# PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

Edited by

Nicholas Bamforth
*Fellow in Law,*
*The Queen's College, Oxford*

and

Peter Leyland
*Senior Lecturer in Law*
*London Metropolitan University*


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4 November 2001 at midnight. An attempt by the Assembly on the preceding Friday to elect David Trimble and Mark Durkan (who had replaced Seamus Mallon) as First Minister and Deputy First Minister failed, the requisite cross-community consensus not being satisfied.[33] After members of a non-designated party changed their designations for cross-community purposes, the vote was taken again on 5 and 6 November and the two candidates for office were elected. The Secretary of State for Northern Ireland accepted that as the election was outside the requisite six weeks he was under an obligation to nominate a date for an extraordinary general election under section 32(3) and actually nominated the date of the next scheduled ordinary election, 1 May 2003, some 18 months on from the date of his decision.

The issues, therefore, before the court in *Robinson* (heard by the Northern Ireland High Court[34] and Court of Appeal[35] and the House of Lords[36]) were twofold:

(1) was the 'out-of-time' election of the First Minister and Deputy First Minister under section 16(8) valid; and
(2) was the Secretary of State entitled to propose as the date for the extraordinary general election the date specified in the Act for the next ordinary election.

Before turning to consider the courts' responses to these questions, some material not referred to by the judges will be provided, in order to facilitate a fuller consideration of the role discharged by the judges in *Robinson* in terms of the material they relied upon and the emphasis it received.

First, we may consider the legislative history of the Northern Ireland Act 1998, whose long title (rather surprisingly referred to by some of the lower court judges as its (non-existent) preamble) states it to be an Act 'to make new provision for the government of Northern Ireland for the *purpose* of implementing' the Belfast Agreement (emphasis is added) . It is, obviously, the case that the Belfast Agreement did not—and could not—contain all the detail necessary for inclusion in the later Act, although as the Bill progressed through Parliament, there was full liaison/discussion between the Secretary of State and the (participating) Northern Ireland parties.

The Northern Ireland Assembly has (once its initial 'shadow' phase ran out) a fixed four-year term.[37] In such a situation it is wise to provide for an earlier dissolution, and to do so in such a way as not to enhance the electoral chances of any one party. In the Bill as originally published, neither what became section 16(8) nor section 32(3) appeared. The Bill did, however, contain a power *vested* in the Queen in Council, effectively of course the *Secretary of State*, to dissolve the Assembly early, thus causing an Assembly election to be held. This was *in addition*

[33] See Northern Ireland Act 1998, ss 4(5) and 16(3). Those MLAs who choose not to designate themselves as either 'nationalist' or 'unionist' remain in the 'other' category, a category which does not count for cross-community voting purposes.

[34] Kerr J, 21 December 2001.

[35] Nicholson and McCollum LJJ, Carswell LCJ dissenting, 21 March 2002.

[36] [2002] UKHL 32, 25 July 2002.

[37] Northern Ireland Act 1998, s 31(1). See now the Northern Ireland Assembly Elections Act 2003 and the Northern Ireland (Elections and Periods of Suspension) Act 2003.

to a power vested in the Queen in Council to prorogue or further prorogue the Assembly. What was clause 24(4) stated:

> If at any time it appears to Her Majesty—
> (a) that the persons who are the [First Minister and Deputy First Minister] and the Northern Ireland Ministers are not able to carry out their functions;
> (b) that, if they were to resign, the persons who would be likely to succeed them would not be able to carry out their functions; and
> (c) that it is in the public interest that the Assembly should be dissolved, then she (having taken account of any relevant Assembly vote) may direct that an Assembly election take place on a date earlier than 1 May 2003.

During the Committee stage in the House of Lords (a quite crucial stage given the allocation of time order on the Bill in the Commons), several pertinent amendments were made to the Bill. First, when the Bill left the Commons, what became section 16(8) read (as clause 14(7)):

> Where the offices of the [First Minister and Deputy First Minister] are vacant, an election shall be held under this section to fill the vacancies.

