament is no longer the sole and unlimited sovereign authority in matters of legislation and that European actions and initiatives constitute a higher legislative authority. Where there has been disagreement and conflict over the consequences of a European regulation or directive for the United Kingdom, the European Court of Justice has upheld European law as superior to British law and, on several occasions, it has carried decisions against the UK government. Moreover, the British law courts have taken the same view and are now free to challenge the legality and effectiveness of parliamentary statutes that are not compatible with European law (Bradley, 1996: 90-98; Johnson, 2004: 129-130; Oliver, 2003: 17; Peele, 1995: 36-38). Hence, a system of judicial review has begun to develop without any formal constitutional document setting out the terms of such a procedure. Judges have

had to recognize the new constitutional situation wherein some laws (those enacted by a European body) have superior standing to ordinary laws passed by parliament (Johnson, 2004: 38; Oliver, 2003: 82; Peele, 1995: 38). The Westminster Parliament itself has had to come to terms with this new constitutional situation, and has frequently passed laws to ensure that prior decisions taken by European bodies would be clearly known and fully administered across the United Kingdom. Both houses of parliament have also established select committees to scrutinize draft proposals for European legislation and directives and to examine whether laws emanating from Europe require new British legislation or amendments to existing statutes. These committees, despite their considerable expertise, have little control over what laws and directives emerge from Europe. They can advise and warn, but, once agreed to by the relevant European institution, the Westminster Parliament has no realistic option but to approve the measures and to ensure that they are implemented within the United Kingdom (Johnson, 2004: 267-268; Oliver, 2003: 82). The only way that the crown-in-parliament could now exert its formerly unlimited and unrestricted sovereignty in relation to European laws and directives would be to pass legislation withdrawing the United Kingdom from the European Union (Moran, 2005: 73; Oliver, 2003: 82, 201). While this might be legal in constitutional theory, it is difficult to imagine it being done in practice unless there was a very severe economic or political crisis. Moreover, withdrawing from the European Union would in itself create a constitutional crisis about what to do with the vast body of European laws, regulations and directives that have already been adopted into the law and practices of the United Kingdom.

Whereas British involvement in the European Union has had major consequences for the constitutional doctrine of the sovereignty of the crown-in-parliament that were not fully expected at the time, later decisions taken by parliament to devolve certain powers to Scotland, Wales and Northern Ireland were

always seen as having an effect on the British constitution. In 1998, three acts were passed by the Westminster Parliament to end the territorial unity of the United Kingdom legislature (*Government of Wales Act, 1998; Northern Ireland Act, 1998; Scotland Act, 1998*).³ While the Government of Scotland Act of that year explicitly affirmed the supremacy of the Westminster Parliament and it did reserve certain powers such as defence, foreign policy, and fiscal and monetary policy to itself, it did, nonetheless, in fact and in practice, devolve considerable powers upon the new Scottish Parliament and executive in Edinburgh. In effect, all powers not expressly reserved to the Westminster Parliament were devolved to the Scottish Parliament. The Scottish Parliament was given power to legislate over a broad range of Scottish domestic affairs, including home affairs, the legal system, housing, agriculture, health, and social, educational and environmental policy (Bogdanor, 1999: 203-204). It also has the power (though it has not yet used it) to vary the rate of income tax in Scotland by plus or minus three per cent. Legislation passed by the Scottish Parliament does not need to go to a British minister or to the Westminster Parliament for approval (Johnson, 2004: 176-182). The Government of Wales Act (1998) devolves much less of Westminster's power. It confers executive, but not primary legislative functions on the Welsh Assembly in Cardiff. The Secretary of State for Wales has to secure primary legislation at Westminster which will then allow him or her to let the Welsh Assembly pass subordinate legislation in the areas over which the primary legislation grants it competence. The power to implement this legislation, however, is passed to the Welsh executive and the Welsh Assembly (Bogdanor, 1999: 209-210; Johnson, 2004: 188-193). Important powers over agriculture, housing, health, education, social services, economic development and the care of the environment were also conceded by an act of the Westminster Parliament to a legislative assembly in Belfast in Northern Ireland,

³ These three acts are also available on microfiche in Dippel & Wispelwey (2004).

