



Chapter 5 – Protecting the constitution

5.1 The British constitution – “the collection of rules which establish and regulate or govern the government”¹ – has shown itself over centuries to be extraordinarily dynamic and flexible, with the capacity to evolve in the light of changes in circumstances and in society. There are many who would argue that it is this very flexibility which has allowed the United Kingdom to avoid the kind of upheavals which have forced other countries to return to the constitutional drawing board.

5.2 It is both a strength and a potential weakness of the British constitution that, almost uniquely for an advanced democracy, it is not all set down in writing. There can be little question that the raft of constitutional legislation introduced by the current Government in its first two years in office – including the Devolution Acts, the incorporation of the European Convention on Human Rights into British law and the registration of political parties – would have been impossible under the laborious systems required to amend the written constitutions of many other countries. The risk, however, is that a Government with a secure majority in the House of Commons, even if based on the votes of a minority of the electorate, could in principle bring about controversial and ill-considered changes to the constitution without the need to secure consensus support for them. It could force them through the second chamber by use of Parliament Act procedures if necessary. Similar concerns could arise in respect of legislation that might represent a breach of human or civil rights. As Professor Sir William Wade succinctly put it, “One safeguard conspicuous by its absence from the constitution is the entrenchment of fundamental rights”.

5.3 While our terms of reference require us to take “particular account of the present nature of the constitutional settlement”, we recognise that the open nature of our unwritten constitution relies on those in positions of authority operating within a web of understandings and conventions as to what is and is not permissible. As Gladstone wrote over a century ago, the British constitution “presumes, more boldly than any other, the good faith of those who work it”.

5.4 Given those circumstances, one of the most important functions of the reformed second chamber should be to act as a ‘constitutional long-stop’, ensuring that changes are not made to the constitution without full and open debate and an awareness of the consequences. This is one of the classic functions of a second chamber and one the House of Lords has on occasion played in the past.

Recommendation 15: One of the most important functions of the reformed second chamber should be to act as a ‘constitutional long-stop’, ensuring that changes are not made to the constitution without full and open debate and an awareness of the consequences.

Powers in respect of constitutional matters

5.5 The House of Lords currently has an absolute veto over the dismissal of a number of key office holders, including senior judges, the Comptroller and Auditor General and the Data Protection Registrar. This helps to secure their independence from the executive. Similarly, the Parliament Act 1911 deliberately excluded from its scope any Bill to extend the life of a Parliament beyond five years. This preserves the House of Lords' absolute veto over any attempt by a Government with control over the House of Commons to legislate itself into extended existence. Finally, the House possesses a suspensory veto over all Bills (other than Money Bills). It therefore has the capacity to delay controversial legislation and force the Government to think again or justify its position once more to the House of Commons. On each of the five occasions since 1911 when Acts have been passed under Parliament Act procedures, they have dealt with what were arguably 'constitutional' matters.



The House of Lords voting on the Parliament Bill, 1911

5.6 A number of those who submitted evidence to us argued that the second chamber should be given significant additional powers over constitutional and human rights legislation. It was suggested either that the reformed second chamber should have an absolute veto in respect of such matters or that the extent of the suspensory veto should be extended to at least two years in such cases. We do not support any such proposals, both for practical reasons and also on principle.

Balance between the two chambers

5.7 Our fundamental concern about any such proposal is that it would alter the current balance of power between the two chambers and could be exploited to bring the two chambers into conflict. It would be inconsistent with the requirement in our terms of reference "to maintain the position of the House of Commons as the pre-eminent chamber of Parliament" and with our view of the overall role that the second chamber should play.

Conclusion: Increasing the powers of the second chamber in respect of any particular category of legislation would be inconsistent with maintaining the position of the House of Commons as the pre-eminent chamber of Parliament.

