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SWAMPING THE LORDS, PACKING THE COURT, SACKING THE KING. THREE CONSTITUTIONAL CRISES*

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Three great constitutional conflicts – United Kingdom: *Lords* v. *Commons*, Parliament Act 1911 – United States: *Supreme Court* v. *President and Congress*, New Deal Controversy 1935-1937 – Belgium: *King* v. *Parliament*, Abortion Act 1990 – Democracy wins the day in each of these cases.

This essay considers three rather unusual constitutional conflicts that occurred in the previous century in the United Kingdom, the United States and Belgium respectively. But before I start, let me take you back for a moment to the beginning of the era of the written constitution, that is to say to the late eighteenth century.

The world's oldest constitution, that of the United States, was written in 1787 and came into effect in 1789, even before France's *Etats-Généraux* met again for the first time in almost two hundred years. The American Constitution opens with the words '*We the People*':

> *We the People* of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

** *The present essay is a slightly adapted English translation of an address delivered some years ago on that university's anniversary. References to Dutch sources have been omitted. Translation by Kath Starsmore, a freelance translator specializing in law and legislation. European Constitutional Law Review, 2: 116–146, 2006 © 2006 T.M.C.ASSER PRESS and Contributors DOI: 101017/S1574019606001167*

'*We the People*', it resounded, and it was also intended incidentally as a rejection of royal power. In the countries of western Europe monarchy by the grace of God had been glorified in a variety of ways. Royal pretensions to absolute power were displayed in official documents especially. For example, the way in which the Spanish kings used to sign documents of state was simple but impressive: '*Yo el Rey*' or I, the King. In the late eighteenth century the differences between monarch and subjects began to harden in many countries. In America, what is known as the age of the democratic revolution[1] manifested itself in the resistance of the British colonists to their fatherland, personified in the figure of King George III. Initially, the object of this resistance was merely the redress of grievances, but it very soon became independence. A huge impression was made by the pamphlet *Common Sense*, published in Philadelphia in January 1776. It was written by the rebel, pamphleteer, adventurer and agitator Tom Paine, who had come over from England, where he had been a corset maker by trade. But Tom Paine preferred making revolution to making corsets and took an active part in America's struggle for independence, and later in the French revolution. In the said pamphlet *Common Sense*, he called on the British colonists to set out on their own and to break all ties with Great Britain, which they were to do six months later. The text is a torrent of abuse against the monarchy in general and George III in particular. In the following passage the writer explains that a country with a charter needs a king about as much as it needs a hole in the head:

> But where says some is the King of America? I'll tell you Friend, he reigns above, and doth not make havock of mankind like the Royal—of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law *ought* to be King; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.[2]

The idea that by drafting a constitution one could arrive at a 'government of laws, not of men' has, of course, never been anything more than a pious illusion.[3] But that is still no reason for denying or underestimating the significance of constitutions. Instead of a motley assortment of documents of state of a widely differing nature and often dubious legal force which had come into being over hundreds of years, the era of the written constitution brought a large measure of clarity and certainty to constitutional affairs. A pre-war British author formulated it as follows:

> A welter of charters, statutes, bulls, treaty clauses, political testaments, pragmatic sanctions, manifestoes and mere undertakings had managed to stick like burrs to the body politic on its way down the ages. From the amorphous heterogeneity of some of these venerable ragbags it

[1] R.R. Palmer, *The Age of the Democratic Revolution. A Political History of Europe and America*, 1760-1800, 1959.

[2] Thomas Paine, *Common Sense*, Penguin Classics 1986, p. 98. The dash in 'the Royal—of Britain' can be substituted with a swearword of one's own choice. In the parlance of the transcription of the Watergate tapes one might say 'expletive deleted'.

[3] Article XXX Massachusetts Constitution (1780) decreed a strict separation of powers 'to the end that it [the government of this commonwealth] may be a government of laws, and not of men'.

was almost a relief to have the situation simplified by the seventeenth-century despot who could point to himself and pronounce '*L'état, c'est Moi*', but it was a much more satisfying remedy to be able to point to one not-too-bulky document and to exclaim '*L'état, c'est là*'. The vogue of the written constitution may have brought all sorts of troubles in its train, but it also brought clarity and precision to forms of government to an extent not previously attained.[4]

The era of the written constitution continues unabated. Nowadays, virtually every country has one. One of the first things a new state does, even if only to be taken seriously by the international community, is to adopt a constitution. Of course, this does not mean that the constitution is taken equally seriously in every country, but even if it is applied very freely or is even blatantly violated, it still retains a certain significance as a mirror held up in public to those in power. Constitutions meet the need for 'rules which govern the government', and when the authorities completely disregard these rules, it attracts attention and undermines their authority. Only when total legal chaos occurs – I have in mind the constitutional free-for-all in Moscow during the final months of 1993 – can we see how much support can be derived from a constitution in more normal circumstances.

After these broad, introductory remarks, it is now time to focus our attention on the constitutional conflicts in the United Kingdom, the United States and Belgium referred to above. First of all the United Kingdom.

SWAMPING THE LORDS

The peculiarity of the British constitution is that it has to this very day remained what it has always been: a 'venerable ragbag', an amazing hotchpotch of documents and traditions of the most diverse kind. The United Kingdom is one of the very few countries that have never got around to drafting a constitution.[5] This played a part in the conflict that arose in the early twentieth century between the Asquith government and the House of Lords, a conflict that is described in detail in a book written by the British politician Roy Jenkins (who died in 2003) and published in 1954. The book bears the intriguing title *Mr Balfour's Poodle*, a title I shall come back to.[6] But first some comments on the House of Lords.

[4] John A. Hawgood, *Modern Constitutions Since 1787*, 1939, p. 3.

[5] In 1991 the Institute for Public Policy Research published a draft constitution for the United Kingdom to encourage debate on this topic: *The Constitution of the United Kingdom*, 1991; for a description of British constitutional law see my chapter on the United Kingdom in: Lucas Prakke and Constantijn Kortmann (eds.), *Constitutional Law of 15 EU Member States*, 2004, p. 861-927.

[6] Roy Jenkins, *Mr Balfour's Poodle. An Account of the Struggle between the House of Lords and the Government of Mr Asquith*, 1954. A much shorter, but very useful description of the same conflict can be found in Harold Nicolson, *King George V. His Life and Reign*, 1952.

The House of Lords is an institution whose origin is lost in the mists of a medieval past. I shall spare you the details, but what I must tell you is that at the beginning of the last century the Conservatives held an overwhelming majority of the seats in the Lords. This had not always been the case. In earlier times, there had often been a balance more or less between the Whigs (Liberals) and the Tories (Conservatives) in that House. In the early eighteenth century, when the Lords still had only about 150 members, the Whigs had a small majority. On the recommendation of her minister Robert Harley, Earl of Oxford, Queen Anne in late 1711 raised twelve Tories to the peerage virtually simultaneously in order thus to be assured of a majority in the House of Lords in favour of acceptance of the Treaty of Utrecht, which was to put an end to the War of the Spanish Succession.[7]

The small Whig majority had made way for an even smaller Tory majority. Not long after, though, the Whigs were again in the majority and would remain so until the end of the century. A big change occurred under the Tory Prime Minister William Pitt the Younger, who sent no less than 140 political allies to the Lords with a noble title during the almost twenty years that he was in power (1783-

1801). Later on, a rupture in the Conservative Party around the middle of the nineteenth century caused a virtual restoration of the balance between Liberals and Conservatives in the upper house for a short time, but after that things started going downhill fast for the Liberals. This was mainly a consequence of the radical course adopted by the great Liberal leader Gladstone. His policy of Home Rule for Ireland resulted in a mass exodus from Liberal ranks. The defectors called themselves Liberal Unionists and in a short while allied themselves closely with the Tories, who in those days were known as Unionists – advocates of maintaining the union between Great Britain and Ireland. The havoc caused in Liberal circles by Gladstone's first Home Rule Bill, which was rejected by the Commons in 1886, emerged dramatically when in September 1893 the House of Lords torpedoed his second Home Rule Bill by 419 votes to 41, the biggest anti-government majority ever recorded in British politics.[8] In his farewell speech delivered in the Commons on 1 March 1894, the aged Gladstone attacked the Lords, an attack that was welcomed with great enthusiasm by his sympathizers. He took the view that in the long run it was intolerable that a house of peers should oppose the policies of a government that had the backing of a House of Commons elected by more than 6 million voters. Things would have to change.[9]

It was not very long, however, before the Conservatives got back into power, and experience had shown that the Lords could make life very difficult for a Liberal government, while tending to put not the slightest obstacle in the way of a Tory administration. And indeed, the Tory Prime Ministers Lord Salisbury (1895-1902) and his nephew and successor Arthur James Balfour (1902-1905)

[7] Jenkins, *Balfour's Poodle*, p. 24; Nicolson, *George V*, p. 130. Two of the twelve new peers were the eldest sons of noblemen who were still alive. They went to the Lords by 'writ of acceleration', that is to say that one of their fathers' 'lesser titles' was passed to them early – during the latters' lifetime. The other ten were raised to the peerage by 'Letters Patent'. See *The Complete Peerage of England, Scotland, Ireland, Great Britain and the United Kingdom; extant, extinct or dormant*, part II, 1912, reprinted in 1982, p. 28 note b, and part I, 1910 (1982), Appendix G: 'Eldest sons of peers summoned to Parliament v.p. (*vita patris*) in one of their fathers' peerages', p. 493. For a discussion of Britain's highly complex law on the peerage see: Valentine Heywood, *British Titles. The Use and Misuse of the Titles of Peers and Commoners, with Some Historical Notes*, 1951; *Honours and Titles, Aspects of Britain Series*, Her Majesty's Stationary Office, 1992.

