Wave upon Wave: the Continuing Dynamism of Constitutional Reform

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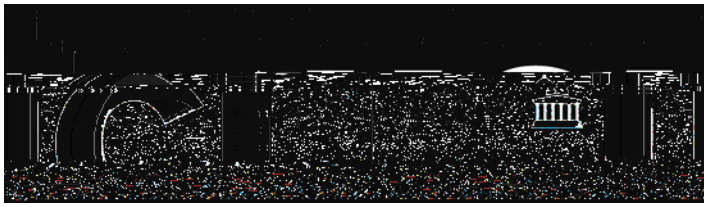

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Summary of Key Points

- The constitutional reforms of 1998-99 released powerful forces which are still working their way through the system, with more changes to come. There is a lot of dynamism still evident in devolution, Lords reform, electoral reform, the Human Rights Act and the new Supreme Court.

- Devolution has plenty of unfinished business. In Wales the government has acknowledged that executive devolution is not working, and propose to grant the Assembly greater powers in three stages. The final leap in stage three to full legislative powers would be made only after a referendum.

- Labour in Scotland have raised the possibility of further powers for the Scottish Parliament. The opposition parties would like greater fiscal autonomy.

- Regional assemblies in England are dead following the North East referendum, but not necessarily for ever. Any future government wishing to resurrect the idea would have to offer stronger powers and functions. The model to watch is London, where the government is planning to devolve more powers to the GLA.

- The semi-reformed House of Lords is more assertive, defeating the government in 25 to 30 per cent of all divisions. The government now wish to codify the Lords' powers. The Liberal Democrats (who hold the balance of power) are unlikely to agree. They openly question the Salisbury convention. They should seek to codify a new convention (currently agreed by all parties but not entrenched) that no political party should seek a majority in the House of Lords.

- Electoral reform will not be introduced until one of the major parties perceives it to be in their interest. A tipping point may come when first-past-the-post starts to operate chaotically because of the growth of minor parties. The Conservatives are hugely disadvantaged by the operation of the present system. If PR was introduced the Liberal Democrats would be in a pivotal position in the House of Commons as well as the House of Lords.

- The Human Rights Act has not been a disaster, but has seen an effective partnership between all three branches of government. Over time its impact will grow. The new Supreme Court will hear a different mix of cases and have a much higher profile.

- This second phase of constitutional reform needs a new narrative which works at two levels: at the constitutional level (checks and balances, devolution, greater separation of powers); and at the level of the citizen (more accountable, open and responsive government). Constitutional guardians are also important, especially the seven new constitutional watchdogs created in the last 10 years.

Introduction

It is one of the great paradoxes of the Blair government that the Prime Minister is famously uninterested in constitutional reform.[1] In his mind it was the agenda of the first part of his first term, when the government legislated for devolution, the Human Rights Act and Lords reform stage one. After that they moved on to the bread and butter issues of education, health, crime etc. The irony is that constitutional reform will be seen as the greatest single legacy of the Blair government. It continued into the second term, and as this paper seeks to show, it continues strongly still. For the tidal wave of reforms in the first term released second and third waves which are still working their way through the system. Constitutional reform generates a powerful political, legal and institutional dynamic which sets in train

The government has finally acknowledged that executive devolution is a half way house which is not working. This is the conclusion of a process which began when Wales' First Minister Rhodri Morgan established an all-party Commission into the Powers and Electoral Arrangements of the Welsh Assembly. The commission chaired by Lord (Ivor) Richard reported in March 2004, and recommended that the Assembly should have powers of primary legislation, that its size should be increased from 60 members to 80, and that it should be elected by the single transferable vote (STV) (Richard Commission, 2004).

The main obstacle to implementing the Richard report is the Wales Labour party, which historically was deeply split about devolution, and is still ambivalent. Most Welsh Labour MPs would not countenance any increase in the size of the Assembly, or a change in the voting system to STV. They have difficulty accepting the case for greater powers. The government in the June 2005 White Paper *Better Governance for Wales* has finally acknowledged the inadequacy of the Assembly's powers, and they plan to grant the Assembly stronger powers in three crabwise steps. In step one, starting in 2005-06, there is to be more framework legislation, with Westminster bills drafted in a more permissive way which gives the Assembly wider powers. Step two will see wider grants of legislative power being made in defined fields by Order in Council, but that will require a new Government of Wales bill, to be introduced in December 2005. The final leap in step three - transferring primary legislative powers over all devolved fields direct to the Assembly - would be made only after a referendum, because the government believes it would constitute a fundamental change to the Welsh settlement (Wales Office, 2005a).

