

CONSTITUTIONAL SCRUTINY OF EXECUTIVE BILLS

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I INTRODUCTION

In this article I shall be considering the arrangements in parliamentary systems for the scrutiny of bills and draft bills against a range of broadly constitutional criteria. I consider in particular whether or in what conditions it is possible for executives or chambers of Parliament to engage in constitutional scrutiny effectively. A problem in a country without a written or codified constitution is that there is even more room than in others for debate about what is or is not 'constitutional', either in the sense of having to do with the system of government or, more relevantly for present purposes, in the sense of being normatively required or prohibited in relation to the system.

As Finer, Bogdanor and Rudden comment, the United Kingdom constitution is 'indeterminate, indistinct and unentrenched'.¹ The problem of determining what is constitutional or unconstitutional arose acutely in 2004 in the UK when clause 10 of the government's Asylum and Immigration (Treatment of Claimants, etc) Bill 2003/4 ('Asylum and Immigration Bill') sought to oust the jurisdiction of the courts to review or hear appeals from the decisions of a new one tier Asylum and Immigration Tribunal. The story of this clause provides the framework for much of the analysis in this article. Given that the readership will be predominantly Australian and may not be informed about the UK system, some account of basics will be included, with apologies to those who are familiar with the material.

To explain why the ouster clause was so controversial it will be helpful to note its breadth. It specifically and in terms excluded appeal or judicial review of the Tribunal's decisions on grounds of 'lack of jurisdiction', 'irregularity', 'error of

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¹ S E Finer, Vernon Bogdanor, and Bernard Rudden, *Comparing Constitutions* (1995) 40.

law', 'breach of natural justice' or 'any other matter'.² In other words it sanctioned potentially very serious breaches of the law by the Tribunal. The government's reasons for the ouster were that illegal immigrants and asylum seekers were applying for judicial review of decisions taken by officials or inferior tribunals as a delaying tactic. They did this in the knowledge that the longer they managed to stay in the country the less likely it was that they would eventually be deported back to their home countries, even if they were found to be illegal immigrants or not genuine asylum seekers. Another concern that led to the inclusion of the ouster clause was that costly legal aid is available for judicial review in asylum cases, and is not available in other immigration related cases, and that this might be seen as unfair by the immigrant population. There was also general public and press concern about what was seen as uncontrolled and uncontrollable immigration.

The proposed ouster clause caused a major political and legal furore. It must have been obvious to the government from the start that the clause would be considered by many to be constitutionally objectionable. There had been previous disagreements between Lord Chancellor Irvine and Home Secretary David Blunkett over proposals for ouster clauses in which the constitutional objections must have been put plainly. It was to be expected that there would be objections from the legal community, including (but not limited to) judges, practitioners and government lawyers. Indeed as we shall see this turned out to be the case as the Bill passed through the House of Commons. Various parliamentary committees published strongly critical reports on the clause, backed up by evidence given to them by independent practitioners. And yet the clause passed through the House of Commons, where the government had a huge majority.

The Lord Chief Justice, Lord Woolf, claimed in a public lecture delivered shortly before the Bill was to have its second reading in the Upper Chamber that it was 'fundamentally in conflict with the rule of law and should not be contemplated by any government if it had respect for the rule of law', and that implementation of the clause would be a blot on the reputation of the Government and undermine its attempts to be a champion of the rule of law overseas.³ (The aspect of the rule of law to which he referred was the principle of legality, the idea that there should be recourse to the courts to challenge illegal actions by public bodies – or indeed private ones.) Lord Woolf revealed in that lecture that the judges had discussed their concerns about the clause with the government, which had taken account of them by having the proposed clause redrafted to tighten up the ouster, rather than accepting the constitutional objections put by the judges. He suggested that 'if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution'. In answer to a question from a member of the

² Asylum and Immigration (Treatment of Claimants, etc) Bill 2003/4 (UK) s 10(7), by insertion of a new section 108A (3)(a) into the *Nationality, Immigration and Asylum Act 2002* (UK).

³ Lord Woolf, 'The Rule of Law and a Change in the Constitution' (paper presented at The Squire Centenary Lecture, University of Cambridge, 3 March 2004) Cambridge University Squire Law Library <http://www.law.cam.ac.uk/squire/about_lib_woolf.php> at 1 July 2004.

audience whether this clause was of a kind that he was referring to in a lecture he had given in 1995 in which he had raised the possibility that the courts might refuse to give effect to a provision that was contrary to the rule of law,⁴ the Lord Chief Justice replied 'Yes'.⁵

The Opposition parties and some Labour backbenchers in the House of Lords decided to vote down the clause, and a number of influential members put down their names to speak in the debate on second reading, including the former Lord Chancellor, Lord Irvine who was expected to make an excoriating speech condemning the clause on constitutional grounds. This prospect led the Secretary of State for Constitutional Affairs (who was also Lord Chancellor) at the start of the second reading debate in the Second Chamber to withdraw the clause and undertake to bring forward alternative proposals for review of the decisions of the tribunal. This decision was welcomed by the House generally, but many members took the opportunity to express in strong terms their condemnation of the fact that such a clause had been included in the Bill in the first place and that the Secretary of State/Lord Chancellor, Lord Falconer, should have been a party to it and ever have considered promoting it in the House.⁶ There was also concern that he had been engaging in constitutional brinkmanship or 'chicken', daring the second chamber and the judges to defy the government.

We shall consider in Part II the various scrutiny stages through which the ouster clause had passed, but the point for present purposes is that the Cabinet committees that saw the Bill and the particular members of the UK government responsible for it (the Lord Chancellor and the Home Secretary, David Blunkett) either did not understand that there was such a thing as a constitutional principle of the rule of law and access to the courts, or did not feel bound by constitutional principles in the face of other policy considerations. A point of comparison between the UK and many other democracies is that in the UK there is no requirement of special parliamentary majorities to give effect to provisions that amend the constitution, or to give effect to measures that are incompatible with the constitution. Overall the government's position was most probably that it was the business of the government to solve problems and not the business of judges (or the unelected second chamber) to stop them on merely constitutional grounds. In other words, there was a cultural divergence on an important constitutional issue between politicians in government and others, including the legal establishment, as to the importance of the rule of law and access to the courts in a democracy. The legal establishment, regardless of party affiliation, if any, was strongly and vociferously

⁴ Lord Woolf, 'Droit Public – English Style' [1995] *Public Law* 57, 67-68. See also Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72, 84-85, in which he indicated that the courts might be justified in refusing to give effect to a measure that was in breach of democratic principles.

⁵ Lord Woolf, The Squire Centenary Lecture, University of Cambridge, 3 March 2004. I was there and heard the exchange.

⁶ See UK, *Parliamentary Debates*, House of Lords, 15 March 2004, cols 49-124.

opposed to the clause.⁷ In such a situation serious questions arise for those who do subscribe to a concept of constitutionality as something other than the will of the majority in Parliament, as to whether purely intra-governmental and parliamentary controls such as exist in the UK are sufficient guarantee of constitutionality of legislation, and whether independent, legally entrenched mechanisms are needed in addition to the political controls. Constitutional principles seem to be nothing more than policy positions that can easily be displaced by other policy arguments which seem to the government to be stronger.