The clause was amended (both with regard to section 16(8) and section 16(1) on the duty of an assembly to elect a First Minister and Deputy First Minister immediately after an election) through the addition of the six week timescale. The main debate (indeed the sole debate) took place on what became section 16(1), section 16(8) being amended in turn 'on the back' of the earlier debate. Lord Dubs (Junior Minister in the Northern Ireland Office said): 'I do not think that six weeks is too short a period'[38] and in response to questions that six weeks was too long or indeed too short as well as concern about the consequences of breach of the six week period, he said:

> (I am) asked what would happen if no election took place for [First Minister and Deputy First Minister] within the six week period. If the Assembly fails to make such an election within six weeks, it will be dissolved and the Secretary of State then sets the date for an extraordinary election. That is not unreasonable. Six weeks is a sufficiently long period to deal with a matter of importance to the government of Northern Ireland.[39]

This specific quotation from Lord Dubs (alone of all the parliamentary material mentioned here) was referred to by some of the judges in *Robinson*, but it has, it is submitted, to be further viewed in light of two other amendments to the Northern Ireland Bill not mentioned by them.

Later in the Committee stage, the government successfully proposed the deletion of clause 24(4) quoted above. Lord Dubs said:

> In the Bill as it stands, the Secretary of State may dissolve the Assembly and call fresh elections if she believes the Northern Ireland Ministers are unable to carry out their functions. *This was seen as leaving too much power in the hands of the Secretary of State*, and planning for failure. Accordingly ... [we propose to leave] the power to call early

[38] HL Deb, 19 October 1998, vol 593, col 1227.
[39] HL Deb, 19 October 1998, vol 593, col 1229.

> elections to the Assembly on a majority of two thirds of all members ... In addition, a fresh election will be triggered if the Assembly fails within six weeks to elect a [First Minister and Deputy First Minister].[40] (emphasis added)

As will be elaborated on below, Lord Dubs indicated that this would bring the Northern Ireland Bill's provisions on extraordinary elections 'more into line'[41] with the provisions of the Scotland Bill.

The third amendment to the Bill was the deletion of the Secretary of State's power to prorogue the Assembly. Lord Dubs, indicating that such emergency powers were 'planning for failure' and 'as a result might make failure more likely,'[42] referred to the already secured deletion of clause 24(4):

> *In discussions with the Northern Ireland parties* there was considerable opposition to the kind of emergency powers represented by [the prorogation clause]. We have already debated the powers to call emergency dissolutions and fresh elections. *As a result,* the *Secretary of State's powers in this field have instead been given to the Assembly.*[43] (emphasis added)

As Lord Dubs indicated, the Northern Ireland Bill's provisions on extraordinary general elections were brought 'more into line' with what became the relevant provisions in the Scotland Act—'more into line' but with one key difference. Section 32 provides for an extraordinary general election after the passing of a resolution of the Assembly with the support of two-thirds of the Members, (the equivalent in the Scotland Act is section 3(1)(a)). Also, an extraordinary general election shall be called in the situation indicated by section 32(3), a provision at the heart of *Robinson* and quoted and discussed above. This is the equivalent of section 3(1)(b) of the Scotland Act concerning the nomination of Scotland's First Minister within the period of 28 days specified in section 46. In Scotland, the 'triggering agent' of an extraordinary election is the Presiding Officer/Speaker; in Northern Ireland, the Secretary of State. The key difference between the two Acts, however—ignoring, for once, the surrounding political contexts!—is that under the Scotland Act, the calling of an extraordinary election does not displace the next scheduled ordinary election. It will take place as scheduled,[44] the extraordinary election becoming an additional election. In Northern Ireland this is not the case.

Given the emphasis placed in *Robinson* on the role of the Belfast Agreement, as will be mentioned below and given the wording of the Northern Ireland Act's long title, it should be pointed out that the Agreement itself does indicate precisely the post-Agreement/Act role of the Secretary of State. It encompasses responsibility for Northern Ireland Office non-devolved matters; to approve and lay before the Westminster Parliament any Assembly legislation (to which he or she will have

[40] HL Deb, 19 October 1998, vol 593, col 1295. The power of the Assembly to resolve to call an early Assembly election is to be found in s 32(1).

[41] *Ibid.*

[42] HL Deb, 21 October 1998, vol 593, col 1442.

[43] *Ibid.*

[44] Subject only to the proviso of the extraordinary election being held within six months of the next scheduled ordinary election.

consented) on reserved matters; to represent Northern Ireland interests in the UK Cabinet; and the right to attend the Assembly upon invitation.[45]

This material has been provided, as mentioned above, in addition to or in comparison with that actually relied on or referred to by the judges. In terms of judicial espousal or disavowal of a soft-edged role with regard to decisions involving the 'deployment of political judgment'[46] the material presented to them and/or relied upon by them is of prime importance. Consideration also needs to be given to the appropriateness of the chosen test when the case involves competing political arguments—as *Robinson* itself did—otherwise the test may simply become one of preserving the validity of the decision challenged whatever the challenge mounted.

