

Reinventing Britain

Constitutional Change under New Labour

edited by

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Global, Area, and International Archive
University of California Press

BERKELEY LOS ANGELES LONDON

Contents

Foreword v
Lord Falconer of Thoroton

Preface vii
Andrew McDonald

Part I: The story

1 What happened next: constitutional change under New Labour 3
Andrew McDonald & Robert Hazell

Part II: Origins

2 Labour's conversion to constitutional reform 31
Peter Riddell

3 Socialism and democracy 55
Mark Bevir

4 Rights culture and constitutional reform 76
Joseph F. Fletcher

Part III: Process

5 How the reforms came about 103
Kenneth MacKenzie

Part IV: Meaning

6	Judicial reform: the emergence of the third branch of government <i>Kate Malleson</i>	133
7	A porous and pragmatic settlement: asymmetrical devolution and democratic constraint in Scotland and Wales <i>Ailsa Henderson</i>	151
8	Britain and Europe: a tale of two constitutions <i>Craig Parsons</i>	170
9	Constitutional reform and British political identity <i>Jack Citrin</i>	193
	About the contributors	219
	Notes	221
	Appendices	242
	Index	257

1

What happened next: constitutional change under New Labour

Andrew McDonald and Robert Hazell¹

The year 1997 has altered Britain for good: politically, institutionally and emotionally. Corrupt politicians were exposed. A Tory government was shattered at the election. A Labour government started to reform the constitution. One of the last remnants of Empire, Hong Kong, was handed back and Establishment figures cried. Then Diana – the mother of single mothers – died, and the country’s image changed as millions cried. Scotland embraced Home Rule and said it was willing to pay for it. Wales followed if only just – with significantly higher support for a Scottish-style parliament than the pup of an assembly on offer. Londoners will confirm that people like radical democracy. Labour and Liberal Democrats started to co-operate and consider proportional representation. British citizens, the term is starting to sound genuine, are to have their rights in court. And the government declared that it wanted the European single currency to succeed and Britain to join.

Anthony Barnett, *This Time: Our Constitutional Revolution*²

Just nine years after it was written, Anthony Barnett’s breathless attempt to capture the mood of 1997 already sounds like a period piece. The death of the Princess of Wales may have moved the nation to tears, but it was not the constitutional landmark his book claimed it to be. And few would suggest that Britain’s entry into the euro is now imminent. Instant history is a perilous business and it is now clear that some of Barnett’s observations were wide of the mark. But his basic contention has been confirmed: 1997 held out the prospect of profound constitutional change. This chapter will tell the tale of what happened next.

The central proposition of this chapter, indeed of this volume, is that the story of the last nine years is an extraordinary one. The British constitution has undergone the most radical change in eighty years: power has been devolved from Westminster, citizens have been able to take human rights cases to domestic courts for the first time and the country is to have a Supreme Court. Our purpose here is first to describe what has happened. Beyond that, we will assess the stability of the changes: have we witnessed irreversible changes and do they collectively represent a new constitutional settlement? We will not attempt to answer the question ‘Have they worked?’ because we cannot yet know what their full effect will be. But we will consider the further changes which may yet follow – either as a consequence of the reforms already made or to complete the agenda which Barnett described in 1997.

Most of the criticisms of the reform programme fall into two categories. The first charges that it is an exercise in vandalism, imperilling Britain’s historic constitution by means of piecemeal changes which have not been fully thought through. The second chides the government for a lack of radicalism and urges it on to even more fundamental change, preferably to be secured in a codified constitution. Neither charge is directly relevant to the task before us in this chapter, but we will consider whether the reforms may be regarded as a unified programme stemming from a single plan and we will show how Britain has been moving incrementally towards a codified constitution.

There is a third critique which addresses the governmental reforms more obliquely: it dismisses them by arguing that New Labour’s style of government has undermined them. To tackle this thesis properly one would have to determine whether the government’s policies and politics have been majoritarian in intent or impact, whether the conventions of Cabinet government have been eroded and whether its criminal justice and anti-terrorist legislation have weakened civil liberties. In short, one would have to assess the whole of the government’s record. Our objective here is more modest and our focus is more precise.

We will first provide a short narrative of the reforms, taking the story from New Labour’s landslide victory in May 1997 to the summer of 2006, early in its third term. The core of the chapter is a thematic analysis of the reforms. We conclude by drawing the themes together and by considering the future priorities of the programme.

What happened next

To appreciate fully the extent and pace of constitutional change from 1997, one needs three points of reference.

The first is Britain's record of constitutional reform over the twentieth century. From 1928, when the franchise was extended to women for the first time, until the Callaghan government of the 1970s, constitutional change did not occupy centre stage in British politics. The country's institutional architecture had been reshaped by the Parliament Act 1911 (which established the primacy of the Commons over the Lords); by the Anglo-Irish Treaty of 1921 (which divided the island of Ireland, creating the Irish Free State and leaving the six counties of the north as part of the UK); and by the introduction of mass suffrage in 1918–28. The subsequent decades did see further refinements to the suffrage, the introduction of life peers to the House of Lords and the curtailment of the Lords' powers to delay legislation. But governments did not seek to change the fundamental architecture of the state. This is not to say that the constitution did not change over this period. For example, the latter half of the century saw the development of extensive powers of judicial review and, in 1972, the introduction of a species of higher law with Britain's accession to the European Economic Community. But these were not the result of conscious, purposive action by the government to bring about constitutional change. Britain's entry into the EEC did have profound constitutional implications, but it was not conceived as an exercise in constitutional reform. The most radical constitutional bill brought before Parliament in the latter half of the century was the Callaghan government's Scotland and Wales Bill; and this ended in failure which, in turn, precipitated the fall of that administration in 1979.

The second reference point is the Labour–Liberal Democrat constitutional agreement of March 1997. The origins of Labour's conversion to the constitutional reform agenda are discussed more fully in Chapter 2 but for present purposes it is important to note that Labour had been in informal talks with the Liberal Democrats for the previous three years. This ultimately resulted in their agreement to co-operate after the general election on a common programme of constitutional renewal. This was remarkable in its ambition and range, taking in reform of the House of Lords, a referendum on proportional representation for Westminster, introduction of a domestic Bill of Rights and devolution to Scotland, Wales and London. The two parties affirmed their commitment to the programme – and where they had differences

(over the speed of movement on proportional representation and the pre-legislative referendum for Scottish devolution) these were side-stepped in the text. Appendix A catalogues the commitments made and shows how they were echoed (with a few exceptions) in New Labour's general election manifesto.

