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Executive Summary

- In the UK, changing the constitution is a simple matter of changing the law. This is subject to only one procedural safeguard: the convention that 'bills of first class constitutional importance' take their committee stage on the floor of the House of Commons in a Committee of the Whole House (CWH).

- This briefing assesses the value of this convention by examining the scrutiny of all constitutional bills passed between 1997 and 2005. It identifies 55 bills on constitutional topics in this period, of which 32 took their committee stage on the floor. But bills can also go to CWH if they are very short, or urgent bills. When these categories are taken out, 20 bills are left which went to CWH as bills of first class constitutional importance.

- Of these 20 bills, six were devolution bills; four to authorise referendums; four on electio095cctn492w0 0 12 126 54vm(l)Tj12 0 0 12 3afer00aT/72otn bsesitive:h w0 0r

Introduction

Legislation is not the only mechanism of constitutional change, but in quantitative terms it is the most important single source of constitutional law in the United Kingdom. And, at its simplest, changing the constitution is a simple matter of changing the law. Other countries typically require special legislative majorities, referendums or other additional safeguards to ensure that constitutional change is not unduly partisan or rushed. In the United Kingdom the constitution can be changed by a simple Act of Parliament. This is subject to only one procedural safeguard: the convention that ''bills of first class constitutional importance'' take their committee stage on the floor of the House of Commons.

The purpose of this article is to review the adequacy of the procedural safeguards in the process of constitutional change, by examining the scrutiny of all constitutional Bills passed between 1997 and 2005. It examines first what counts as a ''first class'' constitutional Bill, measured by the test of taking its committee stage on the floor of the Commons. Are there any conventions as to what counts as a Bill of first class constitutional importance? What are the criteria for deciding? Who decides, and how do they decide? Next, the article looks at the difference made by taking the Commons committee stage on the floor of the House. What value is added in scrutiny terms? How does it compare with the value added by the other specialist committees which now scrutinise Bills in both Houses? The article concludes with some proposals for a new set of conventions to safeguard the process of constitutional change, building on recent improvements to the legislative process more generally.

Bills of "First Class Constitutional Importance"

Until 1997 Erskine May stated that ''it is the regular practice for Government bills of first class constitutional importance to be committed to a Committee of the Whole House''.[1] Subsequent editions have modified the convention, saying that it is ''common practice'', and adding: ''although there is no invariable rule to that effect, nor any settled definition of what 'first class' constitutional importance should be taken to mean''.[2]

The origins of this convention go back to 1945, and the Attlee government's substantial post-war legislative programme.[3] Anticipating that the task of post-war reconstruction would require a heavy legislative programme, the wartime coalition government's Machinery of Government Committee had224441ndated thaj12 0A12 0 0 12 241.74had224441ni8hajt3d.8genrti

list of 55 Bills to be found in Table 1, which records the nature and amount of parliamentary scrutiny devoted to each Bill. This was a period of unprecedented constitutional change, which offers part of the explanation why the list is so long.

The table shows the total time taken before each Bill was passed (col.2); the total time devoted to debating the Bill on the floor of the House of Commons (including all stages), and whether committee stage was taken on the floor or in Standing Committee (col.3); whether the Bill was subject to a guillotine or programme (timetabling) motion (col.5); the nature of the Commons committee stage, the range of speakers, number of amendments moved, and committee sitting hours (col.6); the time devoted to debating the Bill in the Lords, and whether the committee stage there was taken on the floor or in Grand Committee (col.4); the other specialist committees which scrutinized the Bill (col.7); the policy objectives of the Bill, including whether the Bill was implementing a treaty or international agreement (col.8). Table 2, which appears further on, records the public and pre-legislative scrutiny devoted to each measure before its introduction into Parliament.

Two categories between them account for half the total list of 55 Bills which appear in Table 1. There are 14 Bills on Northern Ireland, and 15 on elections (of which five cover electoral matters in Northern Ireland). Nine of the Bills cover devolution in the rest of the United Kingdom (Scotland, Wales, English regions, London). Six are on the European Union (of which three give effect to Treaty amendments). Four provide for referendums, and four are on emergency powers.