[8] Jenkins, *Balfour's Poodle*, p. 27 and 33.

[9] John Morley, *The Life of William Ewart Gladstone*, part III, 1903, p. 511.

had no trouble at all with their Lordships. A little over ten years later, however, the Unionists had run out of steam and, on top of this, internal differences had caused a split. Balfour saw no way out and in early December 1905 tendered his government's resignation, leaving it to a new Liberal minority government yet to be formed to call new elections. It was the last time a British prime minister handed over government to the opposition without first suffering an election defeat.[10] King Edward VII invited the Liberal leader Sir Henry Campbell-Bannerman to form a government and to dissolve parliament. The government was formed within days, and the elections held in January 1906 produced a great victory for the Liberals: the Campbell-Bannerman government could stay on.

* * *

The composition of the Commons (which at that time numbered 670 members) following the elections was as follows: Liberals 400, Conservatives 157 (132 Unionists + 25 Liberal Unionists), Irish Nationalists 83, and Labour 30.[11] The Liberals had 130 seats more than all the other parties combined. However, as their government's actions were supported by the Irish Nationalists and by Labour, neither of whom could expect very much from the Conservatives in terms of solving either the Irish or the social problem, the Campbell-Bannerman government had a *de facto* majority of no less than 356 seats. Things were different in the Lords, however. Although people in Britain tend to speak of the 'dissolution of Parliament', this is really not very accurate as the House of Lords cannot be dissolved and its composition is consequently not affected by a dissolution of Parliament. The opposition was in the majority in the House of Lords, and that majority was greater even than the government's majority in the Commons, namely 391 seats. On paper, the House of Lords at the opening of the first session of the new parliamentary term in early 1906 numbered 602 members, including the 25 Lords Spiritual (Anglican bishops). The majority of them, 479 members, were Conservative (355 Unionists + 124 Liberal Unionists); the Liberals had a meagre 88 seats, while the remaining 35 members (among them 14 of the 25 bishops) had no political affiliation.[12]

How was this to work? Never before had the Conservative majority in the House of Lords been so overwhelming, not since 1832 had a government in the House of Commons had such a broad base as Campbell-Bannerman's Liberal government now had. Would history repeat itself under this sharply defined balance? Would the Conservative House of Lords thwart the Liberal House of Commons, that is to say the government of Campbell-Bannerman? An election address given on 15 January 1906 by the new leader of the opposition Balfour did not bode well. He called out to

[10] Jenkins, *Balfour's Poodle*, p. 11; Nicolson, *George V*, p. 92. The internal differences in the Conservative Party referred to in the text were the result of Joseph Chamberlain's insistence on abandoning the traditional free-trade policy and, through Tariff Reform, creating a customs union – and later perhaps even a kind of federation – with the countries of the British Empire. See Nicolson, *George V*, p. 91.

[11] David Butler and Anne Sloman, *British Political Facts 1900-1979*, 5th edn., 1980, p. 206; slightly different figures in Jenkins, *Balfour's Poodle*, p. 19. Butler and Sloman's 400 Liberals comprise 377 genuine Liberals plus 23 Labour candidates 'who took the Liberal whip', i.e., who became members of the Liberal parliamentary party.

[12] Jenkins, *Balfour's Poodle*, p. 24.

his supporters that it was the duty of each one to ensure that 'the great Unionist Party should still control, whether in power or whether in Opposition, the destinies of this great Empire'.[13] Herbert Henry Asquith, Chancellor of the Exchequer in the Campbell-Bannerman government, took this to be a call to the House of Lords to be prepared. Not a person to be trifled with, this Arthur Balfour. Erudite (author of philosophical works), refined,[14]dazzling focus of London society,[15]and a member of the best circles (his mother was a sister of Lord Salisbury's), he could come up with a scathing remark when it suited. For example, he once said about a colleague: 'If he had a little more brains he would be a half-wit.'[16]

The leader of the Unionists in the House of Lords was Lord Lansdowne, and he soon sought contact with Balfour to map out a common strategy. 'The Opposition is lamentably weak in the House of Commons' he wrote in a memorandum to Balfour, 'and enormously powerful in the House of Lords. It is essential that the two wings of the army should work together.'[17] Well, the Liberals found this out to their cost. One of the Campbell-Bannerman government's first very important bills was the Education Bill. In those days there was a kind of school battle going on in Britain, and the Liberals owed their resounding election victory in no small measure to the support of the Nonconformists (non-Anglican protestants), who harboured vehement objections to Balfour's 1902 Education Act. To satisfy the Nonconformists, the Liberal government now came out with its own Education Bill, which was accepted by the House of Commons in spite of the predictable opposition from Balfour and his troops, but which in line with the latter's specific instructions was scuppered by the House of Lords, led by Lansdowne, in December 1906 by means of a series of destructive amendments.[18] It was this course of events that six months later caused Lloyd George to flare up in the House of Commons when the Lords was referred to there by a Conservative MP as 'the watchdog of the Constitution': 'You mean it is *Mr Balfour's poodle!* It fetches and carries for him. It barks for him. It bites anybody that he sets it on to.'[19] Prime Minister Campbell-Bannerman expressed the government's indignation in the House of Commons:

> It is plainly intolerable, Sir, that a Second Chamber should, while one party in the state is in power, be its willing servant, and when that party has received an unmistakable and emphatic condemnation by the country, the House of Lords should then be able to neutralize, thwart, and distort the policy which the electors have approved…

[13] Ibid., p. 36; also Barbara W. Tuchman, 'Transfer of Power. England: 1902–11', in: idem, *The Proud Tower. A Portrait of the World before the War: 1890-1914*, Bantam Books, 1981, p. 437.

[14] See Churchill's description of Balfour in Winston S. Churchill, *Great Contemporaries*, 1937.

[15] Tuchman, *Proud Tower*, p. 56: 'He was the most dined-out man in London'.

[16] Ibid., p. 61.

[17] Jenkins, *Balfour's Poodle*, p. 38.

[18] The House of Commons rejected these amendments *en bloc*, something that had never before happened. When the House of Lords, at the suggestion of Lord Lansdowne, subsequently pronounced 'that this House do insist on its amendments to which the Commons have disagreed', the government had no option but to withdraw the bill.

[19] Butler and Sloman, *British Political Facts*, p. 247. Jenkins, *Balfour's Poodle*, p. 10, dates this statement, presumably erroneously, to 1908. Butler and Sloman, however, give a precise date, namely 26 June 1907. Tuchman, *Proud Tower*, p. 441, also places the utterance in June 1907.

> But, Sir [he added ominously], the resources of the British Constitution are not wholly exhausted… and I say with conviction that a way must be found, a way will be found, by which the will of the people expressed through their elected representatives in this House will be made to prevail.[20]

A lot more would need to happen, however, before this threat could be made good, and Campbell-Bannerman would not live to see the day. He died in April 1908 and was succeeded by Asquith, who was replaced at the Exchequer by David Lloyd George. Meanwhile, the government's programme of legislation continued to sustain heavy damage in the Lords.[21] Merely starting on a very important topic like Home Rule was impossible given the extremely hostile attitude of the Conservatives and the overwhelming majority with which the Lords had thrown out Home Rule in 1893. Despite all this, the government was unwilling to resign itself to its impotence. As early as May 1907, Campbell-Bannerman had explained in a memorandum to the Cabinet that in his view the House of Lords' absolute right of veto should be replaced by a suspensive right, and a month later the Commons adopted a motion to that effect by a large majority. Interest in this issue gradually increased and there was public speculation about the possibility of breaking the Lords' resistance to a 'Veto Bill' by raising large numbers of Liberals to the peerage. In 1711 Queen Anne had shown how effective this could be, and in 1832 King William IV, after much fussing and fuming, had promised his Prime Minister Lord Grey that he would, if necessary, confer a title of nobility on eighty people in order to guarantee the passage of the Reform Act. On that occasion, the threat alone had been enough: 'Rather than be swamped by Whig peers, the Lords passed the Bill'.[22]

In December 1908 the government had had enough. It had been in power for three years and had achieved very few results:

> No measure, other than a money bill, had passed on to the statute book in anything like its original form unless, on third reading in the Commons, it had secured the acquiescence of Arthur Balfour. For three years the smallest Opposition within living memory had effectively decided what could, and what could not, be passed through Parliament. In the language of the day, the cup was full.[23]

Nonetheless, a Veto Bill was not introduced immediately because everyone's attention was caught by a totally new and spectacular development, namely the House of Lords' impending rejection of Lloyd George's Finance Bill introduced in April 1909, something that had not happened in 250 years. The Finance Bill, also referred to as 'The Budget', is not a budget in the normal meaning of the word, but a body of tax measures, a financial plan. In those days of rising international tension there was in Britain great concern about Germany's construction of armoured ships, which threatened to undermine Britain's traditional supremacy at sea because Britain did not have these

[20] Jenkins, *Balfour's Poodle*, p. 44.

