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## The Coalition and the Constitution

Martin Loughlin and Cal Viney

On 12 May 2010, after five days of negotiations following the general election, the Conservatives and Liberal Democrats published a *Coalition Agreement for Stability and Reform*.<sup>1</sup> Since many conventional practices of governing, especially relating to Cabinet government and collective responsibility, have evolved in the context of single party majority governments, the formation of a coalition government, the first in peacetime since the 1930s, might itself be viewed a constitutional innovation. But of perhaps greater significance is the fact that the Liberal Democrats were unwilling to enter into coalition without a formal agreement being struck over certain measures of constitutional reform.<sup>2</sup> For the first time in modern political history a government of the United Kingdom was founded on a binding commitment to introduce a programme of constitutional reform.

The ambition underpinning this joint undertaking should not be underestimated. That the British constitution presents itself as a flexible scheme of institutional arrangements that has evolved from habitual practice, with many aspects of this scheme being susceptible to change through the ordinary processes of legislation, is widely understood. But there is considerable distance between conservative and liberal philosophies of government. Conservatives believe that political values emerge from a tradition of civility, whereas liberals place greater faith in the power of reason; conservatives regard law, whether in the form of judicial precedent or enacted legislation, as codified social practice, whereas for liberals law specifies general standards of right conduct; conservatives believe that good government rests on an elite conscious of its responsibilities, whereas liberals, being suspicious of all power-holders, advocate the need for formal institutional limitations on the exercise of all aspects of governmental

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<sup>1</sup> *Coalition Agreement for Stability and Reform* (Cabinet Office, May 2010), <<https://www.gov.uk/government/publications/the-coalition-documentation>>.

<sup>2</sup> David Laws, *22 Days in May: The Birth of the Lib Dem-Conservative Coalition* (London: Biteback, 2010), esp. 298-9, 319-20; Rob Wilson, *5 Days to Power: The Journey to Coalition Britain* (London: Biteback, 2010), 160: 'the Lib Dem strategy was simple: focus on getting the constitutional package they wanted (specifically voting reform), and don't waste political capital elsewhere that might distract matters.'

power. The Conservatives are a unionist party who believe in strong government formed on a simple majority principle reflected through the institution of a sovereign Parliament. The Liberal Democrats, by contrast, advocate a federal principle of sharing power across the various levels of government and legitimated by elections based on proportional representation.

There is no denying the fact that the main impetus for coalition was the need to agree an austerity programme in the face of the financial crisis, and on these matters the two parties were not so far apart.<sup>3</sup> But the critical issue on which the formation of the coalition rested was that of constitutional reform and on this, and notwithstanding a degree of overlap of policies, the distance between the parties was considerable. These differences were resolved and formally agreed in the Coalition Government's programme for constitutional reform. In this chapter, we briefly consider how their manifesto commitments were converted into a programme for government.<sup>4</sup> We then examine the main initiatives taken to implement that programme and finally try to draw some general conclusions about this experience.

### **From manifesto commitments to programme for government**

Although the Liberal Democrat demand for electoral reform was the pivot on which the post-election negotiating process revolved, each of the parties included in their election manifestos a package of commitments on constitutional reform. Of these, not surprisingly, the Liberal Democrat policies were the more radical.

The Liberal Democrat manifesto had proposed the introduction of a proportional voting system (with a preference for a Single Transferable Vote (STV)), a consequential reduction in the number of MPs in the Commons to 500, the lowering of the voting age to 16, the establishment of fixed-term parliaments, and the replacement of the House of Lords with 'a fully-elected second chamber with considerably fewer members than the current House'.<sup>5</sup> They also advocated further empowerment of the Scottish Parliament and a significant extension of the powers of the Welsh National Assembly, so it could become 'a true Welsh Parliament'.<sup>6</sup> Most strikingly, the Liberal

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<sup>3</sup> This is especially so given the influence within the Liberal Democrat leadership of the so-called 'Orange Book' faction: see Paul Marshall and David Laws (eds.), *The Orange Book: Reclaiming Liberalism* (London: Profile Books, 2004).

<sup>4</sup> For more detailed background see Finn, Ch.1 of this volume.

<sup>5</sup> Liberal Democrats, *Liberal Democrat Manifesto 2010* (Liberal Democrats, 2010), 88.

<sup>6</sup> *Ibid.* 92.

Democrats pledged to draft a written constitution for Britain, one that might be developed in a citizens' convention and confirmed through a referendum.<sup>7</sup>

The recurrent theme is a desire to strengthen the principle of popular sovereignty. This is exhibited in their policies of involving citizens in constitutional forums and specifically in their advocacy of the use of referendums to legitimate certain constitutional reforms. Consequently, they also committed themselves to 'an in/out referendum the next time a British government signs up for fundamental change in the relationship between the UK and the EU'.<sup>8</sup> The Liberal Democrats presented themselves as 'the only party which believes in radical political reform to reinvent the way our country is run and put power back where it belongs: into the hands of people'.<sup>9</sup>

Though less radical, the Conservative party manifesto also contained proposals for constitutional change. It promised that a Conservative government would 'equalise the size of constituency electorates' so as to ensure that 'every vote will have equal value', though it remained convinced of the need to retain 'the first-past-the-post system for Westminster elections because it gives voters the chance to kick out a government they are fed up with'.<sup>10</sup> It pledged to 'work to build a consensus for a mainly-elected second chamber to replace the current House of Lords'.<sup>11</sup> And it stated that 'we will not stand in the way of the referendum on further legislative powers requested by the Welsh Assembly'.<sup>12</sup> But the manifesto also expressed the convictions of a party wedded to the union and parliamentary sovereignty. So although reference was made to possible further devolution of powers to Scotland, it reiterated the point that 'the Conservative Party is passionate about the Union and ... will never do anything to put it at risk'.<sup>13</sup> Similarly, with respect to relations with the European Union, they pledged to 'introduce a United Kingdom Sovereignty Bill to make it clear that ultimate authority stays in this country, in our Parliament' and 'to amend the European Communities Act 1972 to ensure that there could be no further transfers of powers or competences to the EU without a referendum first being held'.<sup>14</sup>

After the electoral results yielded no overall majority, intense negotiations commenced. Superficially, there was significant overlap in their respective agendas for

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<sup>7</sup> Ibid. 88.

<sup>8</sup> Ibid. 66.

<sup>9</sup> Ibid. 87.

<sup>10</sup> Conservative Party, *Invitation to Join the Government of Britain: The Conservative Manifesto 2010* (Conservative Party, April 2010), 67.

<sup>11</sup> Ibid. 67.

<sup>12</sup> Ibid. 83.

<sup>13</sup> Ibid. 83.

<sup>14</sup> Ibid. 114, 113.

constitutional change, especially on further devolution, on House of Lords reform, the use of referendums to decide on the UK's position in the EU, and on a commitment to some form of electoral reform. The glaring difference was over the prospect of moving from a first-past-the-post system to a system of proportional representation. This became the main issue on which the prospect of coalition revolved. The bottom line was that the Liberal Democrats insisted that without the promise of a referendum to be held no later than June 2011 to give the British people the choice of on the adoption of a 'fairer voting system' no deal would be possible.<sup>15</sup> The Conservatives quickly recognized that a referendum on the Alternative Vote system (the only move from a simple majority they were prepared to contemplate) 'was the deal maker or the deal breaker',<sup>16</sup> and on this they sought and obtained parliamentary party support. They therefore were able to offer to introduce a whipped government Bill for a referendum on AV, though it was accepted that party members would remain free to campaign for or against the AV proposal.<sup>17</sup>

The Coalition Agreement of 12 May laid out the general terms, but it was the policy document released on 20 May 2010, entitled *The Coalition: Our Programme for Government*, that specified in more detail the package of reforms to be introduced.<sup>18</sup> This document superseded the party manifestos and in certain cases directly contradicted their proposals; although it became the key policy framework document of the government, it had not acquired its mandate from the electorate. The word 'constitution' is never mentioned in its 31 sections, with the main proposals for change coming in section 24, headed 'political reform'. This opened with a dramatic statement: 'The Government believes that our political system is broken'.