The third reference point is the mindset of the new government: it came to power determined to implement its programme. This, it might be observed, is true of any new administration. But there was a particular edge to New Labour's commitment. This was a party which had been out of power for eighteen years, which had wearied of the charges of betrayal which critics had levelled at the Wilson and Callaghan governments and whose leader had spoken often of the need for sustained achievement over two successive terms. The programme had been crafted accordingly: it was one which was intended to be delivered in its entirety. Some had criticised the manifesto's economic and social policies for lacking ambition and radicalism. Neither charge could fairly attach to the constitutional pledges and yet they, in common with the rest of the manifesto, were to be delivered come what may.

For all the detail in the cross-party agreement and in the manifesto, the programme began with that rarity in modern political life, a complete surprise. Within days of its election the new government announced that it would grant the Bank of England operational control over monetary policy. The government would establish a new accountability framework for the Bank and in future it would be the Bank's responsibility to take interest rate decisions and to hit an inflation target. The changes were to come into effect immediately but they were buttressed by statutory changes in the following year. At a stroke, the incoming Chancellor had surrendered political control of one of the principal tools of economic management.

This aside, the rest of the constitutional programme got off to a more predictable start. But the pace was extraordinary. Elected on 1 May, the government introduced the legislation for the Scottish and Welsh devolution referendums immediately after the Queen's Speech on 14 May. The bill was passed before the summer – and the referendums were both won in September. White Papers on the government's proposals for Scotland and Wales had been published in July; and the devolution legislation was passed before the end of the first session (a long session, running from May 1997 to November 1998). In all, twelve constitutional Bills were introduced in the first session, so that the European Convention on Human Rights was incorporated into domestic law, London was authorised to hold a referendum for an elected mayor and political parties were made subject to registration for the first time.

Despite this pace, the government still faced charges that it was dragging its feet. As early as May 1997 there was press criticism that freedom of information was not to come at the start of the programme. Some feared that the government would not stay the course; others (especially among the Liberal Democrats) wondered whether Labour was genuinely committed to delivering a more pluralist democracy. Devolution was known to be ‘unfinished business’ from the Callaghan government and Labour’s commitment to it was unshakeable, not least because it had been so closely identified with the last Labour leader, John Smith. But what of the rest of the agenda, with which many in the party felt less affinity?

The answer came over the next two parliamentary sessions. Having carried all before it in the first session, the Government met sterner opposition to its programme – and it began to make compromises which provoked criticism from some reformers. But the commitment to fulfil the manifesto pledges was unquestionable and it was clear that the government remained willing to spend political capital in doing so.

The toughest parliamentary challenge was always going to be Lords reform: one way or another the government had to fashion a majority for its proposals in the Upper House (where it was heavily outnumbered) or it would have to resort to use of the Parliament Act, a device which was both cumbersome and time-consuming. Ultimately it made progress through an extraordinary compromise deal with Lord Cranborne, Conservative leader in the Lords. This saved ninety-two hereditary peers pending the completion of the reform at a later date.³

Enthusiasts for voting reform gave a qualified welcome to the regional-list system which was to be used for future European Parliamentary elections.⁴ But they suspected that the government was at best lukewarm about the Jenkins committee’s report on proportional representation for Westminster. Jenkins reported in October 1998, recommending an alternative-vote system supplemented by a top-up list to deliver broad proportionality.

The government’s record on freedom of information also caused reformers disquiet. It did appear in the legislative programme in 1999 – but only after a draft Bill which was criticised as a pale shadow of the radical White Paper *Your Right to Know*, published in December 1997. The legislation was finally passed in 2000 but not without continued criticism that the government had lost its nerve, or had become too comfortable with the secrecy traditionally associated with Whitehall.

By the time of the 2001 general election Labour could fairly claim to have

implemented its manifesto commitments on constitutional reform (see Appendix A). Some of its reforms were more modest than reformers had hoped. For example, modernisation of the House of Commons had fallen short of its early promise and the regional chambers which were created to supervise regional government in England were no more than voluntary, non-statutory bodies. But the record of achievement against commitments was undeniable.

It was equally clear that much remained to be done. Lords reform had been begun but not completed and proportional representation for Westminster could not be ignored, even though Labour's relationship with the Liberal Democrats was now more tenuous than it had been in 1997. In its 2001 manifesto, Labour pledged broadly to implement the recommendations of the Wakeham commission on Lords reform. After the first phase of Lords reform, the government had referred the question of composition of the House to a Royal Commission chaired by Lord Wakeham. It reported in 2000, setting out a menu of options for the introduction of a minority of elected peers. On proportional representation meanwhile, the manifesto promised another review – this time of Jenkins and of the experience of the proportional representation systems which had been introduced for the devolved administrations and for the European Parliament.

Of the two, proportional representation was to present the government with fewer problems. A review was under way in government by the time of the 2005 general election, but it had received little attention and there was no move to a decision. By contrast, the spectacle of Lords reform was played out in public, to the government's evident exasperation. Faced with differences of view on its own benches as to the composition and powers of the Lords, the government sought to fashion a compromise which might secure enough support in both Houses. It failed. Its first attempt was the 2001 White Paper *Completing the Reform*, which proposed the removal of the remaining hereditary peers and the election of 20 per cent of the new House. Maximalists saw no reason to compromise: they continued to argue their case for a wholly elected House or for a wholly appointed one. And the remaining hereditary peers were unmoved: they argued that the 1999 deal allowed them to stay until Parliament approved a new, permanent basis for the second chamber and few were willing to concede that the government's proposals constituted that permanent solution. The next step on this journey was a series of votes in both Houses on the future composition of the Lords: of the seven options put to a vote in February 2003, none commanded a majority. It would have been hard to think

of a worse outcome for reformers (or for Parliament as a whole, which was seen to have mishandled the voting). Subsequently, the government sought to make progress where it could, bringing forward proposals later in 2003 to remove the remaining hereditary peers and to strengthen the Appointments Commission which had been introduced in Labour's first term to oversee the creation of crossbench peers. The argument about the interpretation of the 1999 deal was reignited and Lord Strathclyde, Cranborne's successor as Conservative leader, pledged determined opposition to the proposals. A Bill to give them effect was prepared but was dropped shortly before its intended introduction in March 2004. No further progress was made before the 2005 general election.