Column 3 in Table 1 indicates whether a Bill took its Commons committee stage on the floor in a Committee of the Whole House (‘‘CWH’’), or was referred upstairs to Standing Committee (‘‘SC’’). There are 32 Bills in the list which took their committee stage on the floor (of which three were split, taking part of the committee stage on the floor, and part upstairs). Again, Northern Ireland (eight Bills) and elections (nine, of which four were on elections in Northern Ireland) each account for a quarter of the total of CWH Bills. Devolution in Great Britain (seven Bills) accounts for another quarter, and five Bills on Europe took their committee stage on the floor.

Not all these Bills necessarily took their committee stage on the floor because they were counted as ‘‘first class constitutional measures’’. As already noted, there are two other recognised grounds on which a Bill can remain on the floor for its committee stage: because it is urgent, or because it is so short that it does not require detailed scrutiny. The reasons why a Bill remains on the floor are not always explained in the record of parliamentary proceedings, but it can be surmised that half a dozen Bills took their committee stage on the floor mainly because they were short Bills.[9] Most EU Treaty changes are made by short Bills, but they can be big in constitutional substance. EU (Finance) Bills are also short, but may sometimes be controversial; they have all taken their committee stage on the floor since the first such Bill in 1985.

[9] Disqualifications Act 2000 (five clauses), European Communities (Finance) Act 2001 (two clauses), House of Commons (Removal of Clergy Disqualification) Act 2001 (two clauses), Northern Ireland Arms Decommissioning (Amendment) Act 2002 (two clauses), European Union (Accessions) Act 2003 (three clauses), Scottish Parliament (Constituencies) Act 2004 (four clauses).

Table 1 PARLIAMENTARY SCRUTINY OF CONSTITUTIONAL BILLS 1997-2005

Bill	Total time taken[a]	Total hours of debate[b] / Nature of committee stage		Guillotine or Programme Motion[c]	Commons committee stage: range of speakers, number of amendments moved, and sitting hours	Specialist committee scrutiny	Policy objective
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				

Bill	Total time taken	Total hours of debate / Nature of committee stage					
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				
				C	CWTm()Tj/F Motion TC /ref Tm( )Tj EMC /P /MCD BD BT TC /ref Tm(Bill)Lords		

Total hours of debate / Nature of committee stag

Bill	Total time taken	Total hours of debate / Nature of committee stage House of Commons (CWH or SC)				

Bill	Total time taken	Total hours of debate / Nature of committee stage		Guillotine or Programme Motion	Commons committee stage: range of speakers, number of amendments moved, and sitting hours	Specialist committee scrutiny	Policy objective
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				
						7th Report 02-03	
						20th Report 97-98 *2nd Report 02-03* *3rd Report 02-03*	
					—— —	*4th Report 02-03* *1st Report 02-03*	
						5th Report 02-03 *11th report 02-03* *21st Report 98-99* *3rd Report 98-99* *1st Report 02-03*	
						20th Report 02-03 *12th Report 02-03*	

committee on the floor before it too was withdrawn. After the Bill was divided, the Scotland Bill 1978 took 14 days in committee, and the Wales Bill 1978 nine days. Mindful

Nevertheless the government did not wholly abandon the idea of splitting constitutional Bills at their committee stage. The Greater

Human Rights (''JCHR''), and the Lords Constitution Committee. With the help of their legal advisers these committees now scrutinise every Bill: the first for compliance with the European Convention on Human Rights and the United Kingdom's other international human rights obligations, the second for points of constitutional importance. Their contribution is understated in Table 1 because the committees were not created until late 2001. Since then the JCHR has issued reports on every single Bill, and the Constitution Committee has reported on eight of the Bills listed in Table 1.

Other committees active in the House of Lords are the European Union Committee, which reported on four Bills in Table 1; and the Delegated Powers Committee, which polices the boundary between primary and secondary legislation (and reported on 40 Bills). In the Commons eight Select Committees contributed to the scrutiny of constitutional Bills or the legislative proposals that preceded them.[23]

The three territorial Select Committees all played a part in scrutinising some of the lesser legislation on devolution.[24] The Foreign Affairs Committee reported on constitutional Bills concerned with Europe, as did the Commons EU Committee. The Home Affairs Committee reported on Bills on electoral matters, and terrorism. The Public Administration Committee reported on freedom of information, Lords reform, and public inquiries. A latecomer is the Constitutional Affairs Committee, hived off from the Home Affairs Committee in early 2003. This can be expected to scrutinize constitutional legislation emanating from the Department for Constitutional Affairs, and made a strong start with its three reports on the Constitutional Reform Bill.[25]

The second respect in which the scrutiny of constitutional Bills has been transformed since 1945 is the more active part played by the House of Lords. The Lords take seriously the business of legislative scrutiny. They no longer feel so illegitimate, following the departure of most of the hereditary peers, and have fewer inhibitions about defeating the government's legislative proposals. In its first eight years the Blair government never lost a single vote in the House of Commons. In the Lords, the government is defeated in 25–30 per cent of all divisions on Bills. In the last session, 2004–05, more than half the divisions resulted in a government defeat.

