

Constitutional Change in the United Kingdom – Time for A New Settlement?

This paper is intended as background for my seminar and not intended as a full text of what will be said in the seminar

1. Introduction

The issue of constitutional change or reform is not, from a public perspective, a fundamentally important, save with regard to on-going public debate in the context of the European agenda. Arguably, there is not (at any rate in England) pressure for formal constitutional change. Yet the nature and quantity of constitutional change that in fact is occurring does raise fundamental issues for the public lawyer: has the time come for a new constitutional settlement? In reality, is a constitutional settlement being put in place in all but name? Current constitutional issues and changes raise important issues about the ease of constitutional change, about the interrelationship within the United Kingdom between European law (in all its aspects) and domestic law, about the relationship between the courts and Parliament and about the very basis of constitutional authority.

2. The constitutional agenda¹

The period since 1997 has been a period of significant and sustained constitutional change. The Labour Government of 1997 was elected in part on a programme of constitutional change. This included a programme of devolution for Scotland² and Wales,³ reintroduction of devolved government in Northern Ireland, the growth of regionalism in England (though not the creation of English devolved powers), some House of Lords reform, on-going implementation of European Union treaty provision, and, most fundamentally, the passage of the Human Rights Act 1998 designed to give direct legal applicability in English law to Convention rights.

Yet despite this wide-ranging agenda constitutional change continues. In part, that is a response to events: the “hung” Parliament of 2010 led to interesting issues about what should happen where no one political party achieves an overall majority, for the process being managed through in 2010 with the the assistance of guidelines and principles written and coordinated by the Cabinet Office. In other respects, issues such as tension between the courts and the Executive are inevitable consequences of the ever-increasing role of European Union and European Convention law, and the continued growth of English administrative law. Still further changes, such as changes to fundamental rules relating to the holding and form of elections, continued reform of the House of Lords, the growing potential for referenda, police reform and the continued changes necessitated by European Union and

¹ See, generally, Blackburn & Plant *Constitutional reform*, Longmans, 1999; Jowell & Oliver *The Changing Constitution* OUP, 6th ed 2007

² Scotland Act 1998

³ Government of Wales Act 1998

Convention rules and decisions, are being taken forward by the coalition Government formed following the result of the 2010 General Election.

The nature and pace of change raises important issues about where power lies within the United Kingdom constitution. The absence of a written constitution and the fact that ultimate constitutional power (if not political or practical power) lies with Parliament (the doctrine of “legislative supremacy”)⁴ may have been appropriate when there was truly a balance of power between the different elements of the constitution,⁵ but the lack of any real legal power (as opposed to political power)⁶ of the House of Lords, the ability of a political party or grouping to force through significant constitutional change, the dichotomy between theory and reality and the tensions between European and domestic law all point to the fact that the current constitutional position is in some respects at least unsatisfactory.⁷

3 Ultimate authority

That ultimate authority lies with Parliament, expressed through Act of Parliament, is basic constitutional law. It is because of the pre-eminence of the House of Commons within Parliament, and the limited role of the House of Lords as a “check and balance” on the Commons⁸ that the principle has been regarded effectively as leading to an “elective dictatorship,”⁹ with control of change – including constitutional change – being in the hands of the controlling majority in the House of Commons (effectively, the Government). Yet experience since May 2010 shows that even the lack of clear single party majority does inhibit real and fundamental change.

Since May 2010, the coalition government has legislated to potentially change the nature and mechanics of the electoral system on which they stand for re-election. The *Parliamentary Voting System and Constituencies Act 2011* requires to be held, on 5 May 2011, a referendum on changing the voting system from “first past the post” to the “alternative vote system”, a change not advocated by any of the political parties during the 2010 election, but the necessary consequence of a coalition agreement negotiated by two political parties in private. The same legislation contains the other part of the “deal”: the equalisation of the size of parliamentary constituencies, involving the reduction of parliamentary seats to 600 from 653, a change predicted by many commentators to favour the Conservative party.

