A crisis of governance?

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ABSTRACT

Background Contemporary legislative and constitutional developments in the United Kingdom for public health. This article explores these implications.

Key findings Examination of the development of parliamentary sovereignty in the United Kingdom shows that, although there is no formal separation of powers, there is a long established convention that legislation should be subject to detailed parliamentary scrutiny, should respect common law, and should be subject to judicial review. This convention has been overturned. Consequently, many recent laws conflict with long-established human rights. Some are unworkable or damaging or both. Public health professionals are being asked to implement poorly thought out laws, against a background of loss of trust. History warns of the danger that public health could be sucked into participation in repressive policies that override the rights of the individual in the apparent interests of the public good.

Conclusions There is a need for a rebalancing of power in the United Kingdom, both among the three branches of government (executive, legislature, and judiciary) and its constituent parts (England, Scotland, Wales, and Northern Ireland). Constitutional reform is a long-term aim but for now much can be done to hold the executive to account and to be aware of the dangers faced by public health

Keywords democracy, human rights, law, public health

Separation of powers

The vote by the House of Commons in favour of a comprehensive ban on smoking in England, on 14 February 2006, was an important achievement for public health. However, this achievement was not a foregone conclusion, and up to the point that the result was announced, there was considerable uncertainty about how the House would divide. In this article, I will argue that the process by which this decision came about raises issues that, although more often a matter of debate among constitutional specialists, should be of considerable concern to public health professionals. These issues are linked by a single expression, separation of powers.

Powers can be separated in several dimensions. The first is among the branches of government. There are three main sources of power in a state. The legislature makes the laws, the executive implements them and the judiciary upholds them, deciding when an action, whether by an ordinary citizen or the executive, is in breach of them. Second, powers can be separated among the levels within a state. For example, in Germany, health policy is a matter reserved for the 16 Lander. In the United States, unless a power is explicitly given to the federal government or denied to the states, it falls within the powers of the states and not the federal government.

Both these dimensions were brought into play in the vote on smoking. First, backbench members of parliament from the governing party were able to decide how to vote rather than be compelled to support the policy of the government, providing a rare example of a separation of the legislature and the executive. Second, although the vote was on a smoking ban in England, many members of parliament from other parts of the United Kingdom took part in the vote. Together, these suggest that the concept of separation of powers in the United Kingdom may be somewhat confused. To understand whether this is the case, it is necessary to examine the origins of this concept.

In many countries, separation of powers is enshrined in a constitution. Although this can never prevent a dictator from seizing powers reserved to other branches or levels of government, for example, by leading a coup, it does make it much more difficult. It also acts as an obstacle to those who would seek to accumulate power more gradually, hoping that it will not be noticed. One of the earliest writers to describe
the separation of powers was a Frenchman writing about England. Montesquieu praised the separation of powers that had existed between parliament and the monarch since the Glorious Revolution of 1689 and coined the term ‘checks and balances’ to describe a system in which no one had absolute power. His views were especially influential in the United States, contributing substantially to the ideas of the founding fathers and leading to the clear division between the executive, in the form of the President and his cabinet, the legislature, in the form of Congress, and the judiciary, whose highest organ is the Supreme Court. Similar structures were being established in many other countries. There was, however, an exception. The United Kingdom felt no need to set out the powers of the branches of government or between the different parts of the realm. In part, this was due to a belief that it was unnecessary because the divisions were already established in documents that had the force of law and that parliament could not override. In 1215 Magna Carta codified the principle of habeas corpus, in 1689 the Bill of Rights constrained the actions of the monarch, establishing the principle of parliamentary privilege, in 1701 the Act of Settlement established who could succeed to the throne, and in 1707 Act of Union created a united kingdom joining the two sovereign nations of England and Scotland.

Yet by the middle of the 19th century, the principle concept of parliamentary sovereignty was gaining ground. This established that parliament was the ultimate source of legislative authority and that no parliament could bind its successors. In other words, parliament could do what it wanted. Writing before the English Civil War, the great jurist, Sir Edward Coke, stated that ‘The power and jurisdiction of parliament is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds’. However, there was a common assumption that parliament would exercise considerable restraint in using its powers. Over 200 years after Coke, Albert Dicey, a leading commentator on parliamentary sovereignty, wrote that laws that passed through Parliament were subject to such intense scrutiny as to ensure that only good laws would be enacted. In contrast, he believed that constitutions were frozen in time and could lead to bad laws that were incompatible with the contemporary situation. He supported parliament’s ‘right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament’. He also believed that the common law, the accumulated body of legal rulings that had progressively established the rights of British citizens, was an effective constraint on any potential excesses by parliament. Parliament, it was assumed, ‘would leave the central features of the common law largely untouched so that the common law . . . would continue to guarantee individual liberty, liberty of discussion, freedom of assembly and rights of property’.