The government suffered a setback of a different sort over its plans for regional devolution within England. Its commitment to an elected tier of regional government had always been qualified: it would proceed if there was demand for it and it would test the demand by a referendum. Ultimately it chose to put the issue to the vote in just one region, the North-East, which was thought to have a strong sense of its own identity. In the all-postal ballot in November 2004 the proposal was rejected by almost 80 per cent of voters, on a turnout of 47.7 per cent. The government's proposals had been vulnerable to the charge that they would have changed little: the new assembly would have modest powers and its opponents successfully branded it a white elephant. In the event, the rejection was so decisive that it became clear that regional assemblies would not be put to a vote again in the foreseeable future. Instead, the government began to focus its energies on the renewal of local neighbourhoods, partly through a regeneration of local democracy.

The reform agenda in the 2001 parliament included a surprise every bit as remarkable as operational independence for the Bank of England. In appointing Lord Falconer to the office of Lord Chancellor in a ministerial reshuffle in June 2003, No. 10 issued a press notice announcing a new departure in constitutional reform. The office of Lord Chancellor was to be abolished, a new Supreme Court was to be established and a Judicial Appointments Commission was to have responsibility for the appointment of the judiciary in England and Wales. The proposals were welcomed by many reformers but they attracted fierce criticism for the manner of their announcement and for the failure to prepare the way for them. Consultation papers duly followed the announcement but goodwill had already been lost, a point subsequently acknowledged by the Prime Minister when before the Liaison Committee. The passage of the Constitutional Reform Bill – which embraced all three proposals – was troubled. Exceptionally, the Lords referred it to a select committee, arguing that this was necessary if the

measure was to attract the scrutiny it merited. Eventually, the Constitutional Reform Act was passed shortly before the 2005 election, much amended but securing the government's principal policy objectives.

In drafting its 2005 election manifesto Labour must have felt some sense of *déjà vu* when it came to its constitutional commitments. Its pledge on proportional representation – a review – echoed the wording of the 2001 manifesto. On Lords reform it placed a new emphasis on looking at the powers and the composition of the House in tandem; and it confirmed the Prime Minister's earlier commitment that there would be a free vote on the composition of the new House. But the manifesto was striking for three other themes. The first was the return of devolution. There were commitments to give the national assembly in Wales new powers; to review the powers of the London mayor and assembly; and to grant new powers to regional government in England. The second theme was a return to unfinished business from the March 1997 agreement with the Liberal Democrats, with a renewed commitment to a Commission on Human Rights.⁵ And the third was a new emphasis on boosting democratic participation.

By July 2006 the government had passed legislation on all three topics. The Government of Wales Act provides a new settlement for Wales (wholly replacing the 1998 Act), which will transfer primary legislative powers to Wales in three stages. The Equality Act creates a new combined Commission for Equality and Human Rights, which brings together the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. The Electoral Administration Act makes new provision for voter registration and tightens the regulation of political parties, in particular in declaring loans. Table 1.1 demonstrates that the pace of constitutional reform slowed after 1998, but it was clear from the start of Labour's third term that the government had yet to exhaust its constitutional agenda.

Making sense of it all

Before attempting a thematic analysis of the programme it is worth considering whether we are studying a programme at all. Does Labour's reform agenda constitute an integrated whole? The individual commitments arose from quite distinct origins – some old and some new. Devolution may have been unfinished business from the 1970s but it was also a political obligation for the party north of the border. Freedom of information was also a child of the 1970s,

having first made its bow in a manifesto in 1974 and dutifully putting in an appearance in every subsequent manifesto until it finally secured the limelight in 1997. Labour's wholehearted conversion to the incorporation of the European Convention on Human Rights happened in 1993, when John Smith was leader, and its more equivocal conversion to proportional representation had been hastened by the Labour–Liberal Democrat 'project' since 1994 – distinct commitments arising from quite different origins.

And once in office Labour was hesitant about drawing together the distinct strands into a single narrative. Bagehot in the *Economist* was one of many to observe that the government did not start its reform programme with a White Paper explaining what it was seeking to do.⁶ Lord Irvine of Lairg, Labour's first Lord Chancellor, could not see the point in doing so: the manifesto provided a clear prescription for Britain's ills and it was the government's job to make good its commitment to the electorate. The agenda was, he maintained, coherent but 'many elements of the package are not interdependent ... The strands do not spring from a single master plan, however much that concept might appeal to purists'.⁷ What mattered, he stressed – in a New Labour nostrum – was what worked. It was not until Lord Falconer's appointment as Lord Chancellor in June 2003 that the tone of the government's public presentation changed. Falconer has done more to explain the programme's common themes – in public lectures and in parliamentary debate.

And so we have a reform agenda which sprang from different origins, served different purposes and, in the early days of the government, was rarely explained as a whole. But Irvine's emphasis on the manifesto is relevant: it was the single document by which he steered the reform agenda in the first couple of years. Chapter 5 shows how this was effected in Whitehall: Irvine and the Cabinet Office Constitution Secretariat co-ordinated action – and kept the policy owners up to the mark. During the government's second term, constitutional policy responsibilities were consolidated in one department and a formal programme was established to take forward the development and the delivery of the reforms. But even if the means of delivery has varied over the lifetime of the government, the consistency of its focus on the agenda set out in 1997 is remarkable (see Appendix A). Some new themes have been introduced in response to later events; for example, the government's interest in democratic participation was sharpened by the 2001 general election, in which turnout fell to just 59 per cent. But these are exceptions to the rule: the policies which have been pursued determinedly since 1997 are essentially those set out in the 1997 manifesto.

Table 1.1: Constitutional statutes under New Labour, 1997–2006

This table includes measures deemed to be of some constitutional significance. There is inevitably some room for argument about what should be included and what should not. This table takes in the frequent adjustments of electoral legislation (some substantive, some more minor) and changes to rules regarding eligibility for membership of the Commons. Northern Irish constitutional legislation – of which there was plenty in this period – is not in this table because the focus of this chapter is Great Britain rather than the United Kingdom. The table includes legislation passed before the 2006 summer recess.