A *The Meaning of 'Scrutiny'*

The very term 'scrutiny' covers a wide range of processes, some less structured than others. The Departmental Select Committees in the UK House of Commons 'scrutinise' in the sense of 'monitor' the expenditure, administration and policy of Departments.⁸ Standing committees 'scrutinise' bills in the sense of debating and amending them at the committee stage of a bill, after second reading.⁹ Both of these kinds of scrutiny are not confined by any stable or set criteria, whether related to constitutionality or not.

'Scrutiny' of bills can however take a more concrete form than that which takes place at second reading or committee stage in the two Houses. Feldman suggests that one usage of the term scrutiny, and an important one in relation to bills, is in reference to a *principled* activity.

Even if conducted in a somewhat unconstructive way, [scrutiny] has its own disciplines. The scrutineer tests the provisions of a measure against certain standards which are independent of the terms or subject-matter of the measure itself, and can and should be applied consistently to all measures which are scrutinised. The standards can be, and should be, chosen and applied so as to be largely unaffected by political, or at any rate party political, considerations.¹⁰

It is this kind of scrutiny with which we are mainly concerned here, the 'standards' for scrutiny being constitutional.

⁷ Lord Irvine, former Labour Lord Chancellor opposed the clause. So did Lord Mackay, former Conservative Lord Chancellor, the Conservative shadow Lord Chancellor, Lord Kingsland, Liberal Democrat Lord Lester of Herne Hill QC, Labour Baroness Kennedy and Lord Plant, who all spoke against it in the second reading debate in the House of Lords, along with many others: see UK, *Parliamentary Debates*, House of Lords, 15 March 2004, cols 49-124.; Law Lord Steyn and the Lord Chief Justice of England and Wales, Lord Woolf, both gave public lectures opposing it. In fact David Blunkett was almost the only person who was willing to speak in favour of the clause.

⁸ See Thomas Erskine May, *Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*. (22nd ed, 1997) ch 26; Robert Blackburn and Andrew Kennon, *Griffith and Ryle on Parliament: Functions, Practice and Procedures* (2nd ed, 2003) [11.02].

⁹ See Erskine May, above n 8, ch 27; Blackburn and Kennon, above n 8, [6-226-232].

¹⁰ David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] *Public Law* 323, 328.

B What are Constitutional Principles and Unconstitutional Measures?

‘Constitutional principles’ and ‘constitutional scrutiny’ are rather vague terms. There are particular difficulties in determining what are constitutional criteria in an unwritten constitution such as that of the UK, where Parliament enjoys unrestricted legislative competence (save in respect of European law). But even written constitutions do not state everything that is normatively constitutional in a system. There are numerous concepts and principles that are implicitly or culturally accepted to be constitutional by commentators and constitutional actors, but which do not find expression in written constitutions. Thus in Australia the High Court has enunciated some implied fundamental rights, even in the absence of a Bill of Rights,¹¹ and in France the *Conseil d’Etat* has referred to the *Declaration of the Rights of Man and of the Citizen 1789* to enable it to develop general principles of law giving effect to constitutional values.¹² Many constitutions do not refer in terms to the rule of law, the principle of legality, the separation of powers, legal certainty, judicial independence, ministerial responsibility or political accountability. Not all written constitutions include bills or charters for the protection of human rights. And yet these are understood to be important values and principles in those systems. They would be included in the category of constitutional principles by most commentators and politicians committed to representative democracy and a Westminster system. Other principles may be less obviously constitutional. Scrutiny of provisions that have adverse retrospective effects on individuals or companies, or that might inappropriately delegate legislative power to ministers or fail to provide for appropriate parliamentary scrutiny of delegated legislation, or remove regulatory burdens,¹³ would be included in our understanding of constitutional scrutiny.

The principal sources of constitutional principles will be the texts of the written constitution or basic law or charter of rights, if there is one, and of important constitutional statutes or texts such as, in the UK, *Magna Carta 1215*, the *Bill of Rights 1689*, *Act of Settlement 1700*, the *Acts of Union 1707 and 1800*, the various *Representation of the People Acts*, the *European Communities Act 1972*, the *Human Rights Act 1998* (UK) and the devolution statutes of 1998. Most countries will have such statutes and texts, even if they also have written constitutions. Statutes that may be regarded as constitutional in the UK have been usefully defined by Laws LJ in the case of *Thoburn v Sunderland City Council* as follows:

¹¹ *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 108 ALR 557; *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681; Keith D Ewing, ‘New Constitutional Constraints in Australia’ [1993] *Public Law* 256; Hoong Phun Lee, ‘The Australian High Court and Implied Fundamental Guarantees’ [1993] *Public Law* 606.

¹² See John Bell, *French Constitutional Law* (1992) 64-73.

¹³ See discussion of the Delegated Powers and Regulatory Reform Committee of the House of Lords, below, part III(B)(2).

A constitutional statute is one which conditions the legal relationship between citizen and state in some general overarching manner, or enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.¹⁴

There are, however, many further possible sources of constitutional principles and values which could, and commonly do in practice, provide the criteria for constitutional scrutiny of legislative proposals or restrictions on the introduction of legislative proposals. Topical ones at present in the UK include the principle, which finds expression in resolutions of the House of Commons over the years and in reports of the Committee of Privileges or of Standards and Privileges, that MPs are representative of their constituencies and must not accept mandates from their sponsors;¹⁵ the requirement that ministers should accept individual responsibility to Parliament for their own decisions (which finds expression in resolutions of the two Houses);¹⁶ and certain principles underlying the law and practice of Parliament (for instance that the Speaker of the House of Commons should act as the representative of the House and as an impartial presider over the House and enforcer of its rules¹⁷). Such rules are commonly rooted in the particular history and culture of institutions and are not easily expressed in statutes or transplanted to other jurisdictions, especially if they are not explicitly underpinned by supporting legislation. But if they were to be breached by legislative provisions, objections would surely be taken on grounds of constitutionality by lawyers and other commentators.

Executives around the world are parties to and are bound by a range of international instruments with constitutional implications, notably about human rights, with which their legislation ought to comply. It falls primarily to the executives in these countries to ensure that their legislative proposals comply with these obligations before a bill or draft bill is presented to Parliament for scrutiny. The level of its conscientious commitment to fulfil international obligations will affect the degree to which an executive's proposals meet these obligations, and the effectiveness of constitutional scrutiny in Parliament or elsewhere before a measure that might be incompatible with these obligations can be promulgated. However, in dualist systems such as the UK and most common law systems these international instruments do not give rise to rights or obligations that are enforceable in the

¹⁴ [2002] 3 WLR 247. This definition was given for the purposes of deciding whether a possible new principle of statutory interpretation was emerging, namely that the courts would not hold a constitutional provision in a statute to have been repealed by a subsequent Act unless the repeal was explicit. But such a definition could usefully serve to determine which measures should be subject to special protection by scrutiny of proposed changes or interferences in a system of constitutional scrutiny. The Joint Committee on the Draft Civil Contingencies Bill 2003 recommended that a list of constitutional statutes be included in the Bill as not subject to amendment by statutory instrument.

