

How is Britain's constitution changing in the 21st century?

Introduction:

Tony Blair's inception as Prime Minister in May 1997 prompted constitutional change due to manifesto commitment. Labour's first term introduced the first wave of alterations to the traditional document. Subsequently the return of the Labour government in June 2001 heralds a second wave of changes to the British constitution. I believe that the onset of this century will introduce a new phase for the British constitution as 'the momentum continues' (Hazell et al., 2000, 260). This is why I have chosen to investigate such a topic, as it is so relevant on the contemporary stage.

A constitution is a body of fundamental laws of a state, which lays down the system of government and serves to define the relations of the legislature, executive and judiciary to each other and the citizen. The UK constitution does not exist as a single document but as an amassment of customs and precedents, together with laws defining certain aspects. In the essay I am going to focus on changing spheres which I believe will influence most upon the constitution. My first focus will be Europe, as it covers such a wealth of potential to modify the constitution. Europe acts as a supranational body on Britain and has assent over some British legislation. Subsisting under the umbrella of the European Union (E.U.) has certainly impinged upon the British constitution in the twentieth century and will continue to do so. Some parts of Europe have suggested a European super state with a federal organisation, which essentially challenges the unitary notion of which the constitution expects Britain to be. Calls for a European constitution by some E.U. members challenges the notion of Britain having an unwritten and subsequently uncoded constitution. Therefore Europe has consequences on the British constitution. Demands for a Bill of Rights in

the British constitution may have been secured by the incorporation of the European Convention on Human Rights (ECHR), which acts as an international guideline on human rights. The convention could have the possibility to repress the British constitution and bring some serious consequences.

A unitary Britain is visibly part of an ever integrating Europe, yet Britain is also transferring power across the national borders to the Scottish Parliament and the Welsh Assembly. The establishment and maintenance of these representative bodies has brought into enquiry how satisfied they are in their current situation, and whether there would be moves for more power to be devolved to these executive bodies, maybe even to the point of independence which significantly alters the constitution. Scotland has been appeased in devolution, as has the capital with the foundation of the Greater London Assembly. This has caused significant interest in certain English regions to challenge Westminster for its grip on power, and the government has served to satisfy them by establishing Regional Development Agencies.

The second chamber's primary role is to examine the accountability of the government, and fulfills an important regulation of the constitution. The first stages of constitutional reform has diluted the power of House of Lords, and the Labour administration has yet to find a way in composing the second chamber. The role of the Lords is to bring the Commons to account, and another way for the government to be scrutinised is by the inception of the new Freedom of Information (F.O.I.) bill. As Studlar states 'the first right of a citizen in a mature democracy should be the right to information' (Studlar, 1999, 49). I want to examine how this will serve to affect the

functioning of the government and how it keeps itself answerable, which surely should be a linchpin in the constitution.

To conclude my essay I am going to critically assess what these reforms have done to the nature of the constitution. Further, I shall examine the complexion of the reforms and scrutinise if I believe they are justifiable, or just being used as a tool to manoeuvre and entrench Blair's government at Westminster.

The Jenkins Report on electoral reform could bring about further constitutional change, however I am not going to investigate this aspect of the constitution. It is a vast subject and brings about numerous questions of which system should be used and how this would affect the party and political system. Therefore I have chosen not to explore this facet of constitutional reform, even though alternative modes of elections have been used in selecting the London mayor and the European elections. Similarly I am not looking at the Northern Ireland Assembly, as its contemporary position is unresolved and would be too monopolising.

Europe

The European Union has predominant influence over Britain since the Single European Act 1973, when Westminster relinquished a part of its sovereignty. Europe is having an ever increasing impact on Britain in the scope of binding legislation and the incorporation of the ECHR which produces an international standard of a Bill of Rights throughout the E.U. I will identify how the form of the British constitution is changing due to Europe being a supranational body. European legislation has 'legal force' (Norton, 1991, 281) in Britain, therefore the country is moving from having the

concentration of power in Westminster. Europe is now responsible for a pillar of power that once resided in Westminster, and was relocated due to Britain's inclusion of the 1973 Single European Act.

