PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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to one another'.[102] What Michael Oakeshott calls 'the system of superficial order' is, of course, always 'capable of being made more coherent'.[103] And while this can often be a useful and positive exercise, 'the barbarism of order appears when order is pursued for its own sake and when the preservation of order involves the destruction of that without which order is only the orderliness of the ant-heap or the graveyard.'[104]

Modern constitutions, especially when colonised by lawyers, are particularly prone to this type of orderliness, presumably because one of the basic legal myths is that an answer to any issue can always be found in the body of the law.[105] What lawyers often fail fully to appreciate, especially when they theorise about constitutions, is that, despite their textuality,[106] they are replete with gaps, silences and abeyances. Further, these silences are not oversights; they are not even truces between opposing defined positions. Abeyances, as Michael Foley notes, are 'a set of implicit agreements to collude in keeping fundamental questions of political authority in a state of irresolution'.[107] Far from being susceptible to orderly compromise, these abeyances 'can only be assimilated by an intuitive social acquiescence in the incompleteness of a constitution'.[108] Being important aspects of the exercise of managing political conflict, such obscurities are functional.[109] Constitutions—and constitutional laws—are as much instruments in the on-going business of state-building as they are constraints on the practices of government.

[102] Oakeshott, above n 58, at 34–35.

[103] *Ibid* at 35.

[104] *Ibid.*

[105] The most prominent contemporary advocate is Ronald Dworkin: see his *Taking Rights Seriously* (Cambridge, Mass, Harvard University Press, 1977).

[106] See Wayne Franklin, 'The US Constitution and the Textuality of American Culture' in Vivian Hart and Shannon C Stimson (eds), *Writing a National Identity: Political, Economic, and Cultural Perspectives on the Written Constitution* (Manchester, Manchester University Press, 1993), ch 1; Steven D Smith, *The Constitution and the Pride of Reason* (New York, Oxford University Press, 1998).

[107] Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (London, Routledge, 1989), xi.

[108] *Ibid* at 10.

[109] See, eg, Albert V Dicey and Robert S Rait, *Thoughts on the Union between England and Scotland* (London, Macmillan, 1920), 191–193. Here the authors analyse art 19 of the Treaty of Union of 1707, which seemed to protect the integrity of Scots law by refusing any jurisdictional claim of the English courts. But the position of the House of Lords was left unmentioned. Dicey and Rait comment: 'Did the Commissioners, one asks, intentionally leave a difficult question [the possibility of an appeal from the Court of Session to the House of Lords] open and undecided? The most obvious and possibly the truest reply is that such was their intention, and that prudence suggested the wisdom of leaving to the decision of future events the answer to a dangerous inquiry which after all might not arise for years. There must have seemed much good sense in leaving a curious point of constitutional law practically unsettled until by the lapse of twenty years or more every one should have become accustomed to the workings of the Act of Union.' This type of analysis could equally be applied to the Anglo-Irish Agreement (Cmnd 9657, 1985) and the Belfast Agreement (Cm 4292, 1999) with respect to governmental arrangements affecting Northern Ireland.

CONCLUSION

That constitutions are to be viewed essentially as instruments of state-building rests on a recognition of the complex nature of political power. Political power is not the same as force; rather, it is generated through authority, that is, through the acceptance by the people of the legitimacy of a governing regime. Thus viewed, the imposition of limitations on the exercise of governmental authority will often provide a method of generating more political power—constraints, in other words, can be enabling.[110] Consequently, although formal authority rests in the institutions of government, the extent of that authority is in reality a product of the character of the political relationship that exists between that institutional structure and the people. In this sense, the political order—the sense of a political unity of a people—must be acknowledged to precede the constitutional order understood as text. The political provides the foundation for the constitutional.[111]

It is this primacy of the political that dictates the ambiguous and provisional character of constitutional texts. By virtue of its character, the text is never able to grasp all the precepts underpinning the practices of politics. But even if it were, the tensions between political practices and more basic conflicts—that is, between the first and second order conceptions of the political that gives politics much of its dynamic quality—retains the potential to destabilise that accommodation.[112] Although this was well understood by early-modern theorists,[113] it seems today in danger of being submerged beneath the rhetoric of constitutional legalism. Ronald Dworkin, one of the principal exponents of this position, occasionally does seem to recognise the sensitive political character of constitutional reasoning.

[110] This is the theme that Jon Elster has recently been exploring as an aspect of what he calls 'constraint theory': see Elster, above n 9.