[21] Jenkins, op. cit., chapter III, with the revealing title 'Ploughing the Sands'; see also Nicolson, *George V*, p. 99 et seq., and Stephen Koss, *Asquith*, 1976, Hamish Hamilton Paperback 1985, p. 84 et seq.

[22] *Chronicle of Britain*, 1992, p. 855; Nicolson, *George V*, p. 130; Arthur Aspinall, *Lord Brougham and the Whig Party*, 1972, p. 192.

[23] Jenkins, *Balfour's Poodle*, p. 63.

'dreadnoughts'. Something needed to be done about this fast, and the resources also needed to be found for the recently introduced old-age pension. So the Chancellor of the Exchequer needed a lot of money, and he had drafted his plans to cover this need in line with the principle of those with the strongest shoulders carrying the heaviest burden. For this reason, and because the plan contained a number of social measures, it soon came to be called 'the People's Budget'. After a war of attrition lasting months, during which the Tories did not shrink from using any form of obstruction, the budget was finally passed by the House of Commons in November 1909. In the meantime, however, it had become fairly clear that the Lords would reject this Finance Bill, basing their authority to do so on the argument that in view of the social measures it contained the bill could no longer be counted among the category of 'money bills', legislation of a kind that the Lords by reason of long tradition were supposed to leave alone. At first Asquith did not think this possible: 'That way revolution lies', he had said, but it still looked as though it was going to happen. Roy Jenkins, the author of *Balfour's Poodle*, rejects the theory that the People's Budget was deliberately aimed at being unacceptable to their Lordships and tempting them to act recklessly. What is certain is that Lloyd George and other radical ministers, e.g., Winston Churchill, hoped by November 1909 that the Lords would reject the Finance Bill and thus dig their own grave. On 4 November the House of Commons finally passed the Finance Bill. In celebration Lloyd George, who for months had worked his fingers to the bone to achieve this, gave a dinner party at which the only toast appears to have been: 'May the Lords reject the Budget'. Which they actually did on 30 November 1909 by 350 votes to 75, knowing full well that this would result in the dissolution of Parliament.

* * *

When Parliament rejects an important bill, a government can resolve to acquiesce in this. That is what Gladstone did in 1893 when the House of Lords rejected his Home Rule Bill, and so did the Campbell-Bannerman government when the Lords rejected the Education Bill and numerous others. They could have dissolved Parliament, but they did not; neither did they step down. They stayed on and continued to govern. A government whose Finance Bill is rejected does not have this latter option. All it can do is resign or dissolve Parliament, because without money it is impossible to govern. It was clear to everyone that Asquith and his cohorts would take on the Lords. Actually, the confrontation had been postponed for far too long. Parliament (i.e., the House of Commons) was dissolved with the aim of allowing the electorate to referee in the dispute between the government and the Lords about the Finance Bill and, more generally, about the government's programme of legislation. At an election meeting held in the Albert Hall on 10 December 1909 Asquith impressed on his audience that one of the three most important matters in these elections was 'the effective limitation and curtailment of the legislative powers of the House of Lords', and he continued: 'We shall not assume office and we shall not hold office unless we can secure the safeguards which experience shows us to be necessary for the legislative utility and honour of the party of progress.'[24]

[24] Ibid., p. 109 and 122.

Although everyone took this as proof that Asquith had assured himself in advance of the assent of King Edward to a large-scale creation of peers if the Lords were to resist a bill to curtail the powers of the upper house, there was in fact no question of any such advance pledges from the King. Much was made in those days of these 'advance pledges', 'advance guarantees' or 'contingent guarantees'. What was meant by them was promises given by the King before the elections to co-operate in increasing the number of members of the House of Lords in the event of a Liberal election victory. The question was whether, by acting in this way, the King would not be exceeding his constitutional authority. But at any rate, he had not given any such guarantees. Five days after the election address in the Albert Hall, the King told Asquith that he had come to the conclusion that he could only co-operate in conferring titles after a *second* election had been held. According to the King, the government's envisaged curtailment of the powers of the Lords amounted to the destruction of that House. This curtailment might now have been put on the agenda, but no concrete legislative proposal had been tabled, and only after the electorate had been able to express their opinion on a 'particular project for accomplishing such destruction' would he perhaps be able to play his part.[25]

The elections were held in January 1910. With 275 seats, the Liberal Party remained the largest party, but it lost over a hundred seats to the Unionists, who ended up with 273 seats. The Liberals had lost their absolute majority, but were able to remain in power because again they were supported by the Irish Nationalists (82 seats) and Labour (40 seats). It was clear, though, that the Irish parliamentary party would now insist on Home Rule with much greater urgency, and to render that possible it was necessary to muzzle the House of Lords. So the introduction of a Veto Bill, or Parliament Bill as it would come to be known, was more pressing than ever. It was introduced in March, and on 14 April the Parliament Bill passed its first reading in the Commons. On 27 April that House passed the Finance Bill 1909, which had been reintroduced without changes, and a day later the House of Lords also approved the People's Budget, thus respecting the decision of the electorate.

The Parliament Bill took away from the House of Lords virtually any say on money bills, and for other legislation replaced the absolute right of veto with a suspensive right of just over two years. If the Commons passed a bill in three successive parliamentary sessions and it was rejected each time by the Lords (or was amended in a manner unacceptable to the government), it could receive the Royal Assent without the consent of the Lords. At the same time, the maximum duration of a parliamentary term (the period between two lower-house elections) was reduced from seven to five years.

When on 14 April 1910 Asquith placed the Parliament Bill on the table in the House of Commons for its first reading, he also laid out his cards regarding further developments. If the House of Lords rejected the Parliament Bill, the government would immediately advise the King on the steps required to get the bill on to the statute book 'in this Parliament', that is to say during the current parliamentary term that had just commenced, in spite of this. Should that fail, the gov-

[25] Ibid., p. 123.

ernment would either resign or recommend to the King that he dissolve Parliament, but the latter only if the government then had the advance pledges it had been denied in December 1909.[26] Things were getting serious, that much was clear. Asquith was dependent on the support of the Irish Nationalists, but apart from that he wanted to see the conflict with the Lords decided once and for all. Even though the King had been unwilling to give any guarantees before the January 1910 elections and had shown himself to be loath to use the kill-or-cure remedy of expanding the House of Lords before a *second* election had been held, the Asquith government would nonetheless confront him with a recommendation to that effect if the Lords were to kill the Parliament Bill. Should the King then be unwilling to co-operate, the government would either resign or, if the King *was* willing to co-operate in the event of a third Liberal victory, would call elections.

On 28 April 1910 Parliament broke up for a short spring recess, and Asquith went aboard the admiralty yacht *Enchantress* for a Mediterranean cruise. A few days later he had to rush back home from the coast of southern Spain on account of the totally unexpected message that King Edward was dying, an event that radically altered the political situation.

* * *

The King is dead, Long Live the King! On board the *Enchantress*, Asquith considered his next step. 'We were nearing the verge of a crisis almost without example in our constitutional history', he was later to write,[27] and at this of all times the politically inexperienced George V had to take over the helm from his father King Edward, who had been closely involved right from the start in the controversy between the government and the House of Lords, in the closing stages of which a leading part appeared to have been reserved for the King. Because of the 'zones of uncertainty'[28] in the unwritten British constitution, that 'venerable ragbag', the King, in a minefield of conflicting recommendations, would in the end be thrown back on his own opinion and judgment. Asquith decided an attempt should be made to reach a political compromise between Liberals and Conservatives on a number of important points, among them the issue of the Lords. Both the new King and the Unionists embraced this idea with a degree of warmth. In spite of this, they failed to reach agreement at the Constitutional Conference that was held from June to November 1910 in the form of a series of meetings of eight top political figures, including Asquith and Lloyd George for the Liberals, and Balfour and Lansdowne for the Unionists. The parties were now more sharply opposed than ever. It was looking as though use of the 'constitutional safety-valve of largescale creation' could eventually prove inevitable.[29] In the meantime, the general consensus had emerged that this could not be effected until after new elections had

[26] Ibid., p. 132-133.

[27] Nicolson, *George V*, p. 124; in Jenkins, *Balfour's Poodle*, p. 146 the word 'almost' is missing.

[28] See Nicolson, op. cit., chapter VIII, in which the author outlines the constitutional position of the British monarchy.

