

## Studying the New Constitutionalism: bringing political science back in

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### Books reviewed

- Blackburn, R. and Plant, R. (eds) (1999) *Constitutional Reform*. London and New York: Longman, xiii + 517 pp., ISBN 0-582-36999-1
- Foley, M. (1999) *The Politics of the British Constitution*. Manchester: Manchester University Press, viii + 296 pp., ISBN 0-7190-4551-7
- Hazell, R. (ed.) (1999) *Constitutional Futures: A History of the Next Ten Years*. Oxford: Oxford University Press, vii + 263 pp., ISBN 0-19-829801-3
- Sutherland, K. (ed.) (2000) *The Rape of the Constitution?* Exeter: Imprint Academic, xiii + 368 pp., ISBN 0-907845-70-3

### Sightings shots

Talking about constitutional politics has become ‘sexy’ in Britain. In addition to several populist polemics written by political journalists (see Hutton 1995 and 1997; Freedland 1999; Mount 1992), an extensive academic literature has emerged that has mainly been concerned with three issues: modelling liberal democracy and assessing its defects from a normative perspective (see Held 1987 and Hoffman 1991); identifying the limits of British parliamentary democracy (see Beetham 1994 and Klug, Starmer and Weir 1996); and explaining the rise of a New Constitutionalism under the present Labour government (see Giddens 1998). This review

focuses on recent literature that has attempted to deal with the latter two issues. It develops a simple argument. Hitherto the literature on constitutionalism in Britain has been circumscribed by the apolitical nature of its constitutional politics. For much of this last century the UK constitution has remained apolitical. It has been 'depoliticised' in the sense that the existence of a consensus across political elites on the 'rules of the game' has meant that, unlike other states, it has not acted as a focus for social and political conflict and change. The apolitical constitution has provided a settled context within which a predominately 'high Tory' constitutional doctrine, with its emphasis on representative and responsible government, has flourished. However, with the advent of radical reform the scope of the field of constitutional action has changed and hence this field of inquiry requires new thinking. Unfortunately the recent literature on the New Constitutionalism is still locked into the traditional narrative of British constitutionalism and consequently overlooks some crucial areas of inquiry. The main reason for this is that the debate continues to be dominated by political journalists and politicians who are preoccupied with the field of action rather than the field of inquiry and tend to focus on their own normative concerns. This, of course, is not their problem; the blame lies squarely on the shoulders of political scientists. The challenge for political science is to respond at last to John Dearlove's (1989) appeal to 'bring the constitution back in' as a focus of political study 'in ways that avoid the limitations of the constitutional approach and a narrow legalism' through the creation of 'a new, or at least a greatly refurbished, language of constitutionalism'. For as Dearlove and Saunders (1984) remind us, constitutional theory is of importance because it seeks to provide us with answers to fundamental political questions about who governs and how; about who should govern and how; and about the respective rights of ordinary people and the propertied in British politics. It should not be ignored by those who are keen to explain the nature of British politics.

I will explore this argument through a review of four books which exemplify the best and the worst of current thinking. Each of these books combine what Ferdinand Mount (1992, Preface) has referred to as 'present-descriptive' and 'future-prescriptive' accounts of constitutional change in Britain, although with varying degrees of success. The former is normally reserved for political scientists, the latter by practising politicians. The review is organised into two parts. The first part assesses the contribution that these four volumes have made to the literature on constitutional reform. In the second part of the review a sketch of the type of new thinking required in order to make sense of the New Constitutionalism is presented.

## Orthodoxy

The first two studies follow the recent fashion for combining the work of academics, political journalists and politicians within one cover. This has become a standard marketing gimmick from which there are both benefits, not least commercial ones, and disadvantages. It can provide readers with a strong understanding of political process and the development of plausible policy prescriptions. However, it can also lead to the absence of the development of holistic thinking, under-theorisation of social and political phenomena, and the limited development of tools of methodological inquiry. The third and fourth studies provide academic accounts of a similar set of research questions.