[111] Cf Carl Schmitt, *Verfassungslehre* (Munich, Duncker & Humblot, 1928), esp ch 8; for French translation see Carl Schmitt, *Theorie de la Constitution* Lilyane Deroche trans (Paris, Presses Universitaires de France, 1993). In relation to Schmitt's argument that the political is the pre-constitutional foundation of the constitution, Preuss (above n 60, at 157–8) notes: 'This has a far-reaching consequence—probably one which, next to the notorious friend-enemy theory of the political, has instigated the most fervent resistance, at least among constitutional lawyers: the consequence that the integrity of the political order can—and sometimes even must—be sustained against the constitution, through the breach of the constitution, because the essence of the political order is not the constitution but the undamaged oneness of the people.' On occasions, Schmitt's argument seems to rely on an unresolved ambiguity between the ancient and modern usages of the term 'constitution'. But, again, where he errs is in drawing an overly essentialist (that is, an ethnic rather than a civic) interpretation of the idea of the unity of a people.

[112] It is for this reason that the attempt by John Rawls to resile from his earlier foundationalism (see Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1972)) and rely on an 'overlapping consensus'—'a consensus that includes all the opposing philosophical and religious doctrines likely to persist and gain adherents in a more or less just constitutional democratic society'—fails adequately to reorientate the idea of 'justice as fairness' as one that emerges within a political tradition: see Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14 *Philosophy and Public Affairs* 223, 225–226.

[113] As we have seen, Locke and Montesquieu recognised the necessity of executive action beyond law. That Hobbes rejects the idea of law as foundational of political order is evident in his argument that, when individuals covenant with one another to establish the office of the sovereign, they do so by an act of alienation rather than of delegation.

But more commonly, the political aspects are repressed. 'Some issues from the battleground of power politics' he argues, are called 'to the forum of principle' and in this special constitutional arena such 'conflicts' are converted into 'questions of justice'.[114] But the process of conversion from political to legal remains mysterious, and his call for 'a fusion of constitutional law and moral theory',[115] suggests ultimately that he seeks to circumvent politics by appealing to the transcendental character of law.

Adherence to law, it must be emphasised, is vital. Rulers lose their state, Machiavelli maintained, 'the moment they begin to break the laws and to disregard the ancient traditions and customs under which men have long lived'.[116] But this is not because law is divinely prescribed, it is not because it reflects some natural equilibrium, it is not because it incorporates fundamental moral principles and it is not because it is an expression of transcendent Reason. Governments adhere to law —to the extent that they do—essentially because it is a prudential necessity. Law observance is necessary for power maintenance. Only by openly acknowledging this basic point—one that is rooted in the primacy of the political—are we likely to be able to address the range of political questions that constitutional discourse throws up for consideration in a sensible manner.

[114] Ronald Dworkin, 'The Forum of Principle' in his *A Matter of Principle* (Cambridge, Mass, Harvard University Press, 1985), 71.

[115] Ronald Dworkin, 'Constitutional Cases' in his *Taking Rights Seriously* (Cambridge, Mass, Harvard University Press, 1977), 149.

[116] Machiavelli, *The Discourses*, III.5.

3

What is Parliament for?

ADAM TOMKINS

We have been in recess since July, and during that time there has been a fuel crisis, a Danish no vote, the collapse of the Euro and a war in the middle east, but what is our business tomorrow? The Insolvency Bill [*Lords*]. It ought to be called the Bankruptcy Bill [*Commons*], because we play no role.[1]

INTRODUCTION

THESE WORDS WERE spoken in the autumn of 2000 by one the twentieth century's most committed parliamentarians, Tony Benn MP. Even if he was exaggerating a touch with his claim that the euro had collapsed, the question he poses is a pressing one: in the era of sound-bite politics, of government by spin, of decentralisation within the United Kingdom and globalisation without, what is Parliament for? With new (or at least renewed) sites of power emerging at the European level and within the United Kingdom at the regional level, where should national institutions turn? As a partial answer to this question, this chapter offers a vision of how one of our most special and, once, cherished institutions—Parliament—might develop in the opening years of the twenty-first century.

The argument in this chapter has three threads. The first and perhaps the most obvious is that we cannot understand what should become of Parliament until we have first understood something of how we arrived at the situation in which we now find ourselves. As we shall see, when we consider the question of what Parliament was for in the past, we will find that many of our assumptions of what Parliament is now for are rather more contingent and less certain than we might have assumed. This has the consequence, or so it will be suggested, that we should not feel constrained by contemporary views of parliamentary purpose and function, and should feel reasonably relaxed about offering revised interpretations: revisions that might at first glance appear rather far-fetched, but which on further analysis turn out to be more modest.

[1] Tony Benn MP, HC Deb, 23 October 2000, col 12.