[29] Jenkins, op. cit., p. 143; see also Koss, *Asquith*, p. 128.

been held,[30] and so Parliament was once again dissolved at the end of November 1910 – but not until after Asquith, completely in line with the scenario he had set out in the Commons on 14 April, had now obtained from King George the advance pledges denied him in December 1909 by King Edward. The meeting with the King took place on 16 November and was considered by Asquith to be 'the most important political occasion in my life'. The King made the following entry in his diary:

> After a long talk, I agreed most reluctantly to give the Cabinet a secret understanding that in the event of the Government being returned with a majority at the General Election, I should use my Prerogative to make Peers if asked for. I disliked having to do this very much, but agreed that this was the only alternative to the Cabinet resigning, which at this moment would be disastrous.[31]

The elections held in December 1910 did not bring about a shift of any significance. The Asquith government could continue and the 'constitutional struggle' that had taken place behind closed doors during the months of failed negotiations with the Conservatives, could now be resumed in public.

* * *

The Parliament Bill, which had lapsed as a result of the dissolution of Parliament, was re-introduced in exactly the same form in which it had been passed by the Commons on its first reading in April 1910, after which it had been left in abeyance in anticipation of the outcome of the Constitutional Conference. On 15 May 1911 the bill was given its third and final reading in the Commons, being adopted by 362 votes in favour and 241 against, and went to the Lords. There, in the customary manner it was passed on second reading, only to be subsequently badly mauled during the 'committee stage' by means of a series of destructive amendments ('wrecking amendments'): a direct challenge to the government. In particular, an amendment tabled by Lord Lansdowne himself was characterized by the Leader of the House of Lords, Lord Morley, as 'tearing up the bill'. It was obvious that the government could not accept these amendments. It informed the King that it intended to have the House of Commons reject these amendments *en bloc*, just as had happened in December 1906 with the Education Bill. And then the hour of truth would be upon them and the House of Lords would have to be expanded by a sufficient number of members to safeguard the passage of the bill in its original form. At the same time, this would create a majority for Home Rule, that extremely important issue that had been so intensely perceptible all the time in the context of the struggle to curtail the right of veto.

[30] Nicolson, op. cit., p. 127; Jenkins, op. cit., p. 147 and 173.

[31] Jenkins, op. cit., p. 178. Jenkins italicizes the last seven words; he goes into great detail about the question of whether the King had been correctly informed by one of his two secretaries, Lord Knollys, about Balfour's disinclination to accept an invitation to form a government, if extended. The source research conducted by Nicolson, who also discusses this issue, has thrown new light on this matter.

However, things were moving far too fast for the King. He did not think the Lords should be snubbed unnecessarily by rejecting their amendments *en bloc* and advocated dealing with them in the normal manner *seriatim*, with each amendment being considered and decided on individually. Far more important, however, was the fact that – before it came to creating peers – the King wanted the Lords to have an opportunity to vote on the Parliament Bill in the form they received it back from the Commons, in the certain knowledge that if they rejected it the government would avail itself of the 'November pledges', the veil of secrecy surrounding which now had to be lifted. The government immediately went along with the King's wishes on both points, which was a not inconsiderable concession. For if the Lords backed down as they had done in 1832, the House would not be expanded. Granted, the government would then have its Parliament Act, but Home Rule could then only be achieved *by means of that Act* and so would once again be seriously delayed.

* * *

In a letter from Asquith to Balfour and Lansdowne dated 20 July 1911, the two Conservative leaders were informed of the King's willingness to ensure through the use of his Prerogative that the Parliament Act would enter the statute book 'in substantially the same form in which it left the House of Commons'.[32] A meeting of the Conservative shadow cabinet was immediately convened, at which a big difference of opinion emerged on the course to be steered. Lord Lansdowne, who had tabled the most controversial amendment and until recently had dug in his heels, now thought further resistance was pointless. He therefore proposed that the Unionist Peers should abstain from voting in the final decision on the Parliament Bill, thus allowing the bill to pass. Thirteen colleagues agreed with him, but the other eight announced that they preferred 'to die in the last ditch': the 'House of Lords wing of the Unionist army' would therefore have to vote against the bill, irrespective of the consequences. This difference of opinion continued with great intensity outside the shadow cabinet. Lord Lansdowne's 'hedgers' were opposed by the 'ditchers' or 'diehards', who had chosen the elderly Lord Halsbury as their leader. Lord Curzon, who had initially been a hardliner, was so worried about the loss of prestige the House of Lords would suffer in the event of a 'large creation' that he began to investigate how many Unionist Peers would be willing, if necessary, to vote in favour of the bill. As a member of the Conservative shadow cabinet, he felt he should himself adhere to the policy adopted by majority decision: 'abstaining with Lansdowne'.

There was great uncertainty about the number of peers that would need to be created if the House of Lords were to be expanded. In a letter to the members of the shadow cabinet written on 22 July 1911 – but not sent, Balfour considered the appointment of 50–100 new Lords 'a matter of indifference'.[33] The ditchers hung on to the illusion that this was the worst that could happen to them. If a large number of Unionist peers were to abstain with Lord Lansdowne, it would not be

[32] Jenkins, op. cit., p. 219.

[33] Jenkins, op. cit., p. 226.

necessary following rejection of the bill to create any more peers than were necessary to offset the preponderance of the ditchers over the government troops. But who could say whether on the occasion of a future vote, in a subsequent parliamentary session, on a re-introduced Parliament Bill there would again be as many 'abstainers'? If the government really wanted to be sure of things, it could not possibly be satisfied with a 'limited creation': in order to demolish the Conservative preponderance in the Lords a 'full', 'wholesale', 'large-scale', in short a '*swamping*' creation of many hundreds of Liberal peers would be necessary. And this was something Balfour did object to very strongly, and not just he. The government meanwhile was very busy preparing for battle. A list was found in Asquith's papers naming 249 suitable candidates, so he was already well on the way.[34] And the Home Secretary Winston Churchill, always ready for a brawl, commented in the House of Commons: 'Why should we shrink from the creation of 400 to 500 Peers?'[35]

In the days preceding the final vote in the Lords, feverish lobbying took place in favour of the different points of view. It was assumed that around 300 Unionist peers would follow their leader Lansdowne and abstain from voting. The government had its own support of just under 100 votes, and something similar applied – it was assumed – to the ditchers. So it would be touch and go, with much depending on the small number of independent peers (among whom some of the bishops), but especially on the number of Conservative peers that at Curzon's urging would enter the government lobby. These – in the eyes of the ditchers – despicable individuals were called 'rats'.

Let us bring this complex tale to a conclusion. After the Commons had decided not to accept the most objectionable of the Lords' amendments, Lord Morley re-introduced the Parliament Bill in the Lords, where a two-day debate took place on Morley's motion 'that this House do not insist upon the said amendments'. Rejection of this proposal would signify the end of the Parliament Bill; if it passed, the bill could be presented for the Royal Assent and put on the statute book. Lords voting in favour of a motion enter the 'content' lobby, those opposed vote 'not content'. The debate took place on 9 and 10 August 1911. To the bitter end the ditchers clung to the illusion that they did not need to take a swamping creation seriously. This aroused the concern of Sir Arthur Bigge, the King's secretary and recently elevated to the peerage as Lord Stamfordham. If the threat of a possible swamping creation were not taken seriously enough, things could well go wrong for the bill, he thought. For this reason he sought contact, with the King's consent, with Lord Morley, the Leader

[34] Jenkins, op. cit., p. 248. There is nothing to show how Asquith went about this, but I do believe he took his task more seriously than Minister Talleyrand, when in the summer of 1815 he was searching for suitable candidates for a house of peers: 'The exercise of such important patronage was a great responsibility, but Talleyrand took it lightly. Vitrolles has described the scene as he saw it. "I arrived one morning at the house of M. de Talleyrand and found him alone with M. Pasquier. He was walking up and down while M. Pasquier sat with his pen in his hand. 'You see', he said, 'we are busy making peers. The Chambers will soon meet. We don't know what influence we shall have in the Chamber of Deputies and we must be sure of the support of the Chamber of Peers'. Then, continuing to walk up and down, the Prince [Napoleon had propelled T. to the position of Prince of Benevento in 1806] mentioned names just as they occurred to him, as he might have done if it had been a question of invitations to a dinner or a ball". As the other members of the Government dropped in they were all asked to suggest names. Vitrolles himself mentioned one or two, including that of a distinguished sailor. Talleyrand was pleased with the suggestion – "That will please the navy", he said, and asked the Minister for that department to suggest a few more admirals'. See Duff Cooper, *Talleyrand*, 1932, p. 275.

[35] Jenkins, *Balfour's Poodle*, p. 248 note 1. However, both King Edward and King George were afraid of making themselves look ridiculous by a mass creation of 'puppet Peers'. What would remain of the King as a 'fount of honour'? A 'puppet king'? See Nicolson, *George V*, p. 149 and Jenkins, op. cit., p. 234.

of the House of Lords, to draft the text of a statement that could be read out by Morley during the debate. With this text in his inside pocket Morley stepped into the arena. At the *moment suprême*, he read it out:

> If the Bill should be defeated tonight His Majesty would assent – I say this on my full responsibility as the spokesman of the Government – to a creation of Peers sufficient in number to guard against any possible combination of the different Parties in Opposition by which the Parliament Bill might again be exposed a second time to defeat.