The Lords also take a special interest in the constitution. The House of Lords Bill 1999 was significantly amended in the Lords, to retain 10 per cent of the hereditary peers. In the case of four other constitutional Bills, the Lords entered into serious disagreement with the House of Commons. These were the (first) European Parliamentary Elections Bill in 1998, when the Lords protested at the use of closed lists; the European Parliamentary and Local Elections (Pilots) Bill in 2004, when the Lords objected to the rushed introduction of all-postal voting in four regions, rather than in two as recommended by the Electoral Commission; the Constitutional Reform Bill in 2005, when the Lords wanted the Lord Chancellor to remain a lord and a lawyer; and the Prevention of Terrorism Act 2005, when the Lords objected to the new control orders. In the first three cases the Lords eventually dropped their objections after fierce rounds of ping pong at the end of the session. On prevention of terrorism, the government introduced a judicial element into control orders, and gave undertakings that they would come back to Parliament with new proposals within a year.

In the Lords almost all Bills take their committee stage in a CWH. But increasingly the Lords are referring some Bills to Grand Committee, to get them off the floor. Their committee stage is then taken in the Moses Room, but all peers can take part. It is sometimes believed that only non-controversial Bills undergo the Moses Room procedure, but of the six Bills in Table 1 which were referred to Grand Committee, three were controversial: the Bank of England Bill 1998, the European Parliamentary and Local Elections (Pilots) Bill 2004 and the Inquiries Bill 2005.

Recent Improvements to the Legislative Process

This article has focused on the CWH procedure for constitutional Bills, because that is the only formal check known to the British constitution before introducing major constitutional change. It is time now to take a step back and look at the wider legislative process, to see what other checks might be introduced at other stages in the process to guard against unduly rushed or partisan constitutional change. In the main these are checks at earlier stages in the process: most suggestions for improving the legislative process focus on improving legislative proposals before they are formally introduced into Parliament, by more rigorous procedures for expert and public consultation. There is a checklist of such measures in the 1996 Constitution Unit report *Delivering Constitutional Reform*, which identified three broad categories of consultation:

- **building political consensus**: through cross-party talks, a Speaker's Conference, constituent assembly or constitutional convention;
- **calling in the experts**: through a Royal Commission or expert commission;
- **public consultation**: through manifesto commitments endorsed at a general election, referendums, consultation on Green and White Papers and draft Bills.

All three forms of consultation have been used as part of the preparation for some of the big constitutional changes introduced in recent years.[26] Table 2 tries to summarise the extent to which each of the constitutional Bills listed in Table 1 was subject to expert and public consultation before its introduction. In terms of public endorsement, it records whether the proposals were the subject of a manifesto commitment (col.2), and whether they were put to referendum (col.3). The next column records whether the proposals were considered by an expert commission or in cross-party talks. Finally the table shows whether there was consultation on a Green Paper, White Paper or draft Bill.

The table includes examples of all three categories of consultation listed above. As an example of building political consensus, the Scotland Bill derived from plans for a Scottish Parliament developed by the Scottish Constitutional Convention, which included Labour and the Liberal Democrats as well as representatives of civil society. The Northern Ireland Bill followed the talks between all the parties in Northern Ireland which resulted in the 1998 Belfast Agreement. Cross-party talks between Labour and the Liberal Democrats produced a detailed report in March 1997 on their shared

[26] In evidence to the Constitution Committee Lord Irvine offered a simplified schema of the process for 0 12 90.00.023ted in the 1

commitments to constitutional reform,[27] and after the 1997 election a joint Cabinet Committee was formed with the Liberal Democrats to help implement those reforms. A final example of talks which included all the main

Table 2 PUBLIC and PRE-LEGISLATIVE SCRUTINY OF CONSTITUTIONAL BILLS

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention or cross party talks	Green Paper or Consultation Paper	White Paper
						Scotland's Parliament; A Voice for Wales
						Scotland's Parliament: A Voice for Scotland
						A Voice for Wales
						Rights Brought Home
					RDAs: Issues for Discussion	*Building Partnerships for Prosperity,*

