

New Labour and the British Constitution

In the last few months, the British Academy has hosted a range of events that have considered the state of the British constitution after 13 years with New Labour in power. Dr Andrew Blick offers some reflections on the significance – and limitations – of the constitutional changes, and of what is further proposed.

In his classic historical study of autocratic government, *Oriental Despotism*, published in 1957, Karl A. Wittfogel observed:

The development of a written constitution is by no means identical with the development of a ‘constitutionally’ restricted government. Just as a law may be imposed by the government ... or agreed upon ... so a constitution may also be imposed or agreed upon. The term *constitutiones* originally referred to edicts, rescripts, and mandates that were one-sidedly and autocratically issued by the Roman emperors.¹

On 10 June 2009, Gordon Brown, in a statement on ‘Constitutional Renewal’, told the House of Commons: ‘It is for many people extraordinary that Britain still has a largely unwritten constitution. I personally favour a written constitution.’ He was seemingly the first British Prime Minister ever to express such a sentiment. While Brown was correct to argue that ‘this change would represent a historic shift in our constitutional arrangements’,² as Wittfogel’s remarks suggest, it should not be assumed that as a matter of course a ‘written constitution’, if brought about, will be satisfactory – in form or content – from a democratic perspective. With this need for nuanced, critical assessment in mind, the following article considers the entirety of the

New Labour constitutional programme up to and including Brown’s ‘written constitution’ initiative, assessing what difference has been made, and what was the extent and nature of its impact.

During the successive premierships of Tony Blair (1997–2007) and Brown (2007–), New Labour has been active – even hyperactive – over the constitution. This approach led Sir John Baker FBA recently to argue in a lecture to the British Academy that Blair ‘had simply commandeered the constitution and put it on a par with immigration, defence procurement, or the health service, to be managed on a routine basis as an act of governmental power’.³

Changes since 1997

It is possible to detail a core set of substantial constitutional changes introduced since 1997. They include:

- Devolution to Scotland, Wales, Northern Ireland and London.
- The *Human Rights Act* 1998, incorporating the European Convention on Human Rights (ECHR) into domestic law. The ECHR primarily enshrines civil and political rights, but there has also been limited development of economic and social rights, including through opting in to European Union Social Chapter and the establishment of the National Minimum Wage.
- Judicial reform, including the reduction of the role of ministers in judicial appointments and the establishment of an independent UK Supreme Court.
- The *Freedom of Information Act* 2000, providing a statutory right for individuals to apply for access to official information.
- House of Lords reform, in particular the removal of most hereditary peers, alongside some organisational and procedural changes in the Commons (with MPs recently voting to make select committees and the House timetable more independent of the whips).
- The establishment of a semi-official ‘Department of the Prime Minister’, coupled with a considerable reduction in the institutional support available to Cabinet.⁴
- Operational independence for the Bank of England.

A number of these changes were anathema to the Conservative Party when first proposed. It would not have introduced them and has plans to overturn or modify some of them, in particular the *Human Rights Act* – the Conservative plans for which Dominic Grieve, Shadow Justice Secretary, described at a British Academy Forum on 8 March 2010.⁵ But, while they were often resisted by the official opposition at first, most of these contested changes, including devolution and the minimum wage, are now in practice relatively entrenched. The Conservative Party accepts them, if only as *fait accompli*. For this reason, New Labour can be seen as having made a substantial and lasting difference to the



Figure 1. Dominic Grieve MP, Shadow Secretary of State for Justice, discussing ‘A British Bill of Rights’. The British Academy Forum on 8 March 2010 was organised in association with the Arts and Humanities Research Council. Photo: M. Crossick



Figure 2. Professor Vernon Bogdanor FBA speaking in October 2009 at the British Academy Forum on "The New British Constitution": Democracy and Participation'. He also participated in the British Academy Forum on 'A British Bill of Rights' in March 2010. Photo: M. Crossick.

constitution – where it has probably brought about greater transformation than any other policy area in which it has operated. Constitutional reform may well turn out to be New Labour's major historic achievement.

Significance

Professor Vernon Bogdanor FBA conveyed the importance of the changes that had occurred at a British Academy Forum in October 2009, where he stated that

what was once a historic constitution is now something different. By a 'historic constitution' I do not just mean a constitution that was very old, but one that was unplanned, one that was evolutionary and organic. The changes, most of which have occurred since 1997, have made of it a constitution that has been planned and is both codified and statutory.

