
The Coalition and the Constitution after the Referendum

Those interested in – and usually supportive of – constitutional reform in the UK often in the past gave credence to a particular scenario. It involved, following a General Election's yielding no overall winner, the Liberal Democrats using their position as 'power-brokers' to bring about those changes to UK constitutional form and practice which have long been vital objectives for their party, perhaps the most important of which was parliamentary electoral reform. In the wake of the overwhelming 'no' result in the Alternative Vote (AV) referendum, now is an appropriate moment to measure this long-standing expectation against the reality of the Coalition government which took office last year.

The following paper sets out the main constitutional proposals contained in the Coalition 'Programme for Government' of May 2010. Then, taking into account the referendum on AV and its outcome, it considers the political dynamics associated with these policies, how they have played out to date, and where they might lead. Developments that were not necessarily foreseen or allowed for in the Coalition agenda – particularly the rise of the Scottish National Party – and their implications are assessed as well. The paper concludes with a consideration of the nature of the Coalition from the perspective of constitutional policy and the two participating parties.

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The Coalition Agreement

The formation of the Conservative/ Liberal Democrat Coalition government in May 2010 followed a thirteen-year Labour period of office, a prominent feature of which was far-reaching constitutional reform. During this time changes of a constitutional nature included the introduction of devolution, the *Human Rights Act 1998* and the establishment of a UK Supreme Court.

The Coalition 'Programme for Government' between the two parties forming the new government in 2010 suggested that the process of constitutional change under Labour was likely to continue. In a section entitled 'Political reform' the document proclaimed that 'our political system is broken' and that 'We urgently need fundamental political reform'. Through these words the Coalition invited itself to be judged by high standards, which this paper sets out to do.

The Coalition commitments included:

- To establish five-year fixed-term Parliaments;
- To hold a referendum on the possible introduction of the Alternative Vote (AV) system for elections to the UK Parliament, in place of the so-called 'First-Past-the-Post' (FPTP) system;
- To establish 'fewer and more equal sized' parliamentary constituencies;
- To introduce 'Early legislation' on a power of recall where an MP is found to have engaged in 'serious wrongdoing' and 10 per cent of his or her constituents have signed a petition;
- To establish a committee to bring forward proposals for a wholly or mainly elected upper chamber on the basis of proportional

representation. The Committee would produce a 'draft motion' by December 2010.

- To bring forward in full proposals made in 2010 by the Select Committee on the Reform of the House of Commons, chaired by Tony Wright MP, including a Backbench Business Committee to give the Commons more control over its own timetable.
- To establish a commission to consider the 'West Lothian question'; and
- To implement the proposals of the Calman Commission for extending Scottish devolution; and hold a referendum on further Welsh devolution.

There were promises as well to reverse certain developments under Labour identified as undesirable. The 'Programme for Government' promised to:

be strong in defence of freedom. The Government believes that the British state has become too authoritarian, and that over the past decade it has abused and eroded fundamental human freedoms and historic civil liberties. We need to restore the rights of individuals in the face of encroaching state power, in keeping with Britain's tradition of freedom and fairness.

Amongst various specific measures directed to these ends, the Programme promised to 'establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties'.

The 'Programme for Government' called for 'a fundamental shift of power from Westminster to people. We will promote decentralization and democratic engagement, and we will end the era of top-down

government by giving new powers to local councils, communities, neighbourhoods and individuals'. There was a commitment to 'create directly elected mayors in the 12 largest English cities, subject to confirmatory referendums'. Councils would be given 'a general power of competence'.

On Europe, the 'Programme for Government' stated that:

We will amend the 1972 European Communities Act so that any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty – a 'referendum lock'. We will amend the 1972 European Communities Act so that the use of any Passerelle would require primary legislation... We will examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament.

Given the volume of these commitments the following paper is necessarily selective regarding the detail in which it considers them.

The AV referendum

The critical moment in the negotiations leading to the formation of the Coalition in May 2010 came when the Conservative parliamentary party authorised its leadership to offer the Liberal Democrats a referendum on AV as part of the Coalition programme, enabling an agreement satisfactory at the time to both parties to be concluded.

The Conservatives are by tradition committed to the FPTP system for parliamentary elections. Their principled defence of this system includes the arguments that it secures stability through avoiding Commons deadlocks, and maintains the link between electors and elected through providing everybody with a single MP. FPTP

also has practical value for the Conservative Party. Broadly speaking, it has served the Conservatives well historically, enabling them regularly to win Commons majorities without securing a majority of votes cast. In these senses, agreeing to a vote on a possible shift to another system could be seen as a significant concession by the Conservatives in the Coalition agreement.

However, from the latter perspective of partisan interest, while precise projections cannot be made, there is no reason to suppose that AV would have proved necessarily to be a significant electoral hindrance to the Conservative Party. Indeed the system could have made it easier for the two parties comprising the Coalition to operate a pact, more or less informal, at the next General Election, if they chose; and could have helped prevent a damaging split of the pro-Coalition vote, giving voters the option to give their first and second preferences to the two participating parties in whichever order they saw fit.

