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Reconstituting the Constitution

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Chapter 5
Constitutional Reform in the United Kingdom: Past, Present and Future

Robert Hazell

5.1 Genesis of Labour's Constitutional Reform Programme: Unbridled Power

The United Kingdom has travelled a long way in the last 13 years. Constitutional reform in New Zealand began in the 1980s in reaction to the Muldoon administration; in the United Kingdom in the late 1990s in reaction to the Thatcher administration. Until then, the United Kingdom had a system of unbridled power.[1] In Lijphart's typology, the United Kingdom and New Zealand were the archetypes of majoritarian, two party systems.[2] First-past-the-post was used for all elections in Great Britain, squeezing third and minor parties, and delivering a classic, two-party, winner-takes-all political system. There were almost no checks and balances. It was the most centralised system of government in Europe. There was no bill of rights; an illegitimate and ineffective second chamber; no freedom of information; no separate Supreme Court. All that was to change in the space of just 10 years when Labour swept into office in 1997.

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[1] Palmer (1979).

[2] Lijphart (1999).

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5.2 Implementation of Labour's Constitutional Reforms

Labour had not historically been a party of constitutional reform. The two party, winner takes all system was acceptable to them so long as they were the winners from time to time, and got their turn in the driving seat. What opened their eyes were 18 long years in opposition, and the way Mrs Thatcher tore up constitutional conventions and trampled on her opponents. Bit by bit, Labour adopted a series of commitments to constitutional reform, which were all borrowed from the Liberal Democrats. When John Smith became Labour leader in 1992 he presented the reforms for the first time as a constitutional reform programme; but after Smith died in 1994 it fell to his successor Tony Blair to implement them.

Blair himself had little interest in constitutional reform. As Prime Minister he did not make a single speech about it, and he refused to develop any big picture argument about why Labour was doing this beyond the bland theme of modernisation. However when the history books are written, constitutional reform will go down as the greatest single achievement of his government. In the first year after their election in 1997, Labour legislated for devolution to Scotland, Wales and Northern Ireland; and introduced the Human Rights Act. In the second year they reformed the House of Lords by removing the hereditary peers, and introduced proportional representation for elections to the European Parliament. In the third they introduced a Freedom of Information Act. Then they rested. But in 2005, in a second phase, Labour created a new Supreme Court; removed the Lord Chancellor as head of the judiciary; and created a Judicial Appointments Commission.

5.2.1 Effectiveness of Labour's Constitutional Reforms

The Labour government's record is impressive, yet its effectiveness can be questioned. Has Britain's constitution been truly transformed? Some scholars are sceptical, and still classify the United Kingdom as a strongly majoritarian system.[3] They are too mechanistic in their analysis. The United Kingdom is still majoritarian in some respects; but important checks and balances on executive power have been inserted. These reforms will be analysed over the following pages.

5.2.2 Devolution

Scotland, Wales and Northern Ireland now have their own legislatures. All are elected by proportional representation, which has become the electoral system of

[3] Flinders (2002).

choice for all new political institutions. The Scottish Parliament is almost an exact twin of the New Zealand Parliament, with 129 members elected through the Mixed Member Proportional (MMP) voting system. It has power to legislate in most domestic matters. Westminster retains sovereignty, and can still legislate for Scotland; but by convention has agreed to do so only with the consent of the Scottish Parliament. Northern Ireland has similar legislative powers to Scotland. Wales started with less, but in a referendum in March 2011 will decide whether to acquire primary legislative powers.

If Wales catches up, all three devolved assemblies will have significant law making power: power that would be recognisable to any Australian state. But that legislative power is not yet matched by fiscal power. The devolved governments are wholly funded by the United Kingdom central government. That too may be about to change. In Scotland and Wales commissions have reported on the funding arrangements,[4] and recommended much greater fiscal autonomy. The new government is expected to implement these recommendations.

