

The Constitutional Revolution of Tony Blair

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Motivating Questions

- He was never one to exaggerate
 - New Labour's Constitutional Reform is "The biggest programme of change to democracy ever proposed"
 - (Blair, speech to the Labour Party Conference, 4/10/1994)
- Three questions about each area of reform
 - What's going on in the UK, that is, what is the current Constitution?
 - What is the constitutional theory? (???)
 - Why did they (or not) do it? Consider principles, practical politics, obligation (e.g., the EU made them do it).
- What does the on-hold-but-by-no-means-gone-forever EU Constitution portend for the British Constitution?
- Finally, what parts of the received theory are still valid?
 - Is the essence of the British Constitution still that the executive power respects only those rights built up through a process of convention and case law?
 - Or that Britain's Constitution is unwritten, with a core principle of parliamentary sovereignty?
 - A return to Dicey?

Promises, Promises

- Reform of the House of Lords
- Modernisation of the House of Commons
- Controls on party funding
- Referendum on *proportional* voting system for House of Commons
- Freedom of Information Act
- Scottish Parliament *with legislative and tax-varying powers*
- National Assembly for Wales
- More accountable and democratic local government
- Strategic authority for London
- Regional chambers leading to directly elected regional assemblies in England *if supported by regional referendum*
- Incorporation of the ECHR into UK law (*put first in joint list*)
- Support for the peace process and devolution in Northern Ireland.
- *Independent National Statistical Service*
- *A Civil Service Act*
 - Labour's 1997 manifesto (*italics* are additions in the Labour/Liberal Democrat Joint Consultative Committee document, 3/97)
- **Unpromised and Unplanned: A Supreme Court**

A Lot Done, Quickly

- **Why was it good politics in 1997?**
 - Government was out of touch (e.g., new interest groups replacing parties)
 - Sleaze made FOIA good in the short term.
 - Civil Service Protection similar but the opposite of what they wanted to do *ex post*.
 - Accumulation of Conservative centralization
 - Take votes back from LibDems (PR totally tactical, as was written Constitution, Bill of Rights).
 - Good fit with stakeholding theme in some respects (devolution and local democracy fit the community part) and Labour traditions in others (Lords for a classless society)
- **Implementation**
 - six new Cabinet committees by 1998 (20% of total Cabinet committees)
 - overarching strategy, Devolution, ECHR, Freedom of Information, London, Lords Reform
- **Constitutional legislation passed (almost all first term)**
 - *Devolution*: Referendums (Scotland and Wales) Act, Government of Wales Act, Scotland Act, Northern Ireland (Elections) Act, Northern Ireland Act, Regional Development Agencies Act
 - *Incorporation of European Convention on Human Rights*: Human Rights Act
 - *Electoral reform*: Registration of Political Parties Act, European Parliamentary Elections Act
 - *Elected Mayors*: Greater London Authority Referendum Act, Greater London Authority Act
 - *Lords reform*: House of Lords Act
 - *Local government reform*: Local Government Act
 - *Freedom of Information*: Freedom of Information Act, Data Protection Act
 - *Controls on Party Funding*: Political Parties, Elections and Referendums Act
 - *Northern Ireland*: Disqualification Bill

Devolution: Big Changes

- **Scotland, Wales and Northern Ireland**

- **Scotland:** creation of a parliament with law-making powers, including defined and limited financial powers to vary revenue and elected by an additional member system. Extends democratic control over responsibilities exercised administratively by the Scottish Office. Responsibilities of UK Parliament remain unchanged over UK policy, for example economic, defence and foreign policy. Two cycles of elections held.
- The National Assembly for **Wales** provides democratic control over existing Welsh Office functions. Has secondary legislative powers and specifically empowered to reform and democratise the quango state. Two cycles of elections held.
- **Northern Ireland:** Good Friday Agreement. Assembly elections held June 1998. Northern Ireland Act 1998. Very recently, some progress.