Initially – perhaps with such calculations in mind – it seemed that, while formally supporting a 'no' vote, Mr. Cameron intended to play little part in the referendum campaign. However, as the referendum approached, there were signs of discontent amongst the Conservatives about the referendum and the apparent concession to the Liberal Democrats it entailed. A particular subject of controversy was that the offer to the Liberal Democrats was prompted by the mistaken view that – in parallel post-election talks – Labour had offered to introduce AV *without* a referendum as a means to facilitate a deal. Probably because of this disgruntlement amongst his own supporters, Mr. Cameron chose to play a more prominent and energetic role in the 'no' campaign than it was initially anticipated he would. In the event there was a substantial 'no' majority, with nearly 68 per cent of voters on a 41 per cent turnout opposing AV. It could be argued that the Conservative gamble had paid off – except that it was only a limited

gamble, if the view that the Conservative party would not necessarily have lost much through the introduction of AV is correct. International experience anyway suggests that the *status quo* position tends to enjoy inbuilt advantages in constitutional referendums.

While the inclusion of the commitment to an AV referendum in the Coalition 'Programme for Government' was predominantly regarded – in the context of the negotiations – as a concession by the Conservatives, it also involved the Liberal Democrats shifting from their preferred position, which was for a system of Proportional Representation (PR), preferably the Single Transferable Vote (STV). AV would not necessarily have been more proportionate than FPTP and could potentially have been less so. While there is an argument that the adoption of AV could have been a staging post in a shift to PR, it could as plausibly be claimed that there would be little appetite for introducing yet another voting system for a substantial amount of time after AV was introduced. From a practical perspective, while there is a conventional wisdom that the Liberal Democrats would – other things being equal – win more parliamentary seats under AV than FPTP, such predictions are speculative. Moreover they are now irrelevant.

Had there been a 'yes' vote, Mr. Clegg would have had a far stronger case for his argument that settling for less than PR/STV (as well as other Coalition compromises) had yielded a worthwhile achievement for the Liberal Democrats, giving them a greater chance of achieving long-term constitutional objectives, and thus improving their electoral prospects and chances of continuing to play a part in government in future parliaments. But AV was defeated.

The result was so comprehensive as to call into question the hopes of the Liberal Democrats (and others) for the future of constitutional reform in the UK, both in the area of electoral systems and elsewhere.

Admittedly, the AV referendum was held in a political context which minimised the chances of the 'yes' vote. The main party in the government that was calling the referendum – including the Prime Minister of the day – campaigned vigorously for a 'no' vote. It was joined by a significant portion of the Labour Party, and much of the print media weighed in against AV too. The voting system was not the reform of choice of many who opposed FPTP, meaning that even a core vote of reform-minded individuals could not be relied upon. The referendum itself and the limited option it presented to the electorate were vulnerable to the criticism that they were the products of a Coalition deal, rather than a desire to allow the public with a genuine choice over the way MPs are returned to the Commons. There was no public consultation period and the measure was moved through Parliament swiftly. Unfavourable comparisons were drawn with the referendums held on electoral reform in New Zealand in the early 1990s, when voters were given a multiple choice between different voting systems. Finally, AV was seen as associated with the Liberal Democrats and Mr. Clegg in particular at a time when both were enduring substantial declines in their public support, seemingly as a consequence of their close collaboration with the Conservatives.

The AV referendum and its outcome raise fundamental issues about the Coalition as a whole. From the point of view of the Conservatives, what was regarded as the main concession made upon entry has lost them nothing; while for the Liberal Democrats the supposed main gain has amounted to nothing. Moreover, the way in which the referendum campaign was conducted has soured relations between the two parties. Some Liberal Democrat politicians, even within the Cabinet, have openly criticised the Conservatives for supposedly behaving dishonourably, and contrary to the spirit of the Coalition arrangement. First there were complaints of

misleading claims about AV, including the costs it would incur and the idea that some votes would become worth more than others. In addition there were objections to the personal attacks on Mr. Clegg in 'no' campaign literature, seeking to capitalise on his perceived unpopularity – including criticisms of him for his commitment to Coalition policies; and claiming that AV was undesirable because it would make coalitions more likely in future. Even if they were not sanctioned by Mr. Cameron or people close to him in advance, the Prime Minister did nothing to distance himself from such tactics. Earlier on in the Coalition, there was talk of a possible formal or informal electoral pact between the two parties, or even some kind of merger. Such an outcome is now given less credence; and the prospects of the Coalition ending before the next General Election, projected for May 2015, seem to have increased.

House of Lords reform

The two Coalition parties had in the General Election of 2010 similar, but not identical positions on House of Lords reform. The Liberal Democrats had committed in their General Election manifesto to a wholly elected second chamber, while the Conservatives advocated a mainly elected one. The Coalition 'Programme for Government' left the issue of whether the Lords should become wholly or mainly elected open. But the proposal eventually emerging when a White Paper and draft bill were brought forward in May 2011 was for a shift towards a mainly elected second chamber, in accordance with Conservative policy.

While both parties formally supported Lords reform, there was a disparity in the importance they respectively attached to it. A change was far more important for the Liberal Democrats, for whom the introduction of a 'popular' (this was the term used in the introductory text to the *Parliament*

Act 1911, setting out the supposed intention for further reform to follow) second chamber was a long-term objective traceable to the early twentieth century. By contrast the Conservatives have a long tradition of tending to resist reform of the House of Lords; and many in the party remain opposed to an elected second chamber, openly or otherwise.