One consequence of the formation of the Coalition Government is that certain adjustments to standard operating procedures were required. Some of these had been contemplated in advance. In February 2010, for example, PM Gordon Brown tasked Sir Gus O'Donnell, the Cabinet Secretary, with producing a Cabinet Manual, specifying the rules and practices of Cabinet government, and this document included a section on

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<sup>15</sup> David Laws, above n.2, 320.

<sup>16</sup> William Hague MP (lead negotiator on the Conservative team), Interview in BBC2 Documentary, *5 Days that Changed Britain* (BBC2, 2010).

<sup>17</sup> Wilson, above n.2, 220-222; Laws, above n.2, 299.

<sup>18</sup> *The Coalition: Our Programme for Government*, (Cabinet Office, May 2010)  
<<https://www.gov.uk/government/publications/the-coalition-documentation>>

procedures to be followed in the event of a hung parliament.<sup>19</sup> Further, recognizing that the principle of collective responsibility might be strained, the *Programme for Government* also identified five issues on which the parties could agree to differ: in addition to the AV proposal, these were university tuition fees, renewal of Trident, nuclear power, and provision for a tax allowance for married couples. The main implications of this modification were addressed in a third document, published on 21 May, which specified the procedures and principles on which the parties ‘would jointly maintain in office Her Majesty’s Government’.<sup>20</sup>

This third document claimed that there is ‘no constitutional difference between a Coalition Government and a single party Government’ and that it was mere working practices that need adapting. It stated that government appointments would be allocated between the parties on a roughly proportionate basis, and would be agreed between David Cameron, as Prime Minister (PM), and Nick Clegg, as his Deputy (DPM). All Cabinet committees were to include representation from each party. It was also intended that a new Cabinet committee, the Coalition Committee, would be established to manage coalition issues but in practice this formal committee hardly ever met. Its role was taken over by an informal body that had not been contemplated in coalition negotiations. Called ‘the Quad’, the name given to regular meetings between the PM, DPM, Chancellor of the Exchequer and Chief Secretary to the Treasury, this body operated in effect as an inner Cabinet.<sup>21</sup>

It might be noted finally that as DPM Nick Clegg chose not to head a department and instead defined his role as having oversight across government. Crucially, Clegg assumed control of the constitutional reform programme and, since he was based in the Cabinet Office, eighty staff from the Constitution Directorate in the Ministry of Justice were reassigned to his office to offer official support for the delivery of that programme.<sup>22</sup> We now turn to consider the implementation of this programme.

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<sup>19</sup> Sir Gus O’Donnell, *The Cabinet Manual – Draft: A guide to laws, conventions and rules on the operation of government* (Cabinet Office 2010). For analysis see Vernon Bogdanor, *The Coalition and the Constitution* (Oxford: Hart, 2011), 11–24.

<sup>20</sup> *Coalition Agreement for Stability and Reform* (May 2010), Introduction:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78978/coalition-agreement-may-2010\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78978/coalition-agreement-may-2010_0.pdf)

<sup>21</sup> For analysis of the functioning of cabinet government under the Coalition see Robert Hazell and Ben Yong, *The Politics of Coalition: How the Conservative- Liberal Democrat Government Works* (Oxford: Hart, 2012), ch.4 [see Riddell, Ch. 4 of this volume]

<sup>22</sup> Hazell and Yong, *ibid.* 157.

## Fixed Term Parliaments

According to the Septennial Act 1715, as amended by the Parliament Act 1911, if a Parliament was not dissolved in the period up to five years after the day it is summoned to meet it automatically expires. Earlier dissolutions were within the Crown's prerogative power and by convention were exercised on the advice of the PM. Many felt that this power of the incumbent PM effectively to determine the date of the next election gave the governing party a strategic political and electoral advantage.<sup>23</sup> The Liberal Democrats, though not the Conservatives, had long opposed the maintenance of this power. But a reform proposal was agreed relatively amicably between the parties,<sup>24</sup> with the Coalition Agreement providing for the establishment of five-year fixed-term parliaments.<sup>25</sup> This required the repeal of the earlier legislation and modification of the prerogative power of dissolution and its replacement with powers vested in the House of Commons.

This reform was implemented in the Fixed Term Parliaments Act 2011. Introduced in the House of Commons in July 2010, the Bill was the subject of critical reports from three select committees.<sup>26</sup> Despite the Coalition Agreement, it faced intense opposition from some Conservative backbenchers in the Commons and also in the Lords where Labour peers argued that the appropriate term was four rather than five years. Yet it survived unscathed and actualized several constitutional reforms.

First, it fixed the date of the next general election as 7 May 2015 (s.1(2)). It also fixed the date of each following general parliamentary election as the first Thursday in May five years from the date of the previous election (s.1(3)). This means that even if a Parliament does not reach its full five-year term (under provisions set out below), the period is reset with each new Parliament being accorded a new fixed five-year term. Provision is made for the PM to extend the period by a further two months, but this is

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<sup>23</sup> On whether it has in fact done so, see Bogdanor, above n.19, 114-5.

<sup>24</sup> Although the Conservative party manifesto was silent on fixed term parliaments, in 2009 David Cameron had stated that the Conservatives would 'seriously consider the option of fixed-term parliaments when there's a majority government': David Cameron, 'A New Politics: Electoral Reform' (Guardian, 25 May 2009) < <http://www.theguardian.com/commentisfree/2009/may/25/david-cameron-a-new-politics1> >. The Labour party, it might be noted, also supported the establishment of fixed-term parliaments in its 2010 manifesto.

<sup>25</sup> *The Coalition: Our Programme For Government*, 26.

<sup>26</sup> Political and Constitutional Reform Committee, *Fixed Term Parliaments Bill, Second Report of Session 2010-11* (House of Commons, 9 September 2010); Government response, (Cm 7951, November 2010); House of Lords Constitution Committee, *Fixed Terms Parliament Bill Report* (8<sup>th</sup> Report of Session 2010-11, Paper 69, 16 Dec. 2010); Government response, (Cm 8011, 28 Feb 2011); Delegated Powers and Regulatory Reform Committee, *10<sup>th</sup> Report of Session 2010-11* (HL Paper 100, 10 Feb. 2011).

achieved by introducing a statutory instrument subject to the affirmative resolution procedure in both the Lords and the Commons (s.1(5)-(7)).

The Act is in a sense mis-named since it also makes provision for the holding of an early general election. This can be achieved either by the House of Commons passing such a motion with a two-thirds majority in favour of an early election (s.2(1)),<sup>27</sup> or passing a motion, by simple majority, that the 'House has no confidence in Her Majesty's Government' (s.2(4)). In the latter case, an early election must take place unless within 14 days a subsequent motion of confidence in a Government is passed (s.2(3)). This provides for the possibility of a new Government being formed within that period. With respect to these early triggering mechanisms, the election date remains set by royal proclamation on the advice of the Prime Minister (s.2(7)). Dissolution of Parliament will then occur seventeen working days before that date (s.3(1)).