- **Regional government in England**

- Regional Development Agencies Act 1998: eight new RDAs in April 1999, appointed by Ministers, not accountable to Regional Chambers. Regional Chambers are voluntary, non-statutory bodies, which if 'designated' by the Secretary of State must be consulted by the RDA in formulating its regional plan. In summer 1999 eight Regional Chambers so designated, one for each RDA, but not as first stage towards elected regional government.
- In November 2002 the Government introduced the Regional Assemblies (Preparations) Bill. Did not define the powers or functions of regional assemblies but enabled regional referendums to be held. One held (North-East 2004), a disaster. Issue dead for now.

- **London**

- Strategic authority (GLA) and a mayor, both directly elected, are responsible for London-wide issues since November 1999. Third elections for London Mayor coming up.

Parliamentary Reform (1)

- **Commons:**
 - Norton Report, Ann Taylor's Modernisation Committee largely stalled.
 - Robin Cook defeated over plans to move nominations to Select Committees away from Whips.
 - Did manage to give Select Committees wider freedoms and resources, ability to take evidence.
 - Also introduced two year planning for the legislative programme
 - carryover of bills from one session to the next the biggest change
 - more pre-legislative scrutiny, timetabling for bills
 - changes to sitting hours, with morning sittings and sittings in September.
 - Some still up in the air.
 - The legislative and Regulatory Reform Act (2006) expansion of ministers' Orders (think: Executive Orders) has to be set against this.
- **Verdict:** not much difference.

Parliamentary Reform (2)

- **Lords:**
 - House of Lords Act 1999: 92 hereditary peers in transitional second chamber of 700 peers. Second stage of reform referred to Wakeham Commission.
 - Reported 1/2000: recommended part-elected, part-appointed House of Lords
 - elected members to represent nations and regions
 - appointed members (including party nominees) selected by an independent Appointments Commission.
 - The government has created a non-statutory Appointments Commission, but only to select the cross-benchers (some 12 appointments a year).
 - 11/2001 Government White Paper *Completing the Reform*. Strongly criticised by the Public Administration Committee of the House of Commons in 2/02.
 - 5/02 Government announced next stage of Lords reform to be considered by joint Parliamentary Committee chaired by Jack Cunningham MP.
 - 12/02: Joint Committee presented seven options in a report. Both Houses voted in early 2003. All seven went down. Issue returned to the JPC.
 - Summer 2006 Lords elect a Speaker
 - Spring 2007 Commons votes for an elected Lords; Lords vote for an appointed Lords. Some consensus (statutory appointments Commission, 15-year terms).
- **Verdict: can't figure out what they want bicameralism for.**

Human Rights

- Done right away by incorporation of ECHR via HRA.
 - Nothing more heard from Bill of Rights.
 - Compare December 2001 Anti-Terrorism Act: indefinite detention, secrecy, limited rights of appeal and access to lawyers, burden of proof on defendant – state of emergency justified withdrawal from Article 5 of ECHR.
- Verdict: *potentially* huge change in constitutional role of courts, actually used 3-4x per year since inception, results always implemented.
 - Protects rights.
 - Colloquially, the law already is: ECJ should deal with nations but will deal with individuals shafted by their nation and not redressed in national courts. Things should be dealt with at lowest level consistent with EU law (subsidiarity). Much better if the legislature fixes it (Sec 3 of the HRA).
 - What if rights are in conflict? And Parliament legislates that the British way to fix it is as follows ...? Would the ECJ intervene? (Probably) Would this create a crisis? (Maybe)
 - Section 3 of the HRA says courts can only declare noncompliance. But Sec 6 (huge broadening of standing) gives an individual remedies against any public authority that had a choice and impaired the individual's Euro-rights. Possibility of appeal to ECJ is always there, if case based on "erroneous" decision of highest national court.
 - Section 6 also institutionalizes *Factortame* in that "such is the case" unless Parliament has explicitly derogated from EU law (*Factortame* said "if Parliament had wanted to overturn the 1972 treaty, all they had to do was say so; since they didn't, they didn't mean to.")