Also relevant too is the presence of the sovereign Westminster Parliament, as the enactment of the Northern Ireland Act 2000 illustrates. The suspension of the Assembly by a Westminster Secretary of State acting under the (legal-political) authority of the Westminster Parliament was not envisaged by the Belfast Agreement but it happened. Indeed, given the two suspensions of the Assembly under the Act in the summer of 2001, 18 weeks (rather than six) elapsed between the resignation and re-election of the First Minister and of the Deputy First Minister. To put it more broadly, when considering the political context or consequences, what weight should a judge give to the presence and powers of a sovereign Parliament which, in spite of government protestations to the contrary, has shown itself well able to legislate rapidly and fully should the (perceived) need arise? In the devolved context, is it constitutionally preferable for the courts to uphold a 'reserve' power of a Secretary of State under soft-edged review, or to overturn it, if necessary, under hard-edged review leaving the issue to be resolved, if thought necessary, by the exercise of Westminster's legislative powers? Frankly, given the present balance of powers in the UK constitution, does it really matter in practice at all?

The judgments in *Robinson* delivered in the Northern Ireland High Court and Court of Appeal are essentially pitched low in that they reveal few traces of a new form of constitutional reasoning. Kerr J, in the High Court, whose decision was upheld by Nicholson and McCollum LJJ in a split Court of Appeal, indicated that the arguments on section 16(8) (the 'out-of-time' election of First Minister and Deputy First Minister ) and section 32(3) (the date set by the Secretary of State for the extraordinary general election) had to be kept distinct, although resolution of the former question would undoubtedly affect that of the second. The question to which section 16(8) gave rise was whether an election of First Minister and Deputy First Minister outside the prescribed period was valid. Given the wording of the Act's long title, Kerr J noted that its interpretation had to be informed by the Belfast Agreement (and beyond that the 'political realities' of Northern Ireland). The Agreement itself was totally silent on any such time limit. The limited quotations

[45] *The Belfast Agreement* (Cm 3883, April 1998), Strand 1, para 32.

[46] See *In re Michelle Williamson* (a case involving the decision of the Secretary of State for Northern Ireland on whether or not the IRA was maintaining a complete and unequivocal ceasefire); NIHC, 19 November 1999, Kerr J, at 16 of transcript.

from Lord Dubs as recorded in Hansard, he stated, were not sufficiently unequivocal as to settle the question of the proper construction of sections 16 and 32 and therefore could not be relied on. Given that background, Kerr J held that section 16(8) should not be applied in a rigid or inflexible manner: rather in determining whether the six-week period should be classified as a mandatory or directory requirement, the consequences which might flow from non-compliance should be considered. In light of all that (and indeed what is termed 'substantial' compliance with the requirement), he held that the six week requirement could not be classified as mandatory and consequently its terms did not preclude a valid election after the six weeks had run.

Kerr J regarded the discretion given to the Secretary of State under section 32(3) as wide: he was entitled to take the valid election of First Minister and Deputy First Minister into account (and the prospect of continued stable government) and therefore the choice of 1 May 2003 was lawful. Kerr J also referred to the *Williamson* principle:

> a decision such as this is taken in a political context and the political considerations which inform it place it firmly in the category of soft-edged review *where it is inappropriate for the courts to intervene.*[47] (emphasis added)

The 'political considerations' which may have lain behind the Secretary of State's decision were referred to twice by Nicholson LJ in the Court of Appeal, in the context of the meaning to be given to section 16(8):

> It may become apparent to the Secretary of State or the Government that a successful election of [a First Minister and Deputy First Minister] could be held shortly after the expiry of the period under section 16(8) which, if valid, would *obviate the necessity for a fresh election* that *might imperil the Belfast Agreement* ... In view of the date which he did propose ... he obviously thought it was not in the public interest to have an early election for the next Assembly but to allow the existing Assembly to seek to establish public confidence in it ... They must have considered that a fresh election was not in the public interest and at the very least that such an election was *liable to imperil the Belfast Agreement.*[48] (emphasis added)

Indeed, Nicholson LJ indicated that section 32(3) could be used in order to apply pressure on the Assembly to elect a First Minister and Deputy First Minister, 'certainly if compliance with the requirements of section 16 could be met within a short time.'[49]

The Lord Chief Justice, Sir Robert Carswell, dissented. Concentrating primarily on the first issue and placing greater weight on the words of Lord Dubs as well as the policy and objects of the Northern Ireland Act 1998 , he held that section 16(8) precluded a valid election outside the prescribed time and that therefore the election of the First Minister and Deputy First Minister was invalid. He further held that the date specified by the Secretary of State under section 32(3) was invalid.