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper
					New Leadership for London	*Mayor and Assembly for London* *Data Protection: The Government's Proposals*

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper
					Referendum on Local Mayors ODPM May 2000	
					A New Beginning: Policing in Northern Ireland	
						Your Right to Know
						The Funding of Political Parties in the United Kingdom
					Legislation Against Terrorism	
				Working Party on Electoral Procedures	*Modernising Local Government: Local Democracy and Community Leadership*	

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper
				For a Stronger and Wider Union		
					The Law on Extradition	

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper
					Proposals to improve fine enforcement *Power to Order Periodical Payments for Future Loss*	

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper

1) 1 0 Td(2003)T k 31 Tf1.5Tw 2.AC, establish

Act 2005 [HL]

Another striking feature of Table 2 is the variation in practice. A recent example of seriously bad practice by the government is the Constitutional Reform Bill, whose proposals (abolition of the office of Lord Chancellor, creation of the new Supreme Court and Judicial Appointments Commission) were announced with no consultation by Downing Street press release in June 2003. The new Department for Constitutional Affairs struggled to make up for the lack of consultation, rushing out three consultation papers in July, and Parliament went into overdrive to scrutinise the proposals. The

Sadly, it is not possible to define a ''constitutional'' Bill with sufficient precision to identify confidently what is constitutional (or even ''first class'' constitutional) and what is not. That was the interim conclusion reached after the analysis of the Bills set out in Figure 1. We know the really first class measures when we see them, and few would dissent from the recent examples cited by Laws L.J. in *Thoburn* (European Communities Act 1972, Human Rights Act 1998, Scotland Act 1998, Government of Wales Act 1998). But his definition of constitutional statutes as being those which ''condition the relationship between citizen and State in some general, overarching manner'' is too broad and general to be of much assistance when applied to harder, more borderline cases.[35] Readers left in doubt are invited to apply it to the list of Bills in Table 1 and see how far they get.

Fortunately, this is not fatal to the enterprise. For what matters is not constitutional Bills but constitutional principles. And constitutional principles can be raised by Bills which are not on their face constitutional. Two of the biggest cries of ''constitutional outrage'' in recent years have arisen in connection with the Asylum and Immigration (Treatment of Claimants) Act 2004 with its ouster clause, and the Prevention of Terrorism Act 2005 which introduced control orders. Neither Bill was self-evidently constitutional in terms of its primary subject matter, but both raised important constitutional issues about separation of powers, the proper role of judges and the protection of human rights. (It is worth adding that having a written constitution makes little difference: similar issues and concerns were raised in the United States under the Patriot Act, and in Australia with their recent anti-terrorism legislation, but in neither country did the legislation violate the constitution.)

If what matters is constitutional principles, the next question is, how can those principles best be identified? There is no clearly articulated list of constitutional principles in the United Kingdom, but a start is slowly being made. The Lords Constitution Committee is required to report on the constitutional implications of all public Bills. Dawn Oliver has shown how they might pull together their recommendations more systematically, and learn from experience overseas. In time this might lead to the development of a set of legal and constitutional principles similar to those developed by the Legislation Advisory Committee in New Zealand, and their application in a detailed scrutiny standards checklist.[36]

The final question is who should be the institutional guardian and defender of those principles. Here there is a central role to be played by the House of Lords. It is a classic role for second chambers, and the Wakeham Commission specifically recommended that the House of Lords should act as guardians of the constitution.[37] The Lords showed their mettle in the way they scrutinized the Constitutional Reform Bill. They have shown the value of systematic scrutiny through their contribution to the JCHR. They have not yet 685 e0nr5r,8/TT0

Within the Lords the Constitution Committee is best placed to articulate a set of constitutional principles, and then to be their guardian. It has recently conducted a major inquiry into the legislative process, in which it recognized the value of more systematic scrutiny, and commended the use of checklists. Building on that, it could conduct a further inquiry into the legislative process for constitutional Bills, and the defence of constitutional principles, and lay down some guidelines which over time could develop into a new set of conventions.

The Constitution Committee is already required to examine the constitutional implications of all public Bills, so that it is well placed to police its own guidelines, and to develop and refine them in the light of experience. If the committee is serious in its approach to the task, and systematic and consistent in applying its guidelines, it will soon find its guidance reflected in the Ca