Foreword

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In their Introduction, Alexander Horne and Andrew Le Sueur describe this book as having been written by both 'insiders' and 'outsiders'. This contributes to the great strength of the present work. It is pragmatic and practical—as such enterprises seldom are—and it also draws upon the wider context of academic study and public perception. Its combination of authors gives it what my farmer neighbours would call 'hybrid vigour' and its insights and analyses are both refreshing and challenging.

And the publication of this book is especially well timed. We are increasingly seeing our constitutional arrangements modified by a process of experimental surgery on a long-suffering patient, usually following insufficiently exacting examination and diagnosis. Work in progress includes patchwork devolution, including the complexities of English Votes for English Laws (and a situation where recent polling suggests that only one person in five believes that England has had a fair devolution deal); proposals for a British Bill of Rights; and the possibly seismic result of a referendum on the United Kingdom's continued membership of the European Union. This wide-ranging survey will be an essential source book for anyone seeking to understand or influence events.

In his wise consideration of the relationships between the organs of the State, Sir Stephen Laws challenges the orthodoxy of separate and tidy responsibilities. The will of Parliament is indeed something expressed at the prompting of the Executive rather than being some magical emanation, and it is reasonable to question its nature. A government with a Commons majority ('one is enough'!) which can convince its back-benchers issue by issue can do pretty much what it likes, especially if it ignores gypsy's warnings coming from the House of Lords. Laws suggests that it is for each House to define its role in the scrutiny of legislation. As someone who spent his career in the service of the House of Commons, and now finds himself on the Cross Benches of the House of Lords, this is a view that I applaud—and it has a particular resonance, perhaps, in the aftermath of the tax credit furore (something that I regard as primarily a failure of business management rather than the transgressing of some profound constitutional principle).

The Laws analysis rightly emphasises the importance of effectiveness: does this work? Does this deliver what is expected and required? This prompts thoughts about the nature of legislation as a regulator of society and its behaviours. Are we too focused upon statute? If you are running a restaurant, you may be dimly aware

of the health and safety regime put in place by primary legislation. You may even be aware of relevant statutory instruments (but probably not). What matters to you is the local authority's guidance on, for example, how many washbasins you must have. We are increasingly regulated by guidance, often with only a quasi-legal status, and we have not yet quite come to terms with the problems of scrutiny and consistency that that poses.

This is close to the territory bravely explored by Andrew Le Sueur in his examination of automated decision-making, and the problems of effectiveness and legitimacy it raises. As the capabilities of central and local government shrink in response to economic austerity, and automation becomes more and more attractive, this is a scrutiny challenge that Parliament must confront, but one for which I sense that it is not quite ready.

If AJ Balfour was correct in his assertion that 'democracy is government by explanation' then he ought to approve of the concept of pre-legislative scrutiny (PLS); but I suspect that AJB's idea of explanation was to volunteer such explanations as he thought appropriate, rather than being closely examined on his proposals. Jessica Mulley and Helen Kinghorn rightly identify the great merit of draft bills: that Ministers have much less political capital tied up in them and are readier to accept evidence-based change without loss of face. But Mulley and Kinghorn are also realistic about the extent to which the pressures of the legislative timetable militate against the process: governments' (often wholly imaginary) need to demonstrate grip and activity; and the lack of time necessary to do a comprehensive and professional job of scrutiny.

PLS is part of the search for better ways of legislating. The myth of 'line-by-line' scrutiny in the Commons has been thoroughly exploded yet the phrase is trotted out again and again. The dynamics of the Lords, and the lack of programming, allow more exacting (and, for the Executive, less controllable) scrutiny, authoritatively charted by Philip Norton. However, it is reasonable to ask if there are better ways of going about the process. I have a hankering for the Victorian practice of a motion for leave to bring in a bill, allowing consideration of the need for legislation rather than immediate examination of detailed provisions. (There would, of course, need to be a significant gap between the granting of leave and the bringing in of a bill—something which the pressure of time might not allow.) And if we are to engage Parliamentarians more directly in what they are authorising, what about purposive clauses, which would express the elusive 'will of Parliament' and which might make the process of judicial interpretation both easier and more widely comprehensible?