Constitutional legislation

5.8 So far as ‘constitutional’ matters are concerned, it would in any event be virtually impossible in practice to define which legislation should be within the scope of such additional powers. With no written constitution there is no way of distinguishing between ‘constitutional’ enactments and others. As a matter of legislative form, the Parliament Act 1911 had exactly the same standing as the Poultry Act and the Telephone Transfer Act, which received Royal Assent on the same day. Any attempt to draw up a list of ‘designated’ legislation, which might include the three Devolution Acts, the Human Rights Act 1998 and the European Communities Act 1972, rapidly runs into problems. A short list would clearly be incomplete, while a fuller list would rapidly become unwieldy. Problems would arise over the fact that many quite inoffensive Bills would give rise to a need for consequential amendments to be made to Acts which would appear on many lists of ‘constitutional’ legislation – for example, the Representation of the People Acts or the

Devolution Acts. It would be inappropriate for such minor amendments to attract the protection of any additional powers which the second chamber might have in respect of constitutional matters. In addition, such a list would rely for its effect on an assumption that changes to the constitution would require the amendment or repeal of existing constitutional legislation. Such a belief would be unfounded: the Human Rights Act 1998 involved no amendment to existing constitutional legislation, while the Scotland Act 1998 included only a minor amendment (which could probably have been avoided) to the European Communities Act 1972.

Since major constitutional changes can be

made without the need to amend existing constitutional legislation, the value of relying on a list of designated legislation would be very limited indeed.



The Rt Hon Lord Strathclyde, Leader of the Opposition in the House of Lords (on the right)

Recommendation 16: The second chamber should not be given additional powers in respect of a list of designated constitutional legislation.

Constitutional issues

5.9 An alternative would be for any additional powers to apply in respect of a list of constitutional *issues*, rather than specific items of legislation. This would also be far from easy to achieve. Asquith demonstrated the difficulties involved when he showed that there was no coherent theme discernible in the 23 ‘constitutional’ issues identified by various MPs during the debates on the 1911 Parliament Bill. Moreover, there would always be scope for argument as to whether a particular Bill raised a ‘constitutional’ matter or not. The various debates on the question of whether any particular Bill was of ‘first class constitutional importance’, and should therefore be referred to a Committee of the Whole House, have failed to produce any convincing definition or criteria which could be applied on a consistent basis. Drawing a line would be even more difficult if the definition were extended to include human rights.

5.10 Even a relatively short list of subject areas would be almost impossible to apply in practice without effective machinery to adjudicate in disputes over whether a particular piece of legislation was or was not covered. In other countries this function is performed by a special constitutional court, whose decisions are binding. These courts have a relatively defined task because they are working within the context of a written constitution. While the Devolution Acts have assigned a related role to the Judicial Committee of the Privy Council,² the absence of a written constitution for the United Kingdom as a whole and the difficulty of adequately defining what constitutes a ‘constitutional’ matter mean that the courts would be in no position to adjudicate satisfactorily. Giving the courts any role in assessing whether a provision was ‘constitutional’ or not would in any event sit uncomfortably with the doctrine of Parliamentary sovereignty. Above all, it would be bound to result in delay or uncertainty and incur some risk of retrospective judgements which could give rise to all kinds of complications, especially if major constitutional changes were involved. Such a system might also be exploited by those opposed to particular Bills, who would all too easily be able to mount a case that a constitutional issue of some kind was involved.

5.11 An alternative might be to develop a system by which the Speaker, or some other figure, could ‘certify’ constitutional Bills. This would be a development of the procedure under which the Speaker – guided by specific criteria set out in the Parliament Act 1911 – currently certifies Money Bills. In practice, this approach too would be difficult to operate without a clear statement of what makes up a ‘constitutional’ matter. It would impose an unduly onerous burden on the individual concerned.

Recommendation 17: The second chamber should not be given additional powers in respect of constitutional *issues*. There is no satisfactory basis on which this could be done and no suitable machinery for adjudicating on whether a particular Bill raised constitutional issues.

5.12 In short, none of the various proposals by which the second chamber could be given additional powers over constitutional legislation is free of difficulty. Most of the practical objections set out above would apply equally to any attempt to give the second chamber additional powers in respect of human rights legislation in general. They would *not*, however, apply to the narrower proposal, put forward in some submissions, that the Human Rights Act itself should be specifically exempted from the scope of the Parliament Acts. This would give the second chamber an absolute veto over any attempt to amend that Act. However, this would run up against our deeper objection of principle to any suggestion that the reformed second chamber should have greater powers than at present in respect of defined pieces or categories of legislation.

Recommendation 18: The second chamber should not be given additional powers over constitutional or human rights issues or legislation.

² This, coupled with the fact that much of the Scottish constitution is now set out in a single piece of legislation, allowed the Scotland Act 1998 to include a list of reserved matters pertaining to the constitution – Schedule 5, paras 1–5.