Given the provisions that make it clear that 'Parliament can not otherwise be dissolved' (s.3(2)), the 2011 Act shifts the UK's constitutional position from one in which the power of dissolution of Parliament involves the exercise of a Crown prerogative to one in which the House of Commons asserts the power to dissolve itself.<sup>28</sup> It is not self-evident that an arrangement that fixes in advance a five-year term of a parliament will always be beneficial; governments often run out of initiative and live on beyond their 'natural' term. But although the Liberal Democrats considered the reform a corollary of a scheme of proportional election and a Parliament with a multiplicity of parties, it might be noted that the immediate motivation was not constitutional but political: it was designed to protect the minority coalition party from the possibility of the PM using this power to dissolve Parliament at a time that might advance the dominant Conservative party's electoral interest.<sup>29</sup>

From a constitutional perspective, Vernon Bogdanor has argued that the reform exhibits a tension between the principles of parliamentary government and popular government. Once we enter an era of multi-party politics, 'the fact that a government enjoys the support of parliament does not necessarily mean that it is acting in accordance with democratic principles'. That is, a coalition formed after the election (and therefore

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<sup>27</sup> The Coalition Agreement had provided that dissolution could occur if 55 per cent. or more of the House votes in favour. This was criticized as a political fix since a subsequent Labour/Lib Dem agreement could command the support of only 53% of MPS, whereas the Conservative/Lib Dem coalition constitutes 58%. The two-thirds threshold thus requires cross-party agreement.

<sup>28</sup> It might be noted that, although the proposal was contained in the Coalition Agreement, because the Bill was being promoted by the DPM, civil servants felt it necessary to brief the PM separately about the amount of power the PM was relinquishing: see Hazell and Yong, above n.21, 163.

<sup>29</sup> Laws, above n.2, 184.



one which voters have not had the opportunity to endorse) or an adjustment in coalition partners during a parliamentary term may uphold the principle of parliamentary government but not that of popular government. And a rule that makes early dissolution more difficult may promote parliamentary deal-making and be ‘deleterious because it makes an appeal to the people more difficult’.<sup>30</sup> In the words of a former French Prime Minister, the ability to dissolve ‘is not a menace to universal suffrage, but its safeguard’.<sup>31</sup> In short, the reform does not intrinsically support the principle of popular sovereignty.

### **Voting Reform**

Prior to the general election the Conservatives were stridently opposed to any change to the first-past-the-post voting system. The Liberal Democrats by contrast had expressed their intention to ‘change politics and abolish safe seats by introducing a fair, more proportional voting system for MPs’, with a preference for STV.<sup>32</sup> Neither party manifesto had mentioned holding a referendum on the issue. As we have indicated, this became the critical issue on which the coalition agreement revolved.

The deal, as stated in the Coalition Agreement, was that the Government ‘will bring forward a Referendum Bill on electoral reform, which includes provision for the introduction of the Alternative Vote’. Both Parliamentary parties in both Houses would be whipped to support the Bill, though ‘without prejudice to the positions parties will take during such a referendum’.<sup>33</sup> This compromise left the parties in the position of bringing forward a major change that neither truly favoured. Indeed, the proposal to hold a referendum on the adoption of AV had first been included in the Labour government’s Constitutional Reform and Governance Bill of 2010, though this had foundered owing to lack of parliamentary time. This proposal nevertheless offered the best chance for Liberal Democrats to achieve a change in a voting mechanism that bolstered the two party system.

The Bill to authorise the referendum was introduced very swiftly on 22 July 2010, only ten weeks after the formation of the Government and without any prior White Paper or consultation period and without much Cabinet committee discussion.<sup>34</sup> The Government had aimed to ensure maximum cross-party support by incorporating the

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<sup>30</sup> Bogdanor, above n.19, 121.

<sup>31</sup> Pierre Waldeck-Rousseau (1902): cited in Bogdanor, *ibid*.

<sup>32</sup> Liberal Democrat Manifesto, above n.5, 87-88.

<sup>33</sup> *The Coalition: Our Programme For Government*, above n.18, 27.

<sup>34</sup> Hazell and Yong, above n.21, 160.

referendum proposal together with the proposal to reduce and equalise parliamentary constituencies as two parts of the same Bill. This Bill was tightly whipped, generating considerable backbench resentment. It too was the subject of three reports from parliamentary committees, which were critical of the tight timetable and lack of consultation.<sup>35</sup> And it emerged unscathed as the Parliamentary Voting System and Constituencies Act 2011 (PVSC). The process offers a clear illustration of how a central plank of the coalition's programme had, for vital political reasons, to be railroaded through Parliament.

Part I of the PVSC Act provided for the 2015 general election to operate on the AV, so long as that voting system was supported at a referendum to be held on 5 May 2011 (s.8(1),(2)).<sup>36</sup> But the Act also linked the commencement of the AV provisions to the measures for constituency equalization in Part II (and examined below). This meant that AV would not become operational until the equalization measures had been introduced (s.8(1)(b)). By contrast, the equalization arrangements could take effect even if the AV referendum failed.

The proposed AV reform was intended to shift from the current system, in which the candidate who achieves the highest number of votes wins, to what is technically an optional preferential system. This gives electors the option to place numbers in order of preference against the names of some or all of the candidates, with the candidate with the fewest number of first preferences being eliminated and their ballots reallocated by preference and the process repeated until one candidate has more votes than the other remaining candidates put together (s.9).

The precise question to be determined by the AV referendum had not been resolved in coalition negotiations and the question proposed on the Bill's publication was subsequently amended after referral to the Electoral Commission.<sup>37</sup> The question to the electorate on 5 May 2011, in the UK's first binding referendum, read: 'At present, the UK uses the "first-past-the-post" system to elect MPs to the House of Commons. Should the "alternative vote" system be used instead?' The answer given by the electorate was overwhelmingly negative. On a turnout of 42.2%, 67.9% voted against change, with

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<sup>35</sup> Political and Constitutional Reform Committee, Session 2010-11, *Parliamentary Voting Systems and Constituencies Bill*, HC 437; Welsh Affairs Committee, Session 2010-11, *The Implications for Wales of the Government's Proposals on Constitutional Reform*, HC 495; Select Committee on the Constitution, Session 2010-11, *Parliamentary Voting Systems and Constituencies Bill: Report*, HL 58.

<sup>36</sup> In this respect it differed from the earlier proposal in the Labour government's bill, which provided for a consultative pre-legislative referendum.

<sup>37</sup> Electoral Commission, *Referendum on the UK Parliamentary Voting System: Report of views of the Electoral Commission on the proposed referendum question* (Electoral Commission, 2010).

only 32.1% voting in favour.<sup>38</sup>

The impact of this result was profound. AV may not have been the chosen system of the Liberal Democrats but it had become the centrepiece of the Coalition Agreement and they no doubt hoped that, once adopted, it might open the way to further voting reform. In reality, the outcome has knocked back any possibility of Westminster voting reform for the foreseeable future. Since they had been warned that the referendum could not be won without an extended period of public deliberation,<sup>39</sup> the Liberal Democrats must take responsibility for trying to push through an important item of constitutional business so quickly. This failure also had a major impact on coalition dynamics. That the coalition partners had openly and aggressively campaigned on opposite sides created severe strains. The subsequent Liberal Democrat inquiry attached major responsibility to ‘the Conservatives’ desire to win at all costs’ and their belief that ‘the Tory leadership clearly decided their party unity was a higher priority than Coalition harmony’.<sup>40</sup> The episode damaged relations between the coalition partners and had a significant impact on the subsequent implementation of the constitutional reform programme.