¹⁵ See House of Commons, *Code of Conduct for Members of the House of Commons*, 24 July 1996; see Oonagh Gay and Patricia Leopold (eds), *Conduct Unbecoming: The Regulation of Parliamentary Behaviour* (2004) 361. See also *Osborne v Amalgamated Society of Railway Servants* [1910] AC 87.

¹⁶ UK, *Parliamentary Debates*, House of Commons, 19 March 1997, cols 1046-7; UK, *Parliamentary Debates*, House of Lords, 20 March 1997, cols 1055-62.

¹⁷ See Erskine May, above n 8, 188-193.

courts¹⁸ though they will be relevant in statutory interpretation.¹⁹ The pressures on the executive to conform will be less than in monist systems where international instruments may give rise to rights enforceable in domestic courts.

We also need to consider the senses in which the term unconstitutional may be used in reference to provisions in bills and statutes. If a measure would be unlawful, for instance as being in breach of European Community law, it might attract the epithet ‘unconstitutional’, though probably only if it referred to something relevant to the system of government. A provision that was incompatible with European rules about food safety would probably not be regarded as unconstitutional, only unlawful. European law apart, all provisions in UK Acts of Parliament are legally valid but some of them may be contrary to constitutional principles. This point was made in the case of *Madzimbamuto v Lardner-Burke* in which Lord Reid stated:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid.²⁰

The ouster clause is a good example of a provision that was regarded as unconstitutional in this sense by the legal establishment and many other informed commentators. Provisions that breach rights under the *European Convention on Human Rights 1950* that have been incorporated into UK law by the *Human Rights Act 1998* might also attract criticism as being unconstitutional, even though they are legally effective (though possibly subject to a declaration of incompatibility). On the other hand, the government might claim that there is nothing unconstitutional in Parliament exercising its legislative powers to the full. On that view, however, no Act can be unconstitutional, and another word would have to be found for a provision that was legally valid but flew in the face of normative constitutional principles.

C What is Parliament?

Much of the discussion which follows will be concerned with the role of a Parliament in the scrutiny of legislation. Parliament has many dimensions and it would be misleading to regard it as a single, indivisible institution. The UK Parliament consists of two chambers which function largely independently of one another (exceptions being some Joint Committees). They are very different in their culture. The House of Commons, or at least members of the governing party, tend to give less priority to constitutional principles that restrain government than the

¹⁸ See *The Parlement Belge* (1879) 4 PD 129; *Civilian War Claimants v The King* [1932] AC 14.

¹⁹ *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116; *Garland v British Rail Engineering* [1983] 2 AC 751, 771.

²⁰ [1969] 1 AC 645, 723.

second chamber, as the history of the ouster clause shows. The House of Commons' culture is strongly majoritarian and committed to parliamentary sovereignty. Most members have probably never heard of the rule of law.

The members of the House of Commons seldom act, or consider themselves to be acting, together in a corporate spirit or capacity when scrutinising government and its policies. Members of that House commonly act in a party spirit (the parties are the significant institutions within each House of Parliament) and the support of the members of one or more of those parties is at the disposal of the government. The culture in the House of Lords, with its large cross-bench component and the more independent stance that non-elected members can take up, is less politically partisan and tends to favour constitutionalism and limited government.

The members in each House also divide into cross-party select committees, some of which perform important criteria-led scrutiny roles and tend to divide less on party lines than when each House is meeting in plenary session, 'on the floor of the House'. By contrast the standing committees which undertake the committee stage scrutiny of bills in the House of Commons always have a government majority, they divide on party lines, and it is relatively rare for the government to accept amendments to bills that it has not itself proposed. Debating time is devoted mainly to the clauses on which the Official Opposition have tabled amendments.

Blackburn and Kennon have commented:

the reality is that the Palace of Westminster is a clearing-house of political pressure points, through which different power blocks wrestle with one another, constantly jostling for greater vantage points from which to project themselves and exert greater influence. The functions, practice and procedures of Parliament are the political tools which are employed for their various purposes.²¹

The point of all this is that the word 'Parliament' can conjure up a misleading image of an organisation that is well suited to careful constitutional scrutiny of bills on behalf of the public and in the general interest in constitutionalism. In fact, however, the groupings in each House, the different kinds of people there and the different conditions in which they work – particularly the partisanship and party politics that affect activities in the lower house – may mean that 'Parliament' is not well-suited to this function.

II THE LEGISLATIVE PROCESS: OCCASIONS FOR CONSTITUTIONAL SCRUTINY

Proposals for legislation go through a number of stages before they can reach the statute book or be brought into effect. A range of techniques are employed in parliamentary democracies round the world to ensure that adequate and appropriate arrangements are in place not only to secure that bills are properly drafted to achieve the desired substantive policy ends, but also to minimise the likelihood that

²¹ Blackburn and Kennon, above n 8, [13-001].

Parliament will in fact pass unconstitutional laws. The techniques are of varying degrees of formality and compulsion. It will be helpful to summarise these in this section, taking them in rough order of the process by which bills are formulated and eventually passed or promulgated. As we shall see there is considerable rhetoric in the soft law documents that govern the legislative process about constitutionality, but in practice a determined government can generally push through measures that are regarded as unconstitutional in the absence of the possibility of eventual judicial quashing. Insights can be gained from comparisons with other parliamentary systems, and some such comparisons will be drawn in Part III.

A *The Governmental Stage: Producing the Bill*

In countries with written constitutions three questions will arise when government is preparing primary legislation which do not arise in the UK. First, if any provisions in the bill or draft bill seek to amend the text of the constitution itself, will the prescribed special procedures (such as two thirds majorities in the legislative chambers or a referendum) be complied with and met, and what would be the consequences (either before or after the bill is promulgated) if that were not the case? Second, are any provisions in the bill or draft bill incompatible with the constitution, and if so are there special procedures to be followed, or what if anything can be done to prevent such provisions being passed into law? And third, will all provisions in the bill pass muster under any *post*-legislative scrutiny, for instance in the courts, and if not, what would be the consequences? Would they be struck down, or applied notwithstanding the defect? We shall not be considering the role of the courts here, but the quality of intra-governmental and parliamentary scrutiny will be affected by the question whether it is taking place 'in the shadow of the law' with the possibility of the provision not being applied or being held to be incompatible with constitutional provisions by the courts or other independent constitutional watchdogs. No government, or Parliament, welcomes the quashing of its legislation or it being held to be unconstitutional. In the UK, however, the validity of primary legislation may not, at present, be challenged by the courts save where European law is in issue. (The position in relation to human rights is discussed below.)

1 *Departmental Policy, Bids and Preparation for Legislation*

In the formative policy development stage within departments, bids for legislation are considered and prepared, and discussion takes place as to legal issues raised by policy proposals. The primary concern of ministers will be whether their proposals can be got through Parliament or got round by the courts. They will not be concerned with mere constitutionality.