but the rights of the Westminster Parliament have been more explicitly safeguarded than is the case with Scotland. In addition, policing and security matters have remained with the Secretary of State for Northern Ireland who still sits in the Westminster Parliament (Johnson, 2004: 182-188). Devolution has proved much more difficult to operate in Northern Ireland, however, because it has taken much longer to get the two bitterly opposed communities (the Nationalists and the Unionists) to cooperate in the application of these devolved powers in a spirit of cooperation. The Assembly has been suspended four times, with the legislative and executive authority then returning to Westminster (Johnson, 2004: 187). In May 2007, to the surprise of many observers, Sinn Fein and the Democratic Unionist Party, the main Nationalist and Unionist parties agreed to form a coalition with Ian Paisley of the Democratic Unionist Party as First Minister and Martin McGuinness of Sinn Fein as Deputy First Minister. So far, they have cooperated quite well and even agree to seek greater devolved power from the Westminster Parliament. British sovereignty in Northern Ireland has already been diluted by the creation of a North-South Ministerial Council and a British-Irish Council of Ministers that have given the Irish Republic a role in the affairs of Northern Ireland. The Westminster Parliament is clearly quite willing to reduce its role in Northern Ireland if it can get agreement and cooperation between the divided communities of the province.

It is now clear that the sovereignty of crown-in-parliament, once such a major and overarching feature of the British constitution, has been compromised and attenuated in recent years. With so much law being made by European bodies and passed or applied by devolved legislatures in the different parts of the United Kingdom, it is now evident that the parliament in Westminster does not have the absolute and unrestricted sovereign authority that it possessed until relatively recently. It has been eroded, it may well be eroded further, and it could only be restored by a decision to withdraw from the European Union and to repeal all the

devolution legislation. This may be possible in theory, but it is almost impossible to envisage it being done in practice.

III. Changes to the Rule of Law

Both Britain's entry into the European Community and devolution within the United Kingdom have altered the constitutional role of the law courts and the operation of the rule of law. By accepting membership of the European Community, the United Kingdom entered into an association that was based on very different legal principles and operated according to quite different practices. Most parts of the United Kingdom possess and operate legal procedures based on common law principles. By contrast, the European Community has been constructed on the basis of continental European public law principles, with its emphasis on Roman law, with the state conceived of as a legal entity, and with bureaucratic officials trained in law. European legal practices are characterized by a ready acceptance of bureaucratic methods and by the enunciation of broad general principles that leave judges to work out the details. The English common law tradition, on the other hand, has always shown some suspicion of broad and abstract principles that seek to have binding effect (Johnson, 2004: 239-240, 243-244, 316). There is a preference instead for giving courts the discretion to treat each case on its merits and to adapt guiding principles to specific circumstances. English law largely eschews general principles and prefers to establish specific rules for the courts to apply without resorting to any consideration of general policy or principle.

Since it entered the European Community, the United Kingdom has had to accept, as we have seen, that European law takes precedence over domestic legislation and that the European Union can require amendments to parliamentary legislation or even entirely new acts of parliament to ensure that European law is applied within the United Kingdom. This has also affected legal procedures within the United Kingdom. For many issues the House

of Lords is no longer the highest court of appeal. Instead, petitions can now be taken to the European Commission on Human Rights and appeals can be made from British law courts to the European Court of Justice whose decisions and reviews are final. Particularly serious in its implications is the Human Rights Act of 1998, which came into effect in October 2000 and incorporates the European Convention on Human Rights into British law (Bradley, 1996: 98-101). This act is written in terms that require British courts to interpret British legislation in a manner ensuring that it is compatible with the European Convention. More importantly still, it appears to suggest that if the European Court of Justice resolved that a part of any legislation was not compatible with the European Convention on Human Rights, then the Westminster Parliament would have no option but to amend British law in order to comply with the Convention (Johnson, 2004: 29, 130-131, 241-251, 264-265). The European Court of Justice has sometimes ruled that, for the sake of clarity, the Westminster Parliament must amend or repeal laws that it had previously passed. If the European Court of Justice finds against British legislation, it is hard to see how parliament or the British courts could refuse to take action to ensure compliance. Furthermore, in any dispute over a British act with a European element to it that reaches the House of Lords—the final court of appeal in the United Kingdom—it has been decided by the judges that there must be a final request to the European Court of Justice for a final ruling. British judges are, thereby, acknowledging the superior jurisdiction of the European Court of Justice (Johnson, 2004: 129-130). This trend gives the European Court of Justice the right of constitutional review over parliamentary legislation, which it may well use more frequently in the future.