[47] Above n 34, at 17.
[48] Above n 35, at 17–19 of transcript.
[49] *Ibid* at 19.

The Lord Chief Justice concluded:

> It is a difficult and invidious task for judges sitting in a court of law to adjudicate upon matters which have a highly charged political context, where the exercise of political judgment is at the centre of decision-making. That task is, however, imposed on us by law and we have to discharge our function in the manner required of a judicial tribunal, looking only at those matters which are properly within our purview. Those matters are concerned solely with the interpretation of the governing statute, and I have sought to construe its terms in such a way as to ascertain and give effect to the intention of Parliament, eschewing all other considerations.[50]

The House of Lords, by a three to two majority, upheld the decision of the majority in the Northern Ireland Court of Appeal. Lord Hutton (a Northern Ireland judge) and Lord Hobhouse dissented on the import of sections 16(8) and 32(3), but all were agreed that no reliance could be placed on the Hansard quotations which had been referred to (not necessarily relied on) in the courts below. The majority held that the interpretation to be given to the Act in general and the two subsections in particular should be the generous and purposive approach appropriate to what is 'in effect a constitution' (per Lord Bingham).[51] He also referred, more surprisingly, to the Secretary of State as the 'non-partisan guardian of the constitutional settlement.'[52] Lord Hoffmann referred to the Act as 'a constitution for Northern Ireland framed to create a continuing form of government against the background of the history of the territory and of the principles'[53] of the Belfast Agreement.

That stated, however, the approach of their Lordships was not notably different from the lower courts in upholding by a majority the validity of an election of First Minister and Deputy First Minister outside the time prescribed under section 16(8), and of the decision under section 32(3), in the unusual circumstances of the case and allowing for the fact that an election under section 16(8) had been secured shortly outside the six week period. Lord Hoffmann stated on the latter point that:

> the question of when the election should be held will be a matter for the Secretary of State and will be informed by his political judgment as to the likelihood of the Assembly being able to elect two Ministers. But that does not mean that your Lordships are making a political decision.[54]

## CONCLUSION

There are two specific and conjoined points to consider arising from *Robinson* before addressing the broader themes raised by the title of this chapter.

[50] Above n 35, at 23 of transcript.
[51] [2002] UKHL 32, para [11].
[52] *Ibid* at para [14].
[53] *Ibid* at para [25].
[54] *Ibid* at para [34].

The first concerns the use of the Belfast Agreement in the interpretation of the Northern Ireland Act; the second the resort to the Bill's legislative history and to Hansard. First, the Agreement, at least until it is reviewed, will set the parameters for the political debate in Northern Ireland. Secondly, as some of its provisions are directly incorporated by reference into some of the sections in the Act it must in some situations be used as the express and dominant guide to meaning. Thirdly, its inclusion in the long title of the Act gives it a general interpretative role. The Agreement itself, however, is not a detailed blueprint for Northern Ireland any more than the White Papers (albeit of a different genesis) which preceded the referendums in Scotland and Wales deal with all issues later enacted in the Scotland and Government of Wales Acts. Consequently, selective overreliance should not be placed on the silences of the Agreement. As Lord Hutton (dissenting) said in *Robinson*, in effect countering the argument that the Agreement made no reference to any timescale for the election of First Minister and Deputy First Minister:

> the Agreement contains no express provision stating what would happen if cross-community government was not established or did not continue. But Parliament had to provide for this contingency and did so by the provisions of section ... 16(8) and section 32 [55]

and, one might add, by the Northern Ireland Act 2000.

This ties in to the second point. There was extensive discussion during all the Parliamentary stages of the Northern Ireland Bill between the Northern Ireland Office and the 'participating' Northern Ireland political parties. This is one reason for the several hundred amendments made to the Bill in the House of Lords as they addressed the detailed 'outworking' of the Belfast Agreement. In this context, the actual legislative history of the Bill is of significance in its own right and should be fully used, along with, if necessary, a fuller resort to the Hansard debate on the legislative changes. The Belfast Agreement *cannot* stand alone from these later debates and the detailed provisions.