If legislation to bring about a largely elected second chamber is passed in this Parliament, Nick Clegg will be able to claim that – while electoral reform for the House of Commons has failed – participation in the Coalition has facilitated the achievement of a major Liberal Democrat objective, through bringing about an eventually largely elected second chamber (80 per cent by 2025 at the latest), returned, moreover, using the favoured Liberal Democrat electoral system, STV. Such a shift would be of immense significance to the UK constitutional settlement.

However, there is likely to be substantial resistance to the Coalition proposals for House of Lords reform in both Houses from within both the Conservative and Labour parties (though Labour supported a wholly elected second chamber at the 2010 General Election): an 'unholy alliance' similar to that which combined to defeat AV. Attacking the reform may be seen by the Coalition's political opponents as a way of destabilising the Coalition as a whole or undermining the Liberal Democrat component of it. In the Commons MPs may dislike the idea of creating a chamber that – infused with democratic legitimacy – could well begin increasingly to challenge the primacy of their chamber. Many in the House of Lords will fight for the survival of their institution as presently composed; and will not feel bound by convention to accept the will of the Commons over such a major issue.

The government has stated that it believes measures will be in place in time for the first elections to the Lords to be held in May 2015. But there has already been slippage in the timetable. The proposals were due to appear

in December 2010, but did not surface until May 2011. A joint parliamentary committee is now due to begin scrutinising the draft bill that has been published. Once the committee has reported, the government will then respond to it and presumably bring forward a bill. A bill will not appear before some way into next year – say, autumn 2012. If the Lords choose to do so, they could delay the bill for thirteen months from the first time it receives a second reading in the House of Commons. It could then, under the terms of the *Parliament Act 1911/1949* receive Royal Assent without the agreement of the Lords, for argument's sake in late 2013. Further delays could create significant difficulties, since constituencies in England have to be devised (Scotland, Wales and Northern Ireland will each form single constituencies); parties have to select candidates; and other practical preparation would have to take place.

Furthermore, the Parliament Act has only been used to pass legislation without the agreement of the Lords on seven occasions since it was introduced in 1911. To do so is always controversial and will probably be exceptionally so over such a fundamental reform. There might even be an attempt to mount a legal challenge to the validity of such a use of the Act, as there was the last time it was invoked in this way, over the *Hunting Act 2004* (though the chances of success for any such challenge seemingly would not be great). Will the Prime Minister be minded to use the Parliament Act for a measure that is so divisive within his own party, and about which he is probably not personally enthusiastic, relatively close to a General Election (projected to take place in 2015) which he presumably hopes to win outright and thus make himself no longer dependent upon the Liberal Democrats? By this point in the Parliament, the bargaining power of the Liberal Democrats – which was probably at its peak during the negotiations for the Coalition in May 2010, may

well not be sufficient to force him to do so.

Equalisation and reduction

Some features of the Coalition 'Programme for Government' built on areas where there was apparent, even if superficial, prior agreement between the parties. For instance, the Coalition proposed an equalisation in the population size of UK parliamentary constituencies combined with a reduction in the total number of seats and therefore MPs in the Commons. This proposal was established Conservative policy, advocated on grounds of fairness and efficiency. It is also a broadly accepted wisdom that such a shift would improve the electoral position of the Conservative Party. Though the Conservatives possess a disproportionately large number of seats relative to votes cast for them throughout the UK, Labour are favoured even more under existing constituency boundaries. The combined effect of equalisation and reduction – it has been suggested – might help narrow the gap between the two parties.

The Liberal Democrats had advocated a reduction in the number of MPs, but as part of an overall package that included the introduction of STV for elections to the Commons. STV would help ensure the party received a seat share proportionate to votes cast for it; while at present the Liberal Democrats receive a disproportionately small number of seats. However, the Coalition 'Programme for Government' provided only for a reduction in the number of seats, not STV. Some analysts now believe that, of the three main parties, the biggest loser under equalisation and reduction may be the Liberal Democrats, particularly since general elections will now definitely not be held under AV, which *might* have helped the party, and could be seen as a sweetener for accepting equalisation and reduction at the same time.

The constitutional implications of the

combined policies of equalisation and reduction are greater than they might initially seem. A decision has been taken to fix the number of MPs at 600, without any clear rationale offered as to why this figure is an appropriate one, and no meaningful prior debate taking place. The reduction – presented to a substantial extent as a cost-cutting measure – seems likely to leave the executive strengthened relative to the legislature, since, if the number of ministers sitting in the Commons remains roughly the same, the proportion of MPs counting as part of the ‘payroll vote’ will grow as the absolute size of the Commons shrinks. The insistence that MPs should represent in nearly all cases roughly the same number of constituents (the chosen figure is 75,000) also has implications for the concept of what an MP is, tilting the role towards being merely the representative of a particular geographical territory, and away from being part of an institution that deliberates together on behalf of the UK as a whole. Finally, all of these changes were devised separately from the Coalition plans for the House of Lords – yet an overall picture of the possible future make-up of Parliament in its totality would surely have been helpful in this context.