### **Constituency Reform**

The impact of damaged coalition relations was eventually to be felt with respect to the implementation of Part II of the PVSC Act. As indicated, Part II had provided for a reduction in the number of seats in the Commons from 650 to 600 (s.11). This reduction, which also required each constituency to be not less than 95% and not more than 105% of the UK electoral quota (s.11(2)), was to be put into effect through a boundary review. Consequently, the Welsh, Scottish, Northern Ireland and England Boundary Commissions had been required to issue their first periodic report by 1 October 2013 and thereafter to report every five years (s.10(3)). This tight initial timetable was determined by the objective of bringing about the reduction in constituencies in time for the 2015 election.

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<sup>38</sup> For details see: Electoral Commission, *Referendum on the Voting System for UK Parliamentary Elections: Report on the May 2011 Referendum* (Electoral Commission, October 2011). For analysis see Curtice, Ch. 19 of this volume.

<sup>39</sup> Hazell and Yong, above n.21, 162.

<sup>40</sup> James Gurling, *Liberal Democrats Consultative Session: Election Review* (Policy Unit, Liberal Democrats, August 2011), 7.

The justification for these reforms was that Commons membership had grown from 625 in 1950 to 650 by 2010, even though a number of devolved bodies had recently been established. Equalization of constituency size was touted as a democratic measure: one person, one vote of equal value. But the measure could have an impact on parliamentary business: reducing the number of MPs while retaining the number of Ministerial positions was likely to diminish the effectiveness of parliamentary scrutiny. Also, an arithmetical equality of constituency size might be achieved only at the cost of cutting across the natural boundaries of integrated local communities. What can be said with some certainty, however, is that equalization of constituencies would work to the Conservatives' political advantage.<sup>41</sup>

Such comments are, however, speculative since later political events came to render this component of constitutional reform impotent, at least as concerns the Coalition's first term. This is because in January 2013 Liberal Democrat peers supported a Labour amendment to the Government's Electoral Registration and Administration Bill, the effect of which was to defer the timetable for boundary reviews from 2013 to (at the earliest) 2018. The Conservatives sought to reverse this controversial interference by the Lords in electoral processes to the Commons, but were defeated by 334 to 292 in a Commons vote, with Liberal Democrat Ministers voting for the first time against their Conservative colleagues on a Government Bill. On 31 January, the Boundary Commissions consequently announced the cancellation of their 2013 review. It remains uncertain whether, and on what basis, the 2018 review will be conducted.

The cause of this split between coalition partners was not the delayed fallout of oppositional campaigning over the AV referendum. Rather, it was the result of the failure of the Liberal Democrats to gain Conservative support for reforms to the House of Lords which were introduced in 2012 (and which are considered below). The Liberal Democrats viewed the withdrawal of Conservative support for an elected upper house as amounting to a major breach of the Coalition Agreement. Maintaining that the proposals to alter the make-up of the Commons and the Lords were part of a common package of constitutional reforms advocated in the 2010 Agreement, they argued that the withdrawal of Conservative backbench support on Lords reform violated their Coalition commitments. With the Conservatives protesting that constituency and Lords reforms

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<sup>41</sup> See Bogdanor, above n.19, 84-9.

were separate issues,<sup>42</sup> this dispute exposed a major political fault line, one that was undermining the success of the Coalition's constitutional reform programme.

### House of Lords Reform

The status of a hereditary House of Lords has been highly contentious matter for over a century. The Preamble to the Parliament Act 1911, which removed the House Lords' power to veto legislation and replaced it with a power only to delay, had expressed a future intention to replace that chamber with one constituted on a popular basis. Yet until the end of the twentieth century no action had been taken to deliver on that pledge; instead the House had been able to acquire a second life by virtue of the Life Peerages Act 1958, which had the effect of giving party leaders the power to make patronage appointments. The House of Lords Act 1999, which removed the right of hereditary peers to sit and replaced it with an ability to elect ninety-two of their number to represent their interests in the House, was supposed to be the first step towards more comprehensive reform. But that initiative reached stalemate over questions of composition and mode of membership, and it was only with the formation of the Coalition Government that Lords reform was placed back on the agenda.

Both coalition parties committed themselves to bringing about reform, with the Conservatives pledging to 'work to build a consensus for a mainly-elected second chamber'<sup>43</sup> and the Liberal Democrats supporting the establishment of 'a fully-elected second chamber with considerably fewer members'.<sup>44</sup> There therefore appeared to be a clear consensus and this was reflected in the Coalition Agreement commitment to 'establish a committee to bring forward proposals for a wholly or mainly elected upper chamber on the basis of proportional representation'.<sup>45</sup>

Detailed proposals for reform, including a draft Bill, were published on 17 May 2011.<sup>46</sup> This provided for the establishment of a hybrid House of Lords with 300 members, 240 of whom would be elected and 60 appointed, with 12 Bishops sitting as ex-officio members. Elected members would serve for a 15 year term (ie three election

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<sup>42</sup> Lord Strathclyde, Leader of the House of Lords from 2010–13, went so far as to call the Liberal Democrat action to delay the boundary review as 'an outrage ... extraordinary behaviour': See 5th Report of Select Committee on the Constitution, Session 2013–14, *Constitutional Implications of Coalition Government* HL 130 (12 February 2014), para.71.

<sup>43</sup> Conservative Manifesto, above n.10, 67.

<sup>44</sup> Liberal Democrat Manifesto, above n.5, 88.

<sup>45</sup> *The Coalition: Our Programme For Government*, 27.

<sup>46</sup> *House of Lords Reform Draft Bill*, Cm 8077, May 2011.

cycles under the fixed-term parliament reforms) and would be elected by STV. Appointed members would be nominated by a Statutory Appointments Commission for recommendation by the PM for appointment by the Queen. In April 2012, the Joint Committee on House of Lords Reform reported on the proposed reforms.<sup>47</sup> It recommended that, although the proposed 80-20 split between elected and appointed members was appropriate, lowering the number of Lords to 300 was too drastic and a figure of 450 would be more appropriate. It also concluded that the Bill failed adequately to protect the primacy of the Commons and that 'in view of the significance of the constitutional change brought forward for an elected House of Lords, the Government should submit the decision to a referendum'.<sup>48</sup>

Following the Committee's report, a Bill was introduced in July 2012.<sup>49</sup> This included many of the reforms set out in the initial draft Bill. It provided for the creation of elected members, elected under a semi-open list system that would allow electors to vote either for a specific member or a party. Elected members would serve non-renewable 15 year terms. This reform was to be implemented through a gradual three-stage process which would move the House from an appointed to a predominantly elected chamber. In the first phase, 120 members would be elected and 30 appointed and they would serve alongside ministerial and transitional members; in the second electoral period, the total would increase to 240 elected members with 60 appointed members; and finally, in the third electoral period, there would be 360 elected members, 90 appointed members, and up to 12 Lords spiritual (combined with ministerial members, but including no further transitional members). Appointed members were to be recommended by a Statutory Appointments Commission. Reflecting concerns expressed in the Joint Committee Report on the issue of Commons' primacy, the Bill also provided that the Parliament Acts would apply to the reformed House of Lords.

The House of Lords Reform Bill had its second reading in the Commons on 9-10 July 2012. Although the Government won the second reading vote, more than 90 Conservative MPs voted against. Consequently, the Government did not move its programme motion, which meant that the Bill was not sent to committee. Instead, on 6 August, Nick Clegg announced that the Bill would not proceed further. On 3 September

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<sup>47</sup> Joint Committee on House of Lords Reform, *Draft House of Lords Reform Bill Report, Session 2010-12, Vol. 1*, HL 284-I, HC 1313-I (23 April 2012).