Risks in three stage approach to increasing powers

It is a tortuous approach, but it gets there in the end. Lord Richard has been highly critical, asking 'Why do it in a complicated way when it could be done in a simple way?' (Welsh Affairs Committee, 2005). Maybe we have to go through this game of Grandmother's footsteps so as not to frighten the Welsh Labour MPs. But there are risks along the way. The main one is prolonging such an unsatisfactory system of law making, with the Assembly so dependent on the goodwill of Whitehall and Westminster. Step one, reliant on more framework legislation, may not get past the House of Lords, which has been highly critical of such legislation in the past. Step two is ingenious in using the device of Orders in Council, but it is also abhorrent in terms of principle: these would be Henry VIII powers wider than we have ever seen, using secondary legislation at Westminster to confer wide powers of primary legislation on the Assembly. Again the House of Lords is likely to be highly critical, and to say (along with Lord Richard), if this is what you want to achieve, why not go straight to stage three?

The Lords might be emboldened to do so because the government are planning to provide for stage three in the stage two bill (Wales Office 2005a at para 1.26). The government fondly hope that will obviate the need for further legislation if and when

they reach stage three, which will not be before 2011 at the earliest (Wales Office 2005b). That seems wildly wishful thinking. The catalogue of powers will inevitably need further adjustment. Ideally it should also be reversed. If Wales is eventually to have proper

moves closer to gaining primary legislative powers. Will Scotland support stronger powers for Wales, and support a confident and generous settlement based on the model of the Scotland Act: or is the dynamic of devolution a jealous dynamic, a game of leapfrog in which the Scots seek permanently to keep one step ahead, as we have seen happen with the vanguard regions in the historic nations of Spain?

Scotland

Trying to keep one step ahead may help to explain the recent pronouncements by Scotland's First Minister Jack McConnell in which he raised the possibility of further powers being granted to Scotland following the review of the powers of the Scottish Parliament which he announced in July 2005.[2] It is more likely he is trying to keep one step ahead of political rivals in Scotland, and to steal a march on the SNP ahead of the next Scottish elections in 2007. But in truth the powers which have been mentioned (firearms, drugs, nuclear power, casinos, abortion, broadcasting, immigration) are a miscellaneous and ill-assorted list. The truth may also be that it helps to distract from a more important long term issue in Scotland, which is how devolution is funded. The Scottish Conservatives would like a commission to examine the case for fiscal autonomy. The Liberal Democrats have established an internal group looking at a range of extra powers, including tax raising powers. Labour look increasingly isolated in clinging to the Barnett formula for fear of something worse.

The Barnett formula increases the Scottish block grant each year in line with increases in comparable public spending programmes in England. The real issue is that the Scottish government is funded 100 per cent through an annual block grant from London in a straight continuation of the pre-devolution funding arrangements. In the first five years of devolution Scotland did extremely well as it shared in Gordon Brown's extraordinary public spending boom. But the good times are over. We are now entering a public spending squeeze. And in the long term it cannot be good for Scottish autonomy or political or fiscal responsibility to be wholly dependent on block grant from London. It is too risky - too vulnerable to London turning off the tap, or to changing the rules. And it is wrong in principle for any democratically elected tier of government not to have some measure of fiscal responsibility to its electors, to be responsible for the tax as well as the spending side of the equation. It may not happen any time soon: Scotland still does extremely well out of the Barnett formula. But eventually Scotland and the other devolved governments must be allocated a share of tax revenues or given assigned taxes so that they have some other means of being directly accountable to the people of Scotland for tax as well as spending decisions.