Fixed-term Parliaments

A number of constitutional reformers have for some time advocated the introduction of fixed-term parliaments. Arguments for doing so included that, under the previous system, prime ministers possessed an unfair degree of discretion in being able to determine the precise date of general elections. (There was also a debate about whether it was appropriate for the monarch to be, in theory at least, involved in decisions about General Election timing: this proposal ends the personal Royal Prerogative to grant Dissolutions, thereby removing the head of state from the process.)

But while to some extent it meets their

demands, concerns have been raised amongst supporters of this reform at the decision to seek to set the length of a Parliament at five, rather than four, years. This time-span seems long when considered in international perspective, and is more than a year longer than the average length of a Parliament since 1945. As a consequence the public would have less opportunity to participate in the most popular kind of formal political activity – voting in general elections. Advocates of fixed-terms in the past – including when in opposition many within the Liberal Democrats – almost always proposed four years as part of the scheme. The Lords amended the Bill in May 2011 to require the five-year term to be approved at the beginning of each Parliament.

The selection of five-year terms was a product of the political considerations underlying the fixed-term parliaments proposal. Both parties in the Coalition probably felt that they needed as much time as possible to enable the economy to recover and create favourable circumstances for a General Election. Agreeing to fixed-term parliaments could be seen as proof that both parties were committed to the Coalition as more than a short-term arrangement. Finally, from the point of view of the Liberal Democrats, changing the law in this way could remove the possibility that David Cameron could seek an early dissolution at a point when he thought the Conservatives could win a Commons majority, and dispense with the Liberal Democrats. Under the fixed-term plan, were the existing Coalition to break-up, David Cameron would be faced with the choice of resigning immediately or trying to continue in office as head of a minority government for as long as it could survive without suffering a no-confidence vote. If a no-confidence motion was passed there would then be a 14-day period in which the Liberal Democrats would have an opportunity to try to arrange an understanding with Labour – and possibly other parliamentary parties. Only if a new government could

not be formed and endorsed by a Commons majority, would a further General Election be triggered (unless two-thirds of all MPs voted for an early election at any point). Viewed from this point of view, fixed term parliaments shifted the Coalition power balance slightly in the direction of the Liberal Democrats, since it was made harder to jettison them. Fixed-term parliaments, rather than the AV referendum, should be regarded as the real price of entry into Coalition for the Conservatives – probably not an exorbitant cost, given the gains made elsewhere.

European Union policy

Alongside the Conservative concession (albeit of a limited nature) over AV, the Coalition 'Programme for Government' also encapsulated constitutional compromises by the Liberal Democrats to the Conservatives. For instance, the Liberal Democrats agreed to legislation making further so-called 'transfers of powers' to the EU only possible following approval in referendums. The description of this measure as a 'referendum lock' makes it plain that it is intended to hinder further integration. It places no similar referendum requirements on 'transfers of power' away from the EU, nor even on leaving the EU altogether, despite continued UK membership being approved by a referendum in 1975. This policy was coupled with another commitment that the Coalition would seek to effect no such transfers during the present Parliament, nor would it even undertake *preparations* to join the single currency. Why, then, is there a need for legislation about referendums at all? Because this new constitutional measure is aimed at future governments of a different complexion that may be less hostile towards the EU, but will feel reluctant to seek to bring about any changes that would involve holding a referendum. There are grounds for believing that such referendums would be difficult

to win, given evidence of public opinion and the outlook of significant sections of the print media. Given these prevailing attitudes, a government seeking to amend or repeal the legislation bringing about the referendum requirement would be vulnerable to attack as well. Unlike the compromise on AV, which has ultimately meant that the Conservatives have lost nothing, the law on referendums could prove to be a substantial and lasting brake on UK participation in European integration – and even on European integration as a whole.

That the Liberal Democrats – supposedly European enthusiasts – should agree to such an approach has received surprisingly little attention. Protests about concessions made by the party amongst its supporters (or former supporters) have focused on issues such as university fees and the overall retrenchment package, not Europe. The depth of support for the European Union within the Liberal Democrat Party could consequently be questioned; while the significance of the introduction of the so-called 'referendum lock' should not be underestimated. It might be argued that the Liberal Democrats successfully forced the Conservatives to drop some of their more radical ideas about the EU, such as a broad renegotiation of terms of membership. However, another interpretation of this shift is that Mr. Cameron used the Coalition negotiation as a means of dispensing with policies which – though favoured within his party – he saw as undermining the public image of the Conservatives he wished to promote, and probably also as being practically unattainable.

While negotiating an agreed approach to the EU seemingly produced few difficulties for the Coalition partners, future tension over this issue between the two parties – or within one of the parties – should not be ruled out entirely. The deal rested on a static assumption that the Coalition would be able to avoid having to make any 'transfers of powers': yet the history of European integration sug-

gests that it is unwise to assume lasting stasis. Recent financial convulsions are an example of the kind of issue that may arise, possibly leading to a dispute within the Cabinet over how to proceed, and whether further 'transfers of powers' may be required. It is even possible that the Coalition as a whole may come to feel inhibited by the commitment to make during its period in office no 'transfers of powers'; and may regret imposing the referendum requirement on itself.