The second thread is more descriptive. Constitutionally, we live in interesting times, and there is much contemporary debate about the future of Parliament—debate which Parliament itself is deeply engaged in. A substantial portion of this chapter is devoted to surveying these debates, many of which are very recent, indeed still ongoing. Over the past five years especially a series of reform proposals has been put forward by a variety of parliamentary committees, think-tanks, and others. This chapter has as one of its principal goals the task of drawing these proposals and debates to the attention of constitutional lawyers, and of evaluating their various strengths and limitations.

Finally, the chapter contains a proposal of its own: a first, tentative answer to the question posed in the chapter's title. It will be suggested here that we should re-conceive of what it is we think Parliament is for, constitutionally. In particular, *we should abandon the notion that Parliament is principally a legislator. We should instead see Parliament as a scrutineer, or as a regulator, of government.* Such is the key claim made in this chapter. We used to see Parliament as being both essential and central to the constitutional order. Now we are not so sure. As we shall set out in a little more detail in the section below, contemporary commentators generally see Parliament as possessing two constitutional functions. The first is to make the law: Parliament is the national legislature. The second is to hold the government of the day to constitutional account: all government ministers are collectively and individually accountable and responsible to Parliament. Lawyers have tended to devote more energy to the first of these than to the second. This may not be surprising: after all, parliamentary sovereignty (that is, the legislative supremacy of Acts of Parliament) is a rule of law, enforceable in the courts, whereas ministerial responsibility is a mere convention of the constitution: a binding political rule, but not a rule to which there is any judicially enforceable sanction attached. The suggestion here is that we should reverse this hierarchy, and place the emphasis not on Parliament's legislative functions, but on its task of holding the executive to constitutional account.

A century ago there was nothing more sacred to constitutional lawyers than the doctrine of parliamentary sovereignty. For Dicey—the foremost expositor of the rule—it was the very keystone of constitutional law. It meant that Parliament could make or unmake any law whatsoever, and that no one had the authority to override or to set aside the laws Parliament made. So much is axiomatic to any law student. In the past 30 years, however, there has been considerable revision of this doctrine, and we now see the European Communities Act 1972, the Human Rights Act 1998, and the Scotland Act 1998 as constituting limitations of varying sorts on the operation of Dicey's doctrine. The literature on this point is considerable, and this chapter does not seek to add to it. The focus of this chapter will be on Parliament's constitutional role as a scrutineer of government, rather than on its legislative functions.

On this aspect of Parliament's role, constitutional lawyers are more and more coming to the view expressed in our opening quotation by Tony Benn that the House of Commons is bankrupt, and that it has ceased to play a meaningful, or at least a leading, role. Rather than regarding Parliament as the institution in which the government should be held to account, for example, constitutional lawyers are

increasingly advocating that we should instead be turning to the courts. There is a move in contemporary constitutional affairs away from what has been termed the 'political constitution' model, towards a legal constitutionalism. I have written elsewhere of what I consider to be the dangers of this move.[2] This chapter contributes to the debate not by repeating those arguments, but rather by seeking to move on from them. The issue here is not whether we should abandon the parliamentary, or political, constitution and replace it with a legal, or judicial, constitution. Instead, the focus here will be to consider how we should go about the task of repairing the political constitution: if the parliamentary model of constitutional accountability is broken, how do we best fix it?

SOME HISTORY: WHAT WAS PARLIAMENT FOR?

The first thing that we have to remember about Parliament is that the way in which we conceive of it now is not the way in which we have always conceived of it. We now think of Parliament as if its principal constitutional role is to make the law, to pass statutes and statutory instruments, to be the nation's law-maker, its legislator. Any further parliamentary function is secondary to that. Other functions are identified in the literature. We have all read that Parliament scrutinises the work of the executive; or that Parliament provides us with our executive, that it is through Parliament that the executive must govern; or that Parliament has a representative function—the Commons represents the people who elect it, and the Lords represents the aristocracy. But none of this is taken as seriously as the legislative function. Indeed, many constitutional commentators, when writing about Parliament, write *only* of its legislative power.[3]

It was not always thus. Conceiving of Parliament as being in principal part the nation's sovereign law-maker was a late Victorian invention. As with so many Victorian inventions, the twentieth century has ossified a mere fad into a fixed tradition.[4] By these remarks I am not suggesting that there were no traces of parliamentary sovereignty before the days, or the writings, of Dicey.[5] But I am suggesting that the post-Diceyan fixation with questions of legislative sovereignty has led us into making a mistake about Parliament, and that is to place too much emphasis on Parliament's legislative function at the expense of the other constitutional roles it plays.