⁴ See *British Railways Board v Pickin* [1974] AC 765 ; *R (on the application of Jackson) and others v Her Majesty's Attorney General* [2006] i AC 262; *Steyn Democracy through Law* [002] EHRLR 723. *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115. *Thoburn v Sunderland City Council* [2002] 4 All ER 156

⁵ See the arguments of Beatson *Reforming an Unwritten Constitution* (2010) 126 LQR 48

⁶ The House of Lords can, depending on political circumstances, can have real effect: see e.g., the filibuster in the House of Lords in 2011, resulting in some (relatively minor) changes to the *Parliamentary Voting System and Constituencies Act 2011*

⁷ See the arguments of Gordon *Repairing British Politics: A Blueprint for Constitutional Change* (Hart Publishing, 2010).

⁸ Under the Parliament Acts 1911 and 1949. For the status and effects of these Acts see *R (on application of Jackson and others v Her Majesty's Attorney General*

⁹ See the comments of Lord Hailsham as far back as 1978

Other fundamental change is currently before Parliament. The *Fixed Term Parliament Bill*, will, if enacted, create a fixed term for this, and future parliaments, subject to certain limited exceptions, thus effectively removing the prerogative power (nominally that of the Crown but in reality exercised by the Prime Minister of the day) to dissolve Parliament and call an election at a time of his or her choice within the five-year maximum. The *Police Reform and Social Responsibility Bill* makes fundamental changes to the management of the police, with the potential creation of elected police chiefs replacing the pre-existing police authorities. House of Lords reform is proposed by the coalition, although its precise form remains undecided. Most likely it will create a “reformed” composition with a mix of elected and nominated individuals. Whatever the compositional reforms adopted, key questions will arise as to the role of the House of Lords: an elected House will potentially raise fundamental issues as to the interrelationship of the two Houses.

And, of course, there is Europe. The European Union Bill before Parliament will, if enacted, introduce a “referendum lock”, requiring a referendum to be held before treaty changes in Europe are ratified. The details are discussed later, but do not amount to a restriction on Parliament itself, but, rather, on the legal ability of Ministers to ratify or approve Treaty changes. The widespread adoption of referenda might be seen an important constitutional change which, arguably, is at odds with the concept of ultimate authority being exercised by and through Parliament. In 2010 a House of Lords committee¹⁰ considered the use of referenda, and their constitutional impact. UK-wide referenda are rare: the 1975 referendum on EC membership and the forthcoming referendum on electoral reform are the only two.¹¹ The House of Lords Constitution Committee has concluded¹² that the referenda requirements in the European Union Bill are inconsistent with the Government’s statements that “referendums [sic] are most appropriately used in relation to fundamental constitutional issues.”¹³ This shift towards use of referenda, may be politically symbolic but, arguably, is not much more. If it resulted in fact in Acts of Parliament passed to give effect to treaty provisions not having effect (because of non-ratification following a “No” vote in a referendum) that would, indeed, be a significant shift in power. However, the Government has no intention in any event of agreeing changes which would be caught by the “referendum lock”. Further, given the on-going power of Parliament, and the inability of Parliament to bind itself for the future,¹⁴ a Government wishing to avoid the requirements of the referendum lock could do so by expressly repealing or amending the requirements currently contained in the European Union Bill. If the intention is to mark a fundamental shift in constitutional practice then, at any rate legally, the European Union Bill fails to achieve this.

¹⁰ See *Referendums in the United Kingdom, 2010*, summarised by the *Constitution Cmte 2010/2011 at para 28 – 31*, and to be found at www.publications.parliament.uk

¹¹ Referendums have been used more widely on a local basis, and in Scotland and Wales, relating to devolution issues.

¹² *Report on the European Union Bill 2010/2011 at para 38*

¹³ The HL Committee identify the following as falling within the government’s definition of “fundamental”: the abolition of the Monarchy; leaving the EU; cessation of any country from the UK; abolition of either House of Parliament; change in the electoral system; adoption of a written constitution; change in the system of currency.