On Europe-wide issues, members of the E.U. vote with either the use of the veto, or by using Qualified Majority Voting (QMV). As Britain is part of Europe, there are times when the further use of QMV is coming to challenge a further part of Britain's sovereignty, as Britain's choice is being usurped by a European majority. Britain had been intent on retention of her veto. Legislation can be vehemently contested against by Britain, yet if a majority of members approve it, it will be executed as law in the UK. It is easily identifiable that EU law is far more authoritative and constraining on the British statute books. The nature of the constitution can be easily identified as changing. The British constitution was historically revered as being flexible is becoming more rigid in the sphere of Europe. Europe is impinging upon Britain greater than ever. As Europe agrees upon more legislation, Britain's constitution is definitely becoming more of a written nature. I believe a greater number of constitutional conventions will become archaic as Europe further inhibits Britain.

The notion of a European super state should bring concern as to the future of the British constitution. As more issues are decided by QMV, Britain is ceding sovereignty to Europe. 'Most member states agree QMV is desirable' however each has areas they consider inviolable, and obviously these areas are not congruent (Dillon and Castle, 2000). Britain is being reviled by some of the core EU countries and as recognised by Waugh and Castle, Blair has been criticised by French and German ministers for his refusal to surrender Britain's veto on tax and social affairs

(Waugh and Castle, 2000). The European effect upon the constitution is a serious one to be considered, especially when issues such as tax and social affairs are choosing to be addressed by the EU. This is making questions that are at national level become important at European level and smacks of the idea of a European super state, moving a unitary Britain to possibility of being a unit of a federal organisation, and further a written constitution for all EU member countries. As Norton asserts regarding the EU, 'the longer the membership the more likely provision of treaties forming some kind of written constitution' (Norton, 2001, 78). The British constitution has had a radical overhaul due to the 'huge impact' (Hix, 2000, 48) of Europe. Soon Britain will choose its future in Europe, whether to play a pivotal role or be part of an outer-tier. This and subsequently the actions of the E.U. will shape the British constitution or may even lead to its renunciation. The next decades are crucial in determining Britain's role in Europe, and the future of the British constitution as we know it.

A European Constitution

Enlargement of the EU has illuminated the question of a European constitution. In the past year this has seriously been contemplated, and obviously has serious implications for the future of the British constitution. If Britain does choose to become more integrated with Europe, the British constitution could be surrendered for a European one. Some EU members favour the idea of a European scaffold of rules, yet equally there are adversaries. Cohn-Bendit is adamant on this issue, 'Europe must have its own constitution, it is essential to Europe' (Cohn-Bendit, 2000). Europe looks to be welcoming enlargement, and some kind of written document detailing Europe's role is necessary, however we must question to what extent this idea of a European constitution will come to override that of a nation state. Cohn-Bendit advises a

European Magna Carta to be a statement of fundamental values and rights (Cohn-Bendit, 2000), however with most countries having incorporated the ECHR into their national legislation, this may be regarded as more dictation from the European centrists. It is evident that the assumed heads of a super speed Europe, Germany and France, advocate a European constitution to be established and could do so by 2004.

Britain is noticeably cautious in its approach to a European constitution, shadowing the Scandinavian states, who perceive such a notion as 'written by someone with a blueprint for a full-fledged federal state in mind' (Anon, 2001, 47-48). A European constitution suggests a federal type of system, and this is in direct contrast to unitary Britain. If Britain does become part of a federal Europe, no longer will it be part of a unitary system. Similarly the constitution will be codified in one document. Covering such a mass of nation states undoubtedly a European constitution would be quite rigid, with no nation state having supremacy over the others. However the current foreign secretary Jack Straw has played down the idea that Britain is soon to be under the thumb of Europe, stating that he believed action should be taken by the E.U. only if it could do a better job than the nation states (Tempest, 2002).