We have, since 1997, been undergoing a process unique in the democratic world of transforming an uncodified constitution into a codified one ... The essence of this new constitution is a limitation on the powers of Parliament. The Human Rights Act and the devolution legislation have something of the character of fundamental law. They in practice limit the rights of Westminster as a sovereign parliament, and establish a constitution which is quasi-federal in nature.⁶

Acknowledgement of the significance of the New Labour constitutional programme has come from many sources, including those hostile to it. Sir John Baker described to the British Academy

the dismal reflection that we no longer have a constitution, in the sense of a set of conventions which set the bounds of executive power and keep the Government within those bounds, conventions which – though unwritten and flexible – can be

abandoned only by general consensus and after careful thought. The consensus of the last century or more has ended, and the Government has stormed into the void, constantly tinkering with constitutional arrangements as a routine exercise of power and without much regard to the consequences.⁷

Background

But some of the shifts that have occurred can be seen as taking up and perhaps augmenting ideas being implemented or at least considered by the Conservative governments before 1997 (such as Bank of England operational independence, which was contemplated, and the *Open Government* programme for more readily available official information).

Others can be seen as responses (whether wise or otherwise) to external developments, rather than arising from the particular interests of New Labour. Most obviously, growing concern about international terrorism after 11 September 2001 found expression in various modifications of legal processes – such as extensions to the maximum period of pre-charge detention for terrorist suspects – about which significant concerns have been expressed by organisations including Liberty. When speaking at the British Academy in January the Director of Liberty, Shami Chakrabarti, conveyed the idea that, rather than being an exclusively New Labour contribution, such measures were the product of an inter-party bidding-up process (although the Conservative Party has resisted some of Labour's specific proposals). As she put it: 'The greatest problem in our political culture is ... an arms race that has sometimes gone on between the main political parties as to who is to be toughest about terrorism.'⁸

Finally, there are areas where it is difficult to ascertain what would have been the approach of a Conservative government as opposed to a Conservative opposition. For instance, it could be argued that a broadly ambivalent approach towards the EU, and the pooling of sovereignty it entails, is likely under both Labour and the Conservatives, with variations only of emphasis and over particular issues.

Limitations

Aside from a consideration of the differences New Labour has and has not made, it is possible to assess how extensive were the changes it brought. Some key limitations can be identified:

- The stalling of the English regional agenda, meaning that devolution has not impacted directly upon those living in England outside London, who comprise the vast majority of the UK population.⁹
- The inability of courts formally to strike down primary legislation under the Human Rights Act, meaning that it did not fully amount to a Bill of Rights as conceived of in countries such as the United States. Sir John Baker has, however, argued that 'The Act has ... begun to alter the judicial culture in Britain and may have paved the way for judicial review of legislation at some time in the future'.¹⁰
- The persistence of an un-elected House of Lords, though all three parties are now in theory committed to a wholly or partly elected second chamber.

- The retention during the New Labour term of office of the disproportionate first-past-the-post electoral system for determining the composition of the UK Parliament, despite the implementation in the UK during this period of more proportional systems for elections to all the newly-established devolved chambers, Scottish local authorities and the European Parliament. The system which Brown now supports, the Alternative Vote (AV), would not, if introduced, provide a remedy to dis-proportionality.
- Local government – often overlooked in constitutional discussions but of immense significance to people in their everyday lives – continuing to lack autonomy from the centre over finance and policy.¹¹

One outcome which it might be argued the New Labour programme has not delivered is that of a so-called ‘separation of powers’. Baker argues that ‘If we try to discern a guiding strategy from the Government’s statements, we might conclude that it was the Separation of Powers’.¹² But the relevance of this concept has been challenged, including by Dr Mogens Hansen FBA, who told the British Academy in February 2010: ‘the separation of powers is an outdated theory. The subdivision of functions into legislative, executive and judicial is still valid, but the doctrine of the separation of functions and of persons is so riddled with exceptions that it must be scrapped’.¹³ Providing supporting evidence for Hansen’s view, even as New Labour reduced the role of the executive in judicial appointments – arguably separating out two branches of state – Parliament began assuming a new function for conducting pre-appointment hearings for a range of public posts, including some associated with the judiciary, bringing it closer to the legislative branch.¹⁴

Professor Bogdanor made two points about the limits of the New Labour constitutional programme. First he argued that:

the new constitution has done little to secure more popular involvement in politics. It has redistributed power territorially and ‘sideways’ between members of the political and judicial

elite, rather than to the electorate. That is why the new constitution has made so little impact on popular opinion; nor has it served to counter political apathy, as manifested in low turnout and declining membership of political parties.¹⁵

The lack of participation to which Bogdanor referred was particularly problematic from a Labour perspective since, as demonstrated by successive editions of the annual *Audit of Political Engagement* produced by the Hansard Society, there is a clear correlation between social disadvantage and the absence of a propensity to take part in political processes.