'That, I think, is pretty conclusive', said Morley, and for anyone who still did not understand he added: 'Every vote given against my motion will be a vote for a large and prompt creation of peers.'[36] It was time to start voting. Political passions had soared in recent weeks, the result of the vote remained totally uncertain right up to the last, and the drama of the moment was raised not least by the unbearable heat wave that plagued Britain at that time. The result was 'Contents, 131; Not contents, 114'. The 81 Liberals Morley had managed to drum up had received decisive support from 37 Unionists and 13 bishops. 'We were beaten by the Bishops and the Rats', said an embittered ditcher. The King, however, gave a sigh of relief: 'I am spared any further humiliation by a creation of peers', he noted in his diary, and to Lord Stamfordham he wrote: 'If the creation had taken place, I should never have been the same person again'.[37] The Parliament Bill received the Royal Assent on 18 August 1911 and thus became the Parliament Act 1911. The struggle between the Asquith government and the House of Lords was over. As in 1832 it could once again be said: 'Rather than be swamped by Whig peers, the Lords passed the bill'.

It is now time to turn our attention elsewhere, to America, where THE LAW IS KING.

PACKING THE COURT

'This Constitution … shall be the supreme law of the land', reads Article VI, Section 2 of the United States Constitution, the Supremacy Clause as it is known. In the famous case of *Marbury* v. *Madison* (1803) John Marshall, Chief Justice of the United States, deduced from this that courts were permitted and were required to review federal laws for conformity with the Constitution. And just like federal laws (known as 'Acts of Congress', but also referred to as 'federal statutes') courts may also apply 'state laws' (the laws of the states of the union) only if and to the extent they are, in the court's opinion, in conformity with the Constitution. This is not as self-evident as it may seem at first glance. The American Constitution is based on a strict separation of powers. Article I opens

[36] Jenkins, op. cit., p. 260; Nicolson, op. cit., p. 154.

[37] Nicolson, op. cit., p. 155.

with the words 'All legislative powers herein granted shall be vested in a Congress of the United States…', Article II with 'The executive power shall be vested in a President of the United States of America …', and Article III with 'The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish …'. As the Constitution is the highest law of the land, it goes without saying that all three powers must abide by the Constitution, but why should the courts be permitted to decide how the other two powers should interpret the Constitution? Because, said John Marshall, 'it is emphatically the province and duty of the judicial department to say what the law is'. Why? That's why! The power of judicial review has developed into a very important element, if not the core, of American constitutional law, and gives the courts – in particular the highest court, the Supreme Court in Washington – great power.[38] This power is not unlimited, of course, and in general the Supreme Court has been well aware of the limits to its possibilities and has ensured that pride goeth not before a fall. But there was one time when the Court really roused the ire of the other two powers, and in doing so jeopardized its own position. 'I may not know much about law', an exasperated President Theodore Roosevelt once said, 'but I do know that one can put the fear of God into judges'. This was Teddy Roosevelt, the man of 'Speak softly and carry a big stick'. But a really violent clash between President and Congress on the one hand and the Supreme Court on the other was not to occur until the presidency of his distant relative Franklin Delano Roosevelt. This clash is described in a very interesting book by the later Attorney General and member of the Supreme Court Robert Jackson, who as Assistant Attorney General experienced it all from very close quarters. His book is called *The Struggle for Judicial Supremacy. A Study of a Crisis in American Power Politics*,[39] a title that is slightly reminiscent of the subtitle of Jenkins' book *Balfour's Poodle*. One other similarity is interesting. Jackson also describes a 'struggle' between a democratic and a non-democratic element in the system of government, whereby the former, using unorthodox means, made the latter eat humble pie. Let us have a look at how this all came about in America.

* * *

In the early 1930s America was in a profound economic and social crisis. Although the Republican President Herbert Hoover did try to do something about it, it did not help much. Franklin Delano Roosevelt, the Democratic candidate for the presidency, called out to his supporters at the Democratic Convention in Chicago in July 1932: 'I pledge you – I pledge myself – to a new deal for the American people'. In November Roosevelt was elected by a comfortable majority, and in the si-

[38] The richly illustrated booklet *Equal Justice Under Law. The Supreme Court in American Life*, 1965, written for the layman and published by the Foundation of the Federal Bar Association, gives a vivid picture of the position of the Supreme Court in American society. The standard work on the Supreme Court is Charles Warren, *The Supreme Court in United States History*, 2 parts, 1922. The literature on the Court and its case-law is immense. A concise, but fascinating and penetrating overview is given by Robert G. McCloskey, *The American Supreme Court*, 1960, 3rd edn. revised by Sanford Levinson, 2000.

[39] Robert H. Jackson, *The Struggle for Judicial Supremacy. A Study of a Crisis in American Power Politics*, 1941. Racily written is Fred Rodell, *Nine Men. A Political History of the Supreme Court of the United States from 1790 to 1955*, 1955, the seventh chapter of which is devoted to the conflict we are considering.

multaneously held congressional elections the Democrats also won. On 4 March 1933 Chief Justice Hughes swore in the new president, and eight days later FDR turned to the American people with the first of a long series of 'Fireside Chats' (radio broadcasts from the White House).[40]

The promised New Deal took shape at a breathtaking pace. During the '100 days', Roosevelt's first three months in office, he rushed fifteen very important bills through Congress. They constituted a package of experimental legislative measures intended to set the American economy back on its feet again and to alleviate the worst social need. Never before had Congress ventured into this type of socio-economic legislation, which inevitably went hand-in-hand with a great deal of bureaucracy. Opponents sneered at the 'alphabet soup' of the New Deal, because the laws were all referred to by acronyms (NIRA: National Industrial Recovery Act, AAA: Agricultural Adjustment Act, etc.). In a country where laws are subject to 'judicial review', it was inevitable that the anxious question of how the Supreme Court would rule on the power of Congress to impose such drastic restraints on economic freedom as it had in this case would present itself. The powers of the federal legislature are specifically enumerated in the Constitution and it was highly dubitable whether the New Deal legislation would withstand the Supreme Court's review. The proof of the pudding was in the eating, and the dish the Supreme Court served up to the nation as 'constitutional *laissez faire*' lay particularly heavy on the stomach. The Supreme Court swept away large parts of the New Deal. Space does not permit a discussion of the relevant case-law here.[41] But to give an impression of the scale of the damage caused, I shall briefly quote a number of American authors:

> With a salvo of decisions during 1935–36, the Court tore great holes in the New Deal program of recovery legislation.[42]

> Never before Franklin Roosevelt's time had the Court taken almost the entire governmental program of a contemporary President plus his (the pronoun is accurate) Congress and vetoed it law by law …[43]

> In 1935 on a day New Dealers called 'Black Monday', the Court killed the NIRA, and ruled against the Administration in two other important cases. In decisions that followed, the Court continued to strike down Roosevelt's major New Deal Legislation.[44]

Jackson summarizes it all in the title of the fourth chapter of his book, 'The Court Nullifies the New Deal', in which chapter the following passage, *inter alia*, can be found: 'Meanwhile, "hell broke loose" in the lower courts. Sixteen hundred injunctions restraining officers of the Federal Govern-

[40] *Chronicle of America*, 1989, p. 692: 'While unable to walk unassisted and usually confined to a wheelchair, he has stayed close to the people by means of his Fireside Chats'. See also p. 658 and 659.

[41] For this see Jackson, *Struggle for Judicial Supremacy*, which on p. 181 lists the most important rulings; the cited works of McCloskey and Rodell also discuss the cases concerned, as do many hundreds of other books – not counting the casebooks on constitutional law, of course.

[42] McCloskey, op. cit., p. 111.

[43] Rodell, op. cit., p. 214.

[44] *Equal Justice Under Law*, p. 91.

ment from carrying out acts of Congress were granted by federal judges'.[45]And in the following chapter he confronts us with the catastrophic consequences of the decision in which the Supreme Court declared the Agricultural Adjustment Act invalid by 6 votes to 3:[46] the non-validity of the federal 'processing tax' introduced in that Act could come to cost the government a billion dollars in damages claims.[47] A factor of great significance is that it was not just *federal* legislation that got hit. In June 1936 the Court declared a widely supported law of the state of New York guaranteeing women a minimum wage invalid by 5 votes to 4:

> Here was no visionary product of professors and other braintrusters who swarmed around that 'traitor to his class' in the White House; here was a carefully drafted, badly needed law that had been backed by Republicans as well as Democrats in the nation's most heavily peopled state.[48]

In numerous earlier decisions the Supreme Court had rejected federal laws because they allegedly infringed the powers of the states laid down in the Constitution. This time, however, it transpired that there was more going on: '(T)he actual direction of the Court's march … was not simply anti-Congress, to protect the states; it was anti-Government, and it was anti-Government with arms newly forged for the occasion'.[49]

But enough about the blessings of judicial review. Who, then, were the men that had so much power they could kill off the entire legislative programme of a very popular president and 'his' Congress?