[2] See, eg, A Tomkins, *The Constitution after Scott: Government Unwrapped* (Oxford, Clarendon Press, 1998), at 266–75; A Tomkins, 'Introduction: On Being Sceptical about Human Rights', in T Campbell, K Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford, Oxford University Press, 2001), 1–11; and A Tomkins, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157.

[3] See, eg, E Barendt, *An Introduction to Constitutional Law* (Oxford, Clarendon Press, 1998) and C Munro, *Studies in Constitutional Law* (2nd edn, London, Butterworths, 1999).

[4] See E Hobsbawm and T Ranger, *The Invention of Tradition* (Cambridge, Cambridge University Press, 1983).

[5] For the pre-nineteenth century history and development of parliamentary sovereignty, see J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford, Clarendon Press, 1999).

A rather better Victorian view of Parliament than Dicey's was Bagehot's. To the House of Lords Bagehot ascribed two functions: the power to delay and the power of revision.[6] Its value, he thought, was two-fold: first it imposed on the common mass the value of nobility, but equally, in doing so, it prevented the common mass from having to experience the evils that would replace nobility if it were not there. These alternatives he identified as the rule of wealth, the rule of rank, and the rule of office, all of which would for Bagehot be profoundly inferior to the reverence, respect and obedience which were the qualities associated with noble rule.[7] To the House of Commons Bagehot ascribed five functions. Its 'main function' was to act as the electoral college 'which chooses our president'.[8] Unlike the electoral college of the United States, the House of Commons was permanent. Thus for Bagehot the most fundamental constitutional role of the Commons was to supply the government. We shall return to this point below. The additional functions of the Commons were its expressive function ('to express the mind of the English people on all matters which come before it'); its teaching function ('to teach the nation what it does not know'); its informing function, and finally its legislative function. Bagehot added that for some commentators, the House of Commons possessed as well as these five a sixth function—a financial function—by which the Commons would scrutinise the government's finances. He dismissed this, however, arguing that this sixth was not a discrete function, but rather a particular manifestation of the others.[9]

On the informing function, Bagehot wrote:

> In old times one office of the House of Commons was to inform the sovereign of what was wrong. It laid before the Crown the grievances and complaints of particular interests. Since the publication of the Parliamentary debates a corresponding office of Parliament is to lay these same grievances, these same complaints, before the nation, which is the present sovereign. The nation needs it quite as much as the king ever needed it.[10]

This is an incisive point, more incisive indeed than Bagehot himself realised. In the sixteenth century the existence of Parliament had revolved around the monarch's need for counsel and consent: 'for monarchs, parliaments were occasions on which they could consult a wider range of their subjects than was normally available.'[11] The central importance of parliamentary consultation (as opposed to other forums in which the monarch could consult with his or her subjects) lay in the essential constitutional fact, established even before the reign of the Tudors, that the Crown could raise money from its subjects only with their

[6] W Bagehot, *The English Constitution* (London, Fontana, 1993), 133. Bagehot's book was first published in 1867, and is the leading work describing British government in what might be regarded as the golden period of parliamentary government: 1832–1867—the curious period falling after the end of the rule of the Crown but before the beginning of the rule of party.

[7] *Ibid* at 124–26.

[8] *Ibid* at 152.

[9] *Ibid* at 154–46.

[10] *Ibid* at 154.

[11] See J Loach, *Parliament under the Tudors* (Oxford, Clarendon Press, 1991), 1.

consent. From the fourteenth century it had been recognised that it was through the meeting of Parliament that such consent could be obtained. This, historically, is the principal function of Parliament: not to legislate, but to give consent to the Crown's raising of money. Constitutionally the most pressing grievances and complaints which the Commons could lay before the Crown were those which related to money.

In the seventeenth century, Parliaments conceived of themselves as having two functions: the power of the purse, and the powers attendant on being a High Court. As to the latter, Parliament had two powers as a court of law: judicature (the administration of justice) and legislation (the creation of statute). Of these, 'contemporaries perceived no clear distinction between judicature and legislation, and regarded the making and implementation of law as inseparably linked.'[12] Parliament's jurisdiction as a court stemmed directly from its medieval origins, but during the sixteenth century Parliament's judicature began to be eclipsed by the common law courts, by the courts of chancery, and by the prerogative courts. However, the revival of parliamentary judicature is a notable feature of the early seventeenth century, and represents Parliament's growing dissatisfaction with the constitutional positions adopted by the common law courts. Parliamentary judicature took many forms: the Lords heard appeals, petitions, and cases enforcing privilege, and the Commons acting jointly with the Lords employed two centrally important procedures: attainder and impeachment.[13] An attainder was an Act of Parliament 'declaring an individual guilty of treason or some other felony.'[14] Attainder was little used between 1603 and 1641, as it proved difficult for the Commons to secure the Lords' assent.[15] Impeachment played a much more significant role.[16] Maitland described the early seventeenth century as 'the era of impeachments' but he warned that we should 'not think of impeachments as common events. During the whole of English history there have not, I think, been seventy, and a full quarter of all of them belong to the years 1640-1642.'[17] The procedure for impeachment was generally that the Commons would prepare