Departments are required to comply with the informal *Guide to Legislative Procedures*²² on bills that is issued by the Cabinet to departments in the UK and, in relation to human rights, with the requirement in section 6 *Human Rights Act 1998* that public authorities should not act incompatibly with *Convention* rights, which is reflected in the document *The Human Rights Act 1998 Guidance for Departments*.²³ But the *Guide* and *Guidance* do not include warnings about the inclusion of possibly unconstitutional measures in primary legislation other than those that will be specifically considered by parliamentary committees, such as the Joint Committee on Human Rights, the Delegated Powers and Regulatory Reform Committee and the Constitution Committee of the House of Lords, discussed below.²⁴

Much of the work on the preparation of instructions to Parliamentary Counsel is done by departmental lawyers, who are expected to consult the Law Officers where they are in doubt about 'the legality or constitutional propriety' of proposed legislation.²⁵ 'Constitutional propriety' is however nowhere authoritatively defined. Departmental lawyers are civil servants, but they are also bound by the rules and ethics of their professions. The rules respect their status as independent professionals and allow for the proper exercise of independent professional judgment.²⁶ There is a pyramidal structure which entitles departmental lawyers working on legislation to refer issues of concern up their hierarchy. But while they have a professional obligation to give impartial, objective and frank advice, as civil servants, the *Guidance Note for Government Lawyers* and *Civil Service Code* state, they owe their loyalty to the duly constituted Government and are accountable to their minister.²⁷ This is a controversial position on the part of the Government but in practice it governs the relationships between ministers and civil servants.

The Cabinet Office *Guide to Legislative Procedures*²⁸ sets out a number of the requirements, some of a constitutional nature, which should be met by Departments. For instance, the bill should be compatible with the *European Convention on Human Rights 1950*, unless the government is specifically prepared to justify breaching its provisions. When the bill goes in due course to the Cabinet Legislative

²² Cabinet Office, *Guide to Legislative Procedures* September 2003, Available on the Cabinet Office website < <http://www.cabinet-office.gov.uk/> > at 1 July 2004.

²³ Cabinet Office, *The Human Rights Act 1998 Guidance for Departments*, February 2000; see also Terence Daintith and Alan Page, *The Executive in the Constitution* (1999) ch 8; see also further discussion below, part II(B)(1).

²⁴ There is, by contrast, extensive guidance on the drafting of statutory instruments, warning against retrospectivity, uncertainty and so on. Such defects in statutory instruments, unlike those in bills, are vulnerable to quashing by the courts.

²⁵ See Cabinet Office, *Ministerial Code*, July 2001 [22(b)(i)]; Government Legal Service, *Guidance Note for Government Lawyers*, 1, s 1; Daintith and Page, above n 23, 256-258.

²⁶ Government Legal Service, above n 25, 1, s 2.

²⁷ This doctrine is in line with the position set out in the *Armstrong Memorandum* (Feb 1985) published in the wake of the *Ponting* case. See now Cabinet Office, *Ministerial Code*, 1997, ch 5; Rodney Brazier, *Ministers of the Crown* (1997) 132-141; Diana Woodhouse, *In Pursuit of Good Administration* (1997) ch 2.

²⁸ Blackburn and Kennon, above n 8, [13-001].

Programme Committee for clearance for introduction into Parliament, a memorandum setting out the bill's compatibility with the *European Convention on Human Rights 1950* will have to be produced²⁹ and when the bill is introduced in Parliament the minister will have to make a statement under section 19 of the *Human Rights Act 1998* as to its compatibility with *Convention* rights. Civil servants preparing bids and bills sometimes contact the Legal Adviser to the Joint Committee on Human Rights to find out whether provisions are likely to pass muster before the Committee.³⁰

Apart from these *Human Rights Act 1998* requirements, there is no other *statutory* duty on ministers or the UK government, and thus on their departments, to consider constitutional implications of bills. By contrast, under the *Scotland Act 1998* section 31(1) a member of the Scottish Executive in charge of a bill shall, on or before the introduction of the bill in the Parliament, state that in his view the provisions of the bill would be within the legislative competence of the Parliament.³¹ This illustrates the effect of legislating 'in the shadow of the law', which includes European law and the *Human Rights Act 1998*, on the legislative process.

However, in preparing and drafting bills, Departments and the lawyers working in them, and Parliamentary Counsel will also know that the House of Lords Delegated Powers and Regulatory Reform Committee will scrutinise bills for inappropriate delegation of legislative powers, and consider whether subordinate legislation should be subject to negative or affirmative resolution in Parliament.³² Departments will consider the justifications for the delegation and regulation of such powers carefully.³³ Provisions that do not pass muster might well be regarded as unconstitutional in the sense discussed earlier. A memorandum explaining the purpose and justification for such powers must be sent to that Committee by the time the bill enters that House. It is significant then that where a constitutional principle is clear and incorporated into the terms of reference of a parliamentary committee whose members have expertise and are not influenced by party politics in their work, the *Guide to Legislative Procedures* requires the principle to be taken seriously and respected in the terms of the bill. But in the absence of such specific parliamentary scrutiny and without the possibility of recourse to the courts, the *Guide* lays down no special requirement of attention to constitutional principles.

Once a Department has prepared a bid for a slot in the legislative programme, the policy must be collectively agreed and cleared by the relevant Cabinet policy committee – in the case of the Asylum and Immigration Bill this would be the

²⁹ Ibid, ch 10. This memorandum is not however shown to Parliament and its committees.

³⁰ See below for discussion of the Committee at part II(B)(1).

³¹ The Presiding Officer is also required, by section 31(2) of the *Scotland Act 1998* to decide whether in his view the provisions of the bill would be within the legislative competence of the Parliament and state his decision.

³² See below part II(B)(2).

³³ They are required to do so by the *Guide to Legislative Procedures*, above n 22, ch 8, 26 and 27.

Cabinet Domestic Affairs Committee, chaired by the Deputy Prime Minister. Agreement on the ouster clause policy would have been reached between the relevant departments (the Home Office and the Department for Constitutional Affairs) and their ministers by then. The objections to the ouster clause must have been known, but a determined Home Secretary was able to persuade his colleagues to support the Bill in the knowledge that there is no legally effective way of preventing such a measure from taking effect if it passes in Parliament – unless and until the courts decide to modify the doctrine of parliamentary sovereignty in order to uphold the rule of law, as Lord Woolf indicated they might be justified in doing in his 1995 lecture.³⁴

The Cabinet Legislative Programme Committee then decides whether to grant a slot for the bill in the legislative programme.³⁵ That Committee will not be concerned with policy or constitutionality. Only when the Legislative Programme Committee has cleared the bill can the Department instruct Parliamentary Counsel on the drafting of the bill.