**The world has changed?**

Is this belief still valid? In recent decades, the situation has changed beyond all recognition. One important check on the executive, the House of Lords, has been changed substantially, although while the removal of the hereditary peers was expected to make it easier for the government to enact its legislative programme, paradoxically the second chamber has shown a greater enthusiasm than ever before for sending back legislation that is incoherent and unworkable. Its contribution was especially apparent in relation to the government’s proposal to implement a system of identity cards, which it sent back to the Commons several times. Yet ultimately, it could only delay this legislation, even though a carefully argued report from the London School of Economics demonstrated clearly that the provisions, as currently drafted, will be extremely expensive and potentially unworkable. For example, existing facial recognition technology will fail to recognize ~10% of people. Individuals with nystagmus, and many other diseases affecting the eyes, will confront great difficulty in having their irises scanned. Fingerprints wear down in manual workers, excluding their use in ~3% of the population. The limitations of fingerprinting as a form of identification were exposed in a recent Scottish case in which the thumbprint of a police officer was apparently found at a murder scene even though she claimed not to have been present. Much later, after she had been charged with perjury, it became clear that the print was not hers, exposing serious flaws in the fingerprint service. Similarly, an American Muslim who had served in the US army was arrested because a print found on material at the site of the Madrid terrorist bombings was erroneously matched with his.

The report also demonstrates the huge cost involved, much resulting from the proposed requirements to check people when they want to have a prescription issued or rent a video, or any of the other myriad reasons why they may in future be compelled to establish their identity. Finally, it examines the consequences of the raft of new offences that will be created, such as failure to attend to be fingerprinted, to notify a change of address or to attend an interview at a specified time and place, many of which conflict with legislation such as the Data Protection Act, the Disability Discrimination Act and European Union provisions on free movement.

Unfortunately, rather than being grateful for the efforts by the Lords to improve the legislation, the government let it be known that it was thinking of ways that would constrain their
powers even further, to prevent them from delaying laws emanating from the Commons, no matter how incoherent.

It may be that the legislation on identity cards is an aberration, and it is possible to share Dicey’s confidence that parliament would ‘continue to guarantee individual liberty, liberty of discussion, freedom of assembly and rights of property’. Unfortunately, this is at variance with the evidence, as can be seen from even a superficial examination of rights that are now gone.9 The Civil Contingencies Act is in part a response to concerns about public health. A minister can invoke the Act simply by saying so, without having to put his or her decision in writing or consulting parliament. The government can then initiate forced evacuation, seize property without compensation, ban any assembly, including parliament itself, and make any new law that it chooses. The minister is not required to show that there is a real threat but just that he or she believes that one exists. If he or she is mistaken, they cannot legally be stopped.

The 2003 Criminal Justice Act has removed the right to jury trial and to silence and withdrawn the protection against double jeopardy. The 1997 Protection from Harassment Act made any repeated action, such as demonstrating against a military base, an offence, whereas the Serious Organised Crime and Police Act was used to convict a young woman who read out the names of British soldiers killed in Iraq beside the Cenotaph in Whitehall.10 These laws are profoundly authoritarian, in some cases sweeping away rights that had existed since Magna Carta.

There is, however, another important consideration. Are they workable? The prime minister states that juries will recognize the ‘glorification of terrorism’ when they see it. Yet eminent lawyers already seem to have difficulty in understanding what it might mean.11

At least these laws had gone through a parliamentary process. The Legislative and Regulatory Reform Bill, currently passing through parliament, will, unless substantially amended, allow ministers to alter almost any aspect of legislation without parliamentary approval.12

Do the established constitutional principles still apply?

In the present circumstance, therefore, Dicey’s beliefs that parliament could be trusted to exercise adequate legislative scrutiny and would respect the provisions of common law guaranteeing individual liberty can unambiguously be refuted.

What then of his second premise that the courts will act to constrain any tendency to enact tyrannical legislation? This again raises the issue of separation of powers. The scope for British courts to act has always been limited by the principle of parliamentary sovereignty, although the principle that the judiciary can review the actions of the executive has been well established. Thus, a court could rule that the Home Secretary acted unlawfully in blocking the issuance of a passport to a young Australian man who has a legitimate claim to British citizenship and who is currently being held illegally in Guantanamo Bay.13 Yet it is apparent that new legislation will seek to immunize the decisions of ministers from judicial scrutiny. Lord Steyn has noted how the 2004 Asylum and Immigration Act is contrary to the rule of law and ‘the constitutional principle on which our nation is founded’ and ‘seeks to immunise manifest illegality’.14 The consequences were seen in a recent case where a judge ruled that the government’s system of control orders, directed at individuals suspected of links with terrorist organizations but where this cannot be proved, was an affront to justice and clearly in breach of human rights legislation.15 He concluded that, in the case he was ruling on, the Home Secretary had made his decision on the basis of patently one-sided information, yet the law had been drafted in such a way that he was unable to envisage how he might quash the decision.