Jack Simson Caird and Dawn Oliver grasp the nettle of better scrutiny through the establishment of legislative standards ('legisprudence') founded on the work of the Lords Constitution Committee. I must declare an interest as a member of the Lords Delegated Powers and Regulatory Reform Committee, which has also been in this business. It may be too much to hope that the use of such standards within government would survive the pressures of political expediency, but the

articulation, and wide acceptance, of what constitutes best (or even acceptable) practice should encourage better scrutiny.

But I suspect that we have a way to go yet. The rising threshold between primary and secondary legislation, where statutory instruments are increasingly used for matters of policy and principle which should be the subject of primary legislation, and receive the appropriate examination and challenge, is a worrying phenomenon. And in the present Parliament there has been no shortage of Ministerial pronouncements to the effect that this or that bill 'sends a message', something which is emphatically not the purpose of legislation.

The magisterial review of Parliament's engagement with national security issues by Alexander Horne and Clive Walker, and Arabella Lang's fascinating study of Parliamentary examination of treaties, in effect give 'two cheers' for what Parliament has done and is doing, while offering tempting glimpses of what more could be done.

But here, and in Richard Kelly and Lucinda Maer's shrewd study of Parliamentary reform and accountability, we run up against two powerful limiting factors. First, the shrinkage of central government has dramatically reduced the resources with which the Executive can respond to the scrutiny and questioning of Parliament. In effect, the raw material of scrutiny has become rationed. And second, the currency of Parliament, and especially of the House of Commons, is one of time and political attention, a currency for which no quantitative easing is available. This has, for example, been one of the reasons for the disconnect between an effective European scrutiny system, broadly complementary as between the Houses, and the wider political process, as Paul Hardy recognises in his survey of Parliamentary engagement with EU matters. It is also the reason why there is as yet no sign of a House of Commons Business Committee and voteable agenda; it is difficult to imagine a government, except *in extremis*, being willing to give up the control which Balfour effectively completed more than a century ago.

The examination by Alexander Horne and Hélène Tyrrell of human rights issues will be an essential *vade-mecum* in the debate on a British Bill of Rights, just as Gavin Drewry's level-headed analysis of the UK's engagement with the EU will be for the referendum debate. Horne and Tyrrell's examination takes them into a fascinating discussion of parliamentary sovereignty—a concept I have always been uneasy with (as opposed to *legislative* sovereignty)[1]—and privilege.

I plead guilty to the charge, in Oonagh Gay's compelling study of ethical regulation, of opposing the codification of privilege (in my evidence to the Joint Committee on Parliamentary Privilege),[2] and I am delighted that the Joint Committee decided against codification. As Horne and Tyrrell point out, defamation remains a problem (which would not necessarily have been solved by codification). The Joint Committee's suggestion of guidelines to ensure the fair treatment of witnesses

[1] See Robert Rogers and Rhodri Walters, *How Parliament Works*, 7th edn (Routledge, 2015) 169–71.
[2] HL Paper 30 and HC100 of Session 2013-14, Memorandum No 9 and QQ191–37.

was welcome, and most select committees are courteous and fair to those they examine. A very few are not; and, for example, the administration of the oath to one witness in the last Parliament, without notice, was a most regrettable lapse of fairness. It is up to select committees, especially in the Commons, whether there is greater pressure for a right of reply to criticism in Parliamentary proceedings, with all that that might imply.

Every subject dealt with in this excellent collection of studies is a moving target. Some are moving faster than others. But every one of those subjects has benefited from expert and insightful treatment. In the uncertain and unpredictable context of constitutional and Parliamentary development, this book is an essential companion.

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