Changes to the Parliament Acts

5.13 The current balance between the two chambers has evolved over many decades and should not be changed lightly.³ There is, however, one point which concerned us and which was drawn to our attention by a number of witnesses. It is a potential weakness of the Parliament Acts that they can themselves be amended using Parliament Act procedures, as was done in 1949. We recommend that this loophole should be closed, in order to protect the current balance of power between the two Houses of Parliament from being changed except with the agreement of both chambers.

5.14 The present position gives the second chamber power effectively to delay the enactment of any Commons Bill (except a Money Bill) by a few months, while requiring the House of Commons to reconsider it and to reaffirm its support for the legislation. It makes it possible for any Bill consistently supported by the Commons (except a Bill to extend the life of a Parliament) to be enacted within 13 months of Second Reading in the Commons, even in the face of objections from the House of Lords.

5.15 That seems to us to strike the right balance. Any change to the detriment of the second chamber would risk leaving it with insufficient powers to carry out its overall role effectively. We therefore recommend that the Parliament Acts should be amended to exclude the possibility of their being further amended by the use of Parliament Act procedures. This would, in effect, give the second chamber a veto over any attempt to constrain its existing formal powers in respect of primary legislation. On the basis of expert advice, we believe that this could be achieved by a simple and straightforward amendment, for example by inserting the words “to amend this Act or” after “provision” in Section 2(1) of the 1911 Act.⁴ This would avoid opening up the whole of the Parliament Acts to debate and amendment.

Recommendation 19: The Parliament Acts should be amended to exclude the possibility of their being further amended by the use of Parliament Act procedures.

5.16 This recommendation would also secure the second chamber’s veto over any Bill to extend the life of a Parliament, since that provision is written into the Parliament Act 1911. Our consultation exercise revealed overwhelming support, from all the main political parties and from the public, for the preservation of the House of Lords’ existing veto over any such Bill.

Recommendation 20: The second chamber’s veto over any Bill to extend the life of a Parliament should be reinforced. Our previous recommendation would achieve that.

³ See the discussion in Chapter 4.

⁴ S.2(1) would therefore apply to any public Bill “other than a Money Bill or a Bill containing any provision to amend this Act or to extend the maximum duration of Parliament beyond five years”. The provisions which apply to Money Bills are set out in S.1 of the Parliament Act 1911.

A Constitutional Committee

5.17 If the second chamber is not to have additional *powers* in respect of constitutional or human rights matters, how should it discharge its role as a ‘constitutional long-stop’? We propose that the second chamber should establish an authoritative Constitutional Committee to act as a focus for its interest in and concern for constitutional matters. In making this proposal, we are building on recommendations made from across the political spectrum, including the Labour Party and the Rt Hon John Major MP as well as the influential Delegated Powers and Deregulation Committee of the present House of Lords.

5.18 The Labour Party’s evidence recommended that the second chamber should establish “a sessional committee devoted to constitutional affairs which would: scrutinise all Bills to consider their constitutional implications and in particular their implications for designated legislation; [and] keep under review the operation of the ‘constitution’, including the recent reform initiatives, as well as any which may be enacted in the future”.⁵

5.19 Mr Major suggested in his speech on the Second Reading of the House of Lords Bill⁶ that the second chamber should establish a ‘Constitutional Committee’. He expanded on this suggestion in a meeting with our Chairman and in further written evidence to the Commission, arguing that it would be “highly desirable to have in place a respected Committee of distinguished people who understand how the British constitution works and who are under a duty to produce independent, dispassionate and authoritative reports on problem areas within the constitution and on proposals for changing it. ... The general aim would be to limit the scope for ill considered constitutional change whilst also ensuring that simmering discontents are identified and dealt with in a flexible and evolutionary way. A Lords Committee would have the characteristics necessary to play an effective role in this area.”

5.20 The Delegated Powers and Deregulation Committee in its evidence noted that, apart from its own specific activities, “there is no other forum in the House of Lords where issues of constitutional principle are discussed on a regular basis”. It suggested that there were many occasions on which “the House of Lords could have been considerably assisted by advice from a Constitutional Committee whose members were well versed in such issues and – an important point – used to examining legislation from this view point on a regular basis”.