### *Constitutional Reform: The Labour Government's Constitutional Reform Agenda*

Robert Blackburn and Raymond Plant's edited book provides an impressive collection of individual commentaries on the Labour government's reform agenda. The aim of the coeditors was 'to produce a constructive offering on how the underlying objectives of the Labour Party with respect to constitutional reform ... might best be achieved' (Blackburn and Plant 1999, 1). The book largely succeeds in achieving its aim. Each of the contributors was asked to examine Labour's stated policy objectives and to offer ideas and practical suggestions on how these might be put into practice. This is a 'future-prescriptive' account of the New Constitutionalism without apologies and an extremely good one. Its scope is impressive, with 20 chapters organised into four sections on: Parliament; the Executive; European, Regional and Local Government; and Justice and Human Rights. Moreover, it draws on an impressive array of academics, political journalists and practitioners. Of course, there is some unevenness in the quality of their contributions but this is inevitable in a volume of this size and the 'hits' greatly outnumber the 'misses'. Indeed, a more valuable book for undergraduate students and enthusiasts of constitutional reform who are interested in the original reform project cannot be found.

Nonetheless, there are three shortcomings here that require some elucidation. The first is a problem of timing. The book was published at a time when most of the major constitutional reforms were either awaiting implementation or were yet to reach the statute book. It may have been wiser to have delayed publication until the end of the Labour government's first term in office. This would have provided greater scope for analysis and ensured a longer lifeline for the book. Secondly, the

introduction could have presented a more detailed exposition of the contours of the ensuing discussion and allowed for a reflection on some key conceptual issues, such as centre–periphery relations. Thirdly, the book lacks a unifying concluding chapter in which lessons could have been drawn from each of the individual contributions, lessons compared and general themes highlighted. This would have been particularly prudent given that contributors were drawn from the world of practice as well as academe.

*The Rape of the Constitution?*

Keith Sutherland's crudely titled edited collection is dedicated to the memory of the celebrated political scientist and constitutional inquisitor Max Beloff. It provides a platform for the views both of disenchanted constitutional radicals and conservatives with the odd academic dropped in for good measure. In his foreword, Beloff's son Michael, QC and president of Trinity College Oxford, notes that:

These essays suggest that there are two routes to a good constitution as an integrated whole: tradition—in which it is slowly fashioned by the experience of time, and reason—in which it is more swiftly fashioned in the crucible of analysis. It is a matter of concern to all of us that the British Constitution is arguably being altered in a manner which is distinct from either (in Sutherland 2000, viii).

There is the germ here of an interesting idea but unfortunately the book gets bogged down in the rehearsing of old political standards which we have already read elsewhere. The politicians—Tony Benn, Simon Hughes, Tam Dalyell, Roy Jenkins and Peter Shore—have all remained pretty consistent in their views on the nature and origins of Britain's constitutional malaise since the late 1970s, a source of much praise if consistency of viewpoint is considered a virtue. Paradoxically, what is new to this volume is the reappearance of the forces of constitutional conservatism in the guise of Norman Tebbit, who laments the absence of public debate on constitutional issues. This is a longstanding member of a government that refused to discuss constitutional issues in the 1980s and much of the 1990s, despite significant evidence of declining public trust in government. Indeed, his prime minister declared in 1989 that, '[t]he Government consider that our present constitutional arrangements continue to serve us well and that the citizen in this country enjoys the greatest degree of liberty that is

compatible with the rights of others and the vital interests of the State' (letter to the *New Statesman and Society*, 9 June 1989).