5.2.3 Reform of the House of Lords

It was a major achievement to remove the hereditary peers in the House of Lords Act 1999: an anachronism which had persisted for far too long. Shorn of the illegitimacy of the hereditary peers, the House of Lords has been transformed into a much more confident and assertive institution. The contrast between the two Houses can be easily illustrated. Thanks to its large majorities, the Labour government was defeated only five times in the House of Commons during its 13 years in office. In the House of Lords, it has been defeated over 500 times.[5] One in three divisions in the House of Lords resulted in a government defeat. The new government has already been defeated three times in the Lords in its first 2 months. Although many of those defeats are reversed in the Commons, our research shows that about four out of ten Lords amendments stick.[6] Even with that falling away, the Lords is much more effective in revising legislation than the Commons.

The big change since 1999 is that no single party has overall control in the Lords. The Labour and Conservative groups are roughly equal in number, with the non party crossbenchers and Liberal Democrats holding the balance of power. But the crossbenchers rarely attend, and it is the swing votes of the Liberal Democrats which determine the result in nine out of ten divisions.[7] The government could in theory create more peers until it has a majority. But the Labour government, and the

[4] Calman (2009); Holtham (2010).

[5] Russell (2007), p. 5.

[6] Russell and Sciara (2008), p. 574.

[7] Russell and Sciara (2007), p. 314.

new Liberal Democrat-Conservative government, have said that so long as the Lords remains fully appointed, they will not seek a majority. Instead, they will appoint new peers in proportion to the votes cast, rather than seats won, at the last general election. This proportionality principle, which is approaching the status of a constitutional convention, should enshrine the Lords as a chamber in which no party has a majority.

5.2.4 Human Rights Act

The Human Rights Act incorporated the European Convention on Human Rights into United Kingdom domestic law, and so made it directly enforceable in British courts. There is a lively debate amongst academic lawyers about its effectiveness. Some claim it was unnecessary and futile[8]; others lament the lack of a strike down power. The courts can strike down delegated legislation, and Acts of the devolved assemblies, but not Acts of the Westminster Parliament. If a Westminster Act is found to be non-compliant, they can only issue a declaration of incompatibility. So far, after 10 years of operation of the Human Rights Act, the courts have issued 26 declarations of incompatibility, of which eight were overturned on appeal. Of the remaining 18 declarations, 15 have been remedied by amending legislation, with three still under consideration.[9]

The government is not obliged to respond, nor is Parliament obliged to remedy the breach. But so far they have done so: sometimes readily, sometimes reluctantly. The parliamentary Joint Committee on Human Rights has proved to be a real terrier in monitoring government compliance with adverse judgments.[10] But the Act's full effect cannot be understood just by looking at court judgments. In Whitehall every new policy is carefully checked for human rights implications, and new legislation cannot be introduced into Parliament without a certificate of ECHR compliance. There is a continuous dialogue between government, Parliament and the courts about how best to protect human rights: not perfect to be sure, sometimes frustrated, sometimes quite fierce. But dialogue is much better than the opposite, silence or indifference; and it is a dialogue which genuinely engages all three branches of government.[11]

5.2.5 New Supreme Court and Independent Judiciary

The next reform was the new Supreme Court and the judiciary. The United Kingdom has introduced a greater separation of powers, enabling the emergence

[8] Ewing (2004, 2010).

[9] Ministry of Justice (2010), p. 5.

[10] Joint Committee on Human Rights (2010).

[11] Hogg and Bushell (1997); Hogg et al. (2007).

of a more independent and assertive judiciary. Their new head is the Lord Chief Justice. New judges are selected by the newly created Judicial Appointments Commission. The apex of the legal system has been crowned with a new Supreme Court.