What about separation across the constituent parts of the United Kingdom, an issue raised by the decision by some members of parliament representing non-English constituencies to vote on a ban on smoking in public places in England? This raises the West Lothian question, first posed by the retired parliamentarian Tam Dalyell and brought to the fore by the creation of a Scottish parliament.16 In several highly controversial areas, such as student top-up fees and foundation hospitals, the current government has only been able to pass legislation with the support of Scottish Members of Parliament (MPs) whose constituents’ interests are unaffected by their actions.

Is there a crisis of governance in the United Kingdom? The political scientist Richard Rose has noted that the British constitution is ‘not the product of a compact, drafted and signed by its constituents, as is usual with a written constitution’.17 Instead, it has emerged as a piecemeal combination of statutes and precedents, as custom over a 1000 years. Until recently, it could be argued that it worked. There was a tacit understanding among all parties that laws would respect individual freedoms and would be subject to parliamentary scrutiny to ensure that they made sense. It was also accepted that, through the process of judicial review, where a mistake had been made, the courts could put it right. This is no longer the case.

Implications for public health

What does this mean for public health? Most obviously, there is no check on the decisions of ministers. This situation
has allowed them to engage in a relentless and ever more rapid process of ‘modernisation’ in which primary care trusts are stripped of their ability to deliver services one week and have them returned the next.\textsuperscript{18} They can split health authorities into smaller organizations to make them locally responsive and then amalgamate them to make them more managerially efficient. Yet they need never explain their reasoning, free from the inconvenience of convincing anyone else that their policies have some merit or are even internally coherent.

Yet the consequences go far beyond the stability of the health service. In an era in which health professionals are, quite rightly, expected to base their practice on the best available evidence, surely it is reasonable to expect politicians to do the same. How does the government handle complex evidence? An important insight comes from the evidence that has emerged about one of the most important decisions taken by government in the past decade, the decision to join the invasion of Iraq. The many fabrications and distortions that helped to make the case for invasion are now well known.\textsuperscript{19} Arguably what took place within the intelligence and policy community was research misconduct on a monumental scale, a scandal that was only possible because of the absence of any effective scrutiny.

Of course, the relationship between research and policy is complex, and it is entirely reasonable that evidence should be combined with political judgement, especially where there is uncertainty or where it is necessary to incorporate values.\textsuperscript{20} Yet it is reasonable to expect that political leaders do not make up the evidence or make decisions that fly in its face. Unfortunately, British health policy over the last two decades provides a long catalogue of policies that have been introduced without any evidence to support them but which health professionals and managers have then been asked to implement.

Another concern is loss of trust. The public now understand the concept of spin and news management, exemplified by the observation that 11 September 2001 was a ‘good day to bury bad news’.\textsuperscript{21} It is not, therefore, surprising that people have a profound distrust of politicians. This is not new. In 1995, before Stephen Dorrell had admitted to parliament that the consumption of infected beef was the most likely cause of new variant Creutzfeld-Jakob disease (CJD), we identified several issues, including Bovine Spongiform Encephalopathy (BSE), where the government’s statements were simply not believed by most people.\textsuperscript{22} The problem was that when ministers did tell the truth, few would believe them. This had tragic consequences when the *Lancet* published a paper proposing a link between vaccination and the measles, mumps and rubella vaccine.\textsuperscript{23} Unfortunately, the lessons were not learned, as became clear during the 2001 Foot and Mouth outbreak, when those living in affected communities simply disbelieved official statements because they were contrary to their own experience.\textsuperscript{24} Kant argued that humanity’s essential moral worth derives from our ability to make moral choices and so reach rational decisions and that deception corrupts that essential humanity because it removes the ability to make rational choices.\textsuperscript{25} Public health policies depend on public trust, and as with the spirits in Pandora’s box, once trust is gone, it is very difficult to recover.