So what is there of real value in this volume? Andrew Tyrie, Conservative MP for Chichester, produces an interesting case for a 'largely elected' second chamber, which rests on the need to redress the imbalance in the British constitution between the executive and the legislature that has been caused by executive dominance. The academic contributors provide some decent material. Gillian Peele's chapter includes interesting insights into why the absence of 'joined-up' constitutional reform is likely to destabilise the overall reform project and Michael Rush presents a typically detailed review of the Wakeham Report on the Reform of the House of Lords (Cm. 4534). The political journalists also contribute some interesting material. Peter Osborne, for instance, provides a fascinating account of the rise of the media class in British politics. However, the rationale for a chapter on this subject in a book about constitutional reform was never clearly spelled out, giving the impression that there had been a mix-up at the printers. Mike Diboll provides a thoroughly plausible and entertaining account of possible future constitutional developments in Britain. He argues that in his view it is unlikely that a second term in office will yield further extensions of democracy through the introduction of proportional representation for general elections to the House of Commons or the reform of the monarchy as Prime Minister Tony Blair has become too accustomed to 'the powers and privileges of an "elected dictator"' (in Sutherland 2000, 349). Nonetheless, Diboll does see the possibility of the introduction of forms of direct democracy which might be construed in some quarters as evidence of a decentralising impulse. However, in his view, to do this effectively would require a raft of far-reaching constitutional reforms 'for which New Labour shows no stomach'. Rather, he suspects that direct democracy will be used as a device for manipulating the 'hearts and the minds of the people' and ensuring that majority opinion in the 'nations' and 'regions' remains in abeyance with the will of the centre. Provocative stuff, although it does endow the Labour government with a degree of governing competence that was sadly lacking in the Ecclestone, Kosovo, Millennium Dome, petrol, and foot and mouth crises. Are we really talking about the same government here?

Perhaps the most disappointing contribution to the book is the chapter provided by Jonathan Freedland. Freedland's *Bringing Home the Revolution* was published to huge critical acclaim in 1999. Indeed Will Hutton claimed that it was "The Book of the Year". However, chapter 9 of his book entitled "Ten steps to the revolution", which presents the case for a British

Republic, is simply transported to the edited collection with a different introductory passage. Unfortunately it does not really work as a stand-alone chapter because the republican project on the US model is difficult to accept without the humour which is omnipresent in *Bringing Home the Revolution*. Indeed Freedland is far too 'in praise' of the American constitution and is all too quick to ignore its evident contradictions and the enormous suffering that this has brought upon large parts of its non-white citizenry.

In short, *The Rape of the Constitution?* fails as a 'present-descriptive' account of constitutional reform as it says next to nothing about how the constitution should be studied, and little about the impact of the programme itself. Indeed, it only partially succeeds as a 'future-prescriptive' account as it also provides few original insights into the developing reform programme itself. The book also repeats the mistake of failing to provide a unifying concluding chapter. Perhaps I am old fashioned, but if an editor expects a reader to follow 368 pages, the reader can expect the editor to sum up with some general, overarching themes or arguments.

### *Constitutional Futures: A History of the Next Ten Years*

The Constitution Unit was set up in April 1995 to conduct 'an independent inquiry into the implementation of constitutional reform' in the United Kingdom under the directorship of Robert Hazell. The initial aim of the Unit was to 'analyse current proposals for constitutional reform; explore the connections between them; and to identify the practical steps involved in putting constitutional reforms in place'. It was thus timely for a project to emerge that dealt in specifics rather than declamatory statements which merely extolled the virtues of constitutional reform. In this sense the Constitution Unit provided a much-needed way forward from the visionary monographs written by David Marquand (1988), Ferdinand Mount (1992), Anthony Wright (1994) and Will Hutton (1995), which all succeeded in exciting but failed to provide a *modus operandi* for delivering constitutional reform. The Unit subsequently made its name through several detailed studies of individual reforms: devolution to Scotland and Wales, reform of the House of Lords, human rights legislation, introducing freedom of information, the conduct of referendums, and changing the electoral system. However, most of these reports, with the exception of the reform of the House of Lords, were really little more than reviews of the secondary literature. Robert Hazell's edited collection *Constitutional Futures: A History of the Next Ten Years* attempts to take the project one

step further forward and succeeds in providing an account of constitutional reform in Britain of real substance. As Hazell himself puts it:

This is the most ambitious project the Constitution Unit has yet undertaken. In this book we have tried to view the Government's reform programme as a whole, to forecast the cumulative impact of all these different constitutional changes, and to explore the interactive effects between them ... This study is the first systematic attempt to foresee the full effects of the new Government's constitutional reform programme (Hazell 1999, Foreword).