The new Supreme Court is developing a much higher profile now that it has left the sheltered surroundings of the Lords. In a press interview at the end of their first year the Deputy President of the court, Lord Hope, showed how much more assertive the judges have become. He said that if the new government had repealed the Human Rights Act, as the Conservatives had indicated they wanted to before the election, it would be difficult to see any changes until the United Kingdom withdrew from the ECHR, and suggested the judges would have recreated the Human Rights Act through the principles of the common law.[12]

5.2.6 Freedom of Information

The Freedom of Information Act 2000 was seen as a fairly restrictive and complex Act. In practice, it has proved a lot more effective than its critics supposed. The fees regime is unusable, so in effect requests are free of charge. A public interest test runs through almost all the exemptions, giving the Information Commissioner a lot of leverage. His rulings have sent shock waves round Westminster and Whitehall: over MPs' expenses (which ran right round the world), and the Cabinet minutes on Iraq. The Labour government eventually vetoed the order to disclose the Cabinet minutes – as they were entitled to – and they were clearly uncomfortable about disclosing Cabinet papers. But the new government has since disclosed the Cabinet minutes from 1986 on the Westland Affair.

So is the FOI regime not so open after all? The Constitution Unit has recently completed two pieces of work comparing the United Kingdom regime with the operation of FOI in Australia, Canada, Ireland and New Zealand, and the United Kingdom comes out of the comparison pretty well. Using the use of veto as an example, it has been used just twice in the first 5 years of the United Kingdom Act, in comparison with 48 times in Australia, 14 times in New Zealand in the early years of the Official Information Act, and twice in Ireland. In terms of access to policy papers, the conclusion was that the United Kingdom is more open than Canada, Australia and Ireland, outshone only by New Zealand, which in freedom of information is in a class of its own.[13]

[12] Rozenberg (2010).

[13] Hazell and Busfield-Burch (2011).

5.2.7 *Unfinished Business from Blair's Reforms*

That ends the assessment of the effectiveness of each of the main reforms. The other point to emphasise is their dynamism. Critics tend to view the reforms in static terms. But each is still evolving, some – like devolution – evolving fast, and the initial tidal waves of reform are generating second and third waves.[14] But for an ardent constitutional reformer it is at best a job half done, and it is only fair to mention the unfinished business in Labour's constitutional reform programme.

5.2.7.1 Devolution in England

Devolution extends to only 15% of the United Kingdom. England remains a gaping hole, and the 85% of the British people in England continue to live under a highly centralised system of government. Labour attempted to introduce regional government in England, but in a referendum in the North East in 2004 their modest proposals for a Regional Assembly were defeated by four to one. Regional government is dead, at least for the time being; and the United Kingdom remains the only large state in Western Europe without a regional tier.

There remains a second order issue, the so-called West Lothian Question, which is whether it is right, post devolution, for Scottish and Welsh MPs to continue to vote on English matters at Westminster, when English MPs can no longer vote on similar issues which have been devolved. The issue is summarised in the slogan "English votes on English laws." It is not supported by Labour, but has been Conservative party policy at the last three elections.

5.2.7.2 Referendum on the Voting System

The second unfulfilled pledge in Labour's programme was to hold a referendum on the voting system for the House of Commons. There was no enthusiasm in Blair's cabinet for electoral reform, and the referendum was never held.

5.2.7.3 An Elected Second Chamber

The next two items of unfinished business are both stage two reforms. Removing the hereditary peers from the Lords was only the first stage. The next stage is to move to an elected second chamber. Again, Blair's cabinet were divided on this, and Blair himself was opposed. Only under Brown were serious attempts made to move towards an elected Lords.

[14] Hazell (2007b).

5.2.7.4 A British Bill of Rights

The other stage-two reform is development of a British bill of rights. The British people have not embraced the Human Rights Act. A British bill of rights could command more popular support. For the experts, it could include some more modern rights not found in the ECHR, such as social and economic rights; incorporate some of the other international human rights covenants; and be entrenched, rather than simply being found in an ordinary Act of Parliament.