2 *Parliamentary Counsel: Drafting the Bill*

The identification of and attention given to possible constitutional implications of the bill at the drafting stage will depend in part upon the practices of Parliamentary Counsel. They are separate from the civil service and independent, being outside government departments. Their role is both to facilitate what ministers want, and to warn them of difficulties. They draft the legislation necessary to give effect to government policy.³⁶

Parliamentary Counsel have been said to act as guardians of legal values, which include some constitutional values such as non-retrospection of laws, respect for the liberties of individuals, and separation of powers in the sense that legislative powers should not be inappropriately delegated.³⁷ However, ‘the legal values of which Counsel act as the internal guardians are impossible to state with precision’.³⁸ They include compliance with international law, clarity and proportionality. Daintith and Page comment that ‘the concept of legal policy as interpreted by Parliamentary Counsel is as close as our system has traditionally come to a check on the “constitutionality” of legislation’.³⁹ As we shall see, however, since then parliamentary committees have taken on additional responsibilities for constitutional scrutiny.

³⁴ Lord Woolf above n 4.

³⁵ See *Guide to Legislative Procedures*, above n 22, ch 6; and Daintith and Page, above n 23, ch 8 for a general account of the process of preparing legislation.

³⁶ See *Guide to Legislative Procedures*, above n 22, ch 8.

³⁷ See Hansard Society Commission, *Making the Law: the Report of the Hansard Society Commission on the Legislative Process* (1993) [187-189]; Daintith and Page, above n 23, 254-256.

³⁸ Daintith and Page, above n 23, 254.

³⁹ *Ibid.*

The drafting process is iterative, conducted largely by correspondence between departmental lawyers and Parliamentary Counsel, though there may be meetings with ministers if considered desirable.⁴⁰ Parliamentary Counsel make a subjective and personal input into the drafting of bills, and they do so on their own personal responsibility. They are encouraged to be forthright in their comments on proposals and suggestions for drafting in correspondence, in meetings with ministers and at the Legislative Programme Committee. They consider it to be part of their role to warn ministers of the consequences of following certain courses of action, and to draw attention to aspects of a proposed bill that are not consistent with normal legal or constitutional values and the general Whitehall ethos. If they are concerned about a proposal they may ask the department whether it has considered referring it to the Law Officers, which may well result in the idea being dropped. They may refer matters to the Law Officers, who may take up the matter with the minister, but this is exceptional. It has been said that the Law Officers will almost always take the same line as Parliamentary Counsel, and the Department will yield. But it is impossible to know if this is the case in practice.

Parliamentary Counsel and the Attorney General would not, however, be able to prevent the inclusion of an ouster clause such as the one in the Asylum and Immigration Bill, or indeed any other provision that was contrary to constitutional principles but legally valid. This illustrates the way in which parliamentary sovereignty trumps arguments about constitutionality and shows that the drafting process, like the processes within Cabinet committees, cannot be expected to provide watertight protection against the passing of measures that are unconstitutional in the sense of being inconsistent with constitutional principles, though lawful.⁴¹

3 Clearance: the Cabinet Legislative Programme Committee

In due course the bill, once drafted, goes to the Legislative Programme Committee, which is concerned with the business of getting the government's legislation through Parliament and not directly with constitutionality. The whips will know whether the bill has the support of government backbenchers in each House. The Chief Whip in the House of Lords (where the government does not have a majority) will know whether a combination of government backbenchers, members of opposition parties and cross benchers will defeat a provision in the bill, perhaps on constitutional grounds.⁴² It was the knowledge that the ouster clause in the Asylum and Immigration Bill would not pass the House of Lords in the face of largely constitutional objections that led the government to withdraw that clause at second reading. At times in the past the predecessors of the Legislative Programme Committee have been chaired by the Lord Chancellor, who, as the member of the

⁴⁰ See *Guide to Legislative Procedures*, above n 22, [8.11-8.13].

⁴¹ See earlier discussion of the meanings of constitutional and unconstitutional at part I(B).

⁴² The importance of considering the likely reception of a bill in the House of Lords is recognised in *Guide to Legislative Procedures*, above n 22, ch 25 of which requires departments to prepare a House of Lords handling strategy.

government with responsibility for justice and as a link between the judges and the executive, might have been well-placed to raise constitutional issues. However it was no part of the formal duties of the Lord Chancellor to act as constitutional or legal adviser to government. That was and remains the role of the Law Officers. They will be members of the Legislative Programme Committee as will the Leaders of the two Houses, the Chief Whip and the Lord Chancellor/Secretary of State for Constitutional Affairs. Parliamentary Counsel will be in attendance at the meeting of the Legislative Programme Committee, and departmental officials may accompany their minister. But the Committee has been said to act more as a business management committee than one concerned with actual scrutiny of bills.⁴³ Experience of the ouster clause of our study seems to support this view. A constitutional issue not related to business handling will only be raised at this stage if it is connected to a policy disagreement on which one department has an interest but no department has a specific responsibility to raise constitutional issues – not even the Department for Constitutional Affairs.

B *Parliament's Scrutiny Role: the System in the UK*

Once a bill has been cleared by the Cabinet Legislative Programme Committee it may be introduced into Parliament. Apart from issues to do with the *European Convention on Human Rights 1950* and European law, the constitutional scrutiny of primary legislation is not conducted in the shadow of the law, since under the doctrine of parliamentary sovereignty no statute can be 'unlawful'. Nor, as we have noted, do constitutional measures have to achieve special majorities in Parliament.

In relation to the *Human Rights Act 1998*, Explanatory Notes are published with bills, and these draw attention to any *Convention* issues. The government's view is that a minister may make a statement of compatibility if the proposed legislation is 'more likely than not' to withstand a challenge before the courts.⁴⁴ This has become known as the 51% rule. However, ministers are not prepared to disclose to Parliament any legal advice on which they base their statement as to compatibility, though they do give the gist of the reasons which have led them to make a section 19 statement. So Parliament has to seek its own advice on the issues. The *Human Rights Act 1998* further provides, by section 4, that a higher court may make a declaration of incompatibility if they find a provision in a statute to be incompatible with *Convention* rights. The effect of such a declaration is not to prevent application of the provision, but it draws attention to the incompatibility and triggers a power in the minister under section 10 of the Act to make a remedial order removing the incompatibility, subject to parliamentary consent.

The main forum for the detailed scrutiny of bills in the UK is the committee stage in each House, after the second reading (at which the principle of the bill is debated

⁴³ Comment by Lord Simon of Glaisdale in evidence to the Hansard Society Commission on the Legislative Process, above n 37, 47.

⁴⁴ UK, *Parliamentary Debates*, House of Commons 5 May 1999, col 371 (Jack Straw, Home Secretary).

and accepted).⁴⁵ In the House of Commons the committee stage is normally taken in standing committee in which the minister in charge of the bill and a whip are members. Some bills are debated in committees of the whole House, for instance if they are of constitutional importance, or of major political importance (or bills requiring only formal approval or bills which the government wishes to pass quickly).⁴⁶ In other cases specific clauses of bills may be taken on the floor of the House, while the rest of the bill is taken in standing committee. It is notable that the ouster clause in the Asylum and Immigration Bill was not regarded as of constitutional importance, was taken in standing committee in the House of Commons, and was passed there. In the House of Lords the committee stage is taken by a committee of the whole House.

