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more timely or more needed'**

JOHN HUMPHRYS

THE RAPE OF THE CONSTITUTION?

FOREWORD BY MICHAEL BELOFF QC

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IMPRINT ACADEMIC

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Published in the UK by Imprint Academic
PO Box 1, Thorverton EX5 5YX, UK

Published in the USA by Imprint Academic
Philosophy Documentation Center, Bowling Green State
University, Bowling Green, OH 43403-0189, USA

ISBN 0 907845 70 3

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the
British Library

Library of Congress Card Number: 00-101083

Front cover design: AB Graphics, Exeter
Rear cover graphic: Mother ®

Printed in Exeter UK by Short Run Press Ltd.

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Contents

About Authors	vii
Dedication and Editor's Note	viii
Michael Beloff , <i>Forward</i>	ix
Keith Sutherland , <i>Introduction: Bagehot Revisited</i>	1
Overview	
Tony Benn , <i>How Democratic is Britain?</i>	33
Jonathan Freedland , <i>Ten Steps to the Revolution</i>	61
Peter Hitchens , <i>A Slow-Motion Revolution: How New Labour rediscovered its republican roots</i>	93
Response from Jonathan Freedland	109
Gillian Peele , <i>New Structures, Old Politics?</i>	115
Simon Hughes and Duncan Brack , <i>Power, Politics and Modern Liberalism</i>	129
Holding the Government to Account	
Nevil Johnson , <i>Parliament Pensioned Off?</i>	145
Bernard Weatherill , <i>The Law of Unforeseen Consequences</i>	163
Michael Spicer , <i>Socialism on the Sly: The new parallel government of the regulators</i>	179
The House of Lords	
Peter Carrington , <i>The Lords are A-Leaping</i>	187
J.R. Lucas , <i>Constitution and Democracy</i>	199
Andrew Tyrie , <i>Reforming the Lords: The Democratic Case</i>	213

Michael Rush , <i>The Wakeham Report</i>	227
Conrad Russell , <i>Wakeham Report: A short commentary</i>	241

Devolution and Local Government

Simon Jenkins , <i>Local Government</i>	245
Tam Dalyell , <i>Devolution: The End of Britain</i>	257
Diana Woodhouse , <i>The Judicial Committee of the Privy Council: Its new constitutional role</i>	263

The European Union

Roy Jenkins , <i>Britain and Europe: The problem with being half pregnant</i>	277
Jeremy Black , <i>Foreign and Defence Policies: The challenge of Europe</i>	285
Norman Tebbit , <i>Britain and Europe: The issue of sovereignty</i>	291
Peter Shore , <i>European Union Takeover of UK</i>	299

Populism and the Media

Peter Osborne , <i>The Rise of the Media Class</i>	309
Mick Hume , <i>What if they Gave an Election and Nobody Came?</i>	325
Moshe Berent and Keith Sutherland , <i>Consensus Politics and the Modern State</i>	333
Anthony O'Hear , <i>The People's Party</i>	341
Mike Diboll , <i>Democracy Direct</i>	349

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Dedication and Editor's Note

This book is dedicated to the memory of Max Beloff who died shortly after confirming his own contribution.

The editorial policy was to include scholars, politicians and journalists from all points on the political spectrum who would not normally share the same platform or address the same audience. Whilst most of the essays are new, a small proportion are revised and updated versions of previously published material.

Notwithstanding the diverse provenance of the authors there is a surprising degree of agreement. Although it would be misleading to imply that everyone was 'singing from the same hymn-sheet', the main difference between the *English Hymnal* and *Hymns Ancient & Modern* is the colour of the cover.

*Keith Sutherland
Bramford Speke, Devon
February 2000*

Michael Beloff

Foreword

My father, Max Beloff, would undoubtedly have regarded the title to this compelling collection of essays as an example of mealy-mouthed meiosis. He never knowingly understated anything. Although it had always been an intellectual fantasy of mine that one day we should collaborate on a book on the British Constitution (a dynamic Diceyan duo *de nos jours*), in fact the only time that we put joint pen to paper was in attacking Lord Mackay's Green Paper on the reform of the legal profession, and, in particular, his proposals for civil service involvement in the profession's regulation. Even then we quarrelled over whether it was appropriate to say (as Max wished) that 'lay' was simply a synonym for 'ignorant'.

My father was of course a political scientist and latterly a legislator of passionate views. I am a lawyer — a construer, not a maker of legislation — whose views are necessarily subordinate to the interests of my clients. It is improper to express them in court, and (in my judgment) unwise to broadcast them too loudly outside it. Our interests overlapped, it may be said, to a greater extent than our ideologies. One of my father's last public pronouncements was to defend the retention of the hereditary peerage; he genuinely wished *défendre l'aristocratie*, and not merely *épater la bourgeoisie*. It fell by coincidence to me, as an advocate, to appear before the Committee of Privileges to argue on behalf of the Conservative Hereditary Peers that the (then) Bill to abolish the hereditary element in the House of Lords from the end of the session was ineffective to attain its end. My submission was that, on its true interpretation, the Bill failed unambiguously to cancel rights to sit which resulted from response to the Monarch's

writ of summons to Parliament. The Committee's decision was that, whatever might be or have been the incidents of the medieval writ, the Bill was clearly designed to override them. It was a stark reminder that Parliament can undo, if it wills, the legacy of centuries in the course of a few months.¹

Yet I would argue that one of the most profound recent changes to the Constitution (I squeamishly abjure notions of rape, or even indecent assault) results not from the designs, benign or brutal, of New Labour or Thatcherite Tory, but from the activities of the third branch of government, the judiciary, which have themselves infringed the sovereignty of Parliament – an impregnable given for those reared in the traditions of Blackstone and Dicey.

