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[Cover photo: Members of the CLC Organising Committee – from left to right: (standing) John Tarry, James Dingemans QC, Peter Williamson, Colin Nicholls QC, Kevin Martin, Peter Slinn; (seated) Deanie Thain, Maureen Miller, Claire Martin, Diane Burleigh. Four of the remaining members, the Rt Hon Lady Justice Arden DBE, Michael Smyth, Dr Karen Brewer and Mrs Betty Mould-Iddrisu are absent.]

The Changing Constitution of the UK

Austen Morgan

Introduction

The reign of Tony Blair, now drawing inexorably to a close, will be remembered – after Iraq, economic liberalisation and public-sector reform – for changes to the UK's constitution; this, nevertheless, remains uncodified, despite London's experience of drafting constitutions for almost all the members of the Commonwealth.

While the early reforms were praised as progressive, the later ones, when critically examined, are more ambiguous. New Labour's piecemeal constitutionalism from 1997, I argue, gave way, following the events of September 11, 2001, to a law and order populism, in which the executive threatened judicial independence from 2003.

Constitutional Reforms

The major reforms of the early years were:

- ***human rights***: domestic effect was given to the European Convention by the Human Rights Act 1998;
- ***devolution***: powers were devolved to Cardiff, Edinburgh and Belfast by the Government of Wales Act 1998, the Scotland Act 1998 and the Northern Ireland Act 1998 (the latter being the basis of the Belfast Agreement negotiated with the Republic of Ireland);
- ***House of Lords***: all but 90 hereditary peers were expelled from the Upper House by the House of Lords Act 1999, but the government failed subsequently to move to stage two of the reform;
- ***freedom of information***: a general right of access was created by the Freedom of Information Act 2000, though public authorities could rely upon a long list of exemptions;
- ***electoral reform***: proportional representation was not included in the Political Parties, Elections and Referendums Act 2000, which created an Electoral Commission for the UK;
- ***House of Commons***: there was no legislation. However, the hours of sitting were altered (a reform partly reversed since).

These reforms were identified, in whole or in part, with Lord Irvine of Lairg, Tony Blair's former pupil master and head of chambers. New Labour's thinking had been shaped in opposition, in the 1980s and 1990s, by a plurality of single-issue constitutional campaigns. As Lord Chancellor, from 1997 to 2003, Lord Irvine incrementally, and without posturing, sought to create a justice department against the weight of the Home Office.

Law and Order Populism

The Al-Qaeda attacks on the US on 11 September 2001 raised the spectre of international terrorism. This had been anticipated in the permanent Terrorism Act 2000. It led to the Anti-terrorism, Crime and Security Act 2001, and, following an important House of Lords' judgment,[1] the Prevention of Terrorism Act 2005.

New Labour, which had coined the slogan, "Tough on crime, Tough on the causes of crime", treated internal security equally robustly (though not in Northern Ireland). The Home Office was feminised under David Blunkett. The consolidating Sexual Offences Act 2003 – with 57 new crimes – represented a new puritan compact.[2] The Criminal Justice Act 2003, with 329 sections and 38 schedules, followed it quickly. This measure includes the following provisions: prosecution applications for no-jury trials; prosecution appeals on rulings; prosecution applications for retrial; new bad character and hearsay rules of evidence; new sentencing powers, with executive interference through a Sentencing Guidelines Council.

The enactment of this anti-terrorism, and criminal, law led to a struggle between the executive and the judiciary, much of it hidden from view. The senior judiciary, led by the Lord Chief Justice, Lord Woolf, sought to defend the judicial branch of government nobly. Ministers relied upon spinning, poor argument, threats to the House of Lords, and a quiescent House of Commons; in a word, populism.

The Constitutional Reform Act 2005

The turning point was 12 June 2003, when Tony Blair sacked Lord Irvine as Lord Chancellor, and replaced him with Lord Falconer, as Secretary of State in a new Department for Constitutional Affairs (though he also held the office of Lord Chancellor).

David Blunkett embraced Lord Falconer, who had been a junior Home Office Minister, as he left to set up the new

[1] *A v Secretary of State for the Home Department* [2004] UKHL 56 [2005] 2 WLR 87.

[2] The Bill was criticised by Francis Bennion in 12: 1 *Commonwealth Lawyer*, April 2003, p61.

department. The Home Secretary is reported to have said *sotto voce:* "Now at last we will get the judges we want."

This was the occasion of the Prime Minister's 'back of an envelope' constitutional proposals: attempted abolition of the Lord Chancellorship; establishment of a Supreme Court for the UK; and the creation of a Judicial Appointments Commission.

The government struggled, principally in the House of Lords, between summer 2003 and spring 2005, to get its Constitutional Reform Act ('CRA') on to the statute book. Ministers had the support of the Liberal Democrats. The Conservatives, cross benchers, and most lawyers of all persuasions opposed the bill. The former Law Lord, Lord Lloyd of Berwick, was to the fore. The opposition secured the retention of the Lord Chancellor's office, shorn of its judicial and parliamentary functions. The government emerged bloodied but unbowed.

On 26 January 2004, Lords Woolf and Falconer announced a Concordat. The Secretary of State and Lord Chancellor strategically divided the senior judges and their political supporters.

A decisive preliminary skirmish took place during the passage of the Asylum and Immigration (Treatment of Claimants, etc.) Bill. The government intended to oust the jurisdiction of the High Court. Lord Falconer supported the ouster clause. The Lord Chief Justice described it as unconstitutional. Lord Irvine forced the government to back off, simply by putting his name down to speak.