	Statute	Policy objective
1997	Referendum (Scotland and Wales) Act 1997	To authorise pre-legislative referendums in Scotland and Wales
1998	Scotland Act 1998	To establish Scottish Parliament
	Government of Wales Act 1998	To establish Welsh Assembly
	Human Rights Act 1998	To incorporate ECHR into UK law
	European Communities (Amendment) Act 1998	To incorporate Treaty of Amsterdam of October 1997
	Regional Development Agencies Act 1998	To establish regional development agencies and to designate regional chambers
	Bank of England Act 1998	Independence for the Bank of England
	Greater London Authority Referendum Act 1998	To authorise referendum on Greater London Authority
	Data Protection Act 1998	To give effect to EC Data Protection Directive (95/46/EC)
	Registration of Political Parties Act 1998	Provision for legal recognition of political parties
1999	European Parliamentary Elections Act 1999	To change voting system to regional-list proportional representation
	Greater London Authority Act 1999	To establish Greater London Authority
	Access to Justice Act 1999	To establish Legal Service Commission and reform legal aid, rights of audience, family court reform
	House of Lords Act 1999	To remove all but 92 hereditary peers
2000	Disqualifications Act 2000	To allow members of the Irish Parliament to sit in the House of Commons and the devolved assemblies
	Local Government Act 2000	To provide for elected mayors and separate executives
	Freedom of Information Act 2000	To create new statutory right of access to information
	Political Parties, Elections and	To establish Electoral Commission and

	Referendums Act 2000	regulate elections and referendums
	Terrorism Act 2000	To amend and extend existing counter-terrorism legislation
	Representation of the People Act 2000	To introduce rolling voter registration and experiments in new voting methods to make voting easier
2001	Election Publications Act 2001	To postpone the operation of requirements introduced by Political Parties, Elections and Referendums Act 2000
	House of Commons (Removal of Clergy Disqualification) Act 2001	To remove the disqualification of members of clergy from membership of the House of Commons
	Elections Act 2001	To defer local government elections to coincide with general election on 5 May 2001
	Anti-Terrorism, Crime and Security Act 2001	Series of anti-terrorism measures
2002	European Communities (Amendment) Act 2002	To ratify the Treaty of Nice signed by UK government in February 2001
	Sex Discrimination (Election Candidates) Act 2002	To exclude from the Sex Discrimination Act 1975 certain matters relating to selection of candidates by political parties
2003	Regional Assemblies (Preparation) Act 2003	To authorise referendums on regional assemblies in English regions
	European Parliament (Representation) Act 2003	To reduce number of UK seats in European Parliament from 87 to 78, and enfranchise Gibraltar
	European Union (Accessions) Act 2003	To give effect in UK law to EU enlargement, increasing EU from 15 to 25 member states
	Courts Act 2003	To modernise criminal justice system through unified courts system
2004	European Parliamentary and Local Elections (Pilots) Act 2004	To enable experiments with more flexible methods of voting
	Scottish Parliament (Constituencies) Act 2004	To maintain Scottish Parliament at 129 members
	Civil Contingencies Act 2004	To provide for unified executive control in a state of emergency
2005	Constitutional Reform Act 2005	To abolish office of Lord Chancellor, and establish new Supreme Court and Judicial Appointments Commission
	Prevention of Terrorism Act 2005	To introduce control orders to restrict suspected terrorists who cannot be deported
	Inquiries Act 2005	Statutory framework for operation of government inquiries

2006	Equality Act 2006	To establish the Commission for Equality and Human Rights
	Electoral Administration Act 2006	To reform voter registration and tighten voter security
	Government of Wales Act 2006	To increase powers and reform structure of the Assembly and to end dual candidacy in constituencies and top-up list

And so we can speak of a consistent agenda, even if it had diverse origins and the individual components served quite distinct purposes. But when it comes to identifying the programme's underlying themes, we face renewed difficulty because the public presentation of Labour's plans did not always delineate those principles consistently. In 1998 Irvine seemed to address those who were seeking theoretical rigour, when he defined the government's purpose in a sentence: 'Our objective is to put in place an integrated programme of measures to decentralise power in the United Kingdom; and to enhance the rights of individuals within a more open society.'⁸ Two of the recurring themes are clear here – decentralisation and the rights of the citizen. A third – openness – was especially prominent while Labour was in opposition, not least because it was used as a stick with which to beat the Major administration, which had been beset by ministerial scandals. But openness is perhaps best understood as a sub-set of citizens' rights. Two further themes might be added to Irvine's list. The first concerns democracy: it was there in 1997 in the manifesto commitments to introduce changes to voting systems and to tighten up electoral administration; and it remains there today with the new emphasis on democratic participation. The fourth concerns reform of the judiciary – the surprise which emerged from the June 2003 reshuffle. This is not in Irvine's summary, not least because he did not see the case for doing away with the Lord Chancellor and for curbing ministerial involvement in the appointment of the judiciary.

We will use these four themes for our analysis: decentralisation of power; strengthening of the rights of the citizen against the state; democratic reform and innovation; and rebalancing of the relationship between the executive and the judiciary. In each case we will consider what progress has been made towards that end and will assess whether the change is stable and whether the reform is irreversible. Any judgement on this final point must be tentative. In theory, there is nothing stopping Parliament from setting out tomorrow to reverse all of these changes. But in many cases it is now inconceivable that this

would happen, and in some instances there are serious practical obstacles in the way of a retreat to the status quo ante.

Devolution

Since 1997 Great Britain has been reshaped. Scotland has its national parliament, Wales its national assembly and London its mayor and assembly. All three reforms were validated in popular referendums. And in the three major parties there is no appetite for rolling back the reforms.

The Westminster Parliament is becoming a federal legislature for the United Kingdom as a whole and a domestic legislature for England and, for the moment, for Northern Ireland.⁹ Vernon Bogdanor has gone so far as to ask whether Westminster remains sovereign over the domestic affairs of Scotland and Wales. The technical answer to that question is clearly yes but Bogdanor notes that political authority has to be exercised if it is to remain legitimate. It is true that the Holyrood Parliament has frequently allowed Westminster to legislate on its behalf – but that procedure (by legislative consent motions) simply confirms that authority is now in Edinburgh and not London. The political culture of Edinburgh and Cardiff has been changed for good: each provides a distinct focus for national political life and each is now attracting a new generation of politicians who are choosing to make their careers there rather than in Westminster. Labour is the dominant political party in each of the three capitals but that has not prevented the emergence of distinctive domestic policies in Scotland and Wales. And the Labour leaders of those administrations have been at pains to stress that distinctiveness: Jack McConnell has gone out of his way to emphasise his Scottish identity over his Britishness and Rhodri Morgan has emphasised that on social policy there is ‘clear red water’ between Cardiff and London.¹⁰

But if these changes are irreversible, that does not mean that they are necessarily stable. It is a truism that devolution is a process rather than an event. Anybody who questioned the wisdom of this observation may finally have been persuaded by the events of the last two years: devolution of additional power to Cardiff, Edinburgh and London is either under way or under consideration.