'Defence of freedom'

The 'defence of freedom' agenda, which manifested itself through such proposals as scrapping the national identity card scheme, was to a considerable extent an area of commonality between the two parties. During the Labour period of office the Conservatives and the Liberal Democrats came to be united in their opposition to what they saw as increasingly authoritarian tendencies in government. Both parties raised concerns about the so-called 'database state' involving the collection, retention and sharing of personal information about citizens by public agencies; and objected to measures such as the increase in the period of pre-charge custody of terrorist suspects.

From a political perspective, it was useful to the leaderships of both parties when forming the Coalition to be able to define themselves as united against the party they had replaced in power. The Liberal Democrat leadership could stress the 'liberal' nature of the Coalition, and claim that cooperation with the Liberal Democrats was bringing about an accentuation of more desirable features of the Conservative Party. Furthermore, such an orientation could be seen as useful to Conservative attempts to soften its image and appear more moderate. Indeed, it could be argued that this shared approach to questions of internal security by the two parties could lead to them competing for the same group

of centre-right voters – those who have been discouraged from supporting the Conservatives by their more extreme appearance in recent decades, but who could in theory vote for a more moderate Conservative Party. Had AV been introduced, this overlap could have worked to the benefit of both parties, with voters giving them their first and second preferences. Under FPTP, it appears likely that the bigger losers will be the smaller party, the Liberal Democrats, who also seem currently to be experiencing difficulties retaining their more left-inclined supporters.

A review of the approach to counter terrorism and security produced policies from the Coalition government including:

- A lowering of the standard maximum pre-charge detention period for terrorist suspects from 28 to 14 days;
- An ending of indiscriminate use of terrorism stop and search powers provided under Section 44 of the Terrorism Act 2000;
- The end to the use of the 'most intrusive [communications interception] powers by local authorities to investigate low level offences and a requirement that applications by local authorities to use any [communications interception] techniques are approved by a magistrate';
- A commitment to 'rationalise the legal bases by which communications data can be acquired';
- A 'stronger effort to deport foreign nationals involved in terrorist activities in this country fully respecting our human rights obligations'; and
- The 'end of control orders and their replacement with a less intrusive and more focused regime'.

This package included significant measures, such as the change to stop and search powers and the reduction in the maximum pre-charge detention period for terrorist suspects (although 14 days remains historically and comparatively a high total). On the other hand some of the policies were not genuinely as 'liberal' as they were presented. Control orders – by which terrorist suspects who had not and could not be convicted of any crime in the UK had major restrictions imposed on their personal freedoms – were to be replaced with only slightly diluted equivalents. The commitment on deporting foreign nationals appears incongruous within a supposed 'defence of freedom' agenda. It involves sending individuals who – like those subject to control orders – have been convicted of no crime in the UK, to regimes with dubious human rights records, subject to assurances that they will not be mistreated. For instance, when this policy was initiated under Labour, one of the nations considered by the government an appropriate destination was Libya, at that point enjoying partial rehabilitation from its international pariah status.

Commissions

The Coalition has seemingly used in certain areas the setting up of commissions as a means of defusing and postponing fundamental disagreements between the two parties.

Bill of Rights

In March 2011 a Commission on a Bill of Rights was established. Its terms of reference are to 'investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties'. It is also required to 'examine the operation

and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties'. The Commission will also provide advice to the government on the reform of European Court of Human Rights. It will aim to report by the end of 2012.

There are clear differences of opinion between the two Coalition parties over these issues – and between members of the Commission. For instance, the Liberal Democrats are committed to maintaining the *Human Rights Act 1998*, which incorporates the European Convention into UK law; while the Conservative Party supports replacing the Human Rights Act with a 'British Bill of Rights' which – it has been held by Conservatives including Mr. Cameron – would provide the UK with greater flexibility in its application of the Convention, in areas such as the deportation of terrorist suspects. The terms of reference apparently leave open the issue of the Human Rights Act, seemingly an acknowledgement that it will be difficult for the Commission to reach agreement in this area. But if the Commission cannot meaningfully address an issue so central to its subject matter, what significant outcomes can be expected? A clear proposal for a UK Bill of Rights seems an unlikely outcome of the Commission's deliberations.

It could be held that the commitment in the Commission's mission statement to maintaining in the UK the obligations arising from the Convention is a success for the Liberal Democrats, given currents of resentment within the Conservative Party towards what is seen as a foreign imposition of often ill-conceived rights. The inclusion in the terms of reference of the Commission of the task of investigating 'ways to promote a better understanding of the true scope of ...[the Convention's] obligations and liberties' could also be seen as encouraging from the Liberal Democrat point of view. However opponents of the Conservative approach to human rights have

argued that the Conservative party has been and continues to be prominent in preventing a 'better understanding' in these areas. For instance, Mr. Cameron's intervention in the recent controversy over 'super-injunctions' has been criticised for creating the impression that, in making decisions about the balancing of different Convention rights, the judiciary has somehow behaved in a constitutionally inappropriate fashion, usurping the role of Parliament. In fact, it has been noted, judges have merely been performing a task that Parliament itself entrusted them with through the Human Rights Act. Given that such portrayals of the Convention and its operation in UK law are emanating from the highest level within the government that set up the Commission, the chances of this body finding ways of counteracting them seem slim, even if all its members are serious about doing so.