The European Convention of Human Rights

Over forty countries in the European realm have applied the ECHR as an addition to their constitution. In 1937 Friedrich believed a constitution should be 'a system of effective regularised restraints on government action, therefore should be a statement of individual rights' (Hague and Harrop, 2001, 186). The American constitution has a Bill of Rights attached at its close, which spells out an American citizen's rights.

Since late 2000, the ECHR has become part of British legislation, earlier so in Scotland due to their detached legal system. This will have an underlined effect on Britain's constitution, which can at best be described as vague on civil liberties. Describing the ECHR can be done so concisely by Norton as 'an international treaty that seeks to protect basic human rights' (Norton, 2001, 79), which extends into the areas of a right to life, liberty, respect for private and family life, and freedom from torture and discrimination.

The consequences of the integration of the ECHR into British legislation does have profound effects for the present British constitution. The constitution, though not contained in one document, is becoming increasingly written. The ECHR is assumed to 'maintain parliamentary sovereignty,' (Norton, 2001, 79) though I believe this is a fallacy. The role of judges is further enhanced by the E.C.H.R. as it is their role to interpret the convention in their exposition of British law. In the event that ECHR and British legislation are not perceived to be consistent, then a declaration of incompatibility can be issued, a move which can 'override parliamentary sovereignty' (Johnson, 2000, 343). There is no doubt, the convention somewhat 'alters the balance between Parliament and the judiciary' (Bogdanor, 2001, 146) which does question the mounted role of the law lords. Their role to strike down legislation that is incongruous with the ECHR does question the legitimacy of parliament, in that it is parliament that should be deciding upon legislation.

In the aftermath of the events of September 11th, Britain is evading the ECHR. Of course measures should be taken after such a world changing event, but I don't believe these should be in contrary to the ECHR which serves to define Western

democracies. John Wadham, a civil rights solicitor, views the anti-terrorism legislation as 'ill judged and unacceptable' (Wadham, 2002, 2). As director of Liberty, an organisation that seeks to defend and extend rights and freedoms in England and Wales, Wadham is obviously partisan in his views, though the arguments he raises should be considered. As he broaches, 'only the UK of the 40-plus countries signed up to the Convention deemed such extreme measures essential' (Wadham, 2002, 2). As Britain did resolutely stand shoulder to shoulder with our Atlantic cousin, there may be cause to be more circumspect than some other European countries. It is clear democracy is being undermined. It seems the ECHR has been made part of the British constitution, but only to an extent the present government are satisfied with it. The ordinary citizen has a reliable statement of civil rights, yet the government is now deciding upon the description of an ordinary citizen. As an international treaty, the ECHR should extend over all citizens, and not exclude those to whom the government is suspicious of. It smacks of a McCarthy stained state, and is in direct contention to a democracy and ultimately the idea of a constitution.

Devolution and the Scottish Parliament

A favoured part of New Labour's constitutional reform programme was devolution to Scotland, Wales and the Greater London Assembly. This has changed the form of Britain. Arguably Britain is still an unitary state though certain amounts of power have been devolved to these sub-national bodies, yet Westminster retains parliamentary sovereignty. As easily as this power was devolved, it can be retained. The main focus of constitutional implications will be the Scottish Parliament, though Wales does have some extent of power.

Devolution is in direct contrast to the question of Europe usurping Britain's sovereignty. Westminster has been active in dispensing power to national administrations. The capital also has a measure of power issued to it; that of the Greater London Assembly. The moves to give away power does have huge consequences. Westminster 'retains absolute sovereignty, it can choose to legislate on whatever it likes' (Cowley, 2000, 121). However this can be questioned by the use of referenda. If a government is deemed to be legitimate, the use of referendum means that its result is likely to be binding. It is unlikely that central government would retain the powers now vested in the Scottish Parliament, the Welsh Assembly and the Greater London Assembly, especially as devolution has been consecrated by referenda. The people have voted, and the government would be unwise to challenge this validity. Therefore I cannot agree with Bogdanor when he claims that 'too great a concern was shown to preserve the shell of parliamentary sovereignty' (Bogdanor, 2001, 148).