The process of review is furthest advanced in Wales. It began with an all-party commission established in 2002 by Morgan, the First Minister, and chaired by Lord Richard to consider the powers and electoral system of the

Assembly. Devolution has had a more difficult journey in Wales than in Scotland: it only squeaked over the 50 per cent approval threshold in the 1997 referendum; turnout in Assembly elections has been disappointing; Labour's first candidate for the leadership in the Assembly – and his successor – both succumbed to misfortunes of one sort or another; the Welsh Labour Party is opposed to the electoral top-up system (whereby losers in a constituency battle can be reborn as victors on the top-up list); and the constitution and powers of the Assembly have been criticised as modest and/or unworkable. The Richard commission's report, delivered in March 2004, proposed major structural changes. It called for a new constitution for the Assembly, scrapping its unitary structure and effecting a formal separation between executive and assembly. Beyond that, it recommended that the Assembly should be given primary legislative powers; and that the number of members should rise from sixty to eighty, elected by single transferable vote (STV).

Richard was received with modified rapture in London. The government's response, published in June 2005, conceded the new constitution of the Assembly. It proposed a three-stage move to greater powers – proceeding by way of more framework legislation, to further grants of legislative authority by Order in Council and, finally, to primary powers (but only if approved by a referendum). And, finally, it rejected the move to STV, preferring to keep the existing additional member system (AMS) but barring candidates from standing both for individual constituencies and for the top-up list. The government's response has, in turn, been criticised for proceeding too cautiously on the extension of powers and for ignoring Richard's strictures on AMS. Lord Richard himself was particularly critical of the government's approach. The House of Lords resisted the ban on dual candidacy but ultimately it yielded to the Commons and the Government of Wales Act 2006 was passed.

The Scottish review has also been initiated by the devolved administration and it, too, is considering whether Westminster should surrender further powers. But the scope of the review is narrower and it is currently unclear what it will yield: the First Minister has suggested that the Holyrood Parliament might acquire control over firearms, drugs, casinos, abortion, broadcasting and immigration. And in truth, there is less to play for in Scotland. The 1998 devolution settlement was more radical than its Welsh counterpart: aside from a defined list of powers reserved to Westminster, the remainder was all devolved to Edinburgh. The result has been a stable, and increasingly self-confident, parliament and executive, which have, for example, followed quite distinct policies in university education and care for

the elderly. Edinburgh and London have found a *modus vivendi* in their ministerial and official dealings without undue difficulty. But it is fair to add that the true test of the London–Edinburgh dynamic is yet to come: the relationship will come under greater pressure once Labour loses its dominant position in Westminster or Holyrood.

The review initiated by McConnell will not be considering reform of the Barnett formula, which determines changes to the financing of the Scottish executive. At present, the administration is funded wholly by a block grant from Whitehall; so far it has shown no interest in changing the formula or in making use of its own tax-raising powers. And given the benefit Scotland has derived from the increases in Exchequer spending sanctioned under New Labour, one can understand this reticence. But opposition parties in the Parliament are beginning to question Barnett, and if the balance of advantage for Scotland shifts, the issue may force itself onto the agenda. That would lend a new and challenging dimension to relations between London and Edinburgh. Arguments over the financing of provincial or state governments are commonplace in most federal states: it is perhaps their absence rather than their imminence in the UK which is notable.¹¹

The review in London was initiated by the government and confirmed in its 2005 manifesto. The story in London has not been without its alarms for Labour – mostly over the election of Ken Livingstone as mayor in 2000, who had left the party amidst much acrimony, arguing that his election as Labour’s candidate had been blocked. But as an exercise in the devolution of power London’s story is remarkable. The government’s proposed solution for London-wide government was bold: it wanted to introduce a single-person executive to be chosen not by an assembly, but by the votes of an electorate of more than seven million. The powers initially granted to the mayor were relatively modest and they remained subject to checks by Whitehall. But crucially the mayor’s remit included transport, and Livingstone’s flagship policy was the imposition of congestion charges for vehicles entering central London. Their introduction was watched nervously not just in London, but in cities across the country; its signal success and the mayor’s role in London’s 2012 Olympic bid have contributed much to the sense that the mayoral system is working well. The review was undertaken in that context and resulted in new powers for the mayor in respect of housing, planning, skills, culture and waste management.

These reviews – and the reforms in their wake – demonstrate that the devolution process is not static, but nor is it reversible. Within just nine years,

the structures and political cultures of the country have been transformed. The UK is becoming a quasi-federal state. In theory sovereignty has been delegated by Westminster to Cardiff and Edinburgh. But in practice it would be exceptionally difficult to reclaim: with Scotland, at least, sovereignty has been shared, just as it is shared in all federal states. The distribution of powers has purposely been uneven, and so it will remain; but the dynamics of devolution, not least the demands from the new representatives in Cardiff and Edinburgh, will ensure that the term 'devolution settlement' remains misleading.

Citizens' rights

In his review of the first two years of the Human Rights Act, Lord Irvine proposed that Britain start to celebrate what the statute had achieved. It was not hard to understand why he had to make an official plea for the rejoicing to start. The Act, passed in 1998 and implemented from 2000, has attracted repeated criticisms in the media. It is variously portrayed as a cranks' charter, an offence to British common sense and (in the face of all the facts) an import from the European Union drafted by foreigners unfamiliar with the British way of life. And since Irvine's appeal, the government has found itself having to reconcile the Act's obligations with the threat posed by international terrorism. It had to derogate from Article 5 of the Convention and has been criticised for the balance it has struck between civil liberties and the protection of national security.¹²

But it is easy to see why Irvine feels that there is cause for celebration. The Act gave British citizens recourse to their rights under the European Convention on Human Rights in domestic courts. And it did so without challenging the doctrine of parliamentary sovereignty: judges are empowered to declare statutes incompatible with the Act, but not to strike those laws down. Once a declaration has been made Parliament may choose to use a bespoke fast-track procedure to decide what to do about the offending statute. Alternatively, it may choose simply to repeal the statute and replace it with something entirely different.¹³ The careful balance between judicial review and parliamentary authority provoked much agonising when the Human Rights Bill was under discussion. Some suggested that the Act would open the door to judicial activism and they conjured up the spectacle of the courts filling up with cases taking spurious human rights points. The Bill was duly passed, public authorities and the judiciary were trained in what the legislation meant,

and the statute book was audited to weed out provisions which would not survive the new dawn.