West Lothian Question

A further Commission promised by the Coalition 'Programme for Government' is on the subject of the West Lothian Question. A number of Conservatives have long promoted the idea that, following devolution, Scottish MPs could be excluded from voting on what advocates of this idea sometimes term 'English laws'. It is possible to note the problems inherent in defining legislation in this way, and to fear that an inappropriately reductionist view of MPs as purely geographical representatives (reinforced by the equalisation in the size of constituencies) is being promoted by this suggestion. But there is perhaps more importantly a clash of political interests, between the Conservatives, who have for some time had minimal parliamentary representation from Scottish constituencies, and the Liberal Democrats for whom Scotland is – at least for the time being – an important base of representation in the House of Commons. The impact of 'English votes for English laws' – assuming a meaningful way of implementing this idea could be

found – would be to give the Conservatives a larger share of MPs when Parliament was voting on 'English' as opposed to 'UK' issues; and the Liberal Democrats a smaller one.

Decentralisation

The Coalition commitment to radical decentralisation was on the surface another shared objective for the two parties. For the Conservatives such an agenda was attractive partly because it was seen as fitting with the idea of less government. The Liberal Democrats on the other have a traditional commitment to bolstering the policy and financial autonomy of local government - a tier at which they have traditionally enjoyed strong representation. How meaningful the Coalition 'localism' programme will prove is debatable, and it certainly seems unlikely to bring about a significant strengthening of local government. In a recent report the House of Commons Communities and Local Government Select Committee found that:

The Government has announced its intention to instigate a radical devolution of power to local level, giving new powers and opportunities to councils, communities, neighbourhoods and individuals...we welcome the emphasis that the Government has put on decentralisation. The Government's approach in practice, however, has thus far been marked by inconsistency and incoherence, not helped by a definition of localism that is extremely elastic...

Localism should not be adopted purely as a way to achieve reductions in public sector costs...

Devolution of power both to local government and to local communities are not always compatible aims, and the latter appears to be the Government's priority. The infusion of the Government's pronouncements on

localism with 'Big Society' rhetoric implies a diminished, not greater, role for local authorities, and there are differences across government in the level of trust departments appear willing to place in councils...

Scotland, devolution and the Union: constitutional opportunities

A further and unexpected development of May 2011 may have a significant impact upon the Coalition's constitutional agenda. At the same time that the UK delivered a decisive 'no' verdict on AV, the Scottish electorate gave the secessionist Scottish National Party (SNP) a second term of power at devolved level, returning it with a majority in the Scottish Parliament, in which it had since 2007 been the largest party. On the surface this outcome could be seen as a major step towards Scottish independence. Unlike in the first SNP period of office, there is now no obstacle to securing the Scottish parliamentary support needed for a referendum on independence. Yet there has never been strong evidence that a 'yes' outcome could be achieved in such a vote (and in practice more than one referendum may be required). Indeed, the level of support for this specific option seems to have no direct correlation with the popularity of the SNP at any given time. Even so, the SNP will probably feel under pressure to deliver some kind of change in the constitutional position of Scotland, even if full separation is not politically possible. It may be that the SNP and its politically astute leader Alex Salmond will seek a more open-ended mandate from the Scottish electorate, allowing him to re-negotiate Scottish terms of membership of the Union (possibly subject to approval in a second referendum), without leading to an immediate exit. Alongside constitutional structures, the allocation of money will also be on the agenda in some form; for instance there may be discussion of

the 'Barnett Formula' used for determining changes in public funding to the nations.

Mr. Cameron will need to handle this issue carefully. He will not wish to appear weak in the eyes of English voters (particularly, in the present climate, for making apparent financial concessions). But nor will he want, through his own intransigence, to be remembered as the Conservative and Unionist Prime Minister who presided over the break-up of the Union (tempting though it may be to some Conservatives to rid themselves of a nation which in recent decades has become increasingly hostile to their party). One outcome that met the political needs of Mr. Cameron and Mr. Salmond could be a Scotland that not only has greater fiscal and policy autonomy (and perhaps, like Northern Ireland, has a defined secession procedure), but has its position constitutionally entrenched, and not subject to modification or abolition by simple majority votes in the House of Commons. This model is far closer to the Liberal Democrat prescription for the future of Scotland than to the Conservative template.

Although this is inevitably an area of speculation, it seems doubtful that such a transformation of the position of Scotland could be brought about without impacting upon constitutional issues involving the whole UK. A yet more devolved pattern of governance for Scotland (combined with the recent extensions to the legislative power of the Welsh Assembly) would recall to voters that devolution has not been introduced in England outside Greater London - an area which includes within it a large majority of the UK population. The beginning of a way forward here might be offered by the Coalition plan to introduce directly elected mayors to the twelve largest English cities (subject to referendums). Possibly this approach could lead on to devolution in England on a city-regional model. Otherwise, consideration could be given to the idea of the establishment an English Parliament.