* * *

As we already know, there were nine of them – a number that is not laid down in the Constitution incidentally. The nine judges of the Supreme Court had and have the right to lay down their strictly personal view in a so-called 'individual opinion'. It may be a *dissenting* opinion, an opinion that departs from the majority decision, or a *concurring* opinion, which although it endorses the conclusion to which the majority has come, does not endorse the grounds on which the majority decision is based. Thanks to this system of *seriatim* opinions adopted from the country's British past, the judges of the Supreme Court and their views are wellknown to a broad public. Whenever a law is held to be unconstitutional, it makes front-page news, and the relevant cases are excitedly commented on, with much attention being devoted to the ratios of votes and to the force of the arguments employed in the majority and minority opinions.

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[45] Jackson, op. cit., p. 115.

[46] *United States* v. *Butler* (1936). A newspaper ran the quite apt headline: 'AAA plowed under'.

[47] Jackson, op. cit., p. 136 et seq. See also ibid., p. 139: 'The Butler decision, more than any other to that date, had turned the thoughts of men in the Administration toward the impending necessity of a challenge to the Court'; in the same vein Rodell, op. cit., p. 238.

[48] Rodell, op. cit., p. 242. The decision in question is *Morehead* v. *Tipaldo* (1936). On this see also Jackson, op. cit., p. 170 et seq.

[49] Jackson, op. cit., p. 170.

Four of the nine judges in the period under review were decidedly conservative. They wanted nothing to do with the New Deal or, more generally, laws that obstructed the business community, and thought they could find more than enough points of departure in the Constitution to be able to persevere in their philosophy of *laissez faire* against the legislative wishes of the Congress or of the states. In order of their appointment these were the judges Van Devanter, McReynolds, Sutherland and Butler. The New Dealers derisively named them the 'Four Horsemen of Reaction'.[50] I have to confess that it was not immediately clear to me what this was supposed to mean. A friend told me, however, that it must be a reference to the Four Horsemen of the Apocalypse. So I looked it up in the Bible, and I can assure you that the four characters in question are formidable ones.[51] Opposite the Four Horsemen stood the three 'liberal Justices' Brandeis, Stone and Cardozo, while the Justices Hughes (Chief Justice) and Roberts were not so easily labelled and so were frequently referred to as the 'roving Justices'. Generally speaking, Chief Justice Hughes felt more at home with the three progressive justices than with the Four Horsemen, which made Justice Roberts 'the Court's swinging keystone' and hence – American authors are not averse to a little exaggeration – for years 'the most powerful person in the United States'.[52] After all, he was the one that in difficult cases, on which the Four Horsemen and the four progressive justices had a fundamental difference of opinion, could decide whether a 'five-to-four decision' would come down in favour or against the constitutionality of a law. Chief Justice Hughes could often go either way as well, but his vote usually did not decide the result, only the ratio of votes. As Chief Justice he felt a special responsibility for the authority and the prestige of the Court, and so wanted to avoid five-to-four decisions as much as possible. It is for this reason that he would sometimes – when it was obvious that Roberts had sided with the Four Horsemen – in the end also vote against a law, even though he had at first argued forcibly that it was in conformity with the Constitution. Hughes had at one time written a book about the Supreme Court, in which he had made the famous remark: 'We are under a Constitution, but the Constitution is what the courts say it is'. Now, though, it often came down to 'swing-man Roberts' deciding on his own about the constitutionality of laws.[53]

Four years after taking up office, President Roosevelt had not had a single opportunity to fill a vacancy in the Supreme Court, whereas that Court had thwarted him more than any other president.[54] In November 1936 he was reelected by an overwhelming majority: only Maine and Vermont (together eight electors) voted for the Republican candidate Governor Alfred M. Landon of Kansas, the remaining 46 states (523 electors) all voted for FDR. The Democrats held more than three-quarters of the seats in both houses of the Congress. That could hardly be interpreted as anything other than a massive vote of confidence in Roosevelt and his New Deal. Although during the campaign Roosevelt had himself made no mention of the Supreme Court and its decisions that had been so

[50] Rodell, op. cit., p. 217.

[51] *Revelations* 6:1-8.

[52] Rodell, op. cit., p. 221.

[53] Rodell, op. cit., p. 240-241; Jackson, op. cit., p. 211.

[54] See the President's radio broadcast of 9 March 1937 quoted below.

disastrous for his New Deal, the topic had nonetheless loomed large during the election battle.[55] It was clear to everyone that Roosevelt would, or would have to, come up with a plan 'to curb the Court'. But how?

* * *

Initially the President shrouded himself in mystery. Still in his initial term in office he had addressed the Congress on 6 January 1937 in the annual State of the Union speech, saying, *inter alia*: 'The vital need is not an alteration of our fundamental law but an increasingly enlightened view in reference to it'.[56] Fourteen days later he delivered his second inaugural address in the pouring rain, saying:

'The Constitution of 1787 did not make our democracy impotent',[57] words that emitted a similar kind of veiled threat as the language used thirty years earlier by Prime Minister Campbell-Bannerman in the House of Commons: 'But Sir, the resources of the British constitution are not wholly exhausted'.[58]

On 5 February 1937 the vagueness ended. On that day FDR sent a message to Congress that came as a bombshell. It was a proposal 'to reorganize the judicial branch of the federal government' and took the form of a bill plus explanatory memorandum.[59] The proposal covered not only the Supreme Court, but also the entire federal judiciary, and comprised various elements that cannot all be discussed here. By far the most interest was shown in the following, however. In Article III, the Constitution stipulates: 'The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior'. Unlike the judges in most of the states, who are often elected – and then for specific periods, federal judges are appointed for life and cannot even be dismissed on grounds of age. So America had had many ancient judges, and even after Congress had made provision for certain pensions for federal judges, they frequently preferred to carry on to their dying day. Roosevelt was now proposing that he should appoint additional judges throughout the federal judiciary, which at the time numbered 237 judges, in all those cases where a judge over the age of seventy declined to avail himself of the opportunity to leave the service on full pay.[60] Judges in the inferior courts already had this right, which was now also being granted to the justices of the Supreme Court in a bill pending before Congress which FDR, smiling derisively, said 'has my entire approval'.[61] Six of the nine Supreme Court justices were over the age of seventy and if they did not

[55] Jackson, op. cit., p. 176 et seq.; Rodell, op. cit., p. 214, 235, 242, 243; McCloskey, *American Supreme Court*, p. 112.

[56] Jackson, op. cit., p. 178.

[57] Rodell, op. cit., p. 243; *Chronicle of America*, p. 674.

[58] See text accompanying n. 20 above. Jackson too draws a comparison with Britain where he writes: 'Property interests … had come to regard the Supreme Court as their own House of Lords and to believe they had a moral right to control its sheltering veto', op. cit., p. 182.

[59] The Presidential Message is printed in Jackson, op. cit., p. 328-337; the verbatim text of the bill relating to the subject of Court-packing, which will be discussed below, can be found in Dowling and Gunther, *Constitutional Law. Cases and Materials*, 7th edn., 1965, p. 265.

[60] See the Presidential Message.

[61] Ibid., Jackson, op. cit., p. 334. On 1 March 1937 Congress passed the bill, which became the Supreme Court Retirement Act.

pack their bags, Roosevelt would be able to expand the Court in one fell swoop to 15: a *swamping* creation! Everyone was agreed that this was essentially what it had all been about from the start, and that was the very reason the proposal went down badly, even among supporters of FDR. People disapproved of the fact that a frontal attack on the Supreme Court had been concealed in a high-sounding proposal for reorganization of the judiciary which, moreover, was based on dubious assumptions. For example, Chief Justice Hughes announced immediately that the Supreme Court was not overloaded and that it did not have a backlog of cases. Many also doubted the constitutionality of the proposed measure: an attempt to call the Supreme Court to order could only be undertaken by revising the Constitution. A very radical bill to this end was introduced on 15 February by Democratic Senator Burton K. Wheeler: a federal law declared invalid by the Supreme Court would regain its force of law if it were once more passed by both houses of the Congress by a two-thirds majority. An amendment to the Constitution launched on 11 March took a different tack by stipulating that in the future a two-thirds majority would be required for court decisions holding laws unconstitutional.[62] While FDR's proposal was already going down the wrong way with many of his supporters, his opponents naturally had no good word for it at all. They spoke indignantly of a 'Courtpacking plan', and that is how it went down in history.[63]

* * *

It was called a Court-packing plan, and a Court-packing plan it was, too. The disingenuous way in which the proposal was presented had been a blunder in view of Roosevelt's reputation as a straight-talking president. In a Fireside Chat on 9 March he attempted to make good the mistake. He described the American system of government as a 'three-horse team' and went on:

> The three horses are, of course, the three branches of government – the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not.

In the rest of his chat the President did not mince his words. He did not even attempt to deny that adding justices to the Supreme Court had been the chief motive for the proposed plan of reorganizing the federal judiciary. I quote a number of salient passages:

> Since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State Legislatures in complete disregard of this original limitation [viz. the presumption of validity of laws]. In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body …

[62] These two proposed amendments of the Constitution are printed in Jackson, op. cit., p. 352-353.

[63] The verb 'to pack' has several definitions, one of which is to fill (a legislative body, committee, etc.) with one's own supporters.