Since European law now takes precedence over past or future parliamentary legislation, some laws are now seen as being constitutionally superior to ordinary legislation. In the British constitutional tradition, this was not previously the case. In consequence of this, the British courts themselves are now

beginning to develop a new doctrine of constitutional rights that does not actually allow them to strike down parliamentary legislation as unconstitutional, but which enables the courts to place a burden on parliament to use express and clear words if it wishes to interfere with rights set out in the Human Rights Act. British courts now have the power to quash decisions that are in breach of the European Convention on Human Rights except where the breach is expressly allowed by an act of parliament (Johnson, 2004: 129-130). This introduces new legal concepts and constitutional arguments into British law and jurisprudence and strengthens the hands of the judiciary by adding new instruments for the control of legislation and the upholding of the rule of law.

Devolution within the United Kingdom has also had constitutional consequences for legal process and the rule of law. In Scotland, the Presiding Officer (the Speaker of the single chamber parliament) must assure himself that any legislation proposed by the Scottish Parliament lies within its constitutional powers and the Scottish law officers may refer a bill to the Judicial Committee of the Privy Council for a decision as to whether it lies within the legislative competence of the Scottish Parliament (Bogdanor, 1999: 205-206). In Wales, too, the courts have the power to determine whether the Welsh Assembly has acted constitutionally and within its powers. Again, the final court of appeal in any dispute is the Judicial Committee of the Privy Council. The consequence of devolution is that it is no longer the Westminster Parliament that can declare such legislation incompatible with its own formerly sovereign authority as the Judicial Committee has, in effect, taken up the functions of a constitutional court (Bogdanor, 1999: 206-207; Oliver, 2003: 293).

Concern over review of conflicting and incompatible legislation passed by devolved legislative bodies and by the Westminster Parliament in relation to European law has led to serious discussion in the United Kingdom over how best to deal with constitutional appeals and led to suggestions that the United

Kingdom improves its system of appellate justice. Proposals were made in June 2003 to abolish the office of Lord Chancellor, the senior law officer of the crown, and to set up a Judicial Appointments Commission to improve the quality of judges and the means by which they are appointed. It has also been proposed that the United Kingdom needs a distinct Supreme Court to take over the appellate work of the judges in the House of Lords (Johnson, 2004: 255-258).⁴ These proposals were motivated by a belief that British legal institutions needed to be brought more into line with European models despite the United Kingdom's very different history and the fact that the judicial system appeared to be working reasonably well. Not all judges and legal experts have been convinced of the need for these changes, and public opinion has shown little interest in the issues raised.

IV. The Accountability of the Executive to Parliament and People

British governments were for a long time held to be directly accountable to parliament and indirectly accountable to the electorate. Although sovereign power was regarded as residing in the crown-in-parliament, and although the British people have always been referred to as subjects and not citizens, it was believed that governments could be held to account by parliament and that parliament was accountable to the people. Since the later twentieth century both of these comforting beliefs have been subjects of considerable concern and heated discussion.

The Prime Minister long ago inherited many of the prerogative powers of the crown, but it is only in recent years that the use made of these powers has come under increasing challenge as parliament has been by-passed and voters have become less deferential to those in office. The power of the Prime Minister to appoint and dismiss cabinet ministers, to exercise a significant role

⁴ See also "*Lord chancellor and reform*" (2004).