That dawn did not bring with it the collapse of the court system. Nor did it provoke aggressive activism by a newly emboldened judiciary. All parties became accustomed to their new roles – from the minister advising Parliament that a new Bill was compatible with the Act through to a judge declaring that a statute was in conflict with rights granted under the convention. In practice, the judiciary has made modest uses of its new powers. In the first five years, judges have used their power to reinterpret statutes to make them compliant in just ten cases and they have made seventeen declarations of incompatibility.¹⁴

What are we to make of this? The Human Rights Act does not (yet) have strong institutional champions; by contrast, devolution is reinforced by pressure from the elected representatives in Cardiff and Edinburgh. The Act remains politically controversial and at the 2005 general election the Conservatives spoke of the need to review it. Subsequently, the party has returned to the earlier debate about the merits of a distinctively British Bill of Rights. But it would be difficult for any future government to repeal the Act: unless Britain were to withdraw from the European Convention itself, repeal would mean that British citizens would again have to travel to Strasbourg to secure their rights. Amendment remains possible, but the government's own review of the perceived tension between the Act and counter-terrorism policy found no case for legislative action, not least because domestic legislation cannot alter the convention or the government's obligations in international law to give effect to it.¹⁵

The most likely outcome is that the Act will remain and that government and judiciary will continue to explore its potential. Over time, we can expect that the judiciary will make greater use of the broad principles expressed in the convention. The British judicial culture may be more conservative and legalist than other common-law traditions, but the increasingly bold and innovative use made by Canadian judges of that country's Charter of Rights and Freedoms demonstrates that judicial cultures change – and that judges learn from the innovations made in other jurisdictions. There is no necessary reason why the judicial reforms initiated in 2003 should influence the development of human rights jurisprudence. But they may well encourage a new self-confidence on the part of the judiciary and a greater willingness to exert its authority.

By 2007 the Human Rights Act will have a new champion: the government is creating a Commission for Equality and Human Rights

(CEHR). Aside from bringing together the existing anti-discrimination commissions, the new body will have an advocacy role for human rights. To date this role has been taken on by the Joint Committee on Human Rights – authoritative but little known beyond Parliament – and by the government itself, where the role has sat alongside the executive’s own obligations to observe the Act. The commission will have greater freedom of manoeuvre. Whether it can make the British love the Human Rights Act is another question. But it is safe to conclude that the Act is here to stay, even if currently we can only guess at its long-term potential.

An even more provisional judgement has to be offered on the government’s freedom of information legislation. After its circuitous route to the statute books in 2000, the Act was not implemented in full until January 2005. And so there are two reasons to be cautious in our judgement. First, it is simply too early to say what impact it will have: at the time of writing the Information Commissioner has yet to make many substantive rulings on appeals and only a handful of cases have made their way beyond the commissioner to the Information Tribunal. And second, the forces unleashed by access legislation tend to work against it, rather than reinforce it. In Australia and Ireland, to take just two examples, governments reacted to their early discomfort with freedom of information by increasing access charges to curb demand.

All that can be said at this stage is that the rights conferred by the 2000 Act are comparable to those in many access statutes passed in other jurisdictions in the last 10–15 years. The fee regime in Britain is relatively liberal and access to the commissioner – the independent adjudicator – is theoretically straightforward, even if the commissioner’s office found it difficult to cope with the early demand. More than 38,000 requests were made of central government within the first year, a figure well within initial estimates; and the quarterly breakdown of applications shows a sharp decline after the early surge in demand in January 2005.¹⁶

The first judgements on the efficacy of the legislation were made by media commentators before the end of February 2005 – as the early requests were being processed. Some delayed their judgement a few weeks longer, declaring the Act a failure when the government refused to give access to the Attorney General’s advice on the legality of the war in Iraq. But these are no more than the early skirmishes that have accompanied the introduction of access legislation in all jurisdictions. We will have to wait years, not months, before we can take a view on the efficacy – or durability – of Britons’ right to know.

Democracy

Reformers' sternest criticisms of the government's record have been reserved for its changes to Britain's electoral and parliamentary systems. New Labour's reforms, it is alleged, have been faltering and self-serving, and critics fear that the partial reforms which have been achieved will ossify into permanence, because it is now too difficult, and too expensive of political capital, to do more.

But before we consider the to-do tray, it is worth examining what has already been achieved. On three fronts – referendums, proportional representation and electoral regulation – the pace and scale of change have been extraordinary.

Britain's first national referendum was the 1975 vote on whether or not to remain part of the European Community. The exercise was a device to manage the tension within the Wilson government over Europe: Cabinet ministers were free to campaign as their conscience dictated, the country voted and party unity was maintained. But Britain's experiments with the referendum remained tentative: there had been a border poll in Northern Ireland in 1973 and the Scots and Welsh voted on devolution in 1979. Since 1997, however, the British constitution has become more accustomed to direct democracy. There have been votes on devolution to Scotland, Wales, London and North-East England; the government has committed itself to a referendum before entering the euro; and preparations for a vote on the European Constitutional Treaty were under way before it succumbed to rejection by voters in France and the Netherlands.¹⁷ And Britain took a step closer to popular sovereignty when citizens in England were given the right to initiate referendums on whether their community should have a directly elected mayor.

New constitutional conventions emerge mysteriously in Britain: a new practice becomes established, and it may (or may not) be blessed with acceptance in a government statement or in parliamentary standing orders. As yet, the role of the referendum is a convention waiting to be born. But Britain is close to accepting the notion that a referendum should (must?) be used if Westminster is to yield its authority, either to its own nations and regions, or to the European Union. It might be objected that this is a deduction from a miscellany of recent votes, each motivated by distinct political calculations. But that is not the point. Constitutional conventions have rarely emerged from theoretical textbooks: they are commonly a by-product of party politics.

The referendum is now established in British political life and any attempt at significant constitutional change in future will prompt calls for a referendum.

If this constitutes rapid change, the same must be said for the progress made by proportional representation. However much its advocates protest at the government's inaction on reform for Westminster, they have much to cheer elsewhere. Proportional representation has become established as the appropriate mechanism for electing all new tiers of government: Wales and Scotland use AMS; Londoners elect their mayor and assembly by supplementary vote; and the elections to the Assembly in Northern Ireland have been by STV. And the momentum has not yet ceased. The Scottish Parliament has approved the introduction of STV for local government north of the border. And supporters of the Richard commission still hope that Wales will eventually adopt STV for its Assembly elections.