At the committee stage the bill is debated ‘at large’ and the committee does not operate within any formal scrutiny criteria⁴⁷ such as compatibility with the rule of law, respect for the independence of the judiciary, respect for human rights as set out, for instance, in the *Human Rights Act 1998* or international instruments to which the UK is a party, or legal certainty. That is not to say that such issues do not arise in debate in committee, only that they are some among many issues. The votes of the committee on each proposed amendment will determine the terms of the bill when it returns to the House. There is of course nothing to prevent a bill ultimately receiving the royal assent and coming into effect even if it is incompatible with constitutional principles. This is unlike the position in countries with written constitutions, where a range of possible safeguards have been put in place to prevent or restrain the passage or coming into effect of unconstitutional legislation.

The committee stage of the legislative process may be used by opposition party members on the committee, and the government’s own members, for a range of purposes: to point out weaknesses and improve the bill, to find out what the government’s intentions are, to cause political mischief, or to embarrass the government.⁴⁸ Feldman notes how the process in the House of Commons is undermined by lack of members’ time and of research and other support for members, and the fact that adversarial politics is pervasive, so that the determination of almost any issue is commonly linked to some other apparently unconnected issue.⁴⁹ This is not a setting in which scrutiny of bills against objective criteria can take place.

There are however other stages or possible stages in the legislative process at which bills (or draft bills⁵⁰) are scrutinised against concrete criteria of a broadly

⁴⁵ See *Guide to Legislative Procedures*, above n 22, ch 20 & 23.

⁴⁶ See Blackburn and Kennon, above n 8, [8.019].

⁴⁷ But amendments must be within the scope of the Bill.

⁴⁸ See for instance the House of Commons Select Committee on Procedure, *Public Bill Procedure* (Second Report 1984-85) 49 [30]; Blackburn and Kennon, above n 8, [8-021].

⁴⁹ Feldman, above n 10, 326-7.

⁵⁰ The Government has agreed to publish some bills in draft for pre-legislative scrutiny since 2002.

constitutional kind and where party politics is absent or less pervasive. The function of objective constitutional scrutiny as defined by Feldman⁵¹ is performed by the Joint Committee on Human Rights, the Delegated Powers and Regulatory Reform Committee of the Lords and the Lords' Constitution Committee. The House of Commons Departmental Select Committees may also decide to scrutinise draft legislation or bills or parts of a bill. Their terms of reference are very broad and do not refer specifically to constitutional issues, though neither do they preclude such scrutiny. The Lords' European Union Committee and its sub-committees also perform some constitutional scrutiny functions, mostly in relation to secondary rather than primary legislation. There is not the space to go into the activities of that committee here.

1 *Joint Committee on Human Rights*

The provisions of the *Human Rights Act 1998* in relation to Acts have already been outlined. The Joint Committee on Human Rights ('JCHR') was established in 2001, sixteen months after the *Human Rights Act 1998* came into effect⁵² and it has a major role in the scrutiny of bills. It has an expert specialist Legal Adviser,⁵³ and it almost always produces unanimous, authoritative and non-partisan reports.⁵⁴ The Committee's remit is 'to consider matters relating to human rights in the United Kingdom'.⁵⁵ It decided early on that it would scrutinise all bills and draft bills for compatibility with *Convention* rights and report to each House. It also scrutinises bills against further human rights criteria, including respect for social and economic rights, in instruments to which the UK is a party such as the *International Covenant on Social, Economic and Cultural Rights*⁵⁶ and the *Convention on the Rights of the Child*.⁵⁷ This point is included at the start of the Summary of each of the Committee's scrutiny reports. The Committee also considers broader constitutional principles and core values such as individual autonomy, legal certainty, proportionality and the rule of law.⁵⁸ It has already been noted that departmental

⁵¹ See Feldman, above n 10.

⁵² See generally Lord Lester of Herne Hill and David Pannick (eds), *Human Rights Law and Practice* (2nd ed, 2004) ch 8; and see also Feldman, above n 10 and David Feldman, 'The Impact of Human Rights on the Legislative Process' (2004) 25 *Statute Law Review* 91; Anthony Lester 'Parliamentary Scrutiny of Legislation under the Human Rights Act' [2002] *European Human Rights Law Review* 432; Robert Hazell, 'Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?' [2004] *Public Law* 495.

⁵³ The first Legal Adviser was Professor David Feldman, succeeded in April 2004 by Mr Murray Hunt, barrister.

⁵⁴ Exceptions have included refusal by Kevin Macnamara MP to vote for any report which contemplates the introduction or continuance of anything resembling internment and reluctance on the part of Richard Shepherd MP to refer to international instruments that have not been approved by Parliament on the ground that to do so might imply erosion of parliamentary sovereignty.

⁵⁵ Lester and Pannick, above n 52, [8.10].

⁵⁶ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁵⁷ Opened for signature 20 November 1989, UN Doc A/44/49 (1989) (entered into force 2 September 1990).

⁵⁸ See Lester and Pannick, above n 52, [8.14].

lawyers may contact the legal adviser at an early stage for an indication of whether proposed measures are likely to fall foul of the committee – there is in other words an informal as well as a formal dialogue between government and this committee in the legislative process. The Committee has in effect taken on the role of legal adviser to Parliament on human rights matters – the Attorney General being the government’s legal adviser and not Parliament’s.

Unlike the Delegated Powers Committee, discussed below, the JCHR does not receive a specific memorandum on each bill from the Government, despite the fact that such a memorandum will, under the *Guide to Legislative Procedures*, have been submitted to the Legislative Programme Committee. Instead it has a brief certificate from the minister under section 19 of the *Human Rights Act 1998* indicating whether the minister is satisfied that the bill is compatible with *Convention* rights.⁵⁹ The certificate does not however give reasons for the minister’s view on the matter. Explanatory Notes published with bills give further indications of the government’s position on human rights compatibility issues. The Committee therefore conducts its own independent inquiry into the compatibility of bills with human rights, often with minimal indication from government of the issues. The role of the legal adviser is therefore crucial to the work of the Committee, though it does have in its membership Lord Lester of Herne Hill QC, one of the early campaigners for a Human Rights Act and a leading expert on the subject.

The Committee’s reports have led to some government changes to bills, and they are referred to by members of the two Houses in debates at second reading or in committee or on report. Overall the existence and expertise of the JCHR has meant that government and departments are more conscious of the human rights implications of bills than they would be without this stage in parliamentary scrutiny hanging over them. Professor Feldman, the first legal adviser to the Committee, found that over time ‘fewer provisions are drafted in ways that leave rights subject ... to inadequate safeguards’.⁶⁰ However, the JCHR has not had the same degree of success in securing government acceptance of its findings as the Delegated Powers and Regulatory Reform Committee, considered below.⁶¹ This may be because human rights issues tend to be more politically controversial than provisions delegating legislative powers to ministers usually are, and ministers may be more committed to the former than to the latter.