in the appointment of peers, bishops and judges (who sit in the House of Lords), and, most serious of all, to take the country to war without the formal approval of parliament has come under increasing scrutiny. It has also become more obvious to the media and the public that many important policy decisions have been taken by a small group of unelected people around the Prime Minister and that many major policy issues have thus never been considered by the whole cabinet (Johnson, 2004: 224-228). New parliamentary procedures, civil service reforms, codes of conduct in public life and new public bodies have all been created without referring these matters to parliament. Unless there is a party revolt threatening the Prime Minister's majority in parliament the executive cannot be held properly to account by parliament on many issues. Both Margaret Thatcher and Tony Blair were criticized for stretching the powers of the executive at the expense of the authority of parliament. On occasion, the British government has appealed over the heads of the people's representatives in parliament by holding national referenda on major constitutional issues, though it has never done so to endorse the sovereignty of the people. While this has not yet become a regular feature of British politics, the device was used in 1975 to decide whether the United Kingdom should remain a member of the European Community and in the late 1970s and late 1990s on the issue of devolution to Scotland and Wales (Johnson, 2004: 131-132). While the results of a referendum does not absolutely bind parliament to accept the result given by the people, it is difficult to see how a clear result could be rejected. Certainly, parliament accepted the results of the referenda in 1975 and 1998.

When legislation is submitted to parliament almost all of it is proposed by government ministers. Very little legislation is now proposed by backbench MPs or outside pressure groups (as was the case in the eighteenth century) (Moran, 2005: 198). The chance of a private member's bill being carried into law is quite remote. The parliamentary calendar is dominated by government business and ministers can ensure that there is insufficient time to pass any

legislation not proposed by them. Once a government is installed with a clear majority in the House of Commons there are very few checks on its ability to pass measures of its own devising. The royal veto was abandoned centuries ago and the power of the House of Lords to veto legislation approved by the House of Commons has been severely eroded. The Parliament Acts of 1911 and 1949 enable a determined majority in the House of Commons to over-ride any opposition in the upper chamber (Johnson, 2004: 124-125; Oliver, 2003: 188; Peele, 1995: 34). Bills passed by the House of Commons that are certified as money bills by the Speaker of the House of Commons are approved by the crown without requiring the consent of the House of Lords. Other legislation that has been approved by the Commons can be held up for only one year by the House of Lords because the Commons can insist on the Lords accepting its legislation thirteen months after the second reading of the measure in the House of Commons. The House of Commons is generally reluctant to invoke the provisions of the Parliament Act of 1949—it has had recourse to the act on only a few occasions—but it is always available to the Commons to override determined opposition in the House of Lords. The provisions of the Parliament Act of 1949 have seldom been invoked by the government because the House of Lords is quite aware of the superior authority it gives to the House of Commons. It has also been generally accepted by the Lords, under what is known as the Salisbury Convention, that its members will not normally block a measure for which the government can claim a clear electoral mandate, by making it, for example, a major plank of its election manifesto (Oliver, 2003: 8, 191). The most that a determined majority in the House of Lords can do, therefore, is to force the government to pause for second thoughts about its proposed legislation and to be prepared to consider amendments suggested by the upper chamber.

The entry of the United Kingdom into the European Community also reduced the ability of parliament to hold the British government to account because so many executive decisions

resulted from European laws, regulations and directives, or emerged from decisions taken by the European Commission, the European Council of Ministers and the European Council of Heads of Government. These laws do not emerge from the European parliament so much as from unelected executive and administrative bodies. They result from a complex process of negotiation and from bureaucratic and political compromises in which the British government partakes, but the Westminster Parliament is not fully consulted in this process of bargaining and it often has to pass legislation resulting from executive actions over which it has had almost no control or even prior scrutiny (Bogdanor, 1996: 9-15). The British government is left on the sidelines while European ministers and bureaucrats in other bodies make the real political decisions. The European parliament itself is not a powerful legislative body and its ability to hold European ministers and officials to account is decidedly limited. The real power in the European Union is not held by elected legislators, whose role is to pass laws by open, democratic process and to hold European officials and governments to account; power is, instead, held by unelected bureaucrats and by the executive ministers of the member states (Johnson, 2004: 265-266).