I think that it would be unlikely that a government would take back power it has given away, especially when Europe seems to intensified national feelings for some kind of independence. Studlar recognises the Scottish National Party's committal for independence in Scotland. If the SNP were to gain a majority in the Scottish parliament, then a sub-national level of government enhances rather than diminishes claims for independence (Studlar, 1999, 52). This is the extremity of possible circumstances, but could prove a reality. Whilst Scotland has the most commanding governance of those with devolved power, it has been observed that the electorate are disappointed with the performance of the Scottish Parliament, resolving that it needs extra powers to make a difference in their lives, determined from opinion polls

(Hazell et al., 2001, 192). This could impact hugely on the constitution, especially if Scotland did vie for a greater measure of the power and potentially create political disunity.

The Welsh Assembly

The conception of the Welsh Assembly was less enthusiastic than that of its more powerful Scottish counterpart. The scope of its authority is not dramatic, however the 'Assembly has power to allocate a budget that was in the region of £7 billion in 1999' (Cowley, 2000, 111). Otherwise it is very reserved and few members of the National Assembly believe that it has sufficient powers to make a difference (Hazell et al., 2001, 191). Primarily, the Welsh assembly is regarded as a talking shop, which has small teeth in which to exert its minimal leverage (Cowley, 2000, 111). The Welsh assembly is a reflection of the centralised Labour government. Hazell et al. asserts this echoes Labour's long standing ambivalence about devolution in Wales (Hazell et al., 2000, 247). There is little challenge to the existing constitution here. The Presiding Officer of the Welsh Assembly, Lord Elis-Thompson, identifies the move to devolution as follows: 'We are at the beginning of the end of the old constitution' (Hazell et al., 2001, 191). The changes to the constitution in the twenty first century is definitely determining a lesser role of Westminster and serving to challenge the unitary nature of the constitution always prescribed to previously.

Regional Assemblies

The move to devolved national bodies has magnified a cry for regions in England to have some kind of autonomy. The role of Westminster may now be regarded as exclusively an English parliament and a chamber for only British matters, such as

defence. Again the unitary nature of Britain is being brought to question and whilst Britain is in no way describable as a federal state, it is quasi-federal. Norton has found that a faction of Tory MPs visualise England with its own elected Parliament, leaving Westminster to deal with UK wide matters, which does serve to produce a federal structure (Norton, 2001, 286). However a federal Britain is not comprehensible, as Hazell conceives 'an English Parliament does not seem realistic as England would be too dominant' (Hazell et al., 2001, 193). The domination that Westminster and England has always maintained could never be given up to smaller bodies. That is why Britain has been relatively cautious in passing power downwards, or even upwards in the question of giving up Britain's veto in Europe wide matters.

A further question which results from the success of the nationalist movements within Scotland and Wales is the deepening movement for regional assemblies in some parts of the UK. The capital has elected its own mayor, and has an assembly on issues that dominate the capital such as transport for example. The strive for regional governance does not prevail all of England but does have a strong following in the Northern regions of England. As Hazell et al identify, in certain regions pressure is increasing regarding self governance. The Campaign for English Regions was launched in 2000, formed by the bodies of the North East, the North West, the West Midlands and Yorkshire (Hazell et al, 2001, 193). There has been some kind of appeasement in the form of Regional Development Agencies, whose purpose is to aim to further economic revival and progress, boost business performance and introduce further investment and competitiveness. As Burch and Holliday have acknowledged the power and resources of the RDAs are limited and keeps in the government's prudent approach to English regional devolution outside of the London metropolis (Burch and