Because of the scale of the project the Unit invited the collaboration of experts from six other universities: Professor Paul Craig (Oxford), Professor Conor Gearty (King's College, London), Professor Richard Macrory (Imperial College, London), Jeremy Mitchell (Open University), Professor Brendan O'Leary (London School of Economics), Frank Vibert (the European Policy Forum), and Professor Helen Wallace (Sussex). The book draws on the team's arenas of expertise—'the political and legal effects of constitutional change'. It is organised into four parts. Chapters 1 and 2 introduce the key elements of the reform programme and ascertain their likely impact. Chapters 3 to 9 provide more detailed discussions of the impact of each area of reform on political life in Britain. Chapters 10 to 12 provide an evaluation of the impact of reform in selected areas of policy—the environment, financing devolution and citizenship. The book concludes with an attempt to map out the nature of the new constitutional settlement. It identifies the key features of this settlement and identifies the gaps that are emerging within the government's constitutional reform programme. Possibly the most important observation that the book makes is that constitutional reform is likely to release dynamics in politics and the law that take on their own directing force. As Hazell puts it:

The cumulative impact of increased openness of government, a rights culture and devolution will work together to produce a dynamic whole that is greater than the sum of its constituent parts. Further, this constitutional change occurs at a time of rapid change in international law and politics, both at European and global levels. Interactive effects will occur at this level too ... (1999, 4).

However, Hazell's collection shares the same strengths and weaknesses as Blackburn and Plant. The book is a triumph as a 'present-descriptive' and

'future-prescriptive' account of constitutional reform but is guilty of going to press too early and failing to consider how the constitution should now be studied. Indeed, given the number of academics involved in this project this is quite a serious sin of omission. It also fails to explore issues of political culture and tradition in enough detail and thus remains rather conservative as a prescriptive exercise. It is important to remember that the genius of Britain's unwritten constitution lies in its ability to absorb radical agendas. History tells us that a 'gradualist' approach will provide an enabling context for this to occur once more, for as Raymond Williams affirms in *Culture and Society*, 'the struggle for democracy is allied, in spirit, with the practice of its open enemies' (1989 [1958], 322). Nonetheless, the book is extremely well written and provides a refreshing tonic for lecturers in need of fresh materials to reinvigorate tired undergraduate discussions in and around the reform of Britain's constitution.

### *The Politics of the British Constitution*

Although Michael Foley's *The Politics of the British Constitution* (1999) is not without its problems, it is probably one of the most original and, more often than not, interesting academic works on constitutional reform in Britain to be published to date. Foley makes a genuine attempt to tackle a complex range of issues in a systematic, dare I say it, 'pseudo-scientific' way. For Foley, constitutional 'reappraisal has now become a consistent feature of, and a concerted force within, the interplay of British politics ... And yet, the nature of its existence and the significance of its wider implications are quite obscure'. Hence, the purpose of his study is 'to elicit the meanings and properties of such a politics' (Foley 1999, 9).

In this context, two features of Foley's book particularly merit critical attention. The first is his discussion in chapter 3 of what he terms, 'constitutional fuels'. More specifically, he argues that 'the constitutional debate in Britain is essentially fuelled by several discernible themes which are closely related to substantive political issues and, which together constitute a multiple assault upon what has traditionally been seen as an aggregate constitution. These fuels have disturbed the old tranquillity surrounding the constitution and they continue to generate an agenda for constitutional change' (Foley 1999, 45). He then goes on to identify 10 constitutional fuels that have created the space for constitutional renewal: electoral inequity; governmental excess; centralisation; governmental misuse; secrecy; personal misconduct; systemic dysfunction; transcendent innovation; external imposition; and traditional anomalies. Foley presents



a wide-ranging examination of these 10 fuels and concludes by identifying six criteria that provide 'the organising principles of a table of contents and ultimately a typology of fuels' (*ibid.*, 95): problem recognition (behavioural or structural); problem recognition (dynamics of continuity and change); multi-level dimensions of response (at the micro and macro levels); ignition opportunity (the underlying causation of constitutional disquiet); forms of constitutional controversy; and political and constitutional costs. He then attempts to rank the constitutional fuels by 'controversy quotient' in order to present a general estimate of each fuel's contribution to constitutional controversy. Unfortunately he never draws any concrete conclusions from this exercise and the readers are left to their own devices to ascertain the significance of such an approach.