This is not to minimise Jack McConnell's review of the powers of the Scottish Parliament; but it is at most going to lead

significance, and no change to outcomes. The dynamics of devolution are likely to lead Scotland always to be demanding more powers. Talk of a 'devolution settlement' suggests a degree of stability which we will never achieve: even in federal systems where the division of powers is enshrined in the constitution, there is a constant ebb and flow of powers and functions between the federal government and the states or provinces. In most spheres of public policy it requires a degree of co-operation between both levels of government to achieve the desired outcome, and that is the reality here too (Hunter 2000). We were naive at the dawn of devolution in supposing that we could separate powers into neat watertight compartments. It was also naive if anyone supposed that Westminster would be largely written out of the script. Research that we have done shows that Westminster is still the more important legislature, judged simply by the quantity of legislative output. In 1999-2003 the number of Westminster Acts applying to Scotland was 50 per cent greater than Acts of the Scottish Parliament: measured by pages of the statute book it would have been greater still. As for subordinate legislation, the UK government makes about 1000 statutory instruments each year which extend to Scotland, while the Scottish Executive makes around 500 (Hazell, 2005).

There has been controversy over the practice of Westminster legislating on matters devolved to Scotland, under the Sewel convention, whereby the Scottish Parliament gives its consent to Westminster legislating on what is properly its own preserve (Scottish Parliament 2005; Winetrobe 2005). I think most of the criticism is misplaced. It is true that there have been as many Sewel motions as there have been Acts of the Scottish Parliament. But I don't believe this is a dereliction of duty by the Scottish Parliament, nor that by occasionally handing powers back to Westminster this amounts to 'counter-devolution'. In most cases it reflects the frequent entangling of reserved with devolved powers: a reflection of the impossibility of maintaining watertight compartments which I referred to earlier. In others it reflects a decision by Scotland to opt into a uniform regime (Page and Batey 2002; Cairney and Keating 2004). There is nothing wrong or in dereliction when Scotland does that: it happens in federal systems too. Look at Germany, where the Länder pool their legislative competence in the Bundesrat to enact harmonious legislation on education, which is a devolved matter. Or at Australia, where as part of the latest federal anti-terrorism initiative, the states have agreed to harmonise their own legislation on increasing police powers of detention for terrorist suspects. Not surprisingly, the initiative for most of these uniform policies comes from the centre; but it is always open to the Scots to opt out.

England

Let us now turn to England. It was a year ago in November 2004 that we received the shock referendum result in the North East. The government's proposals for an elected regional assembly were decisively rejected by four to one, on a turnout of 48 per cent. There were many possible reasons for the result (Rallings and Thrasher, 2005). The No campaign had successfully argued that the assembly would mean more politicians, more bureaucracy, more council tax, at a time when politicians of all kinds are deeply

unpopular. The assembly was dismissed as a mere talking shop because of its strategic role and lack of substantive powers. John Prescott appeared to be the sole Labour champion of the policy, with many of his colleagues hanging back.

Following this decisive rejection, it might be assumed that elected regional assemblies are dead. They clearly are for the time being; but not necessarily for ever. In 1979 the people of Wales voted by four to one against the Labour government's plans for a Welsh Assembly, but in 1997 they narrowly reversed their decision, and the Assembly is now firmly established. Could such a

but it will be living proof that strategic bodies can be more than just talking shops - especially when it comes to inward investment, big infrastructure, getting close to business and promoting your region as a global brand. At some point, perhaps after the Olympics in 2012, the English regions might decide they could use one too.

English votes on English laws

The English Question has another dimension at Westminster, which is the Conservatives' call for English votes on English laws. Polling data consistently shows that between 50 and 60 per cent of people in England agree that Scottish MPs should no longer be allowed to vote on English laws, now that Scotland has its own parliament (Curtice, 2006). It seems only logical and fair, since English MPs can no longer vote on matters devolved to Scotland. Even a majority of Scots support restricting the voting rights of Scottish MPs in this way. But the difficulties of implementing such a policy seem insuperable, at both a technical and a political level.