Freedom of Information

- Data Protection Act 1998.
- Freedom of Information Bill introduced in December 1999, passed 2000.
- By international standards a restrictive measure (big gray area over what we would call the “national security exemption”).
- In full force 2004: ever since
 - Arguments over exemptions (e.g. Parliament; failed)
 - Arguments over cost to fulfill requests
 - Arguments over fees
- Seems to be working. Whether this Act or just part of its time, ideas about confidentiality have shifted in the last twenty years.

Electoral Reform

- Jenkins Commission reported: recommended a system dubbed AV-plus: the Alternative Vote for single member constituencies, plus a relatively small number of top-up seats to provide an element of proportionality. Outcome: PR is supported by only two or three members of the Cabinet. Now dead for a while
- Controls on party funding: Oblige political parties to source of all donations above a minimum figure. Nolan Committee on Standards in Public Life, subsequently chaired by Lord Neill, recommended an Electoral Commission as the main watchdog and enforcement body to ensure spending limits are observed in elections and referendums.
- Political Parties, Elections and Referendums Bill 2000
- Verdict: Curbs on funding led directly to the design of an end-run by having loans (no limit) not repaid (who knew?). Led to a long-running scandal and a lot of embarrassment for the Government.

A Constitutional Affair

Not all about the Constitution but so much fun: the road to Court Reform:

- Following 2001 election: Home Office lost all constitutional functions to the Lord Chancellor's Department, which took over human rights, freedom of information and data protection, the Monarchy, Church and State, and relations with the Channel Islands and the Isle of Man.
- In May 2002 LCD given responsibility for electoral matters: in effect became Department of Justice and Constitutional Affairs. December 2002: new post of Director of Constitutional Affairs. Four other Cabinet Committees on constitutional reform all chaired by the Lord Chancellor Lord Irvine.
- June 2003: Lord Irvine sacked as LC. Row between Blunkett and Irvine led to sacking, without which reforms would not proceed.
- June 2003 Cabinet reshuffle produced abolition of the Office of Lord Chancellor. Responsibility for constitutional questions transferred to new Department of Constitutional Affairs, under a Secretary of State, Lord Falconer. DCA handles civil law reform, court system including criminal courts, legal aid but not criminal law; that's a Home Office function, though in conflict with domestic policies like race relations. DCA absorbed back into Ministry of Justice May 2007.
- Amid confusion it became clear that until the necessary legislation had been passed Lord Falconer would have to retain the title of Lord Chancellor, continue to act as speaker of the House of Lords, remain head of the judiciary, sit in Parliament as a Law Lord, and remain a senior member of the Cabinet

A Supreme Court?

- Reform of the court system:
 - separation of political and judicial functions of Lord Chancellor
 - diversity goals for judges
 - appointment of judges by an independent commission
 - creation of a separate Supreme Court.
- What is the Supreme Court?
 - Absorbs the Appellate Committee of the House of Lords “Law Lords”
 - Also has the devolution functions of the Judicial Committee of the Privy Council
 - A unified court of final appeal for the UK
- Verdict: probably the appointments power and incorporation of diversity goals will be more important down the road than the fact that the Court for most purposes just moves across the road. In conflict with Lords reform – an elected Lords has no promise of including enough qualified individuals to fill a Supreme Court – though this will probably just lead to further appointments reform.

Will it Be Different under Brown?

- Some think so, citing “history of interest”
- What he promised
 - Upgrade the Ministerial Code
 - Give up some prerogative powers
 - War
 - Appointing bishops
 - Parliament gets
 - Role in treaties
 - Oversight of intelligence and appointments
 - Recall on demand
 - Attorney General gets removed from prosecution decisions
 - Public gets right to demonstrate at Westminster
- What he didn't
 - Constitutional convention
 - Bill of rights
 - Civil Service Act
 - Lords reform
- Verdict: the latter are bigger than the former. Not too much departure from the recent past should be expected: e.g., Brown as Chancellor greatly expanded the number and role of (political) special advisors in the Treasury.