The JCHR criticised the ouster clause in the Asylum and Immigration Bill as raising serious issues relating to the maintenance of the rule of law and limiting remedies for abuse of rights.⁶² As we have seen, this did not prevent the passage of the provision in the House of Commons.

⁵⁹ See earlier discussion.

⁶⁰ Feldman, above n 52, 92.

⁶¹ See Hazell, above n 52, 498.

⁶² Joint Committee on Human Rights, *Scrutiny of Bills: Progress Report* (Third Report, 26 January 2004) HL 23/HC252; Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants, etc) Bill* (Fifth Report 10 February 2004) HL 35/HC304.

2 *The Delegated Powers and Regulatory Reform Committee of the House of Lords*

This committee scrutinises bills for the inappropriate delegation of legislative power, or inappropriate parliamentary supervision of exercises of delegated legislative power, and reports to the House. This is an important but limited aspect of constitutional scrutiny. The committee operates in a non-partisan fashion and there is never a need for a vote. It has taken on a function as guardian of constitutional norms in areas within its remit. The *Guide to Legislative Procedures* warns Departments that the Bill Team must consider the Committee's report carefully and advise ministers which of the recommendations can be accepted.⁶³ This approach is unique, not being repeated in the *Guide's* instructions in relation to other parliamentary scrutiny committees. The government's response to the Committee's report is normally published. The Committee publishes periodical reports on their success rate. Thus openness puts pressure on government to comply with the Committee's recommendations or to justify its refusal to do so. In practice the Government almost always accepts the Committee's recommendations about whether order-making powers should be subject to affirmative or negative procedure or whether proposed Henry VIII powers⁶⁴ are inappropriate. This is significant, in that although the government is not operating 'in the shadow of the law' in the sense that the courts do not have jurisdiction to not apply subordinate legislation merely on the ground that it was made under a Henry VIII clause or was subject to inappropriate parliamentary scrutiny, governments do cooperate with and commonly defer to the Committee.

3 *The House of Lords Constitution Committee*

This committee is concerned generally with policies and bills that have constitutional implications. But it has not adopted any particular criteria of constitutionality in the normative sense. The committee seeks to ensure that significant changes to the constitution are not made inadvertently or without proper legislative discussion, and it attaches priority to ensuring that there is awareness of such changes, rather than trying to pronounce on their merits. It has not so far been concerned to elaborate constitutional principles or statements of what would be normatively unconstitutional.

Much of the Committee's work is concerned with policy rather than with the scrutiny of bills. However, the Committee does scrutinise all bills for constitutional implications, and for this purpose it too has a Legal Adviser, though it does not report on all bills.⁶⁵ To avoid duplication of effort, the committee refrains from reporting on provisions that could be criticised for infringing human rights or for

⁶³ *Guide to Legislative Procedures*, above n 22, ch 27.

⁶⁴ I.e., Provisions in an Act of Parliament which enable a minister to amend or repeal a provision of an act by order or statutory instrument, thus circumventing the normal principle that a statute may only be amended or repealed by a later statute. See Hazell, above n 52, 495-497.

⁶⁵ The current Legal Advisor is Professor Anthony Bradley.

excessive delegation, since those matters will be considered and reported on by the Joint Committee on Human Rights or the Delegated Powers and Regulatory Reform Committee. It did not comment on the ouster clause in the Asylum and Immigration Bill despite the issues of constitutionality that it raised. There are no special requirements in the *Guide to Legislative Procedures* to provide memorandums on bills to this Committee.⁶⁶

The Committee is, then, not particularly active or influential in the field of constitutional scrutiny of bills. However, it could, given the will to do so, take on a major and important role in promoting constitutional scrutiny of executive bills and in encouraging the formulation of constitutional principles, as discussed in the concluding part of this article.

4 Other Select Committees

The Departmental Select Committees in the House of Commons may decide to scrutinise bills (or draft bills), as did the Constitutional Affairs Committee⁶⁷ and the Home Affairs Committee when the ouster clause in the Asylum and Immigration Bill was before the House of Commons. The Constitutional Affairs Committee produced a highly critical report, in which they cited the opinions of several eminent legal experts that the clause was contrary to the rule of law.⁶⁸ It expressed concern about this, stating that:

As a matter of constitutional principle some form of higher judicial oversight of lower Tribunals and executive decisions should be retained. This is particularly true when life and liberty are at stake.⁶⁹

However, that finding from that Committee did not prevent the Bill passing the Commons. From time to time other Select Committees, either joint or of one House only, are established to scrutinise draft bills or bills. Again, however, they do not operate within specific constitutional criteria or against a background of explicit constitutional principles.

The operations of these parliamentary select committees are generally not dominated or affected to any great degree by party politics. However, the terms of reference of the House of Commons Committees are wide and, unlike those of the Joint Committee on Human Rights and the Delegated Powers Committee of the House of Lords, they do not lay down particular criteria against which bills may be scrutinised. Since Committee reports and findings are not binding on the government or on either House it is of course legally possible for a measure to

⁶⁶ *Guide to Legislative Procedures*, above n 22, ch 25.

⁶⁷ Asylum appeals fall within the remit of this committee.

⁶⁸ House of Commons Constitutional Affairs Committee, *Asylum and Immigration Appeals* (Second Report 2 March 2004) HC 211; see also House of Commons Home Affairs Committee, *Asylum and Immigration (Treatment of Claimants, etc) Bill* (First Report 16 December 2003) HC 109.

⁶⁹ House of Commons Constitutional Affairs Committee, above n 68, [70].

receive the consent of both Houses (or if the Parliament Acts are being invoked, of the House of Commons alone) and royal assent even if a measure is constitutionally objectionable in one of the ways set out above. In effect as far as the House of Commons in plenary session is concerned, constitutional principles such as the rule of law appear to be treated as little more than lightweight policies that are balanced against other policy considerations such as, in the case of the ouster clause in the Asylum and Immigration Bill, concern about delays in official decision making, legal aid, abuse of the asylum system, popular dislike of asylum seekers, maintaining the authority of government, denying political opponents the opportunity to make political capital out of government defeat and the like, and are likely to be outweighed by them. The second chamber, with appointed members having appropriate legal and other expertise and operating in a less partisan way than the House of Commons, seems better suited to this form of scrutiny.⁷⁰

In sum, responsibility for constitutional scrutiny in the UK rests partly with departmental lawyers, Parliamentary Counsel and the law officers, and largely with Parliament, in its specialist committees, particularly in the House of Lords.⁷¹ The Cabinet and its committees no longer play a constitutional (as opposed to legal) watchdog role, if they ever did. It is in Parliament that the pressures on government not to legislate inconsistently with constitutional principles are strongest. However, as the row over the ouster clause in 2004 showed, the House of Commons has only weak influence if the government is determined and has a large majority. In the absence of a written constitution and the possibility of judicial quashing of provisions in Acts, the Upper House is only able to influence government if there are members there of sufficient expertise, authority and independence to force the government to abandon unconstitutional measures and if the government has no majority there.