The technical difficulty is identifying those English laws on which only English MPs would be allowed to vote. Strictly speaking there is no such thing as an English law, in the sense of a Westminster statute which applies only to England. The territorial extent clauses in Westminster statutes typically extend to the United Kingdom, Great Britain or England and Wales. Many statutes vary in their territorial application in different parts of the Act (Hazell, 2006). In theory the Speaker could identify in advance those clauses or amendments which apply only to England, and rule that only English MPs could take part in those divisions (Hadfield, 2005). But the complexity and confusion resulting from excluding non-English MPs from some votes but not others in the same bill would be immense. Only with the introduction of electronic voting at Westminster would it become feasible, because that would enable the voting terminals of non-English MPs to be disabled or discounted in divisions in which they were deemed ineligible to vote.

If the technical difficulties are daunting, the political difficulties are even greater. Proponents of English votes on English laws tend to under-estimate just what a huge change would be involved. It would create two classes of MP, ending the traditional reciprocity whereby all members can vote on all matters. It would effectively create a parliament within a parliament (Hazell, 2001; Russell and Lodge, 2006). And after close fought elections, the UK government might not be able to vo/TT6 1 dv-estimate just whaEament (Haz

twentieth century, despite several previous attempts at reform. Of course removal of 90 per cent of the hereditary peers is only the first stage, and the cha 6 TD0.0012 Tc(13)Tue fbTm0 g0

What are we to make of all this? On powers, it will be seen as a threat to clip the House of Lords' wings. The government is hurting from the frequent defeats inflicted by the Lords. This is one of the consequences of the stage one reform: shorn of the hereditaries, the House of Lords no longer feels so illegitimate, and has fewer inhibitions about defeating government proposals it dislikes. Until 9 November 2005 the Blair government had never lost a vote in the House of Commons. It had rarely even come close. You might ask, which chamber holds the government more effectively to account? In the Lords, the government is defeated in 25 to 30 per cent of all divisions. In the last session, 2004-05, more than half of the di

producing over 90 reports in the space of the four years since it started in early 2001: much of the commitment and expertise on that committee is supplied by the members from the House of Lords.

Expertise and wide professional experience are great strengths of the House of Lords, in contrast with a House of Commons which is increasingly populated with professional politicians who have known no other career. These strengths will be put at risk if the House becomes largely elected. Although I support election, to give the House greater legitimacy, I would have started at the lower end of the scale, with around one third elected. In terms of daily attendance, that would have led to a 50:50 ratio between elected and appointed, because the elected members are more likely to be regular attenders. One should not necessarily criticise the appointed members for their less frequent appearance: if we want to have professional expertise which is current, from doctors like Lord Winston or lawyers like Helena Kennedy, we must allow them time to practise in their professions and recognise that their appearances in the Lords will be part time.

Parliamentary reform

I will devote less time to reform of the House of Commons; but it is equally important. Labour began with good intentions, in the work of the Modernisation Committee which was established in 1997; but over time the opposition parties have come to see modernisation as meaning the government streamlining Commons procedures in its own interest, especially in the programming (which means timetabling) of legislation. Timetabling has become more ruthless, and almost every bill now has its programme motion, routinely pushed through using the government's majority.

The inadequate scrutiny of legislation is the greatest single scandal in the House of Commons. There has been no shortage of proposals for improvement, the latest coming from the Lords Constitution Committee 2004 report on the Legislative Process (Lords Constitution Committee, 2004b). Pre-legislative scrutiny of draft bills has been the biggest advance. But the Commons is unlikely ever really to improve scrutiny of legislation until it does away with Standing Committees. These are *ad hoc* groups of MPs, chosen for no particular interest or expertise in the subject, who take the committee stage when the bill is meant to be examined in detail. They are heavily whipped and huge chunks of bills go unscrutinised. They are beyond reform, and legislative scrutiny will

A second innovation in Scotland and Wales which could be usefully transferred to Westminster is the Business Committee (Lords Constitution Committee, 2004b). In the Commons the weekly business is decided behind the scenes by the 'usual channels', which means the Whips, and announced by the Leader of the House. In Scotland and Wales the business is decided by a committee, chaired by the Presiding Officer, on which all the parties are represented. It is more inclusive, more transparent, and less dominated by the government. It is the business committee which allocates bills to committees and decides on the timetable. And it is the business committee which decides on the membership of committees and their chairs: unlike the Commons, where again these matters are controlled by the party whips (Russell and Paun, 2006).