¹⁴ See the doctrine of implied repeal: *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin)

4. European Union Bill

The attempt in the European Union Bill to create a “referendum lock” has been noted above. The Bill builds on existing parliamentary limitations on EU change.¹⁵ Clauses 2 to 6 apply a referendum requirement to Treaty changes made by ordinary procedure under art 48(2) to (5) TEU, and under the simplified procedures under art 48(6) and (7) TEU. The mechanism adopted is not to impose a limit on Parliament’s legislative competence: under current constitutional arrangements that would not be possible. Rather, as already noted, a Minister will not legally be permitted to ratify or approve a change without the approval of a referendum, subject only to the limitation in clause 5 of the Bill. If a Bill states that the effect of the EU provision in question is “not significant”, and the Minister lays a statement to that effect before Parliament, no referendum requirement arises. How are these matters to be scrutinised? Of course, by Parliament, but the Government has stated¹⁶ that such a statement would be judicially reviewable, a view accepted by the House of Lords Committee. However, it is by no means certain that a court would regard such matters as justiciable, given the judgmental nature of the term “significant” and potential issues about the scrutiny of what are essentially parliamentary matters arise by virtue of Article 9 of the Bill of Rights 1689.

The referendum lock provisions also have to be viewed in the wider EU context. They do not affect the competence of the EU itself, and by definition do not operate unless changes have been agreed by the UK Government, for no issue would be likely to arise without agreement. Further, the provisions do not inhibit in any way, or apply to decisions as to EU competence by the ECJ. By that means EU law seemingly not applicable to the United Kingdom, such as wide fundamental rights contained in the Charter of Fundamental Rights.¹⁷ And, as already noted, the referenda requirements can be amended or abrogated by Parliament itself, by express provision in a future Act of Parliament.

A further, and wider provision of the European Union Bill, should also be noted: clause 18 of the Bill attempt to restate the principle that EU takes effect only by virtue of statutory provision. It states -

“It is only by virtue of an Act of Parliament that directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognized and available in law in the United Kingdom. “

This provision is, arguably, effectively meaningless and unnecessary, and seemingly introduced for two reasons. The first is to address political concerns. The second is to seek to

¹⁵ See: *European Communities (Amendment) Act 1993*, s 2; *European Parliamentary Elections Act 2002*, s 12; *European Union (Amendment) Act 2008*, s 5; *European Union (Amendment) Act 2008*, s 6

¹⁶ See HL Cmtte, op cit, at para 47

¹⁷ This on its face is not applicable in the UK, but the wording of Protocol 1 might not prevent application of Charter rights as part of the fundamental law of the EU. See *R (Saeedi) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin); [2010] EWCA Civ 990. See also the approach in *Association Belge de Consommateurs Test-Achets & others* [2010] EUECJ 236/09

address doubts that might, theoretically have existed following *Thoburn v Sunderland City Council*,¹⁸ where it was argued that the effect of the European Communities Act 1972 was effectively to entrench European law by reference to the doctrine of primacy of EU law over national law. It is true that without the statutory provision in s 2(1) of the 1972 Act EU law would not take effect in UK law. But, unless s 2(1) is expressly repealed, or a statutory provision is expressly stated to be of effect notwithstanding EU law, its result is to give legal effect to all directly applicable or directly effective laws. That includes such laws which are in conflict with domestic law, including statute.¹⁹ In short we have statutory provisions which restate traditional constitutional doctrine but do not match with reality.

5 The role of the courts

It is not only in the European Union context where there is a clear divorce between constitutional theory and reality. The role of the courts is significantly a matter of debate and change. The courts uphold the legislative supremacy of Parliament as a principle, although debate continues as to whether the doctrine is one created by Parliament, in the constitutional settlement of the 17th Century²⁰ or whether it is a construct of the common law, developed by the courts themselves.²¹ In *R (Jackson) v Attorney General*²² Lord Steyn observed –

“The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where courts may have to qualify a principle established on a different hypothesis of constitutionalism.”

