Lords reform: the problem of piecemeal constitutional amendment

democraticaudit.com /2012/01/13/lords-reform-the-problem-of-piecemeal-constitutional-amendment/

By democraticaudit 2012-1-13

How far is it possible to carry out piecemeal reform of a constitution when we do not know and cannot agree on the rules governing such amendment, and are not even clear about the nature of the constitution in question? ***Andrew Blick*** *argues that the difficulties of affecting constitutional change in the UK are particularly acute when the object of change is the House of Lords.*

In most democracies – that is to say, in the overwhelming majority that have written constitutions – the main rules of governance are set out in a single document or set of interlinked documents (though how well they perform this task can vary). This text also includes certain requirements that must be fulfilled – such as legislative supermajorities and/or assent by the electorate through referendums – if it is to be amended.

In the UK – famously – we have no such provisions. The constitution is scattered across various Acts of Parliament, codes, judicial decisions and unwritten (and often contested) understandings. Alterations to it can be carried out in a wide variety of ways. Sometimes a referendum is deemed necessary; sometimes it happens with few outside the government knowing it has occurred. No clear, consistent system exists.

These peculiarities of the UK constitution are made apparent once again by a consideration the recently-published report by the Joint Committee on the Draft House of Lords Reform Bill.

To start with amendment procedures, the Joint Committee recommends that: 'in view of the significance of the constitutional change' entailed by introducing an elected component of the House of Lords 'the Government should submit the decision to a referendum'. The basic principle that the population should be consulted about changes to the fundamental system of government is reasonable (although referendums are not the only means by which constitutions are amended internationally). But no clear rule exists in the UK about when, precisely, constitutional

change invokes the need for a referendum, and therefore whether it applies to the Coalition proposals for the House of Lords, as asserted by the Joint Committee. The Human Rights Act 1998, the establishment of a UK Supreme Court under legislation passed in 2005, the introduction of fixed term parliaments in 2011 and indeed the removal of nearly all hereditary peers from the House of Lords in 1999 did not. Arguably, all of these changes were of comparable importance to those currently envisaged for the second chamber. On the other hand, under the European Union Act 2011, a relatively trivial transfer of power from UK to European Union level might require a referendum.

If we are looking for something close to an authoritative view on this matter, one place to turn is the House of Lords Select Committee on the Constitution, which in 2010 published a report on 'Referendums in the United Kingdom'. The report by the Lords Committee stated that 'if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues'. Note the wording: the Committee did not actually say that referendums should be used in such circumstances. And what was a 'fundamental' constitutional issue? The Committee did 'not believe that it is possible to provide a precise definition'. But it did produce a list of proposals which came within the category: abolition of the monarchy; departure from the European Union; secession from the United Kingdom by any of its component parts; changing the electoral system used for the House of Commons; the introduction of a written constitution; and a change in the currency used in the UK. The abolition of 'either House of Parliament' was also described as a 'fundamental constitutional issue'. But introducing elections for members of the Lords was not.

The Committee stressed 'This is not a definitive list of fundamental constitutional issues, nor is it intended to be.' Yet clearly the Committee had considered the issue of changes to the House of Lords, hence its inclusion of the abolition of either House on its list, and consciously opted not to include the introduction of an elected component to the second chamber. Though some giving evidence to the Joint Committee on the Draft House of Lords Reform Bill claimed the House of Lords Select Committee on the Constitution reference to 'fundamental' constitutional issues as supporting the case for a referendum on the present government proposals for the House of Lords, as has been shown, this proposition has to be qualified. Here is just one example of the lack of clarity surrounding constitutional change in the UK.

A second set of problems involve the affecting of incremental change to a constitution it is difficult to define in the first place. Much consideration has been given to the possible impact on the non-legal rules – or 'conventions' – regulating the relationship between Commons and Lords if the latter acquires a degree of new democratic legitimacy. But the Joint Committee report also identifies a possible issue for the statutory framework governing the interactions between the two chambers. Fundamental to this relationship, and ensuring the primacy of the Commons over Lords, is the Parliament Act 1911, as amended by the Parliament Act 1949. The central purpose of these acts is to enable the Commons ultimately to force through most bills to receive Royal Assent, even if they are resisted by the Lords.

The legal challenge to the Hunting Act 2004, which was implemented using the Parliament Acts, helped highlight the controversy which surrounds the Acts. During this case it became apparent that it is not clear what are the limits on the purposes for which the Commons – dominated by the government of the day – could use Parliament Act procedures. Could the procedures, for instance, be used to enact legislation severely undermining the rule of law that the Lords objected to? Might they be deployed to amend the Parliament Acts themselves, enabling a government to prolong its existence beyond five years in the face of Lords resistance? Or would the courts at some point step in to resist such perceived abuses?

During its investigations of the Draft Bill, the Joint Committee asked the Attorney General – the senior government legal adviser – to provide it with advice on whether the Parliament Acts procedures could be used to implement the present proposals for House of Lords reform. However the Attorney General 'declined' on the grounds that it was 'inappropriate for the Law Officer to advise Parliament on the Government's legislative programme'. This question, then, remains open, though my opinion is that while a legal challenge might be attempted to such a use of the Parliament Acts, it would not be successful.

Aside from the question of what are the limits on the Parliament Acts procedures, if enacted, the present plans for the Lords might raise issues of a different sort around the Acts. The Joint Committee took expert evidence to the effect that the Parliament Acts might no longer apply to the House of Lords if an elected component was introduced to it, since the 1911 Act was designed to apply to a different chamber than the one which would exist once it was mainly elected. Therefore, the reformed second chamber might not only have greater democratic legitimacy in asserting itself against the Commons, but the key statutory restraint upon its authority would no longer be applicable. The Joint Committee concluded that, if it wished to avoid this outcome, the government should specify in any bill for Lords reform that the Parliament Acts should still apply to the Lords.

In our full audit of United Kingdom democracy, we identify various ways in which constitutional reform in the UK, even when it is well-motivated and desirable, can – because of the nature of the constitutional system – have unforeseen and problematic consequences. Here are further examples of this tendency. It is a serious problem. If those responsible for working the constitution do not – or cannot – understand it (or, in the case of the Attorney General, are reluctant to tell), how can anyone else hope fully and meaningfully to engage in the UK political system?

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