Clash of the Titans (3)

Stephen Hockman QC considers the path to take in order to ease the UK's constitutional tensions

- The UK constitutional system has weaknesses.
- The abilities to govern effectively in the interests of "the many not the few" and to protect minorities in doubt.

In my last article (NLJ, 29 July 2011, p 1039), I pointed out some important tensions in our constitutional arrangements. In this, the third and final article in the series, I want to try to identify more broadly what those tensions are and how, if at all, they can be resolved.

Fundamental objectives

An analysis of our constitutional arrangements ought to begin with some propositions about their fundamental objectives. I suggest that the one purpose—perhaps the main purpose—of democratic government is to enable society as a whole to be organised in accordance with the will of the majority. At the same time, as we came to recognise above all in the second-half of the 20th century, the will of the majority cannot be allowed to reign unchecked. A system of government must contain very strong safeguards for individuals and groups of individuals within society, in other words minorities, whose views and behaviour do not coincide with those of the collective.

Parliamentary sovereignty

Until recently, we have been content to describe our particular constitutional system as one based upon parliamentary sovereignty. This means that ultimate power lies in "the Queen in Parliament". The will of the majority is expressed through the enactment of legislation, and through the operation of the executive acting within the parameters which Parliament has laid down. Looking back over the 20th century, it could be said that in Britain these arrangements achieved a measure of success. Certainly, the British people became gradually more prosperous. The position of women in particular (clearly not a minority by any definition) improved very markedly (which is not to say that there is not more progress to be made).

Key issues

But by the beginning of the 21st century, it was clear that our constitutional system is by no means as perfect as many would have liked to think. I will seek to identify some of the key issues. First, our ability as a democracy to govern ourselves effectively in the interests of "the many not the few" has become increasingly seriously in doubt. As society becomes more sophisticated, and as social expectations continue to rise, it is apparent that it becomes all the harder for government to make real progress in the various policy areas. Whether one looks at financial affairs, education, health, legal affairs or indeed many others, one sees a system in which government of all political complexions becomes bogged down in detail, and in which a clear and comprehensible sense of direction is increasingly hard to identify. Assuming that the will of the majority can even be identified in any given area of social policy, it is certainly almost impossible to implement it effectively, so as to achieve discernible social progress. This, far more than problems over MP's expenses or an unelected second chamber, seems to me to be the cause of the disillusionment felt by many of our fellow citizens with the political process.

Protecting minorities

The other main issue concerns the way in which we seek to protect the rights of minorities. The second world war and the persecution and slaughter of millions showed how necessary it is for a democratic system to attain this objective. In the UK, we have elected to make the European Convention on Human Rights part of our law. This has inevitably, and rightly, had the effect of placing considerable responsibility upon the judiciary who have the task of interpreting the meaning of Convention rights, and of applying those rights in individual cases. Through the Convention, we now have a codified law of privacy, in which the right to privacy is appropriately balanced with the right to freedom of expression. But as the recent creation of the government's Human Rights Commission, and the controversy over the treatment of detainees, in their different ways make clear, we do not yet have a system for the protection of minorities and of individuals in which the public have or can have confidence. The balance is likely to be tested again if and when—as seems the likely outcome of the government's e-petition system—a proposal to reintroduce capital punishment appears before Parliament. This is a major weakness in our present constitutional arrangements.

Weaknesses

In an interesting report entitled *The Process of Constitutional Change* published on 18 July 2011, the House of Lords Select Committee on the Constitution identified what it described as "a number of weaknesses inherent in the current practice of legislating for constitutional change". These included a "failure to have regard to the wider constitutional settlement". The committee stated that such weaknesses arise out of the fact that "the United Kingdom has no agreed process for significant constitutional change". But the problem I suggest is perhaps a little wider than the process of constitutional change which was the subject of the report by the House of Lords Constitution Committee. There are in truth some fundamental unanswered questions going to the heart of our constitution itself. These questions include the following:

- Which measures enacted or to be enacted by Parliament can truly be described as "constitutional"? The Lords Constitution Committee

provided an interesting definition of the concept of "Significant constitutional change"—namely "that its impact will outlast whichever government initiated it".

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- What if any degree of protection/entrenchment applies to such constitutional measures? Laws LJ in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2002] 4 All ER 156 claimed that such measures cannot be the subject of implied amendment or repeal, and must therefore be amended or repealed expressly—a comment which has received widespread subsequent approval but perhaps cannot yet be described as fully authoritative.
- Is it legitimate for Parliament to pass legislation which has the effect that provisions in subsequent statutes must be given a meaning and effect consistent with such earlier legislation, even if in conflict with the legislative intention of Parliament in enacting those later statutes? This was indeed the effect of s 3 of the Human Rights Act 1998 as interpreted by the House of Lords in *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411—see the first Lord Alexander of Weedon lecture given by Lord Phillips on 19 April 2010.
- Is it true (leaving aside the special case of legislation that is incompatible with EU law or with Convention rights, as to both of which the judges have an undoubted function in influencing the activities of the legislature) that no person or body has the right to override or set aside the legislation of Parliament? I have taken this question directly from a lecture by Lord Hope at the WG Hart Legal Workshop 2011, delivered on 28 June 2011. Lord Hope's answer to the question was that "the absence of a general power to strike down legislation which [Parliament] has enacted does not mean that the courts could never fashion a remedy for use in an exceptional case where the survival of the rule of law itself was threatened because their role as the ultimate guardians of it was being removed from them".

The expression "if it ain't broke, don't fix it" typifies the spirit of English pragmatism and those interested in constitutional theory would be well advised to keep it in mind. However, as recent controversy about privacy shows, unanswered constitutional questions have a habit of rising to the surface at an inconvenient moment. Perhaps an even better maxim in constitutional affairs might be: "If it is about to break, that may be the best time to fix it." NLJ

Stephen Hockman QC, 6 Pump Court. Website: *www.6pumpcourt.co.uk.*
This is Stephen's third article on the controversy of privacy, Parliament & the courts. (See NLJ, 27 May 2011, p 719; 29 July 2011, p 1039)

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