True it is that the major change was wrought by the accession of the United Kingdom to the Common Market, its signature of the Treaty of Rome, and the enactment of the European Communities Act of 1972. The critical consequence of those decisions, underplayed at the time, was not so much that it gave the European Court of Justice ultimate authority in matters of community law – although, of course, it did that – as that it gave English judges, for the first time since the seventeenth century, power – whose legitimacy was beyond doubt – to hold that domestic primary legislation was invalid as incompatible with directly effective community law. When Lord Bridge said...

Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of community law²

...he spoke of what may have been clear to the eminent Law Lord but must have been obscure to lesser mortals.

I was myself involved in two of the major cases which revealed the dimensions of this new reality. In *Marshall v. Southampton Area Health Authority* (1986 QB 401), I persuaded the European Court of Justice that different retiring ages for

[1] The Motion of Lord Mayhew of Twisden (TLR 12.11.99; HL Paper 106-1).

[2] *Factortame No.2*, 1991 1 AC 603, p. 659.

men and women offended against the Community principle of non-discrimination.³ In *R. v. Secretary of State for the Home Department ex p. The Equal Opportunities Commission* (1995 1 AC 1), I failed to defend for the Government in the House of Lords provisions of domestic law which laid down time limits before rights to redundancy payment or compensation for unfair dismissal could be claimed. The Appellate Committee held that these were indirectly discriminatory against women, contrary to Article 119 of the Treaty of Rome and the Equal Treatment Directive. The Committee went on to describe the Government's attempt to justify them on grounds of employment protection in brutal language as 'not containing anything capable of being regarded as factual evidence demonstrating the correctness of these views' (p. 26). *The Times* editorial suggested that the decision showed that for the first time the United Kingdom might have a constitutional court.

Enjoying the feel of powers conferred adventitiously from without, the judges exploited to the full inherent powers which had atrophied during the long winter of administrative law which spanned the '30s, '40s and '50s. Although the grounds⁴ for judicial review⁵ did not allow (the sphere of Community law apart) an attack on statute, or even the overturning of an administrative decision on mere merits, the devil lay in the application of those grounds. In *Secretary of State for Defence v. Guardian Newspapers* (1985 AC 339) Lord Diplock repudiated the notion of a 'constitutional right' in the British context as no more than a 'evocative phrase' (at p. 345). By 1999 it had become an enforceable concept, so that in *R v. Secretary of State for the Home Department ex p. Simms* (1999 3 WLR 328), the principle of legality had come to mean, in the words of Lord Hoffmann (p. 349), that 'fundamental rights cannot be overridden by general or ambiguous words'. Without support from a Bill of Rights, without even parliamentary fiat, the judges had decided that the common law elevated cer-

[3] And in its sequel, *Marshall No.2* (1994 QB 126) that the cap on compensation for sex discrimination under the domestic Acts was equally unsustainable.

[4] Illegality, irrationality, and procedural impropriety.

[5] As from 1979 the procedure for judicial control of the executive came to be called.

tain rights, which they, the judges, selected, to superior status in the hierarchy of legal norms. Irrationality and procedural impropriety were equally open textured concepts. While paying lip service to the decision maker's primary right to decide what was reasonable and what was fair, the judges were able to imprint their own views as to whether either test was satisfied.

Now from 2 October 2000 AD fresh impetus will be given to judicial creativity and authority by the substantial domestication of the European Convention on Human Rights in the Human Rights Act 1998 ('HRA') which will shift the whole focus of public law from consideration of executive wrong to that of citizens' rights.⁶ And the ingenious device entitling judges under section 4 of the HRA to make a declaration of incompatibility of domestic statute with Convention rights, while preserving the forms of parliamentary sovereignty, further undermines its substance. Faced with such a declaration, Parliament will be confronted with a constitutional Hobson's choice of amending the legislation or mounting a rearguard (and, in probability, unsuccessful) defence in the Strasbourg Court.

The Lord Chancellor, before he ascended the Woolsack, spoke with eloquence, if apprehension, of the risks of 'judicial supremacism' which has extended even to speculation by judges in lectures (although not yet in judgments) that in certain circumstances judges might decline to enforce Acts of Parliament simply because they offended (in the judges' view) against fundamental rights and natural law — a position last taken by Sir Edward Coke in the seventeenth century.

There are, of course, arguments in favour of giving judges overriding authority even in a democratic society: the United States of America provides the paradigm example where this has been chosen as an appropriate procedure for a free people. But, it seems to me, such changes should come about by choice

[6] Interestingly, in a variety of cases the judges have already decided cases as if the HRA were in force; see from my own case file *Ex p. Amin* (TLR 16.11.99) — is entrapment evidence admissible in criminal cases?; *Stern v. Official Receiver* (Independent Law Report. I6.2.00) — is compelled evidence admissible in civil regulatory proceedings, e.g. for director's disqualification?

and after long and anxious debate, not by stealth. The corollary of enlarging judicial power is to invite outside control of the judiciary. When judges become involved in decisions of a political character (even if not fairly characterized as political decisions), politicians will wish to become involved in their selection. The system which gave the USA Brandeis, denied them Bork. Irrespective of the relative merits of those two lawyers, I am unpersuaded that the bargain is a good one, because at some future date, who knows, a Brandeis might be denied status on the grounds of some fashionable political correctness.

These essays suggest that there are two routes to a good constitution as an integrated whole: tradition—in which it is slowly fashioned by the experience of time, and reason—in which it is more swiftly fashioned in the crucible of analysis. It is a matter of concern to all of us that the British Constitution is arguably being altered in a manner which is distinct from either.

Michael J. Beloff QC
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