Electoral reform

Labour's 1997 manifesto boldly stated "We are committed to a referendum on the voting system for the House of Commons. An independent commission on voting systems will be appointed early to recommend a proportional alternative to first-past-the-post". The independent commission was duly appointed, chaired by Roy Jenkins, and recommended a semi-proportional voting system, dubbed AV Plus. Constituency MPs would be elected by the Alternative Vote (to ensure they were elected by a majority of voters in the constituency); and there would be a relatively small number of top up seats - around 15 per cent of the whole - to ensure a limited degree of proportionality (Jenkins Commission, 1998).

In Labour's 2001 manifesto the commitment to the referendum was significantly modified: "We will review the experience of the new systems [the new voting systems introduced for the devolved assemblies and the European Parliament] and the Jenkins report to assess whether changes might be made to the electoral system for the House of Commons. A referendum remains the right way to agree any change for Westminster". Note the modulation: there is now a commitment to review the experience of the new voting systems, introduced in 1999 for the devolved assemblies and the European Parliament, to see how they might inform any change to the voting system for the House of Commons; but there is no longer a commitment to hold a referendum on such a change. There was very little support in the Cabinet for holding a referendum, with only three Cabinet Ministers known to be in favour of PR; so the commitment has been shelved.

The 2005 manifesto contained almost identw[g75m9u03 Tommiss

interest. We did find evidence that, after experience of voting for and living under a government elected by AMS, voters in Scotland and Wales were more supportive of such a system than voters in England; but it was not an important issue for most voters, and few people have well informed or strongly he

privately concede that they may never again win an outright majority. At some point the Conservatives must conclude that electoral reform is in their own interest. Labour are less likely to do so until they lose their majority, and we have a hung Parliament, with the Liberal Democrats holding the balance of power. It is generally assumed that the Liberal Democrats would then enter into coalition with Labour. If the Liberal Democrats place electoral reform as their number one priority, they should enter into coalition with whichever party commits to implementing electoral reform in the life of that Parliament.

If the Liberal Democrats then used their bargaining power to force a referendum, and people voted for PR, the shift would be dramatic. We have already noted how the Liberal Democrats already hold the balance of power in the Lords, and determine the outcome of most votes there. If we had PR for the Commons, they would probably hold the balance of power there as well. Handing such pivotal power in both Houses to the Liberal Democrats might give pause to some PR enthusiasts. It is already the case that the Lords more closely reflects the balance of votes cast in the last election than does the Commons. If we want the Houses to be different, we may want a voting system which continues to deliver single party majority government in the Commons (as the Jenkins Commission sought to do), tempered by a House of Lords where no party has an overall majority.

Human Rights Act

At first sight the Human Rights Act (HRA) might seem less well established and irreversible than the other big constitutional changes. In the run-up to the election the Conservatives said they would set up a commission to review the operation of the HRA,

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between all three branches of government in which each has their part to play. The impact of the HRA has been just as strong on the executive branch of government (and public administration generally) and on the legislative branch as it has been in the courts.

Over time the impact will grow stronger. Some still maintain the HRA was futile, and does no more than codify pre-existing values which are all to be found in the common law (Ewing 2004). Others have suggested that after an initial flurry of activity, the forward momentum of the HRA risked stalling (Audit Commission 2003, para 2). I believe that the Human Rights Act instigated a powerful dynamic which has a long way further to travel. The ECHR is a living instrument whose rights, expressed in broad and general terms, are capable of endless further interpretation. The judges who interpret them are part of an international brotherhood, not just through the European Court of Human Rights in Strasbourg, but worldwide, who provide each other with new precedents and inspiration. In October and November 2005 two powerful human rights lectures were given in London by Albie Sachs, a Supreme Court Justice from South Africa, and Aharon Barak, President of the Supreme Court in Israel. Both were attended by the new Lord Chief Justice and many other senior British judges. But it is not just the judges. The HRA has powerful institutional defenders in the parliamentary Joint Committee on Human Rights, and from autumn 2007 in the new Commission for Equality and Human Rights. Its duties will include promoting public awareness, understanding and protection of human rights, and encouraging compliance by public authorities. Northern Ireland already has a Human Rights Commission; Scotland is legislating for its own Human Rights Commissioner. There will of course continue to be outbursts of indignation in the tabloid press, depicting the HRA as a rogues' charter, and some rights like privacy will develop in fits and starts; but over time the direction of travel will be seen to have been broadly one way, in the strengthening and further development of most of the rights in the ECHR.