[12] See D Smith, *The Stuart Parliaments 1603–1689* (London, Arnold, 1999), 32. Smith argues that 'the modern demarcation between the judiciary and the legislature was entirely alien to seventeenth-century England. Contemporaries regarded the judicial and legislative functions as part of a single process whereby the Houses collaborated with the Crown to redress grievances and resolve problems both general and specific.' (*Ibid* at 38).

[13] The Commons had little judicature when acting alone, other than in enforcing its own privileges, as it lacked the power to hear evidence under oath: see Smith, *ibid* at 35.

[14] Smith, *ibid* at 35.

[15] That said, however, attainder was used in 1641 to remove Strafford, and was employed again against Lilburne and others during the Commonwealth. Attainder was last used in England in 1696: see Smith, *ibid* at 35.

[16] Impeachment appears to have originated in 1376, but was not used after 1459 until it was revived in 1621 to be used in the cases against the monopolists Sir Francis Mitchell and Sir Giles Mompesson, as well as against Francis Bacon. The impeachments of Mompesson and Mitchell were not of great constitutional significance, as they were both commoners, impeached for 'fraud, violence and oppression'. Bacon's impeachment, however, was far more telling, as when he was impeached (for bribery) he was one of the King's principal ministers—indeed he was the Lord Chancellor. See F Maitland, *The Constitutional History of England* (Cambridge, Cambridge University Press, 1908), 246.

[17] Maitland, *ibid* at 317.

articles of impeachment which would form the basis of a trial before the Lords, with managers from the Commons acting as prosecutors. As Smith has explained: 'impeachment was particularly useful because it allowed the Houses to try to dislodge "evil counsellors" and "enemies of the commonwealth" without attacking the monarch personally.'[18] It was from this ancient power that the modern doctrine of ministerial responsibility emerged.

For all Parliament's growing powers in the early seventeenth century, and its growing willingness to use them, one core fact must not be forgotten, and that is that Parliament was called, prorogued and dissolved entirely at the behest of the Crown. Parliaments, as van Caenegem has reminded us:

> were created by the Crown as sounding boards and providers of funds. Their primary function was to listen to royal policy declarations, to agree to them and provide the required financial means.[19]

The great breakdown of English government in the early seventeenth century was caused in part by the King's failure to appreciate the importance to England's constitution of his working with, and not against, Parliament. The result was that Parliament stood its ground and simply refused to vote the sums which the Crown needed.[20] The consequences were fatal: Charles I called no Parliament between 1629 and 1640, and tried to govern without it. He tried too to raise taxation without parliamentary consent, most notoriously in the form of ship-money.[21] Despite the judges supporting him, eventually he was forced to reconvene Parliament. Less than two years later England was at civil war.

The point here is that, taking a longer historical view than merely gazing back lazily to Dicey, suggests that there is nothing revolutionary in reconceiving of Parliament as if it is not an institution which is primarily concerned with legislation. The argument here is radical in the sense that it is taking us back to our roots—it is seeking to remember why we have Parliament in the first place. But perhaps this is sufficient history for now. Let us turn our attention back to the present.

PARLIAMENT SINCE 1990

To read the standard literature, you would think that modern Parliament is in a bad way. Not only is it being reported less and less in the media: now it is also being written out of the constitutional law textbooks. The classic example is *The Changing Constitution.* This influential and widely-read collection of essays contained in its earlier editions an excellent essay by Colin Turpin on the conventions of individual and collective ministerial responsibility to Parliament. The essay was axed

[18] Smith, above n 12, at 36.

[19] R van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge, Cambridge University Press, 1995), 85.

[20] Smith writes that 'during the mid and late 1620s, the costs of war were such that the Crown probably needed in the region of £1 million a year. Parliamentary supply amounted to £353,000 in 1624, £140,000 in 1625, and £275,000 in 1628.' See Smith, above n 12, at 54.