Devolution all-round, if it ever came about, would leave the UK resembling a federal state – an outcome that is a long-term objective of the Liberal Democrats, but anathema to many Conservatives. There has also developed in Wales a dynamic towards greater autonomy which could help produce an increased federalisation of the UK. Initially in 1997 there was only a narrow referendum victory (50.3 per cent to 49.7 on a 50.1 turnout) for the establishment of an Assembly with significantly less powers than the proposed Scottish Parliament. Since then the scope of Welsh devolution has twice been expanded, most recently following a referendum in March 2011, the result of which suggested there now exists a far stronger base of popular support in Wales for devolution than was present at the outset of the project (63.5 to 36.5, though on a lower turnout of 35.4).

Another feature associated with federal constitutions is that ultimate legislative power is shared between ‘federal’ and ‘state’ level legislatures, with the respective spheres of operation of each defined in a overarching constitution, not subject to alteration by simple majority votes in the federal legislature. As has been suggested, it may be that the Scottish government will seek a new entrenched position for the Scottish Parliament within the UK constitution, analogous to that of a state legislature. To do so would be a challenge what has been the central principle of the UK constitution: the doctrine of parliamentary sovereignty. Traditional understandings of parliamentary sovereignty have already been challenged variously in practice and in law by constitutional shifts including UK membership of the EU; devolution; the Human Rights Act; the rise of the referendum as a decision-making device. Attitudes towards the doctrine may be changing within the judiciary as well. The Conservative Party is a longstanding advocate of the doctrine of parliamentary sovereignty. Yet through its policy of an EU ‘referendum

lock’, which avowedly seeks to bind future parliaments, the Conservative Party has further undermined the principle it purports to venerate. The alternative to the doctrine of parliamentary sovereignty is the introduction of a ‘written’ constitution – another core goal of the Liberal Democrat Party. This possibility is not an immediate one and would at present be unacceptable to many Conservatives; but their party has in the past shown an ability to overcome its initial instincts and accept change, and – given conducive circumstances – could perhaps do so again.

Conclusion

The most intriguing political question to be resolved when Coalition constitutional policy is considered is: how good a deal did the respective parties get? Before answering, it should be noted that Mr. Clegg’s bargaining position was not as strong as Mr. Cameron’s; or as it might have been in another kind of ‘hung’ Parliament. As the smaller party in votes cast and seats won, the Liberal Democrats could not expect to negotiate from a position of absolute parity with the Conservatives. Moreover, both political dynamics and the House of Commons arithmetic meant that an arrangement between the Liberal Democrats and the Conservatives was much more easily achievable than an understanding between the Liberal Democrats and Labour, making it harder for the Liberal Democrats to play the two larger parties off against each other.

Interestingly, analysis by the Constitution Unit¹ has suggested that the Liberal Democrats achieved the inclusion of a larger proportion of their manifesto policies in the ‘Programme for Government’ than the Conservatives (by 75 per cent to 60 per cent).

• 1 Prof Robert Hazell and Dr Ben Yong, ‘Inside Story: How Coalition Government Works’, Constitution Unit, University College London, 3 June 2011. <http://www.ucl.ac.uk/constitution-unit/research/coalition-government/interim-report.pdf>

Yet judging the respective levels of success of the two parties should involve considering not only *how many* of their policies were included, but relatively *how important* they were. Most crucially, the commitment to deficit reduction included in the agreement was derived from the Conservative manifesto, not the Liberal Democrat document (though Mr. Clegg may personally have been closer to the Conservative position than that of his party). This policy shaped the whole course of the government, and was stipulated as overriding all other objectives in the 'Programme for Government'.

When considering particular commitments in the agreement, it is also important to take into account: how longstanding a goal it was for the party which advocated it; how central to its ideological approach; the extent to which the other party disliked it; the likelihood of its actually being implemented; and the significance of the policies that were dropped by either party. Apparent prior areas of agreement included in the 'Programme for Government' should also be scrutinised in detail. An analysis of the constitutional programme of the Coalition using these criteria suggests that the Liberal Democrats have fared less well than the overall policy-count suggests.

Given the importance of constitutional issues to the Liberal Democrat Party, it would not have been unreasonable to expect some significant gains to be obtained for the smaller Coalition party in this area, particularly given the willingness of the Liberal Democrat leadership to cooperate with Conservative financial retrenchment plans. The most celebrated supposed Conservative concession, over AV, was made subject to a referendum. On the other hand the Conservatives have achieved a series of constitutional objectives none of which have been made contingent upon referendums. Moreover, some of these changes – such as the EU 'referendum lock' – contradict the Liberal Democrat posi-

tion prior to May 2010; and others, such as equalisation and reduction, may cause political damage to the Liberal Democrats.

In some areas there was apparent agreement between the parties. They include the 'defence of freedom' agenda, from which significant changes of government approach have arisen. The Coalition is also supposedly united by a desire for a democratised House of Lords. But this outcome is far more of a core Liberal Democrat than Conservative goal. Many Conservatives, despite the official policy of their party, are ambivalent or hostile to this proposal. Were this change introduced it could be seen as a success for the Liberal Democrats - but there are serious grounds to doubt that it will be successfully brought about. If it is not, by the time this failure is apparent, many of the Conservative objectives will already have been achieved, thanks to the support of the Liberal Democrats.