New Supreme Court

The Constitutional Reform Act 2005 initially caused the judiciary great alarm, because of the clumsy manner of its announcement on the back of the Cabinet reshuffle in June 2003 and the government's declared intent to abolish the office of Lord Chancellor. But in the vigorous policy and legislative debates which followed the judiciary won a series of important concessions. The judges would not admit it, but they have emerged immensely stronger. The office of Lord Chancellor has been retained, with a statutory duty laid upon him to uphold the independence of the judiciary. His role as head of the judiciary passes to the Lord Chief Justice, with an important Concordat (which has become an instant constitutional convention) dividing functions between them as part of a much clearer separation of powers. The Lord Chancellor's power to choose new judges will be severely curtailed by the new Judicial Appointments Commission. And the apex of the legal system is to be crowned with a new Supreme Court.

The new Supreme Court, created by the Constitutional Reform Act 2005, replaces the Appellate Committee of the House of Lords. Some believe that apart from the law lords crossing Parliament Square to their new building (Middlesex Guildhall, to be converted by October 2008) nothing else will change. It is true that it will be the same judges, with the same jurisdiction hearing the same kind of cases (save for devolution issues, transferred from the Privy Council). But the combination of the Human Rights Act, devolution and the creation of the new court will trigger a series of further changes. First, the case mix. The new court is likely over time to develop a significantly different mix of cases which it selects for hearing. Out will go the commercial and tax and private law cases, to leave room for cases of constitutional importance: human rights cases, cases about the right to die, privacy etc, our relationship with Europe, and devolution cases (Hale 2004 at 43). That has been the experience of the Canadian Supreme Court over the last 25 years; our new Supreme Court will gradually follow suit and transform into more of a constitutional court.

Second, the court will have a much higher profile, when it starts to hear these more interesting cases. Once removed from the House of Lords, the court will come into its own. It will have its own website; I hope it will have its own press officer to publicise and explain its decisions. Some of the judges might even to start to write their judgements in more user friendly language. There will be more reporting of their decisions, and more discussion of the judges on the court, and their influence on the outcomes (Woodhouse 2004).

Third, all this will stimulate much greater interest in who the judges are and how they came to be appointed. Here I fear the reforms have taken a wrong turning. The discretion previously enjoyed by the Lord Chancellor has been drastically restricted by the new arrangements for judicial appointments, and in future he will be presented with a single name. Technically the Judicial Appointments Commission is an advf1gry

democratic accountability has been strongly argued by at least one law lord (Hale 2004: 42) and the former Permanent Secretary in the Lord Chancellor's Department (Legg 2004: 46).

Weaving the threads together: time for a new narrative

It is time now to stand back and start to sum up. I have sought to show that constitutional reform is not a static process. It is dynamic, it unleashes powerful forces which can create new challenges and tensions. That is unsettling for those who thought you could just legislate and then move on. But for those who understand the dynamism it can be challenging and rewarding to anticipate and channel the further waves of reform which have followed and will follow from the very big first wave. The task is more than just maintenance: this is still a constructive and creative phase, in which a lot of work remains to be done.

Two things are needed in this second phase of constitutional reform. First, a new narrative which explains the need for continuing reform, and offers a better justification for the first wave of reforms than the bland word of modernisation. It is a commonplace amongst critics to say that the first wave of reforms were introduced in a disconnected, piecemeal fashion, with no overarching explanation or justification. It is not too late to supply that, and it is vital to sustain the continuation of the reform programme. The narrative needs to work at two levels. At the constitutional level, the narrative needs to begin with a strong statement that far too much power was concentrated in the centre. A whole range of new checks and balances have been introduced into the system. There has been huge devolution of power in Scotland and Wales, with more to come. There is greater separation of powers, tighter rule of law, greater clarity and stronger accountability: through the Human Rights Act, freedom of information, and now under the Constitutional Reform Act for the running of our courts and legal system. Parliament is stronger and more effective with a more confident House of Lords, but more work needs to be done to strengthen the autonomy and effectiveness of the House of Commons. Although we have not (and probably never will have) a written constitution in a single codified document, a lot more of the constitution has been written down.