5.2.8 Gordon Brown's Reform Agenda in 2007

That was the unfinished business which Gordon Brown inherited when he became Prime Minister in June 2007. Unlike Blair, he was an ardent constitutional reformer.[15] His first Cabinet meeting was devoted solely to constitutional reform, and he did set out a big picture in his Green Paper *The Governance of Britain*. This set out his plans to limit all the prerogative powers, strengthen Parliament, and re-invigorate British democracy, culminating in a bill of rights, and possibly a written constitution.[16]

However, Brown laboured under three serious difficulties. First was that Blair had claimed all the easy trophies. There were reasons for each of the items of unfinished business: these were much harder reforms, on which the Labour party remained deeply divided. The second was that Brown was running out of time, coming into office half way through Labour's third term. The third was that he was a control freak who was indecisive and took a long time to make up his mind.[17]

It was the third that proved fatal to Brown leaving any major constitutional reform legacy. After endless delays, his Constitutional Reform and Governance Bill was not introduced into Parliament until 2009, with its second reading in October. This left insufficient time before the election was called in April 2010. In the "wash up" when remaining bills get passed only with the consent of the opposition, whole parts were stripped out. Brown's only legacy is two reductions in the prerogative powers: putting the civil service on a statutory basis, and codifying the rules in Parliament for scrutinising treaties.[18] Neither is a change of much substance. It is the Civil Service Commissioners who are put on a statutory basis, with a requirement that the Civil Service Code enshrine the values of integrity and honesty, objectivity and impartiality. But no one was likely to remove those values from the Code, which itself remains non-statutory. And the new procedure for scrutinising

[15] Hazell (2007a).

[16] Ministry of Justice (2007).

[17] Seldon and Lodge (2010).

[18] Constitutional Reform and Governance Act 2010, Parts 1 and 2.

treaties enshrines in statute the conventional procedure under the "Ponsonby Rule" which requires treaties to be laid before Parliament for 21 days before ratification, allowing either House to debate the treaty.

5.3 Election of the Coalition Government in 2010

Commentators knew the 2010 election was going to be close: after a long period predicting a Conservative majority, the opinion polls began to forecast a hung Parliament from December onwards. This was fortunate for the Constitution Unit, because in December we published a report sub-titled *Hung Parliaments and the Challenges for Westminster and Whitehall*. How prescient, readers might think: but the main title was *Making Minority Government Work*, so we got that bit seriously wrong.

Our report contained a chapter about the New Zealand experience of minority and coalition government, and strongly commended the New Zealand Cabinet Manual as a guide to the rules of government formation when no party has overall control. Rebecca Kitteridge, New Zealand's Secretary of the Cabinet, kindly sent copies of the New Zealand Manual to the UK Cabinet Office. They were willing recipients, and prepared for a range of different scenarios, gaming and role playing each one. They also published in advance of the election a draft chapter of the United Kingdom's own forthcoming Cabinet Manual, on Elections and Government Formation, with a detailed section on Hung Parliaments.

When the election results came in, the Conservatives won 307 seats, Labour 258, and the Liberal Democrats 57, meaning the Conservatives were 20 short of an overall majority. The remaining seats were held by the Scottish National Party (6), Democratic Unionist Party (in Northern Ireland: 8), Sinn Féin 5. The new House of Commons has 650 members. The Liberal Democrats held the balance of power. The Conservatives and the Liberal Democrats could have a majority of 78. Labour and the Liberal Democrats would still be 10 seats short, and would have had to deal with the nationalist parties to construct a slender and fragile majority. The Liberal Democrats might have been expected to conduct parallel negotiations with Labour and the Conservatives, and to negotiate a supply and confidence agreement with one of them; supporting the government in exchange for policy concessions on key Liberal Democrat priorities. Instead they started negotiating with the Conservatives, with the civil service supporting the negotiations held in the Cabinet Office. Only on the third day did the Liberal Democrats begin talking to Labour, in part as a bargaining counter. Labour sensed the game was up, and on the evening of the fourth day Brown resigned, advising the Queen to appoint David Cameron as the new prime minister.

