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Mark Bevir is Professor of Political Science at the University of California, Berkeley. His publications include Key Concepts of Governance (2009), New Labour: A Critique (2005), The Logic of the History of Ideas (1999); and, with R.A.W. Rhodes, Governance Stories (2006), and Interpreting British Governance (2003).

Juridification and Democracy

What is the state of British government? What do we wish it to become? These questions lurk within my article on “The Westminster Model, Governance, and Judicial Reform”. The philosopher J. L. Austin once said that he had been too busy doing what he was doing to explain why it mattered. I am grateful to Roger Masterman for impetus to explain why my article matters. My conciliatory personality will suggest that he and I broadly agree on the nature of juridification and its place in Labour’s reforms. So, what is all the fuss is about? Well, even if we largely agree on juridification, we point to very different answers to questions about the state of British government and what we would like it to become. My confrontational personality will devote most of my reply to these issues. I believe British government resembles the differentiated polity of the governance narrative more than it does the Westminster Model. And I believe we should be looking to strengthen democracy through participatory institutions as well as representative ones.

Juridification

Masterman accepts my main argument about juridification: the sphere of influence of the judiciary has grown in recent constitutional history. Yet, this agreement may be hidden by his use of sentences with a particular structure. One example appears in his abstract: “while the contemporary constitution may have seen an increased degree of ‘juridification’ of the sort described by Bevir, the strengthening and development of political mechanisms of accountability has also been of considerable importance.” A later example refers to the crucial case of the Human Rights Act: “assertive and creative

judicial interpretations have been deployed in adjudication under the Human Rights Act, yet it has been a recurring feature of litigation under the Act that the higher courts have been reluctant to act in a way which would overtly usurp the legislative function.” He uses this type of sentence right through to the end: “while a degree of ‘juridification’ may be perceived in the development of the constitution, the codification of legal right and expansion of the judicial review jurisdiction may also be defended as integral to the rule of law.” All these sentences juxtapose two claims. Such juxtaposition may suggest the two claims are in tension, but a moment’s thought shows they are not. The first claims paraphrase arguments I made in my paper, and Masterman acknowledges some truth to them. The second claims are ones he wants to make, and I am willing to acknowledge some truth in them.

So, Masterman and I are telling compatible stories with different emphasises. Far from insisting that parliamentary sovereignty is the monolithic principle propounded by Dicey, I clearly argue that Dicey’s image of the constitution was always inaccurate and has become increasingly inaccurate. It has become increasingly inaccurate because of, for example, the growth of judicial review, the growing power of the executive, and changes in the management and delivery of public services. These changes, most notably judicial review, have contributed to a process of juridification. The judiciary now plays a greater role in formulating and regulating legal standards, so the range of decisions that can be made democratically has necessarily been reduced. Labour’s reforms include aspects of such juridification.

Masterman explicitly assents to almost every aspect of that story – the one exception being my claim that Dicey was always inaccurate, and I think he probably

would accept that too. Yet his agreement with my story seems a bit begrudging because he emphasises other points. He emphasises that Parliament remains the dominant law-making body in the formal constitution. I agree provided we are talking about legal norms, not the actual processes by which laws are formed. Most of the processes that give rise to laws (and policies generally) occur in policy networks connected to the core executive. Parliament may pass legislation, but it does not dominate the processes that determine what goes into legislation. Masterman emphasises that Labour's constitutional reforms allow government functions to be carried out at a level nearer to the population, while also strengthening Parliament's ability to hold the executive to account. Again, I agree provided we are talking about legal norms. The actual processes of governing have often become increasingly centralized under Labour – a trend apparent in the growth of the size and powers of No. 10. Finally, Masterman emphasises that Labour's judicial reforms included measures that make the judiciary accountable to elected politicians. Yet again, I agree, especially if we are discussing legal norms. Otherwise I worry that the actual processes of accountability will, as so often, prove rather weak.

Governance

The disagreement between Masterman and I is not, it seems, about juridification. I suspect it concerns the state of British government and what we wish from democracy. Let me start with the state British government. Even as I accepted much of Masterman's story, I suggested it applied more to legal norms than actual political processes. His story echoes an old concern with the formal laws and institutions that define the Westminster Model. He only indirectly expresses any doubts about the Westminster Model, and even

then he immediately reaffirms a doctrine of “parliamentary sovereignty” that “has shown itself to be sufficiently fluid to accommodate” the EU and devolution. In contrast, my story echoes the behavioural topics flagged by Graham Wallas, developed throughout the last century, and now embedded in the governance narrative. But I do not want to draw a sharp dichotomy. While some proponents of a governance perspective present it in stark contrast to the Westminster Model, I have consistently argued that the Westminster Model still matters because so many political actors believe in it and act on it.¹ More generally, while some political scientists tackle behavioural topics – interest groups, policy networks, and bureaucratic and judicial behaviour – using formal techniques and explanations, I have consistently argued for an interpretive approach that explores these topics in terms of the beliefs of the actors.

I am sorry to say that I do not understand why Masterman thinks I treat law apart from politics, nor even what he means by saying I do. Sometimes he appears to be discussing the impact on actual behaviour and processes of legal norms. Let me restate, therefore, what I thought were clear views on the complex relationship between the actual processes of governance and the legal norms associated with Dicey or the Westminster Model. Obviously legal norms influence politics. I argued that a general faith in Dicey’s constitutional theory gave it a self-fulfilling aspect, while Labour’s lingering belief in the theory helps explain why Labour responded to the new governance as it did. Equally obviously, politics influences law. I argued that actual processes of governance meant that Dicey’s theory never fulfilled itself, while Labour still regularly treats judges and the courts as part of the policy-making process to be cajoled and coerced into backing its positions.