There is, however, a much greater concern. Public health views itself, usually correctly, as being on the side of the angels. Unfortunately, that has not always been the case. The activities of the public health community in the Third Reich were often shameful.\textsuperscript{26} Arthur Guett, director of public health in the Reich Interior Ministry announced that ‘the ill-conceived “love of thy neighbour” has to disappear, especially in relation to inferior or asocial creatures. It is the supreme duty of a national state to grant life and livelihood only to the healthy and hereditarily sound portion of the people in order to secure the maintenance of a hereditarily sound and racially pure folk for all eternity. The life of an individual has meaning only in the light of that ultimate aim, that is, in the light of his meaning to his family and to his national state.’\textsuperscript{27} The interior minister, Wilhelm Frick, reorganized his Health Department to ensure that the police, public health professionals, welfare administration and social services were closely coordinated in pursuit of this policy. Many public health professionals played an active role in the worst excesses of the Nazi regime, such as Arthur Greiser, the Nazi governor in north-western Poland, who sought to prevent transmission of tuberculosis to Germans by exterminating infected Poles.\textsuperscript{28} Specialists in public health sat in judgement over Polish citizens to determine whether they were sufficiently Aryan to be allowed to live and played a central role in the development of a eugenic policy that led to the forced sterilization of an estimated 400,000 people.\textsuperscript{29} However, although these policies were implemented most extensively in the Third Reich, eugenic teaching and policies were common in many other countries then and subsequently. Many of those who engaged in these terrible acts believed that what they were doing was right and that they were acting in the interests of humanity as a whole, subjugating the rights of the individual to the common good. Yet this is a very slippery slope. It starts when one believes that it is necessary to confine someone because they might pose a threat to the community, either because they have an infectious disease or because someone thinks it might prevent a terrorist atrocity. The Civil Contingencies Act brings together the public health, security and emergency services in pursuit of a common aim, arming them with draconian powers that are not, at least on paper, very different from those...
available to Frick’s Interior Ministry. Ministers dismiss concerns that anyone in the United Kingdom would ever use these powers in a tyrannical way, but unfortunately, they have been unwilling to put in place safeguards that would reduce this risk.30

There are several reasons, therefore, why public health professionals should be concerned about the system of governance in the United Kingdom, quite apart from any anxieties they may have as individual citizens. In particular, they are in danger of becoming party to increasing numbers of illiberal, ineffective and possibly harmful policies that are enacted with negligible parliamentary scrutiny and effectively outside the rule of law. The vote to ban smoking in England was a rare exception, in that MPs were allowed to make up their own minds, leading to a law that can actually work, unlike the poorly thought out proposals from ministers.31 Yet, even here, there was a problem of democratic legitimacy, because some of those voting did so even though any legislation would have no impact on their constituencies.

What is to be done?

This article points clearly to the need for a written constitution. This should provide for effective separation of powers, recognize the new political geography of the United Kingdom and safeguard the rights of the individual, although this is unlikely to happen in the foreseeable future. Yet some things are realistic in the short term.32

The first is a system to hold the executive to account in the absence of any effective scrutiny by parliament or the media. This could be a role for academic public health, exemplified by Allyson Pollock’s exposure of the folly of the Private Finance Initiative.33 However, this requires that society recognizes and values the role that academia can play as part of a modern democracy. It also requires sources of funding. The situation in the United Kingdom is very different from that in the United States, where there are many generous philanthropists willing to support research that challenges the conventional wisdom. There is also a role for non-governmental organizations, as is already done by the Institute for Fiscal Studies in relation to tax policy. In the United States, the website www.factcheck.com provides an impartial check on the claims of politicians from both major parties, with funding from the Annenberg Family Foundation.

The second is a rebalancing of power between ministers and their parties. As Bernard Donoughue’s diaries from his time as an adviser to Harold Wilson reveal, there was a time when party members did have a say in the development of policy.34 Political parties could hold their leaders to account, forcing them to formulate arguments in a way that could be subject to some degree of scrutiny. Now, whenever ordinary members protest against the decisions of the leadership, they are manhandled out of the conference chamber by security staff invoking anti-terrorist legislation.35 Here, there are grounds for optimism because recent scandals over political funding may force parties to collect more money from their ordinary members, rather than as loans from anonymous billionaires. This could provide a stimulus for them to reconnect with their members.

Third, there is a need to move incrementally to restore some degree of separation of powers. Our representatives should represent us and not their party leadership, forcing ministers to win over their backbenchers by the merits of their arguments, reducing the volume of legislation, a good thing in itself. However, there is also a need to strengthen the role of the courts in holding the executive to account, resisting pressure to immunize ministers from the rule of law.

Public health and politics

The lecture on which this article is based strayed further into politics than is usual for one on public health. However, as the great German public health professional Rudolph Virchow noted, after investigating the outbreaks of typhus in Eastern Silesia, ‘Medicine is a social science, and politics nothing but medicine on a grand scale’.36 Churchill, in his famous ‘Iron Curtain’ speech, issued a challenge ‘to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world . . . through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law’.37 It is too easy to ignore what is happening until it is too late, a lesson that the public health community should recall as it reflects on its own history.

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