The issue is one of importance. It affects the role of the courts on judicial review: is the role of the court now to engage in “constitutionalism” in terms of review that goes wider than simply upholding the will of Parliament. The growth of the grounds of challenge, on bases such as proportionality (at any rate in cases that engage with a European issue) is important. It also raises important issues as to how a constitution that depends for its fundamental principle on undemocratic courts can truly be regarded as democratic or representative. Gordon²³ observes-

¹⁸ [2002] EWHC 195 (Admin)

¹⁹ *Factortame v Secretary of State for Transport (No 2)*.

²⁰ See, eg, Bingham *The Rule of Law and the Sovereignty of Parliament*. (2008) 19(2) King’s Law Journal

²¹ See, e.g. Woolf *Droit Public – English Style* [1995] PL 57; Laws *Law and Democracy* [1995] PL 80

²² [2006] 1 AC 262

²³ Op cit, at p 20

“Constitutionally we are in a muddle. We claim to be a democracy and yet the touchstone of our constitutional arrangements ...has no democratic foundation or even clear historical starting point...”

On a more practical level the role of the courts (especially the Supreme Court) on occasion appears (at any rate to the public) to place the courts at odds with the expressed will of Parliament. Section 2 of the Human Rights Act 1998 requires the courts to “have regard” to decisions of the Court of Human Rights. The meaning and effect of section 2 has been a matter of sharp judicial disagreement,²⁴ but the preponderance of judicial opinion favours the position that the courts must, ordinarily, apply the principles and rules as set out by the Court of Human Rights in preference to competing domestic rules. The approach of the courts in Convention cases varies, often, but not always,²⁵ preferring the use of s 3 of the 1998 (the interpretative obligation) to s 4 (the declaration of incompatibility provision), together with the approach to ECHR rulings stated above has led to widespread public perception that power, in this context, no longer lies with Parliament. Issues such as prisoners’ rights to vote, and the potential incompatibility of English use of out of court statements with *art 6* of the Convention.²⁶ have generated amounts of public interest unusual in respect of constitutional issues.

The issue is such that on 18 March 2011 the Ministry of Justice announced the establishment of an independent Commission to investigate the workings of the Convention on Human Rights and the case for a British Bill of Rights. The intention is not to withdraw from the Convention or repeal the Human Rights Act, but to examine how the protection of human rights can be improved. The adoption of a British Bill of Rights is a distinct – but not inevitable – possibility, which provides a powerful argument for debate as to the foundations of the United Kingdom constitution.

6. Where now?

The case for the status quo can be simply stated: the United Kingdom constitution has developed in a pragmatic evolutionary and incremental way – and works! Increasingly, however, its theoretical underpinning it at odds with what the courts and others do, fails to provide formal legal (as opposed to political) safeguards against misuse of executive power to adapt the constitution to its own ends, and fails fully to address the new challenges that may arise with a changed voting system (and with coalition government becoming more frequent), House of Lords reform and the ongoing challenges of devolution.

²⁴ *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; *Doherty v Birmingham City Council* [2009] 1 AC 367 *Kay v United Kingdom* (2010); *Manchester City Council v Pnnock* [2011] UKSC 66; *Hounslow LBC v Powell* [2011] UKSC 8; *R v Horncastle* [2009] UKSC

²⁵ For some of the issues, see *Chester v Secretary of State for Justice* [2010] EWCA 439 (Civ) *Hirst (No 2)* (2006) 42 EHRR 41

²⁶ See *Al-Khawaja & Tahery v United Kingdom* [2009] ECHR 110

So, where now for the United Kingdom constitution? Some issues –

- Is a change needed?
- How difficult would it be?
- What benefits would result?
- How might it change the attitude of the courts?

European Union Bill

Clause 2

(1) A treaty which amends or replaces TEU or TFEU is not to be ratified unless—

(a) a statement relating to the treaty was laid before Parliament in accordance with section 5,

(b) the treaty is approved by Act of Parliament, and

(c) the referendum condition or the exemption condition is met.