The relationship of politics to law is one of mutual influence. Where might I differ from Masterman's views here? Perhaps we disagree about the nature of law. We largely agree on the content of the legal norms. But I think the norms are intersubjective beliefs that do not define their own application, so law is in an important sense always an open-ended political process. Masterman may disagree. More importantly, we may disagree about the nature of governance. While Masterman acknowledges the rise of judicial review, the growing power of the executive, and changes in the management and delivery of public services, he may not accept other aspects of my account of the new governance. Perhaps he rejects the idea that new theories of governance have undermined formal studies of laws and institutions as useful guides to actual political processes. Or perhaps he rejects the idea that new worlds of governance mean that his caveats to my story really apply only if we are discussing legal norms. Either way, he may believe, for example, that Parliament really does do more than the core executive to decide what goes into legislation.

So, the question is: to what extent should we accept that there are new theories and new worlds of governance that undermine the legal norms associated with Dicey? I think the new governance decisively undermines faith in the Westminster Model. The Westminster Model provides neither an adequate account of British political processes nor a useful normative guide to how to reform those processes.

Democracy

The extent to which the new governance undermines the Westminster Model is a question of degree. Loosely speaking, the more one believes it does, the more one will

worry about the state of British democracy. I worry about it. Representative democracy is often a thin veneer covering rule through networks of unelected officials and experts. We need to supplement representative institutions with a robust, participatory democracy, including more dialogic forms of policy-making. Masterman is more sanguine about the adequacy of representative institutions: he may sympathise with devolution as a way of bringing representative institutions closer to citizens, but he shows little interest in more direct forms of participation.

I worry that new theories and worlds of governance reveal and pose serious problems for Britain's representative democracy. Among the problems are those tied to the way juridification reduces the scope of decisions that can be made democratically. It is important to emphasise here that I claimed only that juridification restricts the space for future democratic decisions, not that it destroys it. Masterman over-states his case when he implies I believe handing an issue to the courts precludes later democratic decisions on that issue. My point is only that when Parliament hands the application of a rule to the courts, it necessarily – to use the word I use and he quotes me as using – “constrains” the space for democracy. It is also important to emphasise that I did not argue that the courts should have no role in public life. The courts main role remains that of interpreting and applying the law, and the rule of law requires that citizens can appeal to courts when public authorities go beyond their powers.

Masterman and I may agree that juridification restricts without eliminating the scope of later democratic decision-making, but we seem to disagree profoundly over the role of participatory institutions and dialogic forums as supplements to representation and expertise. He is at pains to present Labour's reforms at least as consistent with and often

as actively strengthening Britain's representative institutions. He argues that the Human Rights Act was carefully crafted to ensure the primacy of representative institutions over courts. He reminds us that section 19 sets up a procedure for checking the compatibility of legislative proposals with human rights during the policy making and parliamentary processes – although he fails to recognize that this procedure is itself an example of the way juridification can lead democratic actors to police themselves in ways that restrict the range of options left open to them. He also reminds us of the different types of scrutiny, from reasonableness to overturning legislation that courts may exercise on government decisions. More generally, he argues that Labour's larger programme of constitutional reform attempts to extend the depth and range of accountability found in British government.

I myself have argued somewhat similarly that Labour's policies combine a continuing attachment to representative democracy with a belief in expertise as a means of shoring up problems and gaps in the current process of government.² In my opinion, however, the problems that the new governance poses for representative government cannot be adequately solved through representative institutions themselves. The most revealing contrast between Masterman and I may, therefore, be this: whereas I mentioned the anti-democratic history and nature of Dicey's concept of sovereignty as a restraint on popular participation, he champions it as establishing a foundation for representative government. The real debate between us is a normative one over the importance of, as I believe, promoting popular participation, or, as he seems to believe, being content to restrain such participation within representative institutions.

Conclusion

What are the hopes for radical democratic innovations? If Masterman's reading of my article is generally fair, his claim that I portray juridification as an incontrovertible and relentless process is so breathtakingly false that I do not know what to make of it. I explicitly challenge juridification's "aura of inexorability" by arguing that it was actively created in response to the new governance and I explicitly argue that the new governance itself arose not because of "an inexorable process" but as a result of contingent responses to new theories and dilemmas. Thus, juridification is not inexorable. To the contrary, juridification is typically a result of political actors taking the same position to the new governance as does Masterman. They respond to the new governance by downplaying its challenge to the Westminster Model, trying to shore up representative democracy, and appealing to the expertise and good will of judges and other professionals. One reason why I challenge this complacent, Whiggish response to the new governance is precisely to promote a more participatory democracy and a more dialogic style of public policy. I may be pessimistic about the chances of that challenge succeeding, but I am making the challenge.

¹ See especially M. Bevir and R. Rhodes, Interpreting British Governance (London: Routledge, 2003); and M. Bevir and R. Rhodes, Governance Stories (London: Routledge, 2006).

² On constitutional reform see M. Bevir, “Socialism and Democracy” in A. McDonald, ed., Reinventing Britain: Constitutional Reform under New Labour (London: Politico’s, 2007), pp. 55-75. More generally, see M. Bevir, New Labour: A Critique (London: Routledge, 2005).