Does the devolved Northern Ireland (remembering that it is not just a part of the devolved United Kingdom but also a part of a wide set of all-Ireland dimensions) need an independent judicial arbiter? Yes, but it is submitted first that there should not be undue reliance on the *Williamson* dictum (which did not really feature at all in the higher courts). Soft-edged judicial review has value but not in the context of litigation in which all the parties have clearly different political perspectives. It would then simply serve the purpose of preserving automatically the impugned decision. More broadly, however, if the post-devolution courts are to fulfil their role as independent arbiters, especially in litigation with parties involving different political mandates, they must be as rigorous in their review of central *government* power as of devolved power. There is no a priori reason to regard the territorial Secretary of State as the sole (or even independent) arbiter of the constitutional settlement. Judicial rigour across the board of such decision-making is

[55] *Ibid* at para [61].

essential, not least when accompanied by changes in judicial appointment processes and the introduction of Judicial Appointment Commissions.

The Northern Ireland experience, through the lack of its case law, shows the difficulties that can arise through unaccountable political power. The remaining checks and balances are now in place. Judicial reserve or caution is justified no longer.

# 7

# *Modernising Government and the E-Government Revolution: Technologies of Government and Technologies of Democracy*

JOHN MORISON*

## INTRODUCTION

THIS CHAPTER LOOKS at the general initiative of the UK government that is associated with the *Modernising Government* programme, and in particular at the development of e-government within this wider process, in order to illustrate a more general argument about how we can now best understand the practice of government and the nature of power through developing the insights of the governmentality approach.

At a theoretical level, the chapter seeks to make some general remarks about the value to constitutional theory of the governmentality approach that is associated with the later writing of Michel Foucault and some important subsequent criticism. The chapter looks critically at the conceptualisation of the practice of government within much public law scholarship, where the emphasis remains on very particular ideas of power that are associated with territory, sovereignty and law. It suggests instead that attention be afforded to insights from the governmentality approach that emphasise the creation and deployment of a whole range of technologies connecting multiple centres of power within an exercise of government

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that is wider and more complex than that which is contained within traditional understandings of the role of government and the nature of the state.

It is argued that although some public lawyers are beginning to come to terms with changes in the site of government—and this can be seen in the acceptance of the concept of governance over simpler ideas of government—there is not yet a similar development in understanding how the practice and techniques of government operate now. To a large extent ideas of state, and state power expressed through law, remain the central way of understanding the business of government. This chapter develops a model of changing governance that indicates how the nature of public power, and practices of government have changed so far beyond the framework provided by traditional public law scholarship that it is now necessary and useful to develop insights from the governmentality approach. These changes are presented in general terms before the emphasis moves to looking at the 'modernisation of government' process, and the related drive towards e-government. Focusing on e-government as both a new space in government and as new strategy for government, the chapter considers the value of deploying the governmentality approach to understand how a technology of government must also be supplemented by a technology of democracy.

## GOVERNMENTALITY AND CONSTITUTIONAL THEORY

The governmentality approach, which is becoming an important way of understanding how power is arranged in society and how government is to be conceptualised, has its origins mainly in the later writings of Michel Foucault, and some subsequent criticism which develops understandings of how programmes, strategies and techniques of government have been organised in advanced liberal societies.[1]

[1] See particularly, M Foucault, 'Governmentality' in JD Faubion (ed) *Michel Foucault, Power: The Essential Works vol 3* (London, Allen Lane Penguin Press, 2000); L Martin, H Gutman and P Hutton (eds) *Technologies of the Self: A Seminar with Michel Foucault* (London, Tavistock, 1998) and P Rabinow (ed), *Michel Foucault: Ethics* (London, Penguin, 1997). Important later work, developing these ideas, includes studies in criminology, notably D Garland, '"Governmentality" and the Problem of Crime: Foucault, Criminology and Sociology' (1997) 1 *Theoretical Criminology* 173; P O'Malley, L Weir and C Shearing, 'Governmentality, Criticism and Politics' (1997) 26 *Economy and Society* 501–17 and N Rose, 'Government and Control' (2000) 40 *British Journal of Criminology* 321. There are also a number of important collections of essays including G Burchell, C Gordon and P Miller (eds) *The Foucault Effect: Studies in Governmentality* (London, Harvester Wheatsheaf, 1991); A Barry, T Osbourne and N Rose, (eds) *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (London, UCL Press, 1996) and R Smandych (ed) *Governable Places: Readings on Governmentality and Crime Control* (Aldershot, Gower, 1999). Perhaps most importantly among those who have developed Foucault's work in general terms there is N Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge, Cambridge University Press,1999) and M Dean, *Governmentality: Power and Rules in Modern Society* (London, Sage, 1999). There have been some efforts to apply governmentality to law generally, most notably A Hunt and G Wickham, *Foucault and Law: Towards a Sociology of Law and Governance* (London, Pluto Press, 1994); V Tadros, 'Between Governance and Discipline: The Law and Michel Foucault' (1998) 18 *Oxford Journal of Legal Studies* 75; P Leyland, 'Oppositions and Fragmentations: In Search of a Formula for Comparative Analysis?' in A Harding and E Örücü *Comparative Law in the 21st Century* (London, Institute of Advanced Legal Studies, 2002), 211–34 and D Cowan and D Lomax 'Policing unauthorized Camping' (2003) 30 *Journal of Law and Society* 283.