The narrative also needs to work at the level of the citizen. Here the government can claim there is greater respect for human rights, more openness and transparency, and stronger accountability throughout the system. Government is more accountable, more open, more responsive, and as a result is more effective government. It is the last bit which needs endlessly repeating, and strengthening with good examples, if Lord Falconer and the Department for Constitutional Affairs are to convince their Whitehall colleagues. In the macho world of many Ministers (urged on by No 10) effective government is seen as strong and impulsive government, and initiatives like the Human Rights Act and freedom of information are seen as adding to the burdens of government without improving its effectiveness through due process.

Weaving the threads together: the interconnectedness of constitutional reform

The first wave of constitutional reforms also needs strengthening and underpinning in the second wave. Gaps need to be filled, and connections made between different elements so that the reforms are interlinked. In the first wave there was no time to do this, because the pace was so rapid, and responsibility was fragmented between eight different Whitehall departments. Now there is time to reflect, and responsibility is concentrated in the Department for Constitutional Affairs for all constitutional issues except devolution (and even there DCA has 'overall responsibility for the devolution settlement').

Devolution provides the main examples of what I mean. Devolution releases powerful centrifugal forces into the political system. It needs to be counterbalanced by underpinning at the centre. Whitehall needs a stronger centre in terms of its capacity to understand the forces released by devolution and still working their way through. That is not helped by the fragmentation between the three territorial departments, plus ODPM and the DCA: they manage the day-to-day business, but they cannot look ahead. But Westminster also needs reconfiguring to underpin the devolution settlement. The opportunity is still there, in the next phase of Lords reform, to ask how the Lords might better fulfil its chosen role of being a guardian of the devolution settlement. One way would be through representation: in federal systems, the first chamber represents the people, and the second chamber the states or the provinces. With devolution we have introduced a quasi-federal system. Should we follow through on that and have indirectly elected members of the House of Lords who would be there to represent Scotland, Wales, Northern Ireland and the English regions?

It is one thing to state as a proposition, another to bring about in practice. Would these members be indirectly elected by the devolved assemblies; by the devolved governments; by local government in England, until we have regional government? And would they have a dual mandate, sitting at both levels (and possibly doing justice to neither); or

from Northern Ireland. What about the emerging new legal system in Wales (Jones and Williams 2004)? What about devolution disputes involving Wales? Another set of issues relates to the anomalous jurisdiction of the court in Scotland. It has no jurisdiction to hear criminal appeals from Scotland, while Scottish civil appeals can be heard as of right, with no leave to appeal. In a court which hears only 60 to 80 cases a year, it seems wrong for any class of appellant to be able to jump the queue. As for criminal appeals, these now come to the Privy Council disguised as devolution issues, because of the requirement in the Scotland Act that the Lord Advocate as a member of the Scottish Executive must comply with the ECHR (Gee 2005; Himsworth and Paterson 2004). The reason given in the past has been that Scots criminal law is so different from the rest of the UK that it should be left to its own mysterious devices. But as Brenda Hale has argued, it raises the legal equivalent of the West Lothian Question: if the Scots can interfere in English criminal law, why cannot the English interfere in the Scots? Whatever the differences of detail, the fundamental principles of criminal liability ought not to be different each side of the border (Hale 2004).

My last two examples of inter-connections relate to electoral reform. There is no complete answer to the English Question, only a series of partial answers. What gives 'English votes on English laws' its political edge is the mismatch between territorial balance and party balance at Westminster, with Labour being disproportionately over-represented in Scotland and Wales. One solution would be to reduce the number of Scottish and Welsh MPs to reflect their reduced role at Westminster post-devolution. Another is proportional representation. First-past-the-post offers a bonus to parties whose support is geographically concentrated, and so exaggerates the political differences between England and Scotland and Wales. PR would help to reduce Labour's dominance in Scotland and Wales, and so reduce the differences between their level of representation there and in England. It is not a full answer to the English Question; but it would help to mitigate its effects (Hazell, 2006).