The story of the ouster clause could of course be regarded as a success story for the checks and balances in the system. But the clause was only withdrawn because of the lack of a government majority in the second chamber, concern about the severe implications for vulnerable people of the proposed clause, and the strong line taken by the lawyers in the House. Not all measures that are contrary to constitutional principles will receive the same level of protection. If the delaying power of the House of Lords were to be reduced from the present one year, the safeguard would be weaker. And the membership of a reformed House might not include such a strong legal or constitutional element. The present arrangements, it is suggested, provide rather a fragile protection against the passage of unconstitutional laws.

⁷⁰ See Lord Hope of Craighead, 'What a Second Chamber can do for Legislative Scrutiny' (January/February 2004) 51 *Amicus Curiae* 21 for a discussion of the case for a second chamber in Scotland to perform effective scrutiny, and of the performance of the House of Lords European Union Committee and its sub-committees.

⁷¹ See Hansard Society Commission on the Legislative Process above n 37; Hansard Society Commission on Parliamentary Scrutiny, *The Challenge for Parliament. Making Government Accountable* (2001); Adam Tomkins 'What is Parliament for?' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (2004) 53; Hazell, above n 52.

III SOME COMPARISONS

It is worth drawing attention briefly at this point to arrangements in other parliamentary systems for the scrutiny of bills for constitutionality, in order to place the position in the UK and in many other Westminster based systems into perspective. In France, for instance, the *Section Administrative* of the *Conseil d'Etat* scrutinises and may amend bills, before they are introduced into the Parliament, against constitutional and other criteria. The Government is not obliged to accept the advice of the *Conseil d'Etat*, but it will know that if a measure is eventually challenged before the *Conseil* in its capacity as an administrative court, it may well be found to have been unlawful if the *Section Administrative* had found so before the bill went to Parliament.⁷²

Stronger intra-parliamentary procedures for constitutional scrutiny than exist in the UK exist in other countries. But these depend on there being explicit constitutional principles set out in a written constitution, and on the Parliamentary chamber charged with a constitutional watchdog function being free from government domination or, in regulatory language, capture, and having recourse to the necessary expertise. An example of a parliamentary system which meets these criteria and does not have full scale judicial review for constitutionality as a fall back position is Finland. There the Parliamentary Committee for Constitutional Law scrutinises bills for constitutionality and reports to the plenary session via a reporting committee. No bill may be passed without a Speaker's certificate of constitutionality, which will not be granted if the Committee has found against it, unless it can achieve a special majority in the Parliament. The committee acts in a non-partisan, non-party political way when scrutinising bills for constitutionality. It is served by expert advisers. In practice it acts almost always by consensus and seldom finds it necessary to vote on its position on these issues. But this is a system operating under a written constitution which makes some constitutional principles explicit, and proportional representation, and with a less partisan tradition than that prevailing in the UK House of Commons.⁷³

Once a measure has passed through a Parliament, it may be possible for it to be challenged before promulgation or, in UK terminology, royal assent. In France, for instance, a bill may be referred, before promulgation (ie, after it has parliamentary consent but before the equivalent of royal assent) to the *Conseil Constitutionnel* which may rule on the constitutionality of a bill.⁷⁴ (This is similar in some respects to the provisions for reference to the Judicial Committee of the Privy Council of Acts of the devolved bodies in Scotland and Northern Ireland for compatibility with

⁷² See Jean Massot 'Legislative Drafting in France. The Role of the *Conseil d'Etat*' 22 (2001) *Statute Law Review* 96; Nicole Questiaux 'Administration and the Rule of Law: The Preventive Role of the French *Conseil d'Etat*' [1995] *Public Law* 247; Bell, above n 12, 53.

⁷³ I am grateful to Jarmo Vuorinen, since March 2004 the Deputy Secretary General of the Finnish Parliament, and from 1985 to March 2004 counsel to the Parliamentary Committee for Constitutional Law, for helping me with this brief account of the position in Finland.

⁷⁴ See Bell, above n 12, 32; *Constitution of the Fifth French Republic 1958*, Article 61.

the devolution Acts.) If the *Conseil Constitutionnel* finds a bill to be unconstitutional it may not be promulgated. But once a bill has been promulgated the courts must apply it. There are, then, in parliamentary systems, possibilities for independent scrutiny of legislation for compatibility short of judicial review in the American sense. But these arrangements depend for their effectiveness in part on there being explicit constitutional principles against which the scrutinising bodies can judge measures that are being challenged and, if the scrutiny is carried out in Parliament, a sufficient degree of non-partisanship and expertise. Generally such systems operate best if they operate in the shadow of the law.

IV COMMENT AND CONCLUSIONS

Returning to intra-governmental and parliamentary stages of the legislative process at which constitutional scrutiny could take place, the results of scrutiny can affect the progress of the legislation, its content and its implementation in various ways. The question arises whether such arrangements can be effective to secure the substantive constitutionality of primary legislation if they do not operate 'in the shadow of the law'. In the UK, only in respect of *Convention* rights or EU law is there recourse to the courts for, respectively, a declaration of incompatibility or non-application of a provision. It is obvious that purely intra-governmental or intra-parliamentary scrutiny cannot secure due protection of constitutional principles and values. The ouster clause in the Asylum and Immigration Bill bears this out.

There is at present no prospect of the UK adopting a written constitution, or granting new scrutiny powers to an independent pre-legislative review body such as the French *Conseil d'Etat*, or pre-promulgation scrutiny by the *Conseil Constitutionnel*, or to the courts. But the problems caused by the absence of authoritative statements of constitutional principles could be mitigated. The task of securing the formulation of such statements by the various constitutional actors might be undertaken by one or more parliamentary committees, such as, in the UK, the Constitutional Affairs Committee of the House of Commons or the Constitution Committee of the House of Lords, or a new Joint Committee. Such a committee could encourage those involved in the legislative process to develop texts or codes which the committee could then report on, having taken evidence from experts in constitutional law, politics and public administration and others. The texts would articulate constitutional norms, expose weaknesses in the existing system and generate debate and dialogue between those involved. They would provide guidance not only on what are the constitutional principles that should be observed when legislation is being drafted, but also on the procedures to be followed where concerns about constitutionalism are raised, whether by departmental lawyers, ministers, the Law Officers, Parliamentary Counsel or members of the two Houses.

The existing internal guides and guidance documents might well be amended in response to this exercise. The *Ministerial Code* could make clearer what is required in the way of respect for constitutional principles and values and in what conditions (for instance of proportionality and national security) departures from such

principles might be justifiable, and require the justifications to be made explicit by the responsible minister. As with the resolutions on ministerial responsibility passed in 1997, these principles could be adopted by the two Houses, thus ensuring that they are accepted and complied with by government. It may be that similar arrangements could be made in other jurisdictions where there is uncertainty about constitutional principles.

This would not of itself alter the fact that the UK courts will give effect to any Act of Parliament however unconstitutional (save where there is incompatibility with European law), but it should alter the culture and make it less likely that a bill will be passed into law that contravenes constitutional norms without meeting pre-set criteria.