Foucault's earlier account of discipline, with its emphasis on 'docile bodies' as surfaces for the inscription of power, has been supplemented by later work which stresses the importance of the active subject as the entity through which and by means of which power is actually exercised. Here Foucault is asking questions that are far from the usual ones put in conventional political analysis. There is little by way of explanation or discovery of causes or even connections to other phenomena. Instead, emphasis is on the mentalities of rule: how certain ways of thinking and acting came to be and how particular objects of government came to be selected and thought possible to be governed. The later writers within the governmentality approach too are concerned with 'the fundamental role that knowledges play in rendering aspects of existence thinkable and calculable, and amenable to deliberated and planful initiatives ... the invention of new forms of thought ... [and] the ethical conditions [under] which it became possible for different authorities to consider it legitimate, feasible and even necessary to conduct such interventions.'[2]

Overall, Foucault is deploying the term 'government' in a very different sense from the conventional idea of state executives and legislatures. The state, sovereignty and law here play a limited role. As he puts it in an often quoted remark, 'Political theory has never ceased to be obsessed with the person of the sovereign. Such theories still continue today to busy themselves with the problem of sovereignty. What we need, however, is a political philosophy that isn't erected around the problem of sovereignty, nor therefore around the problems of law and prohibition. We need to cut off the King's head: in political theory that still has to be done'.[3] In a sense this needs to be done too in constitutional legal theory. We know that the role of the state and of government has changed. Most constitutional theorists now accept in general terms that there has been a movement from government to governance, and that the role of the state has changed from being a guarantor and provider of security, wealth and law towards being more of a partner or facilitator for a variety of other bodies and agencies as they concern themselves with such issues. Nevertheless, constitutionalists remain focused too exclusively on models of power that fail to capture how government now works. Foucault complains that when he first studied power relations there were no tools of study:

> 'we had recourse only to ways of thinking about power based on legal models, that is: what legitimates power? Or we had recourse to ways of thinking about power based on institutional models, that is: What is the state?'[4]

This approach still dominates constitutional thinking. However, the governmentality approach can provide us with a valuable way of understanding how power is exercised indirectly and at a distance. Governmentality puts less emphasis on ideas of high constitutionalism—of Parliament, Cabinet, statute and budget—and

[2] P Miller and N Rose, 'Governing Economic Life' (1990) 19 *Economy and Society* 3.

[3] *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (C Gordon (ed), New York, Pantheon, 1980), 121.

[4] M Foucault, 'The Subject and Power' in Faubion (ed), above n 1, at 327.

stresses instead the importance of the *active subject* as the entity through which and by means of which power is actually exercised beyond traditional state boundaries. The emphasis is much less on the government of a territory, and ideas of judicial sovereignty and law, and more on the management of things—people, resources, ideas—as part of the multiform tactics of government. Instead of state action (or rather in addition to it), there is the important quality of the freedom of the subject. Governmental action by itself cannot attain its own ends; it requires the willing co-operation of the individual subject participating in their own governance. In other words, the site and the agents of government are more than the state and passive subjects; they include also a whole range of persons and agencies co-opted into a wider exercise of power. Rather than simply concentrating on how the state controls and disciplines the body, governance is now involved in two aspects: there are the forms of rule by which authorities govern populations, and there are the 'technologies of the self' through which people shape their own subjectivity and 'make themselves up' as active subjects of power who can make choices.

In this way the governmentality approach sees power diffused through a diverse number of sites, both traditional in the sense of law, police, courts, and legal system, and extended, by way of families, experts, professions, counsellors, churches etc who are all concerned with governmentality, or the 'conduct of conduct' as Foucault terms it. The governmentality approach involves a realisation that government action by itself cannot attain its ends; it needs to 'govern through freedom' where individuals 'make themselves up' (or come to understand themselves and their situation) in ways that coincide with the objectives promoted by the governing authorities. Government involves not simply issuing orders but engaging with existing networks of power in a much more sophisticated approach that takes people as they are, with all their beliefs and understandings of the world, and engaging with these to shape conduct.