What might a European Constitution portend?

- **If** it goes through ...
 - Part II is a Bill of Rights. No matter what it contains, you can no longer say that the essence of the British Constitution is that the executive power respects only those rights built up through a process of convention and case law. But the ECHR has already gotten part way there.
 - Practically, of course, the question is to what extent the Bill will add rights to those already respected under (sometimes recent) British law. “Free job placement” would be one. The EC said it created “no new rights”. Will a court agree?
 - Active debate over a Bill of Rights in Britain cuts across this: could a British bill omit any rights in the European Bill (probably not). Could it add any?
- **Big changes:**
 - Harmonisation of criminal law, and immigration laws and policies
- **Few changes:**
 - Harmonisation of taxation, foreign policy, and defense
- **Does it matter?**
 - Of course, it is a constitution. And it does codify the supremacy of European Law.
 - However, future changes (and adoption, after an IGC) must be unanimous.
 - And in the area of “who knows?” a lot of new areas of EP involvement and some changes down the road to voting weights

What to Say?

- **If you read a book on the Constitution in the past, what would be the key features?**
 - **Unwritten** (still “true”, just written in even more places, and a higher proportion is written somewhere)
 - **No Bill of Rights** (that’s changed with the 1998 HR Act)
 - **Parliamentary sovereignty** (sovereignty gone by 60s: Blue Streak, exchange rate autonomy).
 - **Rule of law** (more true than ever, see next slide for details)
- At least it’s still: **Parliamentary** (i.e., no separate executive: still true):
- **Representative** (big changes in mechanism: different electoral systems below national level, but central assumption of *ex post* accountability still holds; the BIG change is less secrecy –FOIA vs OSA)
- **Responsible** (collective practice shifting: committees and leaks plus agreements to differ and referenda; Individual responsibility also shifting: less force to resign)
- **Bicameral with a dominant House** (wait and see)
- **Unitary?** Weakening, but not nearly federal
 - Devolution plus diminished roles of Secretaries of State for Scotland and Wales
 - Regional assemblies a disaster
 - Nothing really federal until LAs can finance desired diversity
- **Centralized?** Still very ...
 - Not Coalitional
 - Not presidential
- **Electoral/party** harder to discuss: still strong party government but
 - SMD (no longer Euro- or regional-true) was not a point of Constitutional law
 - Parties were not even -- well hardly -- legally recognized until very recently

Rule of Law

- According to **Dicey** (Victorian England)
 - Primarily...No man could be punished or lawfully interfered with by the authorities except for breaches of law. In other words, all government actions must be authorised by law.
 - Secondly...No man is above the law and everyone, regardless of rank, is subject to the ordinary laws of the land.
 - Finally...There is no need for a bill of rights because the general principles of the constitution are the result of judicial decisions determining the rights of the private person.
- More generally:
 - Government decisions are made according to written law and rules
 - Government sanctions cannot be made up after the fact (ex post facto)
 - Rules are applied as much as possible consistently to all
 - Courts provide citizens consistent, written process (due process) before life, liberty, or property is taken
 - Courts provide reasons based upon the law for their decisions
- Generally in Britain for the rule of law to be supreme, Parliament must legislate (or have done so). Lack of clarity means implicit Parliamentary consent or need for Parliamentary action. This has worked so far.

A New Order?

- Close to it: devolution, rights, courts, secrecy even if Lords, Civil Service, electoral system are on back burner.
- Distance already traveled is by past British standards remarkable
 - But no single document or event proclaims the birth of a new constitutional order
 - While breach with past precedent has gradually assumed major proportions
 - New context within which British politics is conducted.
- Pressure for further major changes will build in the years ahead
 - over freedom of information (administrative issues, ministers)
 - voting system for Westminster
 - the composition and purpose of the second chamber
 - the powers of the devolved administrations
 - their relationship with the centre
 - prerogative powers wielded by the Prime Minister