Codification

A second lacuna in the Labour programme noted by Bogdanor was that the ‘process of transforming an uncodified constitution into a codified one’ was ‘piecemeal, there being neither the political will nor sufficient consensus to do more’.¹⁶ On the one hand, to an increasing extent, the UK constitution was being written down in publicly available documents. This process was already under way by 1997, with the publication under John Major of the 1992 edition of *Questions of Procedure for Ministers* (known since 1997 as the *Ministerial Code*) and the promulgation of the *Civil Service Code* in 1996. Legislation such as the *Human Rights Act*, *Freedom of Information Act* and the various devolution acts can be seen as altering both the *content* of the UK constitution, through the policies for which they provided statutory expression, and its *form*, in that they helped bring about a settlement that was more formally defined.

But on the other hand, if an ideal democratic codified constitution is understood as a single entrenched document, in possession of legitimacy drawn from some form of popular involvement, setting out the higher law of a society to which all institutions and individuals are subject, then such an entity has not been brought into being. There is no consensus about what precisely the UK constitution is; there are no special mechanisms to protect it from being altered too easily; it is grounded in no specific popular process; and though the practical reality might be different, the official position remains that ultimate authority lies with the UK Parliament, not a constitution.

There is evidence of growing support, in various different quarters, for the adoption of some of the features of a codified constitution as set out above. Baker believes that – ‘now that our unwritten constitution has been unravelled’ – it is time (regrettably, in his view) to grant judges a role in upholding the UK settlement.¹⁷ And, as has been discussed, Gordon Brown now advocates a ‘written constitution’. At a speech arranged by the Institute for Public Policy Research given on 2 February 2010, Brown outlined a process which may or may not continue, depending on the outcome of the forthcoming General



Figure 3. Shami Chakrabarti, Director of Liberty (The National Council for Civil Liberties), at the British Academy Forum on 8 March 2010. She also took part in the British Academy panel discussion on ‘The Fate of Freedom’ in January 2010. Photo: M. Crossick.

Figure 4. During the 2001 General Election campaign, the constitutional reform pressure group, Charter 88, produced this enormous poster challenging Prime Minister Tony Blair's record on establishing 'a new relationship between government and people', 24 May 2001.
Photo: Reuters/Stephen Hird.



Election. It would involve a proposed all-party group and wide public consultation that could lead to the introduction of a codified settlement on the 800th anniversary of the signing of Magna Carta, that is in 2015. On the surface, a radical agenda. But the contradictory tendencies that have frequently characterised the New Labour approach to the constitution became apparent once more when Brown described how he had instigated proceedings:

I can announce today that I have asked the Cabinet Secretary to lead the work to consolidate all the existing, unwritten, piecemeal conventions that govern much of the way central government operates, and to do so under our existing Constitution into a single written document. ... I think a good basis for starting might be ... to bring together what does exist

into one document and then to throw that out to the public and say, 'Look, this is where we are. Do you want a Constitution like, for example, the South African Constitution, where we set down all the basic rights of people and the objectives of our country?' and then we have to make a decision on the scope, therefore, of what that would be.¹⁸

Process

The initial project, then, was to be one along the lines advocated by Jack Straw, the Justice Secretary, to the House of Commons Justice Committee the previous July, when he supported a written constitution that was 'a text which seeks to bring together the fundamental principles, sometimes called conventions, of our

constitutional arrangements, the most important of which is that Parliament is sovereign', as opposed to 'an entrenched and overarching Constitution which is more powerful than Parliament'.¹⁹