If we turn from the Westminster Parliament's ability to hold the executive to account, and to the power of the people to limit the powers of the executive or the legislature, we encounter further difficulties that have attracted much recent debate and controversy of a constitutional nature. It is obvious, for example, how little ability the electorate has to hold the House of Lords to account. Until 1958, apart from twenty-six bishops of the Church of England and a smaller number of royal judges (who were all members of the upper chamber for life), the House of Lords was composed of hereditary peers: a large majority of whom regularly supported the Conservative Party. The other parties naturally resented this, particularly when the Labour Party, and not the Conservatives, possess a majority in the House of Commons. An effort was made to redress this constitutional imbalance from 1958

onwards by the creation of large numbers of Life Peers, largely created at the behest of party leaders. Most Life Peers were former ministers and MPs, prominent business and professional men, or leading trade unionists. By the early 1990s the Life Peers made up about one-third of the members of the House of Lords, though they often constituted a majority of those who regularly attended and spoke in the upper chamber (Moran, 2005: 212). The continued pro-Conservative bias of the House of Lords and the chamber's lack of a clear democratic legitimacy led the Labour government, elected with a large majority in 1997, to consider ways of making the House of Lords more representative of modern British society. The House of Lords Act in 1999 abolished the entitlement of all hereditary peers to an automatic right to sit in the upper chamber. Instead, ninety-two of the hereditary peers were selected by the hereditary body as a whole to continue sitting in the House of Lords as a temporary measure (Johnson, 2004: 127-129, 210-216; "*House of Lords Act*," 1999; Oliver, 2003: 193-200;). A Royal Commission was established in 1999, which reported in 2000 with proposals to have a largely appointed upper chamber, but with a small minority of elected members. These proposals, however, were not very popular with any body of opinion and have not been implemented (Royal Commission Report, 2000). In 2001, the Blair government produced a White Paper, proposing to reform the membership of the House of Lords by having 480 members appointed and 120 elected, but this too found little favour inside or outside parliament. In 2003, free votes were held in both houses of parliament on a range of options, from a largely appointed, to a wholly elected chamber, to the complete abolition of the House of Lords, but no option received a majority in the House of Commons. In 2004, the government announced an indefinite postponement of further reform in the face of an anti-reform majority in the House of Lords (Moran, 2005: 209-213). On 7 March 2007, the House of Commons returned to this issue and debated no fewer than ten options for the reform of the House of Lords. It voted overwhelmingly to retain a second

chamber, but rejected all proposals for accepting a significant number of appointed, as distinct from elected, members of the upper chamber. The largest majority was in favour of a fully elected upper chamber, a decision that surprised the government and political commentators in such newspapers as *The Times* (on March 8, 2007). To date, the government has still failed to come up with a formal legislative proposal to translate the majority vote in the House of Commons into a constitutional reform. Reform of the upper chamber has proved intractable because of the sharp divisions between those who wish to see a nominated chamber that cannot challenge the democratic legitimacy of the majority of MPs elected to the House of Commons and those who wish to see a fully elected chamber but cannot agree what electoral system should be adopted. The devolved Scottish Parliament and the devolved assemblies in Wales and Northern Ireland have avoided this dilemma by having single chamber bodies.

The House of Commons is the oldest continuously surviving elected representative legislature in any major country, and since 1969 it has been elected by male and female voters aged eighteen and over. While it is clearly a democratically elected chamber, it can be argued that the electoral system does not produce a House of Commons that is genuinely representative of the electorate. Elections at Westminster are based on the principle of single-member constituencies so that the voters know clearly who their MP is and can appeal to him or her for advice or support. Each elector has one vote only and the candidate who achieves the most votes, even if it is not a majority of all the votes cast, is elected to parliament. The turn-out at general elections has steadily declined in recent decades, however, with the result that the percentage of electors casting their votes has declined from a figure in the eighties to one in the low seventies. To compound the problem, most seats are contested by three or more candidates and thus the “first past the post” selection procedure means that in many constituencies the winning candidate has not obtained a majority of the total votes cast. Since some seats are won by large

majorities and others by slim majorities, it is quite possible for a party to secure a large majority of seats over all while failing to gain a majority of the votes cast by the electorate at large. Clement Attlee in 1945, Margaret Thatcher twice in the 1980s, and Tony Blair in 1997 all secured very large majorities with a percentage vote between the high forties and the low forties (Freedland, 2000: 62).