I concluded – following the parliamentary debates in order to annotate the statute[3] – that: (1) the office of Lord Chancellor should be reformed (and the new office of Secretary of State for Constitutional Affairs abolished); (2) a Supreme Court would be an expensive change of form only; and (3) a Judicial Appointments Commission would lead to an executive-minded judiciary.

Modification of the Office of Lord Chancellor

This office – dating from 605 – integrates the executive, legislative and judicial branches of government. The government was wrong to portray the Lord Chancellor as simply a member of the executive who appoints judges. The Lord Chancellor comes from the law: he sits in the cabinet, not as government legal advisor, but as guarantor of the rule of law.

Montesquieu's separation of powers was wheeled out to justify the prime Minister's patricide. The lawyers in the Lords had a ready answer: it was no part of the common law. Some also asked: why worry about separating the judiciary and legislature, when the real problem is executive dominance of especially the House of Commons?

The Lord Chancellorship was being reformed gradually. Lord Bingham had only permitted Lord Irvine to sit twice as a Law Lord in three years; the Lord Chancellor being excluded – because of his cabinet colleagues – from criminal, human rights and judicial review appeals. Lord Irvine might have loosened his grip on the speakership of the House of Lords, though he showed no sign of wishing to do so – being seemingly attached to the ceremonial aspects.

One problem remains with this idea of a reformed Lord Chancellor. How could he remain as head of the judiciary (appointing and disciplining judges)? The answer is: it would be a constitutional anomaly, like so many others. The government's solution – transferring many of the Lord Chancellor's functions to the Lord Chief Justice – is not unproblematic. The Lord Chief Justice, who will no longer sit in the House of Lords, will become increasingly an administrator, managing the judiciary on behalf of the civil service.

The Supreme Court

The 11 law lords (and one lady) secrete themselves in the Upper House of Parliament. They are the Appellate Committee. The whole world knows they are the UK's highest court. In 2000, Lord Bingham announced a self-denying ordinance about participation in debates and votes (which was not fully observed).

The government's idea of a Supreme Court – which will not be established until 2008 – will be one of the few UK-wide institutions created since 1801. However, it will continue to administer English, Scots and Northern Ireland law, as the situation demands.

Why change the Appellate Committee to the Supreme Court, when – unlike the US supreme court – the UK justices will not be able to behave like a constitutional court? Part of the answer is that Lord Bingham called for it. But the main reason is that the government, stymied on House of Lords reform, thought that getting rid of the Law lords would be a passable substitute for a policy.

The Law Lords split on the proposal in October 2003, with Lords Nicholls, Hoffman, Hope, Hutton, Millett and Rodger (plus Hobhouse) opposed, and Lords Bingham, Steyn, Saville and Walker supporting the government. Three of the 'antis' subsequently retired, and the views became more balanced.

That was before the question of a building emerged. The government finally plumped for Middlesex Guildhall (currently housing seven criminal courts), in Parliament Square. Lord Bingham was an early opponent. The rest of the Appellate

[3] *Current Law Statutes*, published by Sweet & Maxwell.

Committee joined him in April 2004.

The CRA 2005 had originated in No 10 Downing Street, and the Chancellor of the Exchequer, Gordon Brown, has never agreed to fund a Supreme Court. Lord Falconer has to raise the costs of £30 million, plus £15 million to relocate the existing courts, and the £8.8 million annual running costs (as opposed to £3.2 million for the Appellate Committee), from increased court fees.

The Judicial Appointments Commission

Do we have a good senior judiciary? Yes. How was it appointed? Pretty much like brain surgeons. True, there were many rough edges in the Lord Chancellor's Department. But it is not inevitable that a statutory quango, a Judicial Appointments Commission, is necessary.

In the generally favourable debate, I did not hear anyone ask: what is a judiciary for; are judges entitled to equality of opportunity; and how do we ensure a judiciary that will stand up to the executive when necessary?

No one has looked critically at Professor Sir Colin Campbell's non-statutory Commission for Judicial Appointments, which Lord Irvine fatally accepted in 2001. It was put together by Sir Colin, a civil servant and a Northern Ireland solicitor. They selected a group of private-sector members, New Labour being enthralled by businessmen and women. This commission came up with the solution of commercial headhunting (through a Judicial Appointments Commission), with closet reverse discrimination practised by new technocratic patrons, as the way to appoint the best men and women.

The work of the Commission for Judicial Appointments revealed very little in the way of complaints. So why did Lord Irvine waver before falling grace, and allow the Judicial Appointments Commission to become the cornerstone of the CRA 2005?

The Inquiries Act 2005

This act repeals the Tribunals of Inquiry (Evidence) Act 1921, and consolidates other statutory provisions. The government claimed it was part of the continuing modernisation of the state. Most likely, it was a response to the length and cost – over seven years and £155 million – of Lord Saville's "Bloody Sunday" inquiry; it was also to prevent the forthcoming Finucane inquiry going the same way.

Commentators pointed to two important transitions in public inquiries: from parliament to the executive; and (much more important) from chairmen to ministers.

One problem arose over the appointment of judges to chair inquiries. Lord Woolf, invoking the Concordat, said the Lord Chief Justice should give his consent. Lord Falconer, ignoring the Concordat, said he should only be consulted. Lord Woolf backed amendments in the House of Lords, and, on 28 February 2005, the House voted by 149 to 131 for consent. The House of Commons overturned the amendment: "To be blunt," the junior minister said, "public inquiries can be more important than the judicial business demands that apply from time to time in the courts."

The Future

The Queen's Speech on 17 May 2005 indicated little constitutional change over the next 18 months: identity cards (reintroduced); an already promised Terrorism Bill; a Commission for Equality and Human rights; and another attempt at reforming the House of Lords.

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