The problem with this chapter is that the most original aspects of the research are contained in a six-page conclusion and are not developed in sufficient detail. It is far from clear what Foley is trying to do here. Is he providing a heuristic framework from which more concrete knowledge claims about the nature of constitutional crisis and reform can be abstracted? Do these constitutional fuels constitute independent variables? If so, how do they interact? Or is he merely offering an extended metaphor from which a clumsy typology can be constructed? This is frustrating because Foley does identify the building blocks here for a more general theorisation of constitutional continuity and change and an opportunity is missed.

Secondly, the discussion in the final chapter also provides some stimulating insights. Here Foley identifies a new matrix of conditions which, in his view, will 'set the parameters of constitutional development and determine the usages, applications and implications of the growing constitutional perspective in contemporary British politics' (Foley 1999, 10). It concludes with four propositions that are presented 'in the spirit of the entire enterprise of this study—namely, to grasp the nature and ramifications of a style of politics which in Britain is unfamiliar, unorthodox, unrecognised and as yet unassimilated':

1. The progression of constitutional reform will inevitably reach a point of disjunction with the passage of the political cycle.
2. Just as the sponsoring government will claim credit for securing constitutional reforms, so will it be seen as directly culpable for all the consequences of such experimentation.
3. Constitutional innovation may initially consist of discrete legislative measures but reform is a continuous process with no finite boundaries.

4. The incidence of constitutional reform will set in motion an increasing disparity between the traditional precepts and habits of parliamentary sovereignty and the rationale of a constitutional sovereignty implicit in the claims and contexts of successive changes to the constitutional arrangements.

All four propositions are entirely plausible but clearly need to be subject to further empirical evaluation as the reform programme develops. Once again there is within these four propositions the germ of a new domain of constitutional inquiry. Unfortunately Foley never develops these ideas in enough detail. In his preoccupation with making sense of the politics of the constitution and its field of action he fails to identify the key changes required in the field of inquiry. In addition, Foley does not have a good sense of history. He treats the constitutional reform programme as a homogeneous whole that emerged with New Labour and fails to recognise that each reform process possesses its own history, personalities, norms and often values, some of which go right back to the very genesis of the Labour movement itself (devolution, for instance).

#### The new domain of constitutional inquiry

As I am anxious to provoke controversy I will return to my original submission. These books say little about how the British constitution should now be studied and how changes in the field of action have prompted changes in the field of inquiry. The remaining passages of this article focus on one fertile avenue of inquiry to which both Hazell and Foley allude but never fully develop—studying constitutional reform as a process.

#### *Definitions*

Any investigation of the impact of constitutional reform must from the outset have a clear definition about what the British constitution actually involves. Its disaggregated system of laws, conventions and principles has tended to obscure the definition of the composition and powers of the institutions of the state. In my view Fred Ridley (1988, 317) provides the seminal definition of a constitution as ‘the whole system of government of a country, the collection of rules, written and unwritten, which regulate the government’. What, then, is meant by constitutional reform? Constitutional reform refers to any changes to those rules, written and unwritten, which regulate government and redraw the relationship between government and

the people. *Constitutional reform may therefore be considered as a process that has a normative outcome.* This conceptualisation allows the researcher to identify a distinctive terrain of constitutional inquiry. It provides a clear distinction between the situation prior to change and the situation prevailing during the process, thus helping us to observe the impact of social change. Hence we should look at constitutional reform as a *process* whereby political, legal and bureaucratic actors drawn from a range of distinct national, regional and sectoral settings shift the scope of their political and administrative activities (and often loyalties) towards new political centres, whose institutions possess areas of competency that previously lay within the domain of the central state. The end result of this process is the emergence of new political communities superimposed over the pre-existing one.