[21] On ship-money, see *R v Hampden* (1637) 3 St Tr 825.

from the most recent edition (published in 2000) because, its editors tell us, 'the doctrine of individual ministerial responsibility has been significantly weakened over the last ten years or so, so that it can no longer be said, in our view, that it is a fundamental doctrine of the constitution'.[22] This is strong and uncompromising stuff, but it is misjudged. No fair-minded constitutional commentator would deny that ministerial responsibility has taken a severe knocking over the last decade or so. The scandalous and clearly unconstitutional rewriting of the rules on ministerial responsibility by cabinet ministers and senior civil servants during the Major years has been well documented elsewhere. Sir Robin Butler's spurious distinction between full ministerial responsibility and mere accountability; Michael Howard's refusal to resign and his dismissal of Derek Lewis over management in prisons in 1995; and William Waldegrave's refusal to resign over the deceitful way he had reported to Parliament as disclosed in the labyrinthine Scott Report on 'arms to Iraq' in 1996 were all deeply troubling episodes for those who continue to respect the ideal of the parliamentary constitution.[23] As Diana Woodhouse has damningly but rightly expressed it:

> the effective operation of the convention [of individual ministerial responsibility] depends upon the integrity of the minister concerned and the extent to which the acceptance of responsibility is a matter of principle rather than political pragmatism. Neither integrity nor principle was a characteristic associated with the Conservative governments of the 1990s.[24]

Nonetheless, it is an exaggeration to suggest as Barendt has done that 'it is rare for the House of Commons to hold an individual minister to account.'[25] Similarly, Jowell and Oliver have acted prematurely in writing the obituary of ministerial responsibility. It might have been thought that with its unsightly and (frankly rather embarrassingly) large majority, the Labour government that has been in power since 1997 would have behaved, if anything, even more obnoxiously than did its Conservative predecessor. After all, is the conventional wisdom not that parliamentary accountability of the government is likely to be stronger when the government's majority is smaller? Major and Blair have combined effectively to

[22] See J Jowell and D Oliver (eds), *The Changing Constitution* (4th edn, Oxford, Oxford University Press, 2000), viii. Ours is not the only time in which commentators have lamented the apparent decline of Parliament—indeed, it may be that every generation considers Parliament, rather like the (now defunct) satirical magazine *Punch*, to be 'not as good as it was'. In the early 1960s there was a glut of books published on this theme: see, eg, B Crick, *The Reform of Parliament* (London, Weidenfeld and Nicolson, 1964); A Hill and A Whichelow, *What's Wrong with Parliament?* (Harmondsworth, Penguin, 1964). A number of the proposals and recommendations in books such as these found their way (eventually) into parliamentary practice from the late 1970s. Perhaps the lesson here is that Parliament *always* gets a bad press, but that it does learn, adapt, and improve, such that it would always be folly to write it off.

[23] For a full discussion of these episodes, see A Tomkins, *The Constitution after Scott*, above n 2, at 25–67.

[24] D Woodhouse, 'Individual Ministerial Responsibility and a Dash of Principle', in D Butler, V Bogdanor and R Summers (eds), *The Law, Politics and the Constitution* (Oxford, Oxford University Press, 1999), 102.

[25] Barendt, above n 3, at 116.

turn this wisdom on its head. Following the 1992 general election the Conservative majority in the House of Commons was 21. This number shrank during the life of the Parliament, as Tory MPs died and their party lost by-election after by-election. By the end, the Conservatives were reliant on the Ulster Unionists for survival. Yet this was exactly the period of Howard and Waldegrave. In contrast, the Labour Party enjoyed a majority of 179 after the 1997 election, and this was dented by only the smallest margin in the 2001 election. How has Parliament fared since 1997? Has the enormity of the Labour majority been as unhealthy for Parliament as was widely feared? Or has the principle of ministerial responsibility begun to recover? Has the Labour government conducted itself with any more integrity and principle than the Conservative government did?

The record since 1997 is actually quite positive. Three instances can be cited each of which constitutes a significant and considerable improvement on the Conservative legacy. The first concerns pensions. The parliamentary ombudsman had found that the department of social security had failed to inform those who might be affected that widows and widowers would inherit only half of their spouses' State Earnings Related Pension (SERPS). He further found that this failure amounted to what he termed a 'systemic failure' on the part of the department.[26] Who should be held responsible for this? The system? The department? The Secretary of State? The internal auditors? In evidence given to the House of Commons the Permanent Secretary blamed the accounting officers, but the Secretary of State (Alistair Darling) stepped forward and contradicted her, saying that it is ministers who are responsible for what happens in their departments and 'if you let the ministers off then you are never going to hold anyone to account really'.[27]