Function of a Constitutional Committee

5.21 An authoritative Constitutional Committee could be expected to enhance the ability of Parliament as a whole to take full account of all the constitutional implications when considering proposed legislation and scrutinising the actions of the executive. Since its terms of reference would not be set out in legislation, there would be no need for a precise definition of ‘the constitution’. Certain key items of legislation, however, might be designated as being of particular relevance. A Committee of the second chamber could be expected to have members with a keen awareness of the web of understandings and conventions that underpins the effective workings of the constitution. It would be sensitive to the constitutional implications of proposed legislation. It would also be

⁵ Labour Party submission, paragraphs 4.9 and 4.10.

⁶ Hansard (HC). 2 February 1999 (House of Lords Bill. Second Reading Debate).

in a strong position to identify and draw Parliament's attention to developments or legislative proposals with significant constitutional implications. These might otherwise be missed or raised at a late stage when lack of time might hinder proper consideration.

5.22 The details would be for the second chamber itself to resolve, but we envisage that the proposed Constitutional Committee would adopt a similar approach to that of the Delegated Powers and Deregulation Committee. It would consider all public Bills – other than those concerned with Supply or Consolidation – upon their arrival in the second chamber and prepare a comprehensive report on any constitutional implications. More generally, it should keep the operation of the constitution under review. Reports from the Constitutional Committee would draw the attention of Parliament, and also the media and the public, to points of concern. These points could then be taken fully into account as legislation was considered by Parliament, rather than emerging only later. In our judgement, the establishment of a Constitutional Committee would be both a more appropriate and a more effective way of protecting the constitution than giving additional formal powers to the reformed second chamber.

Recommendation 21: The second chamber should establish an authoritative Constitutional Committee to act as a focus for its interest in and concern for constitutional matters.

Human rights

5.23 There is a fine line between constitutional matters and human rights issues, but the latter arise in a broader range of circumstances and therefore merit separate consideration. The picture is affected by the passage and imminent coming into effect of the Human Rights Act 1998, which our terms of reference require us to take into account when formulating our conclusions and recommendations.

5.24 There is a tradition of members of the House of Lords taking the lead in the promotion of human rights legislation and in drawing attention to the human rights implications of other proposed legislation.⁷ Bills to achieve incorporation of the European Convention on Human Rights (ECHR) into United Kingdom law were introduced into the House of Lords on ten separate occasions prior to the Human Rights Act 1998. Six of these received a Third Reading and were passed to the Commons, where they fell for lack of time. Members of the House of Lords have also been responsible for attempting to initiate numerous other pieces of legislation to promote human rights, such as the Civil Liberties (Disability) Bill 1995. Most frequently the House of Lords has made amendments to Government legislation to protect fundamental freedoms, such as on telephone tapping in the Telecommunication Act 1984 and the authorisation of surveillance in the Police Bill 1997. Much of this activity has focused on the rule of law and due process rather than on human rights more generally, reflecting the significant legal expertise available to the House of Lords.

⁷ A. Reidy, *Reforming the House of Lords: Its Role in a Human Rights Culture*. Constitution Unit, the original text of which can be found on the CD-ROM enclosed with this report.

5.25 The Parliamentary scrutiny of human rights issues is likely to be transformed by the passage of the Human Rights Act 1998. Parliament will wish to be confident that the legislation it passes is unlikely to give rise to a breach of the ECHR or at least that any such breach is deliberate and considered. Parliament's consideration of these questions will be assisted by the requirement under Section 19 of the Human Rights Act for Ministers sponsoring Bills to make a statement of compatibility with the ECHR.



European Court of Human Rights, Strasbourg

5.26 Parliament will also need to decide what to do about any declaration of incompatibility which may be made by the courts. A fast-track procedure for remedial Orders to put right any deficiencies in primary legislation is set out in Section 10 of the Act and arrangements will need to be made to scrutinise these in draft.

5.27 More widely, the developing 'human rights' culture which was reflected in the passage of the Human Rights Act may make it appropriate for Parliament to monitor the operation of the Human Rights Act, take an interest in the observation of the United Kingdom's other international human rights obligations and consider human rights issues more generally.

Joint Committee on Human Rights

5.28 The Government has already announced its intention to ask both Houses of Parliament to establish a Joint Committee on Human Rights. In making the announcement, the Rt Hon Margaret Beckett MP, President of the Council and Leader of the House of Commons, said:

“We envisage that the Joint Committee's terms of reference will include the conduct of inquiries into general human rights issues in the United Kingdom, the scrutiny of remedial orders, the examination of draft legislation where there is a doubt about compatibility with the ECHR, and the issue of whether there is a need for a human rights commission to monitor the operation of the Human Rights Act.”⁸

5.29 The proposed Joint Committee will play a valuable role in enhancing Parliament's ability to take full account of human rights issues in shaping legislation. Equally obviously, the second chamber will need to provide members for the Joint Committee. It would be natural for those members to provide a focus for the second chamber's own consideration of human rights issues where this goes beyond the remit of the proposed Joint Committee.