The Westminster electoral system has not been adopted for elections to the European Parliament, the Scottish Parliament or the devolved assemblies in Wales and Northern Ireland. It is far from clear, however, that the other methods adopted have produced more democratic or more representative results. The turn-outs for elections for the European Parliament, the Scottish Parliament and the devolved assemblies have been significantly lower than in any general election for the Westminster Parliament. The 1999 election for the European Parliament produced a dismal turn-out of a mere 24% of the qualified United Kingdom voters. This figure rose in 2004, but only to 38.5% of the voters. Only 59% of voters elected the Scottish Parliament in 1999, and a mere 46% voted for the Welsh Assembly in the same year. In 2003, the percentages were only 49% and 38% respectively (Moran, 2005: 228). In May 2007 voter turn-out increased to nearly 52% in Scotland and to just over 43% in Wales, at a time when there was greater interest in both countries in securing greater devolved powers from Westminster. For elections to the European Parliament a system of proportional representation using the d'Hondt formula, closed party lists, and large multi-member regional constituencies is used (Bogdanor, 1999: 219-224). While this method tends to distribute the votes cast more fairly between the parties than the simple majority system adopted in elections for the House of Commons, it means that political parties can determine the order of priority of the members elected by ranking their candidates without reference to the electorate (Bogdanor, 1999: 221, 225-226). This results in the voters having very little sense of a particular MEP (Member of the European Parliament)

being their representative in very large, multi-seat constituencies where they have voted for a party list and not for an individual candidate. Elections for the Scottish Parliament and the Welsh Assembly use the additional-member system of proportional representation. Each elector is allowed two votes, one for a constituency member elected on the simple majority system used for Westminster elections and one to indicate a preference from regional party lists where the party determines the order of precedence in which to rank its candidates. The number of votes cast for each party list is divided by the number of constituency members elected by each party, plus one. The use of this divisor (the d'Hondt formula) delivers a more proportional representation, though it is not exactly proportionate to the number of votes cast, as in both Scotland and Wales there are more constituency members than list members elected. While more democratic in one sense, this method produces some members who are expected to look after the affairs of their constituents and other members who have no direct contact with the electors who voted for them. The two types of members have very different workloads and a different status with the voters (Bogdanor, 1999: 224-225). More obviously, the electoral formula makes it very difficult for one party to win a very clear majority in either the Scottish Parliament or the Welsh Assembly. This led to coalitions being formed in both countries: between Labour and Liberal Democrats in Scotland until the election of 2007 and between Labour and Plaid Cymru in Wales (Bogdanor, 1999: 215; Moran, 2005: 223, 226). While results of this kind are common in Europe, they have been quite rare at Westminster and it means that power is held by a coalition created by party negotiations and not by clear voter choice. What may well prove more contentious in future for the unity of the United Kingdom are the results of the elections held in May 2007. In Wales, the Labour Party lost seats to the nationalist party, Plaid Cymru, and could only sustain the coalition between the two parties by agreeing to support a proposal to seek a further devolution of authority from the Westminster Parliament to the

Welsh Assembly during the lifetime of this newly elected Welsh Assembly. In Scotland, the situation shows even greater potential for the dismemberment of the United Kingdom. The Scottish Nationalist Party won more seats in the elections to the Scottish Parliament in May 2007 and, although it only gained 47 out of the 129 seats in the Scottish Parliament, became the largest single party (with a mere one seat more than the ousted Labour Party). As a result, the Scottish Nationalists have formed a minority administration in Scotland, with their leader, Alex Salmond, elected as First Minister. He and his party are seeking to secure majority support in Scotland by pursuing a populist agenda and by pointing out their policy differences with the UK government. They have already proposed that there should be a referendum in the relatively near future promising the Scottish voters the opportunity to vote to break the Union with England and to create an independent Scotland.

The situation before 2007 had helped to produce some public dissatisfaction with the Scottish Parliament and the Welsh Assembly, which were both less popular as institutions than when they were first established. Both bodies have regained a greater measure of public support since the elections of May 2007, but only by increasing the constitutional strain between themselves and the Westminster Parliament. The situation in Northern Ireland proved even less satisfactory until the changes achieved in 2007. There the devolved assembly is elected by a system of proportional representation with an executive expressly designed to be a coalition based on the percentage of party members elected to the assembly. The system was adopted to compel the mutually hostile Nationalist and Unionist parties to share power and cooperate. It proved so difficult to achieve this admirable objective that the executive and the assembly in Northern Ireland were suspended four times and power reverted to the Westminster Parliament and the Secretary of State for Northern Ireland in the Westminster-based executive (Johnson, 2004: 131, 187; Moran, 2005: 241). To the surprise of many, but to the delight of the

British government, the leaders of Sinn Fein and the Democratic Unionist Party, the two parties most committed to a united Ireland and to keeping Northern Ireland within the United Kingdom, respectively, agreed in May 2007 that they would attempt to manage the internal affairs of Northern Ireland through a coalition government. This cooperation has led to suggestions that further powers should be devolved from Westminster to the Assembly in Northern Ireland.