As Nicolas Rose puts it (and the quotation is worth presenting at length as it captures much of what is important and interesting about governmentality to the constitutionalist) the governmentality approach has:

> reframed the role to be accorded to the 'the state' in analyses of control and regulation. Centres of political deliberation and calculation have to act through the actions of a whole range of other authorities, and through complex technologies, if they are to be able to intervene upon the conduct of persons, activities, spaces and objects far flung in space and time—in the street, the schoolroom, the home, the operating theatre, the prison cell. Such 'action at a distance' inescapably depends on a whole variety of alliances and lash-ups between diverse and competing bodies of expertise, criteria of judgment and technical devices that are far removed from the 'political apparatus' as traditionally conceived. ... 'the state' is neither the only force engaged in the government of conduct nor the hidden hand orchestrating the strategies and techniques of doctors, lawyers, churches, community organizations, pressure groups, campaigning groups, groups of parents, citizens, patients, survivors and all those others seeking to act upon conduct in the light of particular concerns and to shape it to certain ends.[5]

[5] 'Government and Control' (2000) 40 *British Journal of Criminology* 321, at 323.

Government thus has multiform tactics: in addition to straightforward state action in the form of law, sanctions, budgets and administrative action there is the important quality of the freedom of the subject and how this freedom is managed. In contrast to simple domination which involves crushing the capacity for action of the dominated, government, properly understood, involves recognising that capacity and mobilising it. To govern is to act upon action. It involves understanding how those who are to be governed think and operate, and using and shaping this in order to guide conduct in the desired direction. As Foucault expresses it, 'the exercise of power is a "conduct of conducts" and a management of possibilities.'[6] Government thus presupposes and depends upon individual freedom and the way in which people see themselves as free, choosing individuals holding all sorts of beliefs and understandings about the world. Foucault refers to the 'technologies of the self' to indicate how people shape their own subjectivity or make themselves up, and are not simply passive objects of power, but rather active subjects of power who can make their own choices. This subjectivity, people's way of thinking about themselves and the world which they inhabit, is shaped by all sorts of pre-existing patterns and habits, complex chains of constraint, obligations and fear as well as new calculations of interest that may be made in relation to new interventions by government and other agencies seeking to effect change. The art of government within the governmentality paradigm involves cultivating this subjectivity in specific forms, aligned to particular government aims. New ways of thinking about the world and understanding particular problem issues are introduced. For instance, the language of managerialism—of risks and rewards, choice, targeting and economic rationalism—may become a dominant way of thinking about issues and problems. Expert discourses are enlisted in the project of seeming to understand the world. 'Scientific fact' is expostulated, and statistical and actuarial information classifies and regroups people and recalibrates risk. New experts and fresh sources of authority arise to replace older traditional or theological sources of knowledge.[7] It is in this way that particular areas of life are reshaped and understandings about specific issues are changed.

Generally then, the governmentality perspective suggests that power and ideas beyond the formal state operates sovereign will. As Foucault reminds us:

> the analysis of power relations within a society cannot be reduced to the study of a series of institutions, not even to the study of all those institutions which would merit the name 'political'.[8]

[6] 'The Subject and Power' in Faubion (ed), above n 1, at 341.

[7] As Pavlich puts it, 'governmentality involves a power which operates through "truth". In ... "advanced liberal societies" ... power relations defer to scientific truths about individuals, selves, democracy, ethics and freedom. Governance operates, that is, by inscribing its subjects in the realms of discourse, and requiring them to recognise themselves in the mirrors of truth that it holds out': G Pavlich, 'The Art of Critique or How Not to be Governed Thus' in G Wickham and G Pavlich, *Rethinking Law, Society and Governance* (Oxford, Hart Publishing, 2001), at 151–52.

[8] M Foucault 'Afterword, The Subject and Power' in H Dreyfuss and P Rabinow *Beyond Structuralism and Hermeneutics* (Chicago, University of Chicago Press, 1982), 224.