Finally, the connection between electoral reform and strengthening Parliament. The case for PR traditionally rests on fairer representation. Less weight is placed on the effects on political institutions. The most debilitating impact of first-past-the-post is on Parliament when facing a government with an exaggerated majority. It has become a conventional litany to bemoan the subservience of Parliament. In reality MPs are more independent minded and rebellious than they have ever been; but their rebellions are generally smothered by the size of the government's majority (Cowley 2005). The difference is clearly visible in Scotland, where the executive is forced to take more account of the legislative branch because of its smaller majority. The Scottish Parliament is a more effective parliament partly because it is elected by PR.

Guardians of our unwritten constitution

In closing, let me offer three parting reflections on our unwritten constitution. First is the importance of constitutional guardians. Some of these are more visible than others. The judiciary are vitally important, and their role will be more prominent with the creation of the new Supreme Court. Also of central importance is Parliament. But in guarding the constitution the second chamber is as important as the first, and I hope it will become more important. It is a classic role for second chambers, to be a constitutional longstop: over time the Lords should develop the role further, with the help of its new Constitution Committee. Other guardians within Parliament are the new Joint Committee on Human Rights, which is very impressive in the quantity and quality of its output, and the new Constitutional Affairs Committee of the House of Commons. Internal guardians within the Executive are also important, like the Cabinet Secretary. Their role is largely invisible, but Sir Gus O'Donnell surfaced briefly in November 2005 in connection with the resignation of David Blunkett: as did the first chair (Lord Nolan) and current chair (Sir Alistair Graham) of the Committee on Standards in Public Life. That links to the next point, which is the growing importance of an array of specialist constitutional watchdogs which have mushroomed in recent years as part of the process of constitutional reform.

These specialist watchdogs are largely new. We now have 10 specialist constitutional watchdogs: seven of them created in the last 10 years, four in the last five years. They are guardians of constitutional propriety, mainly in specialist corners of the constitution, but some operating more widely. The two generalist guardians are the best known, in the Comptroller and Auditor General and the Parliamentary Ombudsman: they are also two of the most long established. Three watchdogs stem from the Major government which established the Committee on Standards in Public Life: recommendations of that body in turn led to the establishment of the Parliamentary Commissioner for Standards and the Commissioner for Public Appointments. Also involved with regulating appointments are the Civil Service Commissioners, the House of Lords Appointments Commission (which appoints the cross-benchers), and the new Judicial Appointments Commission. The last two were created in 2000 and 2005 respectively. Also created in 2000 were the Electoral Commission, which regulates the free and fair conduct of elections and referendums, and the Information Commissioner, who hears appeals under freedom of information and regulates data protection.

They are a motley collection in terms of constitutional design. Half have a statutory basis; the remainder are non-statutory, and most of these could be abolished by executive fiat, if the government felt so minded. That is not a strong basis for their independence. Most of the heads of these bodies are appointed by the Executive and depend on the Executive for their budgets. Four of them are housed and staffed by the Executive. In Scotland a very different model has developed, in which constitutional watchdogs are

appointed by and funded by and accountable to the Parliament. That can give rise to its own difficulties: they are more independent of the Executive, but how independent can they be of the Parliament? These issues will shortly be investigated by the Public Administration Select Committee of the House of Commons, which in November 2005 announced an inquiry into the system (or lack of it) of constitutional watchdogs at Westminster, and will no doubt be looking at the different system which has developed in Scotland (Public Administration Committee 2005).

Finally, the need for a written constitution. I am often asked if I am in favour of a written constitution, and people are surprised when I answer no. We are not going to get one, so at one level it is futile to make the case for one. But at a deeper level I am not convinced it would necessarily be a gain. Unwritten constitutions can be just as good as written ones, so long as they are nurtured and valued. What matters in a constitution is not so much the written text but the underlying values, and whether people are willing to stand up and defend them. Unwritten constitutions need to be regularly reviewed and updated (something it is easier to do than with a written constitution). They need guardians to protect and defend their underlying values. That is a task not simply for the specialist guardians I have just described; it is a task that concerns us all. We should nurture our unwritten constitution as a precious part of our heritage; and as with the rest of our heritage, each generation should seek to pass it on in better order to the next.

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