The second instance concerns the Sandline affair in 1998, relating to foreign policy and Sierra Leone. It was alleged that foreign office officials had authorised the supply of military equipment to Sierra Leone.[28] The Foreign Secretary, Robin Cook, responded by establishing an inquiry, whose report was published, and by working alongside the House of Commons Foreign Affairs Select Committee in implementing a programme of some 60 reforms. Mr Cook told the House of Commons that Parliament, through the Foreign Affairs Committee, should make sure that 'the Foreign Office and I are harried, pursued and kept up to scratch in putting in place the programme of reform.'[29] The government's handling of this matter stands in stark contrast to the way in which initial allegations of 'arms to Iraq' had been handled by Conservative ministers in the late 1980s and early 1990s.[30] The third instance concerns the way in which the Home Secretary, Jack

[26] See D Woodhouse, 'The Reconstruction of Constitutional Accountability' [2002] *Public Law* 73, 81.

[27] Public Administration Committee, *Report of the Parliamentary Ombudsman* (HC 305, 1999–2000), minutes of evidence, Q 117: cited by Woodhouse, *ibid* at 81.

[28] See Woodhouse, *ibid* at 84.

[29] HC Deb, 18 May 1998, col 609. See Woodhouse, above n 26, at 84. See also I Leigh, 'Secrets of the Political Constitution' (1999) 62 *Modern Law Review* 298, 303–4.

[30] On which, see Tomkins, *The Constitution after Scott*, above n 2, at 95–112.

Straw, responded to the difficulties in the passport office in 1999. Woodhouse tells the story thus:

> The home secretary not only explained what had happened but apologised personally to those queuing at the Petty France Passport Office. He also took amendatory action, intervening in some cases to ensure that passports were issued in time, compensation was paid to those whose travel plans had been disrupted and extra staff were employed to clear the backlog. Moreover, while his explanations and actions implied that the crisis was the result of agency mismanagements, he did not publicly blame and punish the chief executive, as Michael Howard had done in the case of the Prison Service Agency. His emphasis was rather on putting things right ... Before the Home Affairs Select Committee, the permanent secretary, David Ormand, gave a full explanation.[31]

Each of these episodes represents a serious attempt to make parliamentary accountability work. These stories would be unlikely to command many column-inches on the front pages of national newspapers, as ministerial heads did not roll, and the drama of resignation was avoided. But to equate responsibility with resignation was always a mistake—and indeed to expect resignation may well operate so as to dilute, rather than to strengthen, accountability, as it ups the stakes to such a point that political game-playing replaces genuine responsibility. What these stories are about is Parliament trying to do better, and government trying to do better.

PARLIAMENT AND IMPROVING SCRUTINY

Liaison

For all Woodhouse's splendid invective against the hollow Major government, the operation of ministerial responsibility and the success of the parliamentary or political constitution actually depends on more than governmental integrity and principle. It also depends on parliamentary will. The early 1990s witnessed not only a constitutionally bankrupt executive in Britain, but also a pathetically supine Parliament. Such change as we have seen since 1997 might well be more a change in the latter characteristic than the former. While some ministers in the Blair government have clearly sought to subject themselves and their departmental work to greater parliamentary scrutiny than did their Conservative predecessors, it is not as if the Blair government generally treats Parliament with great respect. The Prime Minister himself, of course, rarely attends the House of Commons save for the weekly half-hour Prime Minister's question time. The Speaker has had to remind the government on numerous occasions of the constitutional importance of ministers making policy statements in the House first, rather than in media studios or press interviews. And, as our opening quotation from Tony Benn makes clear, Parliament under Blair has enjoyed spectacularly long holidays.

[31] Woodhouse, above n 26, at 85.

In any consideration of politics under New Labour, allegations of government by spin and control-freakery abound. Power is devolved to Scotland, but the London party leadership exerts its influence to keep dissidents such as Dennis Canavan away.[32] Power is devolved to Wales, but the Prime Minister wants Alun Michael not Rhodri Morgan to be First Minister.[33] London has a mayor but on no account will Ken Livingstone be Labour's candidate.[34] Immediately following the 2001 election the government tried to act in a similar way over Parliament. But just as it was unsuccessful in Rhodri Morgan's and Ken Livingstone's cases, so too was it unsuccessful with regard to Parliament. The government sought to manipulate the membership, and in particular the chairmanship,[35] of the Commons select committees. Most notoriously, the government whips sought to oust Gwyneth Dunwoody from the chair of the Transport Committee, and to oust Donald Anderson from the chair of the Foreign Affairs Committee. Even worse, Mr Anderson's replacement was to be the luckless Chris Smith, who throughout the 1997–2001 Parliament had been a member of the cabinet, as Secretary of State for Culture, Media and Sport. The departmental select committees are the unique preserve of backbench MPs. While Mr Smith was a backbencher (as the Prime Minister had reshuffled him out of the Government following the 2001 election) he had been one for less than a month. Parliament—and in particular the parliamentary Labour Party—revolted, and in an unusual show of defiance voted down the government's proposed membership.[36] The whips had to think again, Mrs Dunwoody and Mr Anderson were reinstated as the chairs of their committees, and the House approved the revised list of nominations.[37]