Holliday, 2000, 84). The unitary structure of England is being retained and does not look like it will be questioned. There is some kind of divergence on the possibility of regional government. Certainly, 'the government continues to be deeply divided on regional government in England' (Hazell, 2001, 43). Maintaining a unitary state is one of the binding essentials of the British constitution, and political unity is desirable. There may be a reluctance on the part of the government to incite some kind inequality within the regions of Britain, by setting up assemblies in some areas of England and not others. The local authorities may be found to be in contention with regional assemblies in that there could be a dual source of power that is overlapping. The British constitution retains the unitary nature at least of England. With the increasing likelihood that Europe may move for a federal organisation, Britain will seek to control some substantive power and will resist further devolution of power internally.

House of Lords

The constitution has maintains that the executive is dominant. The second chamber has experienced its first wave of changes, and now has to wait patiently for the second wave. The Wakeham Commission has not proved anything conclusive, and Blair has not been quick to act on this subject. Its advice recommends 'a chamber of mixed composition, part appointed and part elected' (Hazell et al, 2000, 244) and recent research shows only one fifth of the Lords to be elected. Being elected to a position within a political institution suggests greater legitimacy than being appointed. Appointment would presumably be a role for the Prime Minister. The other house could then be politicised to an extent that it would serve as a second backbench for a cabinet. The second chamber, as prescribed by the present constitution, should

legitimise and bring to account the actions of the government. However I do not believe the present government has thought about the long term consequences of their reforms to such an institution. It is evident 'the government has increased the size of the Labour group through new appointments' (Johnson, 2000, 347) within the House of Lords. By diminishing the overwhelming Conservative party majority within the Lords, Blair has sought to harmonise the house with a deluge of appointments. It is very questionable what is going on here. As there is no evident long term plan the 'Prime Minister continues to control how many appointees each party gets, the number of cross bench peers and overall size of the House' (Hazell et al., 2001, 198).

The House of Lords is now an overriding uncertainty. It has been said that Blair's programme of constitutional reform is aimed at democratising the chambers of Parliament. However there is stalled reform to a House that is seemingly in limbo. It is indeed spurning modification that may check a strong government in the Commons (Johnson, 2000, 348-9), that which is glaringly Blair's own. Blair has not made extreme change to the constitution here. He has merely tampered with it, for his own gains and benefits in the short term. The House of Lords should be a feature of government that is trusted, and its legitimacy is being challenged as more and more appointments are made. Appointing someone to the House is congruent to the hereditary principle, which itself has only been marginally removed. The future of the Lords is a concern, and Blair's system of appointments is not satisfactory. Hazell et al's. research has identified that public opinion polls show overwhelming support for an elected second chamber, in direct contention to the Labour government who don't want their power in the Commons challenged (Hazell et al., 2001, 198). Government

accountability is a central aspect of the constitution to the citizen, and as the House of Lords is an issue, so is the actions of the government.

Freedom of Information

A criticism New Labour levied at previous administrations was their willingness to be open, or rather their lack of it. This was to be addressed by the research of a Freedom of Information (F.O.I.) Bill, which sought to create an openness in Britain that had never been addressed before. This issue could transform a major factor of the constitution, which has always aided a strong and safeguarded executive. The preliminary results of the F.O.I. investigation did bring back a dynamic programme of reforms, headed by David Clark, a Cabinet Office Minister. However, the executive found this programme far too radical and Clark was removed in a reshuffle. Jack Straw was appointed to conclude investigations and the results were deemed a considerably restrictive set of proposals. Measured against international standards, these were seen as submissions of a limiting nature, rather than having the capacity to open out a government and its actions (Hazell, 2001, 45). Labour do seem to have a reluctance to construct a constitution divorced from that which presently adhered to. There have been endeavours to make a slight change, however there is an underlying reluctance to move away from constitutional principles which aid a strong executive, and that is what the present Labour administration maintains. It is unlikely a new constitution would be adopted that would debilitate Labour's present position.