<sup>48</sup> *Ibid.* 108.

<sup>49</sup> House of Lords Reform Bill, HC Bill 52, Session 12-13.

2012 Clegg confirmed that it had been withdrawn.<sup>50</sup>

These developments caused understandable anger within Liberal Democrat ranks, with Clegg complaining that in the face of Manifesto commitments and the Coalition Agreement, and despite ‘painstaking efforts’ being made to construct a reform package that could elicit widespread support, Conservative backbenchers had united with Labour to block any further progress.<sup>51</sup> Claiming that their actions constituted a fundamental breach of the Coalition Agreement, he maintained that the Liberal Democrats would, as a consequence, withdraw their support for the equalization of constituencies’ legislation.<sup>52</sup> That pledge was made good in the following January when, as has been explained, the Liberal Democrats voted with Labour to scuttle the boundary review reporting date of 2013, thereby preventing the 2015 general election from being held according to the proposed new equalised constituencies.

After the failure of the Lords Reform Bill, the Political and Constitutional Reform Committee opened an enquiry that sought to ascertain whether a consensus might be reached on certain smaller-scale changes to the composition of the House of Lords. Its Report recommended a number of relatively minor changes, such as enacting powers to expel peers convicted of a serious offences and to remove persistent non-attendees.<sup>53</sup> But any hope of more basic reform to the second chamber seems presently to have evaporated. Meanwhile, contrary to the Coalition intention of reducing the size of the House of Lords, the PM has been very active in using his prerogative powers to appoint new peers. Having created 161 peerages overall by October 2013, Cameron has been creating new peerages at the fastest rate for at least 200 years.<sup>54</sup> At the same time, the Appointments Commission method of appointing ‘people’s peers’ seems to have run out of steam;<sup>55</sup> from an average rate of appointment of 5-6 per annum till 2010, it has

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<sup>50</sup> See Paul Bowers, *House of Lords Reform Bill 2012-13. Decision not to proceed: Commons Library Standard Note* (Parliament UK, SN06405, 25 Sept. 2012) < <http://www.parliament.uk/briefing-papers/SN06405>>.

<sup>51</sup> BBC News, ‘House of Lords Reform: Nick Clegg’s Statement in Full’ (BBC News online, 6 August 2012) < <http://www.bbc.co.uk/news/uk-politics-19146853>>

<sup>52</sup> BBC News, *ibid.*

<sup>53</sup> 9<sup>th</sup> Report of the House of Commons Political and Constitutional Reform Committee, Session 2013-14, *House of Lords Reform: What’s Next?* HC 251 (17 October 2013).

<sup>54</sup> See: David Beamish, *United Kingdom Peerage Creations 1801 to 2014: A list compiled by David Beamish* < <http://www.peerages.info/admintable.htm>>. Since October 2013, only one new peer had been created to July 2014, but on 8 August 2014 it was announced that 22 new peers would be appointed, taking the size of the House of Lords to almost 800 and making it, after China’s National People’s Congress, the largest legislative chamber in the world: see <http://www.bbc.co.uk/news/uk-politics-28703150>.

<sup>55</sup> The House of Lords Appointments Commission was established in 2000 as an advisory body to make recommendations to the PM for non-political nominations of people with a distinguished record of achievement and who would be able to make an effective contribution to the work of the House. See: House of Lords Appointments Commission: <http://lordsappointments.independent.gov.uk>.

since dropped off significantly and a rate of less than 2 pa.<sup>56</sup> Notwithstanding the high hopes expressed in the Coalition Agreement of bringing about fundamental reform to the second chamber, that prospect seems as far away as ever.

### **Sovereignty and the European Union**

The position of the UK within the EU is one on which the coalition partners fundamentally disagree. Liberal Democrats believe strongly in the value of the EU and of the UK's enhanced position within it, whereas most Conservatives harbour misgivings about UK membership.<sup>57</sup> Such opposed positions could be accommodated in the Coalition Agreement only because both sides believe that the UK's position within the EU should be managed through the use of referendums.

The Coalition Agreement maintained that any future treaty that transferred further competences to the EU would be subject to a referendum.<sup>58</sup> This was taken almost verbatim from the Conservative Manifesto.<sup>59</sup> But the Manifesto went further: it promised that 'a Conservative government would never take the UK into the Euro'<sup>60</sup> and proposed that since the 'steady and unaccountable intrusion of the European Union into almost every aspect of our lives has gone too far', they would 'make it clear that ultimate authority stays in this country, in our Parliament'.<sup>61</sup>

The Liberal Democrat Manifesto, by contrast, had expressed the conviction that 'it is in Britain's long-term interest to be part of the euro', although it was recognized that 'Britain should only join when the economic conditions are right, and in the present economic situation, they are not'. It also accepted that 'Britain should join the euro only if that decision were supported by the people of Britain in a referendum'.<sup>62</sup> More generally, the Liberal Democrats maintained that since 'the European Union has evolved significantly since the last public vote on membership over thirty years ago', they are 'committed to an in/out referendum the next time a British government signs up for

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<sup>56</sup> Ibid. <<http://lordsappointments.independent.gov.uk/appointments-so-far.aspx>>

<sup>57</sup> For details on coalition dynamics over the EU see Smith, Ch.12 of this volume.

<sup>58</sup> *The Coalition: Our Programme For Government*, above n.18, 19.

<sup>59</sup> This reflected the position taken by David Cameron in 2009, when he stated that the Lisbon Treaty should not have been ratified without a referendum being held in the UK and pledged that 'never again should it be possible for a British government to transfer power to the EU without the say of the British people': 'Full text: Cameron speech on EU' (BBC News, 4 Nov. 2009) <<http://news.bbc.co.uk/1/hi/8343145.stm>>

<sup>60</sup> Conservative Manifesto, above n.10, 113.

<sup>61</sup> Ibid. 114.

<sup>62</sup> Liberal Democrat Manifesto, above n.5, 67.



fundamental change in the relationship between the UK and the EU'.<sup>63</sup> The Coalition Agreement thus reflected the tone of the Conservative position, with consensus being reached only on the importance of giving the last word on any proposed change in the UK's position in Europe to a popular vote.

The Government gave effect to these provisions in the European Union Act 2011. This Act determines that any further transfers of competences to the EU cannot be realized simply by a vote in Parliament: they will also require affirmation in a referendum (ss.2-3). The Act then indicates the type of change needed to trigger a referendum. These include not only the conferral of a new competence or extension of an existing competence (s4), but extend to a broad range of other EU decisions, including the use of passerelle provisions under the Lisbon Treaty (eg, to alter a voting arrangement from unanimity to qualified majority vote)(s6). The Act also strengthens the parliamentary controls over approval of various EU decisions (ss7-10), but it is the so-called 'referendum lock' provisions that have engaged most constitutional interest. Since a referendum would be required only if a Government proposed supporting such treaty changes, there is a clear intention that the 2011 Act should bind the actions of future administrations.

The constitutional issues raised by the Bill were assessed in a report from the Select Committee on the Constitution.<sup>64</sup> Highlighting 'the complex and highly technical nature of the referendum lock provisions' and noting that the referendum requirements were 'wholly unprecedented in UK constitutional practice', the Committee questioned whether 'UK-wide referendums are a constitutionally appropriate and realistic mechanism in the case of many of the specified Treaty provisions'.<sup>65</sup> Recommending that if referendums are to be used they should be reserved for 'fundamental constitutional issues', the Committee concluded that, in specifying 'over 50 policy areas where a referendum would be or might be required', the EU Bill makes 'a radical step-change in the adoption of referendum provisions'; it applies to a wider range of issues than provided for by any other Member State and extends far beyond what might sensibly be regarded as a fundamental constitutional issue.<sup>66</sup>

The EU Act 2011 is a strange constitutional innovation. Since it remained entirely within the authority of the Coalition Government to reject any extension of EU

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<sup>63</sup> Ibid. 66.