There is nothing unusual in the government, through its whips, seeking to control membership and chairmanship of select committees. After the 1992 election the Conservative whips sought to prevent Nicholas Winterton from being reappointed to the chair of the Health Select Committee. Mr Winterton, a Conservative MP, had been the chair of the committee since 1983, and under his chairmanship the committee had published a number of reports critical of the government's programme of reforms to the NHS. Mr Winterton objected, but the whips had a defence: they argued that it was a party rule that no member would serve as chair of the same committee for more than two Parliaments. Unfortunately for the whips Sir John Wheeler had served as chair of the Home Affairs Committee for two Parliaments. Unlike Mr Winterton's committee, the Home Affairs Committee had not been especially critical of the Home Office during the 1980s, and it was not in the

[32] Mr Canavan claimed the support of 95% of his local party, but the national party successfully kept him off the list of Labour candidates for the Scottish Parliament. Mr Canavan stood for election as an independent, and was successfully elected.

[33] Alun Michael lost a vote of confidence in the Welsh Assembly, and was replaced by Rhodri Morgan, in February 2000.

[34] Ken Livingstone left the Labour Party and stood as an independent candidate. He won the election to become London's first elected mayor in May 2000.

[35] The House of Commons continues to refer to each committee having a 'chairman'. I will use the term 'chair'.

[36] See HC Deb, 16 July 2001.

[37] See HC Deb, 19 July 2001.

government's interest for him to be replaced, but the price to paid for removing Mr Winterton was that Sir John Wheeler also had to be removed, although he (unlike Mr Winterton) was compensated through subsequent elevation to ministerial office. Both positive and negative conclusions can be drawn from these stories. On the plus side, they suggest that select committees are sufficiently powerful, prestigious and effective to be taken seriously by the government and its whips. If select committees were worthless, or ineffective, why go to the bother of seeking to manipulate their membership and direction? But on the minus side, of course, these committees are supposed to be rigorous and independent committees of inquiry. If the whips can so easily remove thorns from the government's flesh, will that not discourage rigour? If the whips have control over membership, does that not dilute the extent to which the committees can truly be said to be independent of government? What was unusual about the events of July 2001 was not that the whips tried it on, but that Parliament stood up to them, and won.

Select committees are set up at the beginning of each new Parliament. Their membership is formally a matter for the Committee of Selection. When the system of departmental select committees was established in 1979 it was the intention that through the Committee of Selection the political parties in the House of Commons would be obliged to submit their nominations for committee membership to the prior scrutiny of backbench MPs before they were put to the House. However, the Committee of Selection has come to interpret its role as being limited to the confirmation of the proposals put to it by the party managers (ie the whips). What the events of July 2001 clearly showed was that this mechanism of appointment to select committees no longer enjoyed the confidence of the House. Why did Parliament bite back in this way in 2001, whereas it had not done so in 1992?

One reason is that throughout the lifetime of the 1997–2001 Parliament concern gradually developed on all sides of the Commons as to the continuing effectiveness of the departmental select committee system. The House of Commons was well aware of the way it was perceived by public and press. Its reputation had plunged before 1997 and was showing few signs of recovery under New Labour. While the government had delivered notable constitutional reform with regard to devolution and the passing of the Human Rights Act 1998, Parliament had been left relatively untouched, unimproved, and unmodernised. The House of Lords Act 1999 had not even managed to remove all the hereditary peers. The Jenkins Report on reform to the electoral system for elections to the House of Commons had apparently sunk without trace.[38] In 1997 a Modernisation Committee had been established to plot the ways in which the arcane procedures and practices of the Commons could be, well, modernised, but it was a lacklustre committee, without overall strategy, which published rather mundane reports on second-order issues.[39] The Modernisation Committee is a unique committee in that it is chaired

[38] See *Report of the Jenkins Commission on the Voting System*, (Cm 4090, October 1998).

[39] That said, however, the Modernisation Committee did publish reports on two important issues during the 1997–2001 Parliament: on sittings in Westminster Hall, and on the carry-over of public