In short it is difficult to identify a single definite constitutional outcome of the Coalition that clearly fulfils the policy objectives and/or political interests of the Liberal Democrats and at the same time runs counter to the values and/or interests of the Conservative Party. The policy that fits this description most closely is probably for fixed-term parliaments, but how much of a threat it will be to the political interests of the Conservative Party over the coming Parliament is unclear, and Mr. Cameron had shown interest in this change before May 2010.

It is fair to conclude, then, that the scenario outlined at the outset of this paper - in which an inconclusive General Election was exploited by the Liberal Democrats to achieve their core constitutional objectives - has not transpired. The apparent lack of constitutional gains for the Liberal Democrats can be attributed in part to the strategic decision by the party to seek to achieve the widest possible influence in government, rather than focusing on attaining what might have been seen in the past as the party's most important objectives.

The calculation appears to be in part that this approach will help develop the Liberal Democrat's image as a responsible party of government working for economic stability and what is termed the 'national interest'.

Can this approach be said to have justified itself from the perspective of the Liberal Democrats, particularly when the major decline in popularity the party has experienced since entering the Coalition is taken into account? It can certainly be argued that a narrower focus on particular issues, including the constitution, would have achieved greater depth of influence, which would also be more clearly identifiable for those outside government. However, pursuance of a different strategy would not have been an easy option; and might still have incurred political damage to the Liberal Democrats. If during negotiations in May 2010 the Liberal Democrats had pressed harder for certain constitutional concessions – for instance, the dropping of the EU 'referendum lock' or the inclusion of a range of options in the referendum on voting reform – Coalition talks could have broken down, with a likely outcome being a Conservative minority government and/or an early General Election, in which the Liberal Democrats might well have lost the balance of power in the House of Commons. Moreover, if political circumstances change in the Liberal Democrat's favour, Mr. Clegg's compromises, including over constitutional policy, may appear more justifiable.

Has the Coalition shown signs of delivering what is termed in the 'Programme for Government' the 'fundamental political reform' made 'urgent' because 'our political system is broken'? Probably the two most constitutionally significant policies to have been introduced by the Coalition to date (excluding House of Lords reform, which is still in draft stage) are fixed-term parliaments and the EU 'referendum lock'. To some extent, they might plausibly be portrayed as contributing to 'political reform'. Fixed-term

parliaments remove much of the discretion available to prime ministers over election timing; and reduce the scope of the ancient Royal Prerogative; while the EU 'referendum lock' could be seen as a means of involving the public in decision-making. But other features of these policies limit their credibility as reforms. Because fixed-term parliaments are intended to be set at five years, they will in part have the effect of reducing the frequency at which many members of the public participate in formal political activity. The motive for the conception of the 'referendum lock' was to inhibit the extension of UK participation in the EU. The referendum is more a threat to future governments contemplating more active engagement in Europe, than a promise to the electorate.

The evidence of the Coalition to date also suggests that the period of substantial central-government initiated constitutional reform dating to the 1990s may be nearing a close – or perhaps an intermission before further change. The experience of the AV referendum provides further evidence to support this view. The 'yes' campaign faced exceptional difficulties and there is a well-known international tendency for the status quo position to enjoy an inbuilt advantage in referendums on constitutional change. However the decisive rejection of AV can be taken as an indication that, in future, consent to electoral reform (and perhaps other kinds of constitutional reform) through referendums may be hard to achieve; and more broadly that public demand for constitutional change may be lacking. The political and media alliance – or something similar to it – which defeated AV would probably be equally resistant to any other kind of electoral system that was not FPTP, and could be expected to have a reasonable chance of securing victory for the status quo in any referendum that was held. As well as there being barriers to a 'yes' vote to any kind of electoral reform for the Commons, it is also hard to conceive of circumstances in which it

would be politically possible to bring about such a change without holding a referendum. A shift to PR – a key Liberal Democrat objective and possibly the most significant change to the content of the UK constitution that could be effected, because of the permanent effect it would have on the UK-level power balance – appears to be blocked. There seems to be a prevailing wisdom at present that the result of the AV referendum has put paid to discussion of reform for elections to the Commons for an imprecise period often called ‘a generation’; other constitutional reform ideas may also be tainted by association.

It may be that certain inter-related issues and tensions which are not allowed for in the Coalition ‘Programme for Government’ will become more pronounced during the course of the present Parliament and beyond. They include the place of the UK within the EU; the position of Scotland in the UK; instability associated with the asymmetrical nature of devolution; and challenges to parliamentary sovereignty. For instance, a major dispute between an increasingly assertive judiciary and the government, possibly involving as well the EU or European Convention on Human Rights, could develop. In such circumstances fundamental contradictions between the constitutional approaches of the two parties comprising the Coalition would be highlighted. On the evidence to date, the Conservative position would be most likely to prevail. Any other outcome would require the Liberal Democrat leadership to revise its overall strategic approach to Coalition government, taking into account the historic centrality of constitutional issues to the party; and for the Conservative Party to display the same adaptability to changing circumstances that it has on occasion in the past, but which it has arguably shown less often in its recent history.