<sup>64</sup> 13<sup>th</sup> Report of the Select Committee on the Constitution, Session 2010–11, *European Union Bill* HL 121 (17 March 2011).

<sup>65</sup> Ibid. paras 27, 28.

<sup>66</sup> Ibid. paras 30, 33, 37.

powers, the referendum lock seems redundant. Yet it raises the possibility of having to commit to a referendum over what might amount to a fairly technical extension of competence, such as a passerelle clause that alters EU voting rules. The prospect of having to hold a UK-wide referendum on a technical issue, at a cost of around £75m. and at considerable delay to the ratification process,<sup>67</sup> seems unlikely to endear the Government to voters, taxpayers or EU partners. And if it generates, as in all probability it would, a very low turnout, it is difficult to see how the referendum could be touted as a democratic measure.

The 2011 Act falls into the category of symbolic legislation: by establishing a mechanism which was designed not to be utilized for preventing any further transfer of powers to the EU, it provided a sop to Eurosceptic Conservative backbenchers. But it also came to be overtaken by events: in January 2013 David Cameron promised to hold an in-out referendum on UK membership of the EU, though one that would only be held in 2017 and after the next general election.<sup>68</sup>

### **Rights Protection**

The coalition parties had few difficulties in reaching agreement that ‘the British state has become too authoritarian’, that ‘over the past decade ... [it] has abused and eroded fundamental human freedoms’ and that there was a ‘need to restore the rights of individuals in the face of encroaching state power’.<sup>69</sup> But there was considerable ambivalence over the means by which this objective might be realized. In opposition, the Conservatives had advocated repeal of the Human Rights Act 1998 and its replacement with a British Bill of Rights,<sup>70</sup> and this commitment was included in their 2010 Manifesto.<sup>71</sup> The Liberal Democrats also supported the introduction of a Bill of Rights, though crucially this was to be part of a written constitution,<sup>72</sup> and their 2010 Manifesto

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<sup>67</sup> The Electoral Commission reported that the cost of holding the AV referendum in 2010 was £75.265m. and because it was held at the same time as several local elections across the UK, the cost represented a significant saving over that of a freestanding referendum: Electoral Commission, above n.38, at 8.

<sup>68</sup> David Cameron, ‘EU Speech at Bloomberg’ 23 January 2013:

<https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>.

<sup>69</sup> *The Coalition: Our Programme For Government*, above n.18, 11.

<sup>70</sup> David Cameron, ‘Balancing Freedom and Security: A Modern British Bill of Rights’, 26 June 2006; quoted in Alexander Horne and Lucinda Maer, *Background to proposals for a British Bill of Rights and Duties* (House of Commons Library, SN/PC/04559, Feb. 2009), 5.

<sup>71</sup> Conservative Manifesto, 79.

<sup>72</sup> Liberal Democrat Party Policy Paper, *For the People, By the People* (September 2007), as quoted in Horne and Maer, above n.70, 6.

promised to preserve and protect the Human Rights Act.<sup>73</sup> The Coalition Agreement expressed a compromise between these positions. It proposed the establishment of ‘a Commission to investigate the creation of a British Bill of Rights’, thereby reflecting the Conservative view. But the Agreement went on to state that this Bill of Rights will incorporate and build on the UK’s obligations under the European Convention on Human Rights, thereby adhering to the Liberal Democrat policy position.<sup>74</sup> Much would depend on the findings of the proposed Commission.

Given these differences, there was an understandable reluctance to press the issue, but in 2011 political controversy over human rights issues once again erupted. In response to a parliamentary question about rulings of the European Court of Human Rights on prisoner voting<sup>75</sup> and a Supreme Court ruling giving offenders the possibility of coming off the sex offenders register,<sup>76</sup> the Prime Minister stated that ‘a commission will be established imminently to look at a British Bill of Rights, because it is about time we ensured that decisions are made in this Parliament rather than in the courts’.<sup>77</sup> That Commission was established on 18 March 2011, but with the coalition parties each nominating four members, and with the Liberal Democrats proposing human rights advocates and the Conservatives proposing critics of the Human Rights Act, the task of the chair (Sir Leigh Lewis) was an unenviable one.

Rumours of tensions between the two groups of commissioners plagued its work and were confirmed when in March 2012 one of the Conservative nominees resigned, claiming that fellow commissioners were ‘ignoring the prime minister’s desire to reassert the sovereignty of Westminster over the European court’.<sup>78</sup> The Commission delivered its report to the DPM and the Justice Secretary in December 2012.<sup>79</sup> It is necessary only to peruse the conclusions, mostly divided into majority and minority positions, together with the eight personal views of individual commissioners which was appended to the report to get a sense of the failings of the Commission to reach any authoritative position on the key issues. The majority concluded that ‘on balance, there is a strong argument in

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<sup>73</sup> Liberal Democrat Manifesto, above n.5, 94.

<sup>74</sup> *The Coalition: Our Programme For Government*, above n.18, 11.

<sup>75</sup> *Hirst v UK (No.2)* (2005) ECHR 681; HC Debs vol. 523, col.493 (10 February 2011)

<sup>76</sup> *R (on the application of F) and Thompson v Home Secretary* [2010] UKSC 17.

<sup>77</sup> HC Debs vol 523, col. 955 (16 February 2011).

<sup>78</sup> Conal Urquhart, ‘Bill of rights commissioner resigns over bypass of Commons’ *The Guardian*, 11 March 2012: <http://www.theguardian.com/law/2012/mar/11/uk-bill-of-rights-kenneth-clarke>. Michael Pinto-Duschinsky, ‘Commission must not compromise by recommending bill identical to HRA’ *The Guardian*, 13 March 2012: <http://www.theguardian.com/law/2012/mar/13/bill-of-rights-commission-compromise-hra>.

<sup>79</sup> Commission on a Bill of Rights, *Report: A UK Bill of Rights? The Choice Before Us*. Vol. 1 (Commission on a Bill of Rights, 18 December 2012).

favour of a UK Bill of Rights'.<sup>80</sup> But this was rejected by a minority on the grounds, inter alia, that commissioners had been unable to come close to agreement on content and that the main object of many in the majority was to establish a Bill of Rights that would entail 'a reduction of rights' for some.<sup>81</sup> Even some of those in the majority complained that 'the key issue' to be addressed – activism in the European Court of Human Rights – had not been adequately considered.<sup>82</sup>

With such a polarization, it is clear that, other than providing a period of diversion, the Commission could never have achieved its aims. This may have suited the Conservatives whose stance on repeal of the Human Rights Act has hardened. Since the publication of the Report, Theresa May, the Home Secretary, has stated that the 2015 Conservative manifesto would pledge to repeal the Act,<sup>83</sup> and Chris Grayling, the Justice Secretary, has promised to publish draft legislation on the UK's relationship with the European Court of Human Rights.<sup>84</sup> Such statements reflect a widespread antipathy that Conservatives are expressing, not just on human rights protection but also on the growth of judicial review of governmental action more generally. The Justice Secretary's recent proposals to curb legal aid and judicial review<sup>85</sup> have led to widespread criticism,<sup>86</sup> including the claim that he may be in breach of his statutory duties to respect the rule of law and defend the independence of the judiciary.<sup>87</sup> This is a constitutional issue on which there remains a wide gulf between the positions of the Coalition partners.