(2) The referendum condition is that—

(a) the Act providing for the approval of the treaty provides that the provision approving the treaty is not to come into force until a referendum about whether the treaty should be ratified has been held throughout the United Kingdom or, where the treaty affects Gibraltar, throughout the United Kingdom and Gibraltar,

(b) the referendum has been held, and

(c) the majority of those voting in the referendum are in favour of the ratification of the treaty.

(3) The exemption condition is that the Act providing for the approval of the treaty states that the treaty does not fall within section 4

Clause 4

(1) Subject to subsection [\(4\)](#), a treaty or an Article 48(6) decision falls within this section if it involves one or more of the following—

(a) the extension of the objectives of the EU as set out in Article 3 of TEU;

(b) the conferring on the EU of a new exclusive competence;

(c) the extension of an exclusive competence of the EU;

(d) the conferring on the EU of a new competence shared with the member States;

(e) the extension of any competence of the EU that is shared with the member States;

- (f) the extension of the competence of the EU in relation to—
 - (i) the co-ordination of economic and employment policies, or
 - (ii) common foreign and security policy;
 - (g) the conferring on the EU of a new competence to carry out actions to support, co-ordinate or supplement the actions of member States;
 - (h) the extension of a supporting, co-ordinating or supplementing competence of the EU;
 - (i) the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body;
 - (j) the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom;
 - (k) any amendment of a provision listed in Schedule 1 that removes a requirement that anything should be done unanimously, by consensus or by common accord;
 - (l) any amendment of Article 31(2) of TEU (decisions relating to common foreign and security policy to which qualified majority voting applies) that removes or amends the provision enabling a member of the Council to oppose the adoption of a decision to be taken by qualified majority voting;
 - (m) any amendment of any of the provisions specified in subsection (3) that removes or amends the provision enabling a member of the Council, in relation to a draft legislative act, to ensure the suspension of the ordinary legislative procedure.
- (2) Any reference in subsection (1) to the extension of a competence includes a reference to the removal of a limitation on a competence.
- (3) The provisions referred to in subsection (1)(m) are—
- (a) Article 48 of TFEU (social security),
 - (b) Article 82(3) of TFEU (judicial co-operation in criminal matters), and
 - (c) Article 83(3) of TFEU (particularly serious crime with a cross-border dimension).
- (4) A treaty or Article 48(6) decision does not fall within this section merely because it involves one or more of the following—

- (a) the codification of practice under TEU or TFEU in relation to the previous exercise of an existing competence;
- (b) the making of any provision that applies only to member States other than the United Kingdom;
- (c) in the case of a treaty, the accession of a new member State.

Clause 5

- (1) If a treaty amending TEU or TFEU is agreed in an inter-governmental conference, a Minister of the Crown must lay the required statement before Parliament before the end of the 2 months beginning with the date on which the treaty is agreed.
- (2) If an Article 48(6) decision is adopted by the European Council subject to its approval by the member States, a Minister of the Crown must lay the required statement before Parliament before the end of the 2 months beginning with the date on which the decision is adopted.
- (3) The required statement is a statement as to whether, in the Minister's opinion, the treaty or Article 48(6) decision falls within section 4.
- (4) If the Minister is of the opinion that an Article 48(6) decision falls within section 4 only because of provision of the kind mentioned in subsection (1)(i) or (j) of that section, the statement must indicate whether in the Minister's opinion the effect of that provision in relation to the United Kingdom is significant.
- (5) The statement must give reasons for the Minister's opinion under subsection (3) and, if relevant, subsection (4).
- (6) In relation to an Article 48(6) decision adopted by the European Council before the day on which this section comes into force ("the commencement date"), the condition in section 3(1)(a) is to be taken to be complied with if a statement under this section is laid before Parliament before the end of the 2 months beginning with the commencement date.

Clause 6

- (1) A Minister of the Crown may not vote in favour of or otherwise support a decision to which this subsection applies unless—
 - (a) the draft decision is approved by Act of Parliament, and
 - (b) the referendum condition is met.