Scotland and Wales have both experienced a new pluralism in the management of their national affairs. Both have now had experience of coalitions and the experience has not been destabilising. A return to majoritarian politics and to a first-past-the-post electoral system in Scotland and Wales is surely unthinkable. Rather, the debate now is about which form of proportional system is to be preferred.

The third reform of note concerns the regulation of elections and political parties. This had its origins in the opposition politics of the 1990s, when Labour charged that the Major administration was tainted by sleaze. Labour's 1997 manifesto spoke of the need to clean up British politics and it backed this rhetoric with commitments on the control of party funding. These were duly made good within a new framework for the oversight of party politics. Political parties were subject to registration for the first time (a necessary preliminary to list-system proportional representation for the European Parliament); and the Electoral Commission was established with oversight of the new funding arrangements. It was to be responsible for the running of referendums and was to provide an independent source of expertise on the conduct of elections. The commission has had a tough start: not only has the electoral landscape been changing under its feet, but the issues thrown up by the reforms have led to some bruising arguments with government, notably over the choice of regions in which all-postal ballots were to be used in the 2004 European elections. And the coming years will be no less challenging: the commission may well acquire additional responsibilities for the regulation of political party finances and at some point it will be asked to run its first national referendum – a daunting prospect.

Are the new arrangements for electoral regulation stable? The Committee on Standards in Public Life instituted a review in November 2005 of the Electoral Commission's mandate and governance. The distribution of administrative responsibilities between local electoral officers, national government and the commission has evolved piecemeal and the system is now being put under increased pressure as government introduces new – and novel – forms of election. Local autonomy in electoral administration is much prized, but some have begun to call for a national elections agency with responsibilities akin to the Australian Electoral Commission. Add to this the renewed interest in additional state funding of political parties and one can see the case for a more thorough overhaul of the administration and regulation of electoral matters. But we should expect independent oversight to remain and the regime governing party donations to tighten rather than loosen.

During Labour's first term it seemed possible that the two most intractable items on its constitutional agenda might both be addressed in one 'Big Bang' referendum. In talks with the Liberal Democrat leader, Paddy Ashdown, Tony Blair toyed with the idea of a vote on a new composition for the House of Lords and on a new voting system for Westminster.¹⁸ Nobody now suggests this as a way forward.

Reformers were discouraged by the phrasing of Labour's 2005 manifesto on the voting system: it echoed the text in 2001 and little had appeared to happen in the intervening four years. If anything, the political dynamic had worked against change: the Liberal Democrats had moved further from Labour under the leadership of Charles Kennedy and any talk of a 'project' between the two parties had ceased.

By contrast, the 2005 manifesto showed evidence of new thinking on Lords reform: Labour wanted to unlock the problem by broadening its scope. By considering the powers of the Lords alongside its composition there may be some prospect of securing a majority for proposals which simultaneously narrow the Upper House's powers and make it more legitimate. But the way ahead remains difficult: the government has said it will offer a free vote on the composition of the Lords and so a majority may prove elusive in the Commons, let alone the Lords. And the Liberal Democrats have indicated that they will not sign up to a codification of the powers of the Lords. More than that, they have questioned the Salisbury convention, by which the Lords accept that a government Bill announced in its manifesto will not be frustrated. Cross-party consensus on Lords reform has always been elusive but the government continues to search for agreement. The Joint Committee on

Conventions was established in May 2006 to consider the relationship between Lords and Commons, but not the composition of a reformed House of Lords.

Lords reform and proportional representation have long seemed the most contentious items in the government's constitutional in-tray. But they have now been joined by a third dossier which looks every bit as challenging as the other two. And if much of Labour's reform agenda is peculiarly British, this new arrival is an international phenomenon. All political parties were shocked by the steepness in decline in voting at the 2001 general election and they could draw little comfort from the recovery of less than three percentage points at the 2005 poll. The evidence is now clear that the problem is most pronounced among ethnic minorities and the young – and there are fears that if the voting habit is not acquired when young then it will not be learned later. Add to this declining party rolls and it is not hard to see why Britain is seen to be one case among many of democratic disengagement.

In the 2001 parliament, the government's responses included experiments with new forms of voting. All-postal ballots proved to be more successful than electronic voting in boosting turnout, but critics alleged that the postal ballot was more vulnerable to fraud. The run-up to the 2005 general election was accompanied by speculation that the availability of on-demand postal voting was exposing the ballot to new levels of fraud. The fears were not substantiated but in matters of electoral security, the suspicion of fraud is almost as damaging as its discovery. In its Electoral Administration Act 2006 the government included new provisions to safeguard the ballot – however it may be cast. The same Act empowers local electoral officers to promote participation and the government has committed dedicated funding to this task.

But it is now clear that the government is broadening its policy response to democratic disengagement. Citizenship education is to be extended – for schoolchildren and for new citizens – and for the first time it is to include a component on democratic participation. And Whitehall departments are to pilot new approaches to involving citizens in policy-making, building on a large-scale exercise in the National Health Service.

Nobody suggests that these initiatives will be sufficient by themselves. But they are indicative of a new direction in constitutional reform, one whose ultimate trajectory is particularly difficult to predict. Britain is not following the course alone: across the Western world governments are now launching similar exercises in the hope of turning back democratic disengagement. The results in Britain are uncertain – but they will be keenly watched at home and abroad.

Judicial reforms

Our discussion of the government's judicial reforms will be briefer than our examination of the other strands, because they are more recent and they are contained in a single statute, the Constitutional Reform Act 2005. But that does not mean that they are any less momentous.

For all the defeats it suffered during the passage of the legislation through the House of Lords, the government finally emerged with a statute which reflected the broad lines of the policy it had first set out two years before. We will consider the three limbs of the policy in turn.

Some time in 2009 we may expect the UK to have a new Supreme Court. The precise timing of the court's creation will turn on the provision of suitable accommodation – surely a first in constitutional history – but we may safely assume that this hurdle will be cleared. The court will take on the jurisdiction of the Appellate Committee of the House of Lords and it will acquire the Judicial Committee of the Privy Council's role in respect of devolution disputes within the UK. Judges who are Law Lords at the time of the court's creation will automatically become the first Supreme Court Justices and they will cease to participate in the Lords until their retirement from the court. The symbolic link between judiciary and legislature will have been broken.