The next day the Conservatives and Liberal Democrats published their coalition agreement. They had been under intense media pressure to reach agreement quickly, because the British are not used to prolonged periods of government formation. They had also been under intense pressure from the City and Whitehall

to reach a quick agreement, because of fears that the markets would start selling sterling. That demand for a strong and stable government, coupled with the good chemistry generated between Cameron and the Liberal Democrat leader Nick Clegg, tipped the balance toward coalition rather than minority government. There may be some parallels here with the structure of, if not the length of negotiations leading to, the 1996 New Zealand coalition between National and New Zealand First.

5.3.1 The Conservative-Liberal Democrat Agenda for Constitutional Reform

On 20 May the coalition published a more detailed Programme for government, and a procedural agreement on how the coalition will operate. The two parties will work together on the basis of "goodwill, mutual trust and agreed procedures which foster collective decision making and responsibility while respecting each party's identity".[19] Allocation of ministerial appointments are to be agreed by the Prime Minister and Deputy Prime Minister. The Liberal Democrats did well out of the allocation of ministerial posts. They have five seats in Cabinet, or 22%, and 19% of junior ministers, when a proportional share would have entitled them to 16%. No Liberal Democrat minister may be removed without the consent of the Deputy Prime Minister, and he will nominate their successor.

Cabinet Committees are balanced throughout, with a chair from one party balanced by a deputy chair from the other. At the top sits a Coalition Committee, co-chaired by the Prime Minister and Deputy Prime Minister, with equal numbers from both parties, and other cabinet committees may refer any issue up to the Coalition Committee. All papers sent to the Prime Minister must be copied to the Deputy Prime Minister. Collective responsibility continues to apply, save where it has been explicitly set aside, which it has in relation to four policy items.

The Programme for government is 14,000 words long, and contains some 400 policy commitments. These include a lot of commitments for further constitutional reform:

Parliament

- Fixed term parliaments, with a 5 year term;
- A referendum on AV for elections to the House of Commons;
- Reducing the House of Commons from 650 to 600 members;
- Plans for an elected second chamber from a cross-party committee;
- A power of recall for an MP found guilty of serious wrongdoing.

[19] Cabinet Office (2010), p. 1.

Devolution, and Europe

- Implement the Calman Commission proposals for Scottish devolution, and hold a referendum on further Welsh devolution;
- Establish a commission to consider the West Lothian question;
- Legislate to ensure that any future treaty that transfers powers to the EU will be subject to a referendum.

Transparency

- Public bodies to publish salaries of senior officials. On-line disclosure of all central government spending and contracts over £25,000;
- A new "right to data", so that government datasets can be used by the public.

Bill of rights

- Establish a commission to investigate the creation of a British bill of rights.

5.3.2 Prospects for the New Reform Agenda

The Liberal Democrat leader Nick Clegg has been put in charge of delivering this agenda. The Constitution Unit has published a detailed commentary on the feasibility of delivering all these commitments,[20] so they will not be fully discussed here. There will be a focus on just two: fixed term parliaments, and the referendum on AV. The new government has quickly introduced bills on both of these, which had their second readings in September 2010.[21]

On fixed-term parliaments, the main issues are the length of the term, and how to provide a safety valve to allow for mid-term dissolution. The government boldly proposes a fixed term of 5 years. That is long by Antipodean standards, with a maximum of 3 years. Australian states which have introduced fixed terms have opted for 4 years; as have Canadian provinces, and Canada at federal level. Most European countries have 4 year fixed terms. In recent British history 4 year parliaments have tended to be the norm, with governments holding on for 5 years only when they feared they would lose: Brown being the most recent example. So a 5 year fixed term is long and will be contested, particularly in the Lords.

The government proposes a dual safety valve. For the opposition there will continue to be the traditional mechanism of a vote of no confidence, passed by a simple majority, which requires a government to resign. There is for the first time a time limit: the Bill provides that if a new government which commands confidence cannot be formed within 14 days, Parliament must be dissolved.[22] The novel proposal is where the government wants a mid-term dissolution. Here, the threshold

[20] Hazell (2010).

[21] Fixed Term Parliaments Bill; Parliamentary Voting System and Constituencies Bill.

[22] Clause 2(2)(b) of the Fixed Term Parliaments Bill.