Thus, in addition to the formal state there are other bodies that have a role in the operation of government. Power relations are rooted in the system of social networks. Civil society, local government, the private sector, the individual consumer, citizen, voter, expert or whatever are all 'active subjects' who not only collaborate in the exercise of government but also shape and inform it. Government is thus a domain of strategies, techniques and procedures (or 'technologies') through which different forces and groups (including the formal state but reaching far beyond it too) attempt to render their own various programmes operable. The governmentality approach also locates the activity of government generally within the micro level and, in particular, within specific ways of thinking (or 'rationalities') which structure how we see and understand problems, their solutions, as well as the framework within which they exist. This understanding of power takes us away from the state and the formal commands of law as such, and suggests that the space of government is extended far beyond the formal aspects of the constitution. Indeed, the insights of the governmentality approach suggest a chain or network of enclosures where disparate technologies, drawing upon a whole range of resources and techniques, struggle to instantiate particular programmes of action. Different idioms of political power here struggle with one another to be translated from one context to another and to establish themselves in programmes of action which can enlist enough of the various disparate forces to become realisable. Formal government, in the sense of the institutions of the constitution, of course is not absent from this vision: the traditional state retains many resources, including the ability to coerce, and so remains powerful. However, is not the only or even perhaps the main actor in a much more complex process where the problems and solutions of government, and the technologies devised to deal with these, exist in a variety of networks and strategies beyond the formal constitution.

The role of law here is different too. Just as the spaces of government can be seen to extend beyond the traditional boundaries of the constitutional, so too the techniques or technologies of government can be seen to encompass much more than just law in the sense of command. Law is now part of the framework that may establish and go towards defining a space of government. Law does provide much of the context and it underpins and gives effect to many of the ways in which various technologies of government are expressed in ideas of partnership, standards, excellence, best value, audit, performance measure, earned autonomy or whatever. But law in the sense of command, sanction and sovereignty is no longer central.

In this way, the governmentality approach widens our idea of what government involves both in relation to the sites of government and in terms of the technologies of government. It also strips away the perceived 'naturalness' of many of the techniques of governance and allows us to see that even very fundamental ideas such as 'public', 'private', 'citizen' or 'voter', no less than more recent inventions such as 'modernisation', are themselves part of the technology of government.

In sum, the governmentality approach suggests that power exists beyond the state and that the centres and levels of governmental power, like its objectives and

its techniques, are multiple and differentiated. Power is less about imposing sovereign will and more about engaging with the many networks and alliances that make up a chain or network which translates power from one locale to another. Individuals relate to power not as simple coerced objects, but as autonomous subjects whose objectivity is shaped by their active engagement with the powers that govern them and by which they 'govern themselves'. Government is a domain of strategies, techniques and procedures through which different forces and groups attempt to render their programme operable. Instead of thinking about one, overarching, single web of the public or the constitutional, with law as its sole or main expression, we should be considering the countless, often competing, value systems and their various methods of promulgation that exist across state and non-state institutions and centres of power and expertise. Law is an important element in this but its role is part of the multiform tactics of government. There are many spaces for government and many technologies of government. This means that the proper subject of an analysis of contemporary forms of government should be those networks and alliances which exercise 'government at a distance' instead of, or as well as, the formal constitution, the state itself and its expression in law.

## GOVERNMENT, GOVERNANCE AND GOVERNMENTALITY

This governmentality approach, it is argued, would seem to provide a fuller framework for understanding how government now operates than more traditional constitutional ideas based on sovereignty, law and sanction. It will allows us to consider the problem of government outside the juridical framework of sovereignty and the state. As Rose puts it, governmentality 'rejects the view that one must account for the political assemblages of rule *in terms of* the philosophical and constitutional language of the nineteenth century, or that one must underpin this misleading account with a theoretical infrastructure derived from nineteenth-century social and political theory which accords "the state" a quite illusory necessity, functionality and territorialisation'.[9] Governmentality allows us to look at the complex of governmental strategies, technologies and powers that exist across many different centres of power and that are framed or expressed in law (as well as in other ways) but are not exhausted by reference to the state and law. Governmentality allows us to look at what Foucault termed the 'governmentalisation of the state'[10] which emerged in the nineteenth century and developed in the course of the last century. Foucault is here referring to the way in which the state has diffused within a whole range of other political centres and linked up with a whole range of micro centres of power in order to develop a mode of governing that will allow it to survive within contemporary power relations and escape from the irrelevancy of older, seventeenth and eighteenth century modes of government based on discipline,

[9] Rose, *Powers of Freedom: Reframing Political Thought*, above n 1, at 17–18.
[10] See 'Governmentality' in *Michel Foucault: Power, The Essential Works*, above n 1, at 220–21.