Devolution has produced constitutional tensions throughout the United Kingdom that have led to demands in Scotland, Wales and Ireland for a further devolution of power from Westminster and a greater dilution of the former absolute sovereignty of the Westminster Parliament. Devolution has also had a serious impact on the work done and the role performed by Westminster MPs elected by voters in Scotland, Wales and Northern Ireland. Since major policy areas in these countries or regions have been handed over to their local parliament or assemblies, Scottish, Welsh and Northern Irish MPs at Westminster have far less legislation to consider of direct relevance to their constituents and are called upon far less by their constituents seeking advice and support. Voters in these parts of the United Kingdom are more likely to look to those politicians representing them in the Scottish Parliament and the assemblies for Wales and Northern Ireland. Although these devolved bodies have been in existence since 1999, these countries have retained their pre-1999 representation in the Westminster Parliament. In terms of population all these parts of the United Kingdom are over-represented in the Westminster Parliament compared to England, where 85% of the people live. Scotland had 72 MPs at Westminster before devolution, but only 59 MPs now: a figure which should be slightly greater if its representation were based on the same population ratio as England. This reduction was accepted by the Labour party with some reluctance, as it is proportionately stronger in Scotland than in England (Bogdanor, 1999: 211, 232, 264). There is, at present, no suggestion of reducing the representation of Wales and Northern

Ireland at Westminster because less power has been devolved to the executive and assemblies in Cardiff and Belfast.

Of much more serious concern to English MPs and English voters is the so-called “West Lothian Question”, named after Tam Dalyell, the MP for West Lothian who first raised the topic in the 1970s when devolution was being seriously debated in parliament. He pointed out that Scottish MPs are able to vote at Westminster on legislative matters of great importance to the English people (on such matters as education and health policies, for example), when such policy areas, so far as they affect Scottish people, are dealt with in the Scottish Parliament where no English MP can cast a vote (Bogdanor, 1999: 227-235; Johnson, 2004: 196; Oliver, 2003: 288). Moreover, if a Westminster government ever becomes dependent on its Scottish MPs for its overall majority (as has been the case in the past), then using them to pass legislation on domestic English affairs would increase the likelihood of English protests against the whole policy of devolution and the right of Scottish MPs to vote in the Westminster Parliament on such issues (Oliver, 2003: 288-289). Associated with this concern is the problem raised when a Scottish MP at Westminster becomes a minister responsible for a policy area such as health or transport (as has in fact happened in the Blair government since devolution) that concerns England but not Scotland.⁵ The West Lothian question has therefore raised fundamental questions that remain unresolved. Should the United Kingdom create a genuinely federal structure and a separate parliament for English domestic affairs and restrict the Westminster Parliament to the issues, such as defence and foreign policies, which concern the whole United

⁵ As recently as June 25, 2006 the Scottish edition of *The Observer* newspaper claimed that there was growing English dissatisfaction with the fact that John Reid, who was at that time a Scottish MP and the Home Secretary, could make decisions about the police in Lancashire, England, but not in Lanarkshire, Scotland, and Douglas Alexander, the Transport Minister at that time, could in future impose road charges in England, but not on his own constituents in Scotland.

Kingdom? The problem with this solution is that England has 85% of the population and a greater proportion of the wealth of the United Kingdom (Bogdanor, 1999: 271-273; Oliver, 2003: 290). On the other hand, proposals to set up several regional parliaments in England as an alternative have attracted no real public enthusiasm: an apathetic public heavily rejected a referendum for a regional assembly for the north-east of England.⁶ On the other hand, it would clearly break the Union to exclude Scottish MPs from Westminster when the Westminster Parliament still controls reserved issues that are of great concern to Scotland (Bogdanor, 1999: 229). What is most often proposed is that Scottish MPs should adopt a self-denying ordinance (or should be instructed to do so) not to take part in debates and votes on policy and legislative issues concerning England alone (Oliver, 2003: 289). Even this, however, would deny the Scottish MPs a role in the majority of business in the Westminster Parliament and reduce their status to that of second-class MPs, which might also undermine the Union. The result is an anomalous and unsatisfactory situation. The Westminster Parliament serves different functions and performs different roles: it is the domestic parliament for England, a part of a domestic parliament for Wales, a federal parliament for Scotland and Northern Ireland, and in some areas still functions as a parliament for the United Kingdom.