What are the empirical implications of adopting such an approach? If one accepts that New Labour's constitutional reform programme is a process that contains several overlapping processes of reform that give rise to factors of integration and disintegration it becomes possible to generate certain hypotheses. For example, devolution may be defined as a *process* whereby the UK government has forgone its traditional desire and ability to conduct certain domestic policies within the 'nations' and has sought instead to make *joint decisions* or to *delegate* the decision-making process to new institutions. This has consequently facilitated a process whereby political actors in several distinct settings shift their expectations and political activities to a new centre. Although this definition lacks specific analytical clarity it does provide a set of interrelated indicators to judge the experience of the constitutional reform programme. The first part of the definition refers to two modes of decision-making that are, in my opinion, intimately related, the existence of delegated decision-making being a basic precondition for progress in shared decision-making. The processes of *sharing* and of *delegating* decision-making are likely to affect the governmental structure of the British State, creating new internal problems of co-ordination and policy direction, especially between departments of state and national assemblies and parliaments that are accustomed to regarding their spheres as wholly or primarily of their concern. Moreover, a state with traditions of centralised representative and parliamentary government is also faced with the problem created by the development of decision-making centres whose authority derives from a regional, rather than a national, consensus.

The second part of the definition refers to the patterns of behaviour shown by regional policy-makers, civil servants, parliamentarians, pressure-group leaders, the judiciary and other elites as a consequence of constitutional

reform. The New Constitutionalism empowers new elites (political, legal, bureaucratic) and creates new levels of governance. By implication it disempowers or reduces the influence of established elites at other levels of governance. As we all know, in the devolution discourse this has been termed the 'West Lothian Question'. Here our attention is directed to the perceptions and resulting behaviour of political actors. The relationship between this set of indicators and those referring to governmental decision-making is very close. By the nature of the process, policy-makers and civil servants in Northern Ireland, Scotland and Wales are involved increasingly in new systems of joint decision-making. Similarly, as the locus of decision-making changes, so will the tactics of groups and individuals seeking to influence the policy-making process. Moreover, as this process proceeds interests will be redefined in terms of regional rather than a purely national orientation.

### *Levels of analysis*

The investigation of the impact of constitutional change and its consequential effects requires a multi-level approach, which considers external (for example, processes of European integration) as well as domestic dynamics. For example, devolution cannot be considered in isolation from the European process nor, indeed, from other aspects of New Labour's constitutional reform programme. This is because of the impact of political, technical and geographical spillover which characterises the 'disjointed incremental' constitutional reform process in the United Kingdom (see Evans 1999 and 2000). In addition, globalisation theories are having an increasing influence on the study of constitutional politics in Britain as they are increasingly viewed to be central to an understanding of the external 'hollowing-out' of the state. Thus understanding the New Constitutionalism purely through state-centred institutional approaches is no longer tenable. In order to maintain a match between the field of action and the field of study one must examine the impact of international, transnational and, where appropriate, global forces on domestic governing structures and processes. However, the extent to which these forces are transforming the nature of governance remains an empirical question, and thus creates the need for an important reflexive research programme aimed at analysing demonstration effects of increased internationalisation, transnationalisation and the rest.

The assertion here, then, is that constitutional reform has heralded a change in the field of action in which the meaning, process, method and

condition by which society is governed is now changing in a qualitative sense. For while it would presently be difficult to describe New Labour's programme as 'radical' it is likely that existing reforms will spill over into other areas and thus increase the radicalism of reform and the scope and intensity of change. The political, social, not to mention economic and cultural significance of the rise of the New Constitutionalism is certainly far-reaching—one need only read the newspapers to confirm this. For the political scientist, too, they are of consuming interest, for we can observe the actual processes whereby political actors move beyond Whitehall as a basic framework for action and create new political communities. Yet despite the growth of an exhaustive literature on the emergence and development of the Labour party's constitutional reform programme very little attention has been paid to the impact of constitutional reform. This is a significant oversight, for it is impossible to provide a true measure of the transformative achievements, potential and, indeed, failures of the Labour party's constitutional reform programme without such studies. Moreover, the field of inquiry has failed to stay apace with changes in the field of action and develop appropriate theories and methodologies for understanding the impact of constitutional change and all its ramifications. It is possible that the new Economic and Social Research Council initiative 'Devolution and Constitutional Change' will provide a way forward in this respect—we wait to see.

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