A constitution based on the Straw model would fail to meet a number of the criteria for a democratic, codified settlement that I have set out above. It would not be entrenched and would leave the principle of parliamentary sovereignty intact. There would be legitimacy problems as well. It is being generated by a closed process. The first draft of the written constitution for the UK is currently being drawn up inside the Cabinet Office under the name of the 'Cabinet Office manual', apparently emulating an equivalent document which exists in New Zealand. It will comprise a statement of the various conventions and laws its authors believe comprise the UK settlement. (A glimpse was provided of work in progress when the draft of a chapter on 'Elections and Government formation'²⁰ was submitted to the Justice Committee in February.) The only outsiders initially involved are a select group of academics and other experts drawn upon informally as the Cabinet Office sees fit. While this process is intended only as a first stage to be followed by wider consultation, and the views of the Justice Committee were solicited on the 'Elections and Government formation' document, the importance of who produces the first draft of any constitution should not be underestimated. The Cabinet Office will be able – and be required – to exercise a significant amount of subjective judgement in various areas, given the uncertain nature of the settlement they are describing. Furthermore there is no guarantee that significant progress will be made beyond this step. The interim arrangement could become the permanent one.

Finally, even if the process is subsequently broadened, the way in which it has been instigated will mean that the onus of justification falls upon those who favour change to the constitution. There will be an in-built conservative tendency. The alternative approach would be to begin a discussion of the way in which a democracy should function by establishing a set of first principles, to be followed by the devising of a concrete settlement by which they can most effectively be realised. Such a process would be the best means of ensuring the establishment of a democratic constitution, untainted by the flavour of the Roman *constitutiones*.

Notes

- 1 Karl A. Wittfogel, *Oriental Despotism: A comparative study of total power* (New Haven and London: Yale University Press, 1957), p. 101.
- 2 Hansard, House of Commons (HC) Debates, 10 June 2009, Col. 798.
- 3 Sir John Baker FBA's Maccabean Lecture in Jurisprudence, on 'Our Unwritten Constitution', was delivered at the British Academy on 24 November 2009. An audio recording of the lecture can be found via www.britac.ac.uk/medialibrary/. The text will be published in *Proceedings of the British Academy*.
- 4 See: Andrew Blick and George Jones, *Premiership: the development, nature and power of the office of the British Prime Minister* (Exeter: Imprint Academic, 2010).
- 5 The British Academy Forum on 8 March 2010, organised in association with the Arts and Humanities Research Council, discussed 'A British Bill of Rights'.
- 6 The British Academy Forum on 26 October 2009 discussed "The New British Constitution": Democracy and Participation'. The lead discussants were Professor Vernon Bogdanor FBA, Rt Hon Nick Clegg MP, and Dr Tony Wright MP. In an advance briefing note, Professor Bogdanor summarised the argument of his recent book, *The New British Constitution* (2009: Hart Publishing). A transcript of the discussion (including the briefing note) can be found via www.britac.ac.uk/medialibrary/: the quotations here are from pp. 5 and 3.
- 7 Baker, 'Our Unwritten Constitution'.
- 8 The British Academy held a panel discussion on 'The Fate of Freedom', on 12 January 2010. The event was convened by Professor Susan Mendus FBA. Audio recordings of the discussion can be found via www.britac.ac.uk/medialibrary/
- 9 See: Andrew Blick, *Devolution and regional administration: A federal UK in embryo?* (London: Federal Trust, November 2009).
- 10 Baker, 'Our Unwritten Constitution', fn. 3.
- 11 See e.g.: House of Commons Communities and Local Government Committee, *The Balance of Power: Central and Local Government*, Sixth Report of 2008–09 (London: The Stationery Office, 12 May 2009), HC 33 – I.
- 12 Baker, 'Our Unwritten Constitution'.
- 13 On 25 February 2010, Dr Mogens Hansen delivered the annual British Academy Lecture, on 'The Mixed Constitution: Monarchical and Aristocratic Aspects of Modern Democracy'. An audio recording of the lecture can be found via www.britac.ac.uk/medialibrary/
- 14 See: *Pre-appointment hearings by select committees: guidance for departments* (London: Cabinet Office, August 2009).
- 15 "The New British Constitution": Democracy and Participation', p. 3.
- 16 "The New British Constitution": Democracy and Participation', p. 3.
- 17 Baker, 'Our Unwritten Constitution'.
- 18 Gordon Brown, 'Transforming politics', speech given at RSA, 2 February 2010.
- 19 House of Commons Justice Committee, Oral Evidence, 14 July 2009, Question 61.
- 20 'Elections and Government formation (DRAFT)' (London: Cabinet Office, February 2010).

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