⁸ Hansard (HC), 14 December 1998 (Human Rights Committee).

The second chamber's interest in human rights

5.30 There are a number of respects in which the second chamber's interest in human rights issues might indeed go beyond the terms of reference of the proposed Joint Committee. It has been suggested, for example, that the terms of reference of the Joint Committee will enable it to review the compatibility of Bills with the ECHR only where Ministers have been *unable* to make the necessary statement of compatibility under Section 19. In our view there should be a mechanism, at least in the second chamber, for looking behind Ministerial statements of compatibility and checking that all provisions of a Bill really *are* compatible with the ECHR. The experience of the Joint Committee on the draft Financial Services and Markets Bill⁹ illustrates how human rights issues can emerge unexpectedly from the detailed consideration of proposed legislation on other matters. It is also possible that potential incompatibilities with the ECHR will arise in *secondary* as much as in primary legislation. Statutory Instruments may therefore need to be scrutinised from that perspective. This could be a very considerable task.

Recommendation 22: There should be a mechanism, at least in the second chamber, for looking behind Ministerial statements of compatibility under Section 19 of the Human Rights Act 1998 and checking that all provisions of a Bill really are compatible with the ECHR.

5.31 This kind of technical scrutiny of Bills, draft Bills and Statutory Instruments for their human rights implications would fit very well with the role we envisage for the second chamber and with the kind of expertise and characteristics which its members should have. Irrespective of decisions about the precise role and terms of reference for the proposed Joint Committee, we therefore propose that a Committee of the second chamber should be given a wide ranging role in relation to human rights. That would give it scope to carry out technical scrutiny; to contribute effectively to the consideration of draft remedial Orders under Section 10 of the Human Rights Act; and to act as a general focus for the consideration of human rights issues by the second chamber.

Recommendation 23: The second chamber should establish a Committee with a wide-ranging remit in relation to human rights.

5.32 The contribution which such a Committee could make to the effectiveness of Parliamentary scrutiny of the human rights implications of proposed legislation is of crucial importance. Once the Human Rights Act has been brought into effect, it is inevitable that the courts will be invited to play a larger part in determining the legality of public policy as expressed in both primary and secondary legislation. This should *not* relieve Parliament of its primary responsibility for human rights. The human rights aspects of legislation should be identified and resolved *before* the law is made. Parliament should be proactive in ensuring that law meets relevant human rights standards, rather than reacting only when the courts strike down a Statutory Instrument or declare a piece of primary legislation incompatible with the ECHR. An authoritative second chamber Committee of members with appropriate knowledge and expertise would be well placed

⁹ Joint Committee on Financial Services and Markets. First Report. Draft Financial Services and Markets Bill. Session 1998/99. Volumes I and II. April 1999. HC328 I and II.

to draw attention to any human rights implications of proposed legislation. This would enable Parliament as a whole to reach a fully informed judgement before the die is cast.

A Human Rights Sub-committee

5.33 We considered whether this role could be carried out by the Constitutional Committee proposed above. We concluded, however, that while that Committee would probably be concerned with broad trends in human rights development, it might not provide a suitable vehicle for the continuing oversight of human rights issues – partly because of workload. On the other hand, there could be considerable overlap with the work of the Constitutional Committee in terms of the expertise of potential members, staff resources and the issues which might arise. Although this is a matter for the second chamber itself to decide, our suggestion is that the Constitutional Committee should establish a Human Rights Sub-committee, with an ability to co-opt other members,¹⁰ to serve as the focus for the second chamber’s interest in human rights. That Sub-committee might also provide the second chamber’s members of the proposed Joint Committee on Human Rights.

Recommendation 24: The second chamber should consider whether the proposed Constitutional Committee should establish a Human Rights Sub-committee to serve as the focus for the second chamber’s interest in human rights. That Sub-committee might also provide the second chamber’s members of the proposed Joint Committee on Human Rights.

¹⁰ Such a structure would mirror that of the House of Lords’ European Union Committee.