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<sup>80</sup> Ibid. 176 (para.12.7).

<sup>81</sup> Baroness Kennedy and Philippe Sands, 'In Defence of Rights', *ibid.* 221-230, at 222, 227

<sup>82</sup> Lord Faulks and Jonathan Fisher, 'Unfinished Business', *ibid.* 182-190, at 182.

<sup>83</sup> David Barrett, 'Tory manifesto will promise to scrap Labour's Human Rights Act, says Theresa May' (The Telegraph, 30 Sept 2013) <<http://www.telegraph.co.uk/news/politics/conservative/10345499/Tory-manifesto-will-promise-to-scrap-Labours-Human-Rights-Act-says-Theresa-May.html>>.

<sup>84</sup> Chris Grayling, '2013 Conservative Party Conference Speech' <[http://www.conservativepartyconference.org.uk/Speeches/2013\\_Chris\\_Grayling.aspx](http://www.conservativepartyconference.org.uk/Speeches/2013_Chris_Grayling.aspx)>. This legislation had not appeared by July 2014: Owen Bowcott, 'Why are the Conservatives against the European court of human rights?' The Guardian, 17 July 2014: <http://www.theguardian.com/law/2014/jul/17/european-court-of-human-rights-explainer>.

<sup>85</sup> *Judicial review—proposals for further reform: the Government response* Cm 8811, February 2014.

<sup>86</sup> Ben Jaffey and Tom Hickman, 'Loading the Dice in Judicial Review: the Criminal Justice and Courts Bill 2014' *UK Const. Law Blog* (6 February 2014): <http://ukconstitutionallaw.org/2014/02/06/ben-jaffey-and-tom-hickman-loading-the-dice-in-judicial-review-the-criminal-justice-and-courts-bill-2014/>. See, eg, the caustic comments by Sir Stephen Sedley, 'Beware Kite Flyers' LRB, 12 Sept 2013: 'Since the mid-17th century, no non-lawyer has held the office of Lord Chancellor. The decision in 2012 to put a political enforcer, Chris Grayling, in charge of the legal system carried a calculated message: the rule of law was from now on, like everything else, going to be negotiable.'

<sup>87</sup> 13<sup>th</sup> Report of the Joint Committee on Human Rights, Session 13-14, *The implications for access to justice of the Government's proposals to reform judicial review*, HL Paper 174 HC 868, paras 18-23.

## Scotland and Wales in the United Kingdom

The Coalition Government pledged to effect ‘a fundamental shift of power from Westminster to people’<sup>88</sup> by giving new powers to local councils and local communities,<sup>89</sup> and to continue the process of devolving powers to Wales and Scotland.<sup>90</sup> With respect to Wales a referendum was held on giving greater legislative powers to the Welsh Assembly and, after a positive vote in 2011, those reforms were instituted.<sup>91</sup> In relation to Scotland, the Government introduced legislation to implement the Calman Commission’s proposals to extend the powers of the Scottish Parliament.<sup>92</sup> Because of the Sewel Convention, according to which Westminster would not legislate for Scottish devolved matters without the consent of Holyrood, the legislative process stretched over 18 months so as to permit both Parliaments concurrently to examine the Bill. This legislation, which extended the Scottish Parliament’s power to raise or lower income tax by 10p, gave it borrowing powers and devolved control of stamp duty and landfill tax revenues, was enacted as the Scotland Act 2012.

The 2012 Act, the main powers of which were not due to come into force until 2016, had already been overtaken by an important political event: in the election of 5 May 2011, the Scottish National Party was returned with overall majority (with 69 of the 129 seats) for the first time in the Scottish Parliament’s short history. Given the additional member system of proportional representation that had been adopted, this was a remarkable achievement. And because the SNP came to power with a promise to legislate to give the people of Scotland a referendum on Scottish independence, it had major constitutional implications.<sup>93</sup>

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<sup>88</sup> *The Coalition: Our Programme for Government*, above n.18, 11.

<sup>89</sup> See Travers, Ch. 7 of this volume.

<sup>90</sup> *The Coalition: Our Programme for Government*, above n.18, 28. See McGarvey, Ch. 3 of this volume.

<sup>91</sup> On 9 February 2010, Assembly Members voted in favour of a referendum on further law-making powers: the UK Government enacted legislation enabling a referendum to be held on 3 March 2011, which resulted in 63.5% voting in favour. The Assembly acquired its new powers on 5 May 2011 under the Government of Wales Act 2006, Pt.IV and Schedule 7. Further proposals to strengthen financial arrangements were made in the (Silk) Commission on Devolution in Wales, *Empowerment and Responsibility: Financial Powers to Strengthen Wales* (November 2012): <http://commissionondevolutioninwales.independent.gov.uk/files/2013/01/English-WEB-main-report1.pdf>.

<sup>92</sup> Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the Twenty-First Century* (Final Report, June 2009):

<http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009fbookmarked.pdf>

<sup>93</sup> While the proposal was hardly a consequence of the UK Coalition Government’s programme, the SNP majority was in many respects a consequence of the unpopularity of Coalition policies: whereas the Conservatives’ popular vote dropped and they lost two seats, the Liberal Democrats found that their share of the vote had halved and their representation was reduced from 17 MSPs to 5.

Given this clear mandate for a referendum on independence, the PM accepted the need to work constructively with Alex Salmond, Scotland's First Minister. These negotiations culminated in the Edinburgh Agreement. Signed on 15 October 2012, both Governments agreed that the referendum should 'have a clear legal base; be legislated for by the Scottish Parliament; be conducted so as to command the confidence of parliaments, governments and people; and deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect'.<sup>94</sup> Since the power to hold an independence referendum was beyond the power of the Scottish Parliament under the Scotland Act 1998,<sup>95</sup> it was agreed that an Order in Council would be passed under Section 30 of the 1998 Act. This authorized the Scottish Parliament to legislate on an independence referendum provided the poll would be held before the end of 2014 and that the ballot paper would give the voter a simple yes-no choice.

It was initially proposed that the referendum question should ask: 'Do you agree that Scotland should be an independent country?' But on referral to the Electoral Commission this formulation was criticized on grounds that the preface 'do you agree' made it a leading question. The Commission instead recommended: 'Should Scotland be an independent country?'<sup>96</sup> This formulation was adopted in the Scottish Independence Referendum Act 2013, which also set the date of the referendum for 18 September 2014.<sup>97</sup>

We cannot here explain the many complex issues raised by the prospect of Scottish independence. The issues were widely canvassed by the Scottish Government in its 670 page White Paper, *Scotland's Future*.<sup>98</sup> Some constitutional questions were relatively non-contentious: it was intended that Scotland would become a constitutional monarchy and retain a unicameral parliament on the basis already established, the outlines of which had been presented in a consultative draft Scottish Independent Bill in June 2014.<sup>99</sup> But

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<sup>94</sup> Edinburgh Agreement (15 October 2012) retrieved 19.11.13  
<<http://www.scotland.gov.uk/Resource/0040/00404789.pdf>>.

<sup>95</sup> The Scotland Act limits the legislative competence of the Scottish Parliament and sets out 'reserved matters' in relation to which the Parliament cannot make laws: s.29(2)). These specifically include aspects of the constitution that relate to the Union of the Kingdoms of Scotland and England: Schedule 5(1).

<sup>96</sup> Electoral Commission, *Referendum On Independence for Scotland: Advice of the Electoral Commission on the Proposed Referendum Question*, 33.