Criticisms exacted on Labour's F.O.I. legislation are at its 'paternalistic model of open government' (Flinders, 2000, 428). There is a distinct variance between a government that is open, which was what the previous Conservative administration

stroke for, and Freedom of Information which Labour initially forwarded. Open government is what the government chooses to reveal to the general public, whereas Freedom of Information sees the public getting to know all it satisfies. Flinders' investigation into the prospective F.O.I. legislation is very thorough, and considers Clarks' explorations against the subsequent measures proposed by Straw. It is unlikely a government would seek to volunteer knowledge which is likely to disclose it as being inappropriate to govern (Flinders, 2000, 429). I believe a strong government would never undertake to undermine its own position by administering legislation that Clark first penned. Burch and Holliday found that Clark stated the proposals, if fully implemented, would transform Britain from one of the most closed democracies to one of the most open (Burch and Holliday, 2000, 87). Blair and his need for control would never have wanted this for the constitution, desiring controlled change. The looseness of the unwritten constitution aids a strong government to interpret the constitution and make Blair's potential for power limitless. Freedom of Information serves to maintain the executive dominance. This can be reflected in other areas of constitutional reform that Blair has approached.

Conclusion

As an issue for voters, Bogdanor's research ascertained that constitutional reform came sixteenth out of sixteen during the 1997 General Election campaign (Bogdanor, 2001, 144). The electorate's interest concerning the constitution is distinctly inconsequential. However, central policies such as Europe are those that abstrusely affect the constitution. Labour has implemented policy changes in significant areas, yet their programme of constitutional reform is ongoing. In no area I have outlined is there a satisfactory finished article. The domains of constitutional reform are

interrelated to a point that reform in one area of Britain's constitution could dramatically alter pillars in another section.

Blair has presented a veneer of activity regarding the constitution. Britain's obstinance for veto retention to resist further European constitutional direction has backfired as Europe tries to dictate the greater use of QMV. The possibility of a European constitution has been noticeably evaded by the executive as they work out their path towards Europe. The ECHR has been fostered but skirted in some cases post-September eleventh. Power has been devolved beyond the Celtic borders, but not to England or its regions. The House of Lords has faced part change, but the power-wielding Commons has been excused. The liberal first draft of legislation relating to F.O.I. was discarded, and in its place was a rather more restricting document. Evidently, the constitution is moderately changing to the Prime Minister's strategy. Johnson considers that there has been a rejection of reforms that would threaten to impose genuine checks on the political discretion of an over-mighty executive acting in the name of a plain parliamentary majority in the House of Commons (Johnson, 2000, 348-349). Rather than reforming the constitution, I believe Blair is renewing it to his advantage. It would be ludicrous for Blair to impose constitutional reform that would serve to expose and threaten his firm grip on power.

The twenty first century has seen Blair assure his second term in power. Sweeping constitutional reform has been avoided, whereas limited changes are observable. Until a political party is courageous enough to push for reforms that will significantly alter the nature of the constitution, it will be plied as an instrument to ensure an executive's dominance. The contemporary political climate is far removed from that in 1997.

When New Labour took power, the constitution was ripe for change. Respect for Parliament had fallen to an all-time low; Scotland was estranged due to a foisted Conservative dominance; civil rights were unguarded and above all, Britain's constitution had for too long instated too much power in the unchecked executive. Blair's changes have worked to appease these original problems, however as his popularity wanes, it will become apparent of his cautious reforms. As Western Europe integrates further, its implications on Britain will be profound. Europe has the ability to change the constitutional structure of Britain, but it is not presented as imperative at the moment. At present the constitution serves to preserve Blair's administration. However as a new political era in Europe approaches, I believe the British constitution will be regarded as defunct.

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