The popularity of the office of Lord Chancellor had not been obvious in the press until the government threatened it with abolition. This then prompted a wave of nostalgia for the passing of an office which some imaginative sub-editors dated to the year 600AD. The less imaginative mounted a defence of the office, which combines the roles of minister of justice, most senior judge and Speaker of the House of Lords. It was argued that the independence of the judiciary could best be preserved by having one of their number in the Cabinet, speaking for them. Others maintained, more modestly, that the office should remain but that the Lord Chancellor should no longer straddle all three branches of government. The defenders of the post claimed a number of victories in Parliament, but the government secured its principal policy objectives. The office of Lord Chancellor is to remain but stripped of many of its former responsibilities. The office holder will no longer be a judge and, as of July 2006, he has ceased to be Speaker of the House of Lords: peers have elected one of their number to the new office of Lord Speaker. In making future appointments to the role of Lord Chancellor, Prime Ministers will be required by statute to have regard to the advantages of appointing a member of the Lords and a senior lawyer, but neither is an absolute requirement.

The Lord Chancellor will remain involved in the appointment of the judiciary, but his role will be much reduced. A new Judicial Appointments Commission is to take on responsibility for the appointment of the senior judiciary in England and Wales. The commission, which will be independent of government and will have a lay majority, will put one name forward for the Lord Chancellor to recommend to the Queen. He may – once and once only – ask the commission to reconsider its nomination, but he cannot block its nominee. In practice, the commission will be in a position to shape the future composition of the judiciary. A separate commission will be summoned into existence to handle appointments to the Supreme Court as and when they arise.

The new arrangements are being implemented progressively, the Appointments Commission having come into being in April 2006. Taken together, will the new institutional arrangements describe a new relationship between the judiciary and the executive? If that question is understood to mean ‘will these statutory arrangements persist for the foreseeable future’, then the answer must surely be ‘yes’. None of the participants has the appetite to renew hostilities: the parliamentary battles over the Bill were peculiarly bruising and they put into play the role of the judiciary in a way which many found disturbing. But, as Kate Maleson points out in Chapter 6, we can also expect institutional pressures to reinforce the reforms. Some of the judiciary, including Law Lords, were critical of the government’s proposals, but now that the changes are enshrined in statute the balance of advantage has shifted. The judiciary has emerged with new statutory protection for its independence and with a public concordat setting out the terms of its relationship with the government. It is now to be led in England and Wales not by the Lord Chancellor but by one of its own, the Lord Chief Justice, who has been given the administrative support needed to make a success of the new role. And although it is in a minority on the Appointments Commission, it has more influence than ever before over the future composition of the bench.

And so we may expect the statutory reforms to endure. But we can expect the judiciary’s relationship with the other branches of government to change. The conjunction of the Human Rights Act with the new Supreme Court and the judicial concordat may nurture a new self-confidence in the judiciary. One symbol of this will be the evolution of the Supreme Court itself, which we may expect to take fewer private law cases than the Law Lords and to focus harder on issues of constitutional importance. Those are just the issues which will direct attention back to the judiciary’s authority with regard to the

executive and Parliament. Separate strands of the constitutional reform agenda, conceived for distinct purposes, may well serve to reinforce one another and to bring further change.

Britain changed for good?

Did 1997 witness the dawn of a new constitutional settlement for Britain? In a country without a codified constitution, where the barrier to further change is low, it is impossible to answer this question definitively. But this survey suggests two conclusions which point us in rather different directions. First, we have experienced profound change, every bit as significant as Anthony Barnett's portentous assessment. And second, we have not (yet) witnessed a new settlement. This is not simply because some parts of the agenda set out in 1997 have yet to be completed – although that observation is fair. But it is in the very nature of radical, multi-dimensional constitutional reform that it creates a dynamic which encourages further change. Devolution to Scotland and Wales continues to raise questions about how to manage English business in what is now a quasi-federal parliament. The rejection of devolution in the North-East raises questions about the democratic accountability of regional government across England. These challenges and tensions are probably inescapable and some will, in time, spark new substantive proposals for reform.

But we have also seen that the reform agenda has expanded to take in issues which had not been foreseen in 1997 – most notably democratic participation. And as the programme has matured priorities have changed. Nine years on there is, inevitably, a new emphasis on implementation: it is one thing to establish new institutions and create new rights, but it is quite another to foster a new relationship between state and citizen. Lord Irvine's vision of empowered citizens living in an open, decentralised society cannot be realised by statutory draughtsmen and policy makers in Whitehall. Citizens have to understand and learn to use their rights. Seen in this light, it is easier to understand the government's new emphasis on democratic participation, on citizenship education, on the successful implementation of Freedom of Information and on the advocacy role of the CEHR. And it is easier to see why Lord Falconer has been receptive to calls for a single narrative to connect and explain the individual strands of the reform programme.

We should continue to expect the reform programme to move on to fresh territory, whether that is in response to new political priorities or to resolve

tensions thrown up by the earlier reforms. One possibility must be that the role of Parliament itself will come under scrutiny. We have described profound changes to the executive and the judiciary but have said little about the third – and sovereign – branch of government. After its modest start in Labour's first term, the pace of reform in the Commons did pick up in the second, with changes to hours and to the timetabling of legislation. But few would suggest that the changes were momentous. The government's current proposals for the Lords might lead to more profound changes in the role of the Upper House in tandem with the reform of its composition. And there is some suggestion that current concerns over democratic disengagement will lead to a broader examination of the role of Parliament.

There is no suggestion that the government's future plans include the codification of the reforms in a new and comprehensive settlement. The exercise would be daunting in its complexity and it would, presumably, require extensive consultation, education and ultimate endorsement in a referendum. Given the investment in parliamentary time and political capital that has already been made, it is difficult to foresee this outcome in the short term.

But codification is already happening – by stages. Britain's entry into the European Community introduced it to a form of superior law which could not be struck down by Parliament. The Human Rights Act took the process a stage further, giving the judiciary a new and powerful lens through which to view British law. And increasingly the obligations of the state and the rights of the individual are being shaped by international treaties and convention. Parliament could, of course, renounce such treaties and repeal the Human Rights Act but over time those options become less realistic and more costly. We can continue to expect the constitutional reform agenda to move; the progressive codification of the law, allied to the institutional pressures created by the earlier reforms, will ensure that the direction of travel will be forwards and not back.

Was Anthony Barnett right to claim that 1997 had changed Britain for good, institutionally and emotionally? Judgements on the country's emotional trajectory are best left to others. But there can be no doubt that the institutions of the state have been transformed by the reforms of the last nine years.