That is not only my accusation. It is the accusation of most distinguished Justices of the present Supreme Court … (quotes follow) The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress – a superlegislature as one of the Justices has called it – reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself …

We want a Supreme Court which will do justice under the Constitution, not over it. In our Courts we want a government of laws and not of men.[64]

Tough talk! In the continuation of his speech the president defended himself against the accusation of Court-packing, pointed out that in the whole of his first term in office he had not been able to appoint a single justice to the Supreme Court – with the result that no fresh blood had been introduced, and he let it be known that he did not expect any good to come from constitutional amendments. The amendment procedure was so difficult, and the differences of opinion on what should be done so great, that it would take years and years before agreement was reached on the text of a proposal, let alone before it had been passed by Congress and a sufficient number of states.

* * *

A day after this Fireside Chat, the Senate Judiciary Committee started hearings on the president's plans. Resistance to them was and continued to be great, and was led nota bene by Democratic Senator Wheeler, who had himself submitted an even more radical proposal, albeit a proposal to amend the Constitution. On 14

June 1937 the Judiciary Committee adopted by a majority of one vote a withering report rejecting the Court-packing plan in unprecedentedly scathing terms:

We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle.

It was presented to the Congress in a most intricate form and for reasons that obscured its real purpose …

It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy …

[64] The speech is printed in Jackson, op. cit., p. 340-351.

It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.[65]

On 22 July 1937 the Senate concurred with this report by 70 votes to 20, which meant the end of the Court-packing plan. In the meantime, however, spectacular developments had taken place in the Supreme Court. First of all, there was the latest act of swing-man Roberts. When he became a member of the Court in 1930 he initially pursued a fairly liberal course. Little by little, however, the Four Horsemen managed to draw him over to their side, with disastrous consequences for the New Deal. The sharply rising tension between the President and Congress on the one hand and the Court on the other, and Roosevelt's tremendous election victory in November 1936 must, however, have convinced Roberts that things could not go on this way. On 29 March, 12 April and 24 May 1937 the Supreme Court gave rulings in three very important cases, in which it set aside earlier interpretations of the Constitution and decided in favour of the constitutionality of the laws at issue.[66] In all three instances the decision was taken by five votes to four, and in all three instances it was swing-man Roberts who departed from his earlier view and clinched matters: 'A switch in time saved the nine' people joked.[67] This was not just a witty remark, it was also a revealing joke, as it presupposed that the Senate Judiciary Committee had only permitted itself the luxury of a principled and scathing judgment of the Court-packing proposal in the knowledge that the proposal was no longer necessary, because the Supreme Court – i.e., Justice Roberts – had already come down a peg or two anyway. FDR for his part was later to conclude with satisfaction: '*I lost the battle, but I won the war*'.[68] And the icing on the cake of that victory was the resignation of a battle-weary Horseman, the 78year-old Justice Van Devanter, on 2 June 1937. Roosevelt was able for the first time to appoint a member of the Court. He chose Hugo Lafayette Black, a man who in spite of the youthful lapse of briefly being a member of the Ku Klux Klan would for decades adorn the Court as a 'liberal' Justice. In the years that followed, President Roosevelt was to have the opportunity more than once to make his mark on the composition of the Court through new appointments, and hence on the developments in case-law. But the 'constitutional revolution of 1937' had in itself already been enough to clear the way for the New Deal.

Following our stay in the New World, it is now time to return to the Old. Let's go home – to Belgium.

[65] Dowling and Gunther, op. cit., p. 268; Rodell, op. cit., p. 250. The period from 5 Feb. 1937 (introduction of the Court-packing plan) to 22 July 1937 (rejection by the full Senate) is described in Alsop and Catledge, *The 168 Days*, 1938.

[66] Jackson, op. cit., chapter VII: *The Court Retreats to the Constitution*; McCloskey, op. cit., p. 174 et seq.: *The Constitutional Revolution of 1937*; Rodell, op. cit., p. 248 et seq.

[67] A reference to the English proverb 'A stitch in time saves nine'.

[68] Dowling and Gunther, op. cit., p. 268. Rodell, op. cit., chapter 7: *The Court Collides with the New Deal and Wins the Battle by Defaulting the War*.

SACKING THE KING

The Southern Netherlands remained under Spanish rule longer than the Northern part. When the Spanish branch of the house of Habsburg died out in 1700, Belgium came under Austrian rule. In 1795 it was annexed by France and in 1815 was united with the Netherlands to form a buffer state against that same France. In 1830 the Belgians finally wanted to go it alone and threw off the Dutch yoke.[69]

As becomes a modern country, it quickly drafted a constitution. Only when it was finished did they finally go in search of a king. In the end they opted for Leopold of Saxe-Coburg, an uncle of Britain's Queen Victoria.

A chance combination of circumstances resulted in Belgium's 1831 Constitution becoming the focus of quite some international attention and being taken as a model.[70] For those days it was a liberal constitution, perhaps the most liberal in Europe. A little *too* liberal for Leopold's taste, but he was prepared to put up with it. Article 25 stipulated (and still does, but now as Article 33) that '*Tous les pouvoirs émanent de la nation*' [All power emanates from the Nation], a formula taken from France's 1791 Constitution, which in the era of the Restoration had been more or less forgotten. So for the Belgians, there would be no king by the grace of God but by the grace of the Belgian people: Article 78 (now Article 105) stipulates quite matter-of-factly that the king has no powers other than those formally granted him by the Constitution and by specific laws. It is therefore striking that fifteen years ago, in Belgium of all places, there was quite a spectacular clash between the '*Yo el Rey*' and '*We the People*'.[71] What exactly was the problem?

On 29 March 1990 the Chamber of Representatives passed a private member's bill for the partial legalization of abortion which had already been approved by the Senate. The next day the King handed Prime Minister Martens a letter in which he stated that he was prevented by his conscience from sanctioning this law.[72] It was the first time in a long royal career that the King refused to grant the Royal Assent to a bill, a most unusual step that could have far-reaching consequences and ones that would be difficult to predict. 'To those who are amazed at my decision I would put the following question', the King wrote: 'Is it normal for me to be the only Belgian citizen with a duty to act in conflict with his conscience in such matters? Does the freedom of conscience apply to everyone except the King?' Normal or not, Baudouin had made up his mind. He would not sign, taking the lofty stance adopted by Martin Luther: 'Here I stand, I can do no other.' What then follows is very

[69] E.H. Kossmann, *The Low Countries 1780-1940*, 1978, p. 151 et seq.

[70] John A. Hawgood, *Modern Constitutions Since 1787*, chapter XII: Eighteen Thirty-One and the 'Model' State of Belgium.

[71] In Spain, on the other hand, which traditionally has had authoritarian rulers, King Juan Carlos entered the arena in the defence of democracy during the coup on 23 February 1981. See my contribution on Spain in Prakke and Kortmann (eds.), *Constitutional Law of 15 EU Member States*, pp. 725-796.

[72] See *Parlementaire Handelingen van België* [Parliamentary Proceedings of Belgium], combined Chambers of Parliament, meeting of Thursday, 5 April 1990, p. 1-18, in which the entire correspondence between the King and the Prime Minister is published. Initially, Prime Minister Martens said that the Head of State had *handed* him a letter on 30 March, but later he speaks of the letter the King *sent* him.

strange. The King suddenly becomes practical and descends to the level of day-to-day politics, as his letter continues:

> I do, however, realize very clearly that it would be unacceptable for me to obstruct the proper working of our democratic institutions as a result of my decision. That is why I am asking the Government and the Parliament to find a legal solution that guarantees both the monarch's right not to have to act in conflict with his conscience and the proper functioning of our parliamentary democracy.

Reduce '*Yo el Rey*' and '*We the People*' to a common denominator by means of a 'cunning plan': Baldrick, who in this case answered to the name of Wilfried Martens, had his work cut out for him.

With the King's consent Prime Minister Martens for the time being informed only the five deputy prime ministers of the royal missive. The King received them all individually. Like Martens, they all failed to get him to change his mind. It was time for a cunning plan. This was quickly devised and, after Baudouin had agreed to it, was put into operation with all possible speed. On the evening of Tuesday, 3 April the full Council of Ministers met to declare that, under Article 82 (now Article 93) of the Constitution, the King was unable to rule. According to the said Article, the two Chambers in joint assembly would now have to appoint a regent, but that all took too long. So they switched smoothly to another Article of the constitution, namely Article 79 (now Article 90), which stipulates that on the King's demise, until his successor is sworn in his constitutional powers are to be exercised on behalf of the Belgian people by the Council of Ministers. Believe it or not, they had succeeded: *Yo el Rey* and *We the People* with constitution in hand reduced to a common denominator! Granted, it was highly dubitable whether a king who refused to sign one particular bill was genuinely unable to rule – and it was obvious to everyone that the King was not dead, but alive and kicking – but now it was a question of focusing on the big picture. Immediately after declaring the King unable to rule, the ministers collectively signed the Lallemand/Herman-Michielsens bill into law.[73] The job had been done, the King could get back to work! Unfortunately, the ministers were unable to make this decision themselves, as pursuant to a 1945 statute only the combined assembly of both Chambers of Parliament had the authority to do so.[74] Meanwhile, the clock had struck midnight. So, it was 4 April when the resolution of the Council of Ministers convening the Chamber of Representatives and the Senate in combined assembly for 3 p.m. on Thursday, 5 April was passed. On Wednesday morning the 'mini Royal Question' – as the Belgians refer to this episode almost with endearment – had become world news. The formal completion of the *solution à la belge* of a

[73] *Belgisch Staatsblad* [Belgian Gazette] 1990, p. 6370 (declaration of inability to rule), and p. 6379 (Act on pregnancy termination). The decision referred to below to convene the combined Chambers of Parliament can be found on p. 6506. It is striking that the Act of 13 August 1990 setting-up a committee to evaluate the Act of 3 April 1990 on pregnancy termination was signed as usual by King Baudouin (*Gazette*, 20 Oct. 1990, p. 20101).