V. Conclusion

The United Kingdom no longer possesses the kind of constitution described by A.V. Dicey in the late nineteenth century. In recent years the three core features of the British constitution so widely accepted for so long—the sovereignty of parliament, the rule of law and the accountability of the government to parliament

⁶ A referendum in the north-east of England on a regional assembly in November 2004 attracted a turn-out of only 47.8% of the voters and of these 78% rejected the proposal. See the BBC (British Broadcasting Corporation] Report (2004).

and people—have all been subject to change. The constitutional balances that once existed have been seriously eroded, chiefly by entering the European Community, by devolving power to the Scottish Parliament and the assemblies in Wales and Northern Ireland, and by seeking to improve the democratic legitimacy of the House of Lords. The United Kingdom is clearly in the midst of major constitutional changes and significant reforms. These changes have not so far created a rational, co-ordinated, coherent political system based on clear constitutional principles, but they have instead produced a jumble of competing executive and legislative bodies (Johnson, 2004: 3). It has, thus far, proved impossible to produce a genuinely federal structure for the United Kingdom and the asymmetrical devolution that has been adopted has created as many problems as it has solved. Some problems, such as the West Lothian question and the reform of the House of Lords, have not been properly addressed at all. Tensions exist between the devolved Scottish Parliament and Welsh Assembly on the one hand and the Westminster Parliament on the other, and are likely to increase. The attempt to devolve power to Northern Ireland was long mired in difficulty, though this situation has recently improved rather significantly. It has clearly proved very difficult to reform a constitution so heavily reliant for so long on custom, precedent and convention and in a society so wedded to traditional ways of governing itself (Johnson, 2004: 2). The reforms voluntarily adopted and the changes forced upon the United Kingdom by entry into the European Community have not been connected to past history, experience or precedent and the devolved legislative bodies are not overwhelmingly popular. As a result, all the recent changes have failed to win massive endorsement from public opinion and some of them have been largely rejected. The reforms and changes that have occurred in the last thirty years or so have not produced any greater respect for politicians, higher voting figures in elections, deeper involvement in political parties or more enthusiastic participation in politics in general. The old British constitution no longer flourishes and a

completely new one has not been created. Educated public opinion is sharply divided on what has been happening, and there is no great enthusiasm for an alternative constitutional model based on the ten essential principles of modern constitutionalism. It is, therefore, far from clear whether at the present moment the British constitution is in the process of being reformed or has in fact been undermined.

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現代憲法理念與發展及英國憲法面臨的挑戰

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摘 要

英國擁有世界上歷史最悠久的立憲及代議制政府，但是，英國憲法是一套不成文的、習慣的、非法典化的，且歷經數世紀演變的憲法。它與北美及西歐國家盛行的現代民主成文憲法雖具有某些共同特徵，也僅是部分。英國憲法在十九世紀中葉至二十世紀中葉間獲得高度推崇，近幾十年來卻飽受批評，且在最近遭到大幅度的修改。加入歐洲聯盟，將立法權從西敏寺下放至蘇格蘭、威爾斯與北愛爾蘭的地方立法及行政機關等決定，使得長久以來「君臨國會」的主權面臨挑戰，法治發生重大改變，同時，也破壞了過去行政機關向國會及人民負責的做法。英國憲法已不再像過去那樣令人稱頌，同時尚未發展出一套足以獲得社會各階層以及王國各地區廣泛支持的新憲法。這種情況導致大眾的意見嚴重分歧，對於英國該如何因應加入歐洲聯盟以及西敏寺權力下放至蘇格蘭、威爾斯與北愛爾蘭後引發的種種改變，無法產生共識。

關鍵詞：憲法、國會、主權、地方分權、歐洲聯盟