<sup>97</sup> See also the Scottish Independence Referendum (Franchise) Act 2013, which confirmed the franchise as the same as for local government elections, but extended it to include any person aged 16 who fitted the registration requirements.

<sup>98</sup> *Scotland's Future: Your Guide to an Independent Scotland* (Scottish Government, November 2013): <http://www.scotland.gov.uk/Resource/0043/00439021.pdf>

<sup>99</sup> *The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland* (Scottish Government, June 2014): <http://www.scotland.gov.uk/Resource/0045/00452762.pdf>

many major issues, including those concerning defence, security, EU membership and currency union, remained contentious throughout the campaign.<sup>100</sup>

On a turnout of around 85%, the referendum yielded a majority vote against independence (55.3% to 44.7%). That result, which led to the announcement of Alex Salmond's resignation as First Minister, does not mark the end of the constitutional question. On 5 August 2014 the three main UK parties had already issued a joint statement pledging to strengthen further the powers of the Scottish Parliament, especially in the areas of fiscal responsibility and social security.<sup>101</sup> It was therefore accepted that, in the event of a 'no' vote, the parties would propose the introduction of certain 'devo-plus' scheme.<sup>102</sup> It was anticipated that these would be presented in their 2015 election manifestos, but on 8 September, and with the unionist camp expressing concern about the growing strength of the independence campaign, former PM Gordon Brown announced an accelerated timetable that proposed the publication of draft legislation to achieve 'home rule' for Scotland by 25 January 2015.<sup>103</sup> This raises major constitutional questions because to this point devolution to Northern Ireland, Scotland and Wales has taken place with only the most marginal of adjustments to the Westminster system of parliamentary government. But the limits of incremental accommodation seems now to have been reached; any further devolution cannot sensibly take place without putting into question the foundation of the UK's entire constitutional architecture.

## Conclusion

In February 2014, the Select Committee on the Constitution, recognizing that hung parliaments are likely to occur more regularly, issued a report entitled *Constitutional Implications of Coalition Government*. Despite this broad title, their report was devoted mainly to the need to make certain relatively technical adjustments to conventional rules in order

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<sup>100</sup> The UK Government produced a series of documents over 2013-14 dealing with aspects of independence under the banner of Scotland Analysis. These were brought together in: *United Kingdom, United Future: Conclusions of the Scotland Analysis Programme*, Cm 8869 (June 2014).

<sup>101</sup> Labour List, 'Labour, Tories and Lib Dems join together to promise further devolution ahead of first independence TV debate', 5 August 2014: <http://labourlist.org/2014/08/labour-tories-and-lib-dems-join-together-to-promise-further-scottish-devolution-ahead-of-first-independence-tv-debate/>.

<sup>102</sup> See Iain McLean, Jim Gallagher and Guy Lodge, *Scotland's Choices: The Referendum and What Happens Afterwards* (Edinburgh: Edinburgh University Press, 2<sup>nd</sup> edn. 2014), ch.4. See also the (Strathclyde) *Report of the Commission on the Future Governance of Scotland* (Scottish Conservatives, 2014): [http://www.scottishconservatives.com/wordpress/wp-content/uploads/2014/06/Strathclyde\\_Commission\\_14.pdf](http://www.scottishconservatives.com/wordpress/wp-content/uploads/2014/06/Strathclyde_Commission_14.pdf).

<sup>103</sup> See: <http://www.telegraph.co.uk/news/uknews/scottish-independence/11082930/Gordon-Brown-unveils-cross-party-deal-on-Scottish-powers.html>.

to accommodate these changing political circumstances. These included instituting a 12-day gap between the election and the first meeting of new parliament, proposing that the PM remain in office until a new government is formed, and recommending that official support be given to parties involved in government formation negotiations.<sup>104</sup> It also reviewed the difficulties of maintaining the principle of collective responsibility under coalition arrangements and, highlighting the value of the convention, it recommended that in future a ‘proper process should be set in place to govern any setting aside’ of the convention.<sup>105</sup>

There are, however, certain broader constitutional implications that flow from the formation of coalitions between the parties. One obvious consequence is that it will be Parliament rather than the electorate that has the decisive role in determining who will form the government. Any programme for government negotiated between the parliamentary parties might deviate significantly from their manifestos and cannot easily be said to have a popular mandate. In addition, many of the commitments entered into by the parties under a coalition agreement are likely to be of vital significance for continued co-operation, so that, as we have seen, they will necessitate the quashing of any dissent through strong whipping of their parties in parliament. Coalition agreements can accordingly result in the displacement of parliamentary scrutiny of governmental measures. Coalitions are likely to operate in ways that strengthen parliamentary action vis-à-vis popular action, and governmental action vis-à-vis parliamentary action. As the experience of the 2010-15 Government shows, the structural logic of coalition governments may work contrary to the principles of open and popular government.

In this chapter, we have addressed a broader question than that of the impact of coalitions on the workings of the constitution. Our primary objective has been to examine and evaluate the achievements of the 2010-15 Coalition Government in delivering its programme of constitutional reform. The record is stark: no voting reform, no constituency equalization, no reform of the House of Lords, no use of the EU referendum lock provisions, and no reform or repeal of the Human Rights Act. The PM’s discretionary power to dissolve Parliament has been curbed, though it is not self-evident that the fixed term parliament reform will lead to an improvement in the British system of government. What is obvious is that it restricts the ability of governments to make what they conceive to be a timely appeal to the people. Finally, the Government has promoted further measures to devolve legislative powers to Wales and Scotland,

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<sup>104</sup> Select Committee on the Constitution, above n.42, paras 26, 31, 40.

<sup>105</sup> Ibid. para. 79.



though the Scottish independence referendum – triggered at least in part by the collapse of Liberal Democrat support in Scotland – has most certainly placed that settlement in question.

From the procedural perspective, the most distinctive feature of the Coalition Government's constitutional programme has been their promotion of referendums. Does this policy mark a shift from parliamentary to popular government? The question highlights the ambiguities of constitutional reform in the British tradition. If, as Thomas Paine famously remarked, 'the constitution of a country is not the act of its government, but of the people constituting a government',<sup>106</sup> how can governments legitimately reform the British constitution? One answer is that constitutional questions should be resolved by popular referendum. But there are difficulties. If they are constitutional mechanisms, then as the Select Committee on Constitution recommended,<sup>107</sup> referendums must be reserved for constitutional questions. If the procedure is not to be manipulated by governments, it must be triggered by the adoption of clear advance criteria for its use. And if the referendum is to perform that constitutional role, the issue must be of fundamental importance, such that it will engage the active interest of the general public. Without these principles for their use being instituted, the suspicion must remain that the growing interest in the device is a consequence of governments recognizing the potential of deploying populism as a tool of governmental policy.

Our conclusion, then, is that the experience of the 2010-15 Coalition Government highlights the dangers of a minority party seeking to use its leverage to bring about basic constitutional reform on matters for which there is no cross-party consensus. They may succeed in having those commitments recorded in a formal agreement but this cannot buck one of the most basic laws of parliamentary politics: that there exists a considerable gulf between promise and realization and without continuous active political support, both within Parliament and among the electorate, even the noblest of aspirations will count for little.

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<sup>106</sup> Thomas Paine, 'Rights of Man' in his *Rights of Man, Common Sense and other Political Writings* [1791] Mark Philp ed. (Oxford: Oxford University Press, 1995), 83-331, at 122.

<sup>107</sup> 12<sup>th</sup> Report of the Select Committee on the Constitution, Session 2009-10, *Referendums in the United Kingdom* HL 99.