[74] Strangely enough, the Constitution makes no provision in this respect. The uncertainty was removed by a statute dated 19 July 1945, *Belgian Gazette* of 3 August 1945, p. 4902. In 1940, King Leopold III was declared unable to rule on the grounds that he was a prisoner of war. A regent could not be appointed because Parliament could not meet. The King's situation was equated with death; invoking Art. 79 (now Art. 90), the ministers acted for the King until 20 Sept. 1944. On that date the combined Chambers of Parliament appointed Prince Charles as Regent because the King was unable to rule. On 7 May 1945 the US army liberated King Leopold. The said statute of 19 July 1945 appoints the combined Chambers as the competent authority for establishing that the King is no longer unable to rule. These earlier events obviously served as a source of inspiration in 1990.

tricky constitutional problem followed a day later, when the combined assembly restored the King's powers following a brief debate.

* * *

In a constitutional monarchy, the king and his ministers must maintain a unified front: the Crown, as the Belgians say, may not be exposed. But this is exactly what had occurred here in a particularly spectacular manner at the request of the King himself. For the King had ended his letter to Prime Minister Martens as follows:

'Mr Prime Minister, may I request you to bring this letter to the notice of the Government and the Parliament at a suitable time'. The King apparently felt the need to display his conscientious objections and to account publicly for his deeds.

What should we think about all this? A constitutional lawyer will be inclined to say that the King should not have involved his conscience, and that there was no reason at all to do so. After all, the King is inviolable, his ministers are responsible (Article 63 [now Article 88] of the Belgian Constitution). The Royal Assent to a bill can at most be seen as indicating that the legislative procedure has been correctly adhered to, but it certainly cannot be deduced from this that substantively the statute boasts the monarch's approval. How could that be possible with successive coalition governments of ever changing composition which partially undo or thwart the work of their predecessors? The monarch is not a chameleon, is he?

But if the ministers are responsible, and the monarch is not, and if, therefore, approval of the statute in question cannot be deduced from the king's signature, why should the monarch bring his conscience into play? All he has to do is sign, and that is that.

In all fairness we must in my view admit that this really is too simplistic, or perhaps I should say the reasoning is too exclusively legal to be entirely convincing. And that is how King Baudouin himself felt, for he wrote to Prime Minister Martens: 'By granting the Royal Assent to the bill … I feel I would inevitably share a certain responsibility for it'.[75] In the Netherlands, Queen Juliana saw things in exactly the same way: 'You may bear political responsibility', she once said to Prime Minister Drees, 'but when I sign a decree, I bear moral responsibility for the consequences of that decree, don't I?' Anyone attempting seriously to step into a monarch's shoes can in my view only concur with this. The royal signature is an indispensable formal requirement for a large number of decisions, including statutes. If the monarch refuses to sign, the bill does not become law. For the person in question this *has* to mean that he, or she, feels a certain responsibility, irrespective of the teachings of constitutional law. In the great majority of cases the dormant realization of a certain shared responsibility will have no choice but to *remain dormant*. A monarch who – apart from ex-

[75] Proceedings of the combined assembly, 5 April 1990, p. 3 left-hand column.

treme exceptions – brings his conscience into play unacceptably clogs up the machinery. There can, however, be instances in which the monarch says: 'This far and no further. I am not signing this'. It is conceivable that his ministers will accept this and that the matter will not become public. But what if the differences of opinion between monarch and ministers are irreconcilable, if a decision the monarch is unwilling to sign is considered by the ministers to be absolutely necessary? In that case it is bend or break: the monarch will have to abdicate or the ministers will have to tender their resignation. The seas will be very turbulent and the question is whether nowadays the monarchy would survive something like this. I am thinking now of instances in which the monarch is fully aware of these risks and prefers to go down fighting like a 'last ditcher' rather than to tarnish himself and his dynasty by consorting with good-for-nothing ministers. Imagine a Belgian or a Dutch government ever making moves to dismantle our democratic states that are based on the rule of law. Who in that case would want to deny the monarch the right to toss back his head proudly and say: *Yo, el Rey*, I, a descendant of the House of Saxe-Coburg, of Orange-Nassau, will not sign this?

* * *

Once we have admitted in principle that instances can arise in which a monarch could activate his dormant sense of shared responsibility and refuse his signature, we are faced with the problem that no person can decide for another when such a case exists. I am therefore assuming that we will have to respect King Baudouin's decision that for him the abortion bill constituted a boundary he did not wish to cross. But what I then do not understand is the transition from Luther to Baldrick, from the always impressive and lofty level of a moral dilemma to a cunning plan. Baudouin had no problem with the abortion law being passed just as long as his signature was not at the bottom of it. What good is that to the unborn life? This question can naturally be answered: the worldwide publicity surrounding Baudouin's refusal sharply increased the drama of the ethical objections to abortion. The *Osservatore Romano* lauded the King for his 'inner nobility'. Had this global publicity been the object of the exercise? But may a monarch refuse his assent, not to block the passing of a measure he judges morally unacceptable but to cause its passing to be accompanied by constitutional capers that draw worldwide attention? In December 1906 Prime Minister Campbell-Bannerman said in the Commons: 'A way must be found … by which the will of the people expressed through their elected representatives … will be made to prevail'. They found that way in Belgium too in 1990, but it was a very tortuous one!

CONSTITUTIONAL CRISES

In the above we have focused on three unusual constitutional conflicts. In Britain, after a great deal of fussing and fighting the Parliament Act 1911 was passed, under which the House of Lords' unlimited right to veto legislation was reduced to a right to delay it for two years. The mere existence of the Act has proved to be sufficient. It has only had to be employed on rare occasions: never in respect of money bills, and only six times in respect of other statutes: Government of Ireland Act 1914, Welsh Church Act 1914, Parliament Act 1949, War Crimes Act 1991, European Parliamentary Elections Act 1999, Sexual Offences (Amendment) Act 2000. The first two statutes, Home Rule and Welsh Disestablishment, were high on the Liberals' wish list. As a result of the outbreak of the First World War, however, it was years before they could be implemented.[76] The Parliament Act 1949 reduced the Lords' suspensive veto to one year. Attlee's Labour government was not enamoured of the Lords and certainly did not want this House to be able to effectively block steps to nationalization, which is why its right of veto was reduced even further.[77] The War Crimes Act allowed British war criminals to be prosecuted, something from which according to the House of Lords no benefit could be expected almost fifty years on. The fact that the Blair government, which has a very large majority in the House of Commons, has availed itself of the Parliament Act in two successive years has attracted attention.

In America the Court-packing episode has stirred the imagination and buried itself in the national consciousness. The Supreme Court does not operate in a vacuum, but is part of a political system, in which it plays a very significant role, but in which the limits of its power are also embedded. FDR made it very clear where those limits lie and consequently contributed to the positioning of the Court in American society.

The mini Royal Question in Belgium will not be forgotten in a hurry, either. The fact that it did little damage to the King was tellingly revealed on his death a few years later, when the country was inundated by a veritable wave of sorrow and posthumous demonstrations of affection. Prime Minister Martens' announcement of an amendment of the constitution to clarify the monarch's position in respect of legislation and to avoid a repeat of what happened[78] was soon forgotten, though. It is being assumed, and no doubt rightly so, that even without a constitutional amendment all the parties concerned will realize that the incident will not bear repetition.

The political and constitutional pressures that built up during the conflicts described were ultimately released after a brief or longer period by means provided in constitutional law, albeit that these means had to be applied very freely and now and again required some considerable manoeuvring. We should not make a big deal out of it, though, especially as each case involved assuring the

[76] Jenkins, *Balfour's Poodle*, chapter XIV: Epilogue.

[77] Ibid.

[78] Proceedings of the combined assembly, 5 April 1990, p. 3 right-hand column. See also the interpellations in the Chamber and the Senate on 19 April 1990, with post-mortems on what happened.

effectiveness of democratic decision-making. The House of Lords had to yield to the House of Commons, the Supreme Court to the President and Congress, and the King to Parliament. The events described constitute a part of the cumulative experience each country acquired with its own system of government: 'They will stick like burrs to the body politic on its way down the ages'.[79]

[79] See text accompanying n. 4.