

CONSTITUTIONAL RENEWAL

On 16 June 2008 the British Academy held a workshop to discuss the significance of the 'Governance of Britain' constitutional reform programme introduced by Gordon Brown shortly after becoming Prime Minister, and the associated 'Constitutional Renewal' package produced in March 2008. The meeting was all the more timely because Parliament's Joint Committee on the Draft Constitutional Renewal Bill was currently at work. **Dr Andrew Blick**, who produced a discussion paper for the workshop, highlights some of the issues.

Shortly after becoming Prime Minister, in his first major statement to the Commons on 3 July 2007, Gordon Brown unveiled what might be labelled the *Governance* programme for the UK constitution. He described his intention as being the creation of a 'route map' designed to 'address two fundamental questions: to hold power more accountable and to uphold and enhance the rights and responsibilities of the citizen'.¹ The four stated central 'goals' of the programme are:

to invigorate our democracy, with people proud to participate in decision-making at every level;

to clarify the role of government, both central and local;

to rebalance power between Parliament and the Government, and give Parliament more ability to hold the government to account; and

to work with the British people to achieve a stronger sense of what it means to be British, and to launch an inclusive debate on the future of the country's constitution²

On its surface the scope of this programme is vast, taking in central and local government, the Civil Service, Parliament, including the House of Commons and the House of Lords; the judiciary; and the Church. Possible developments of historic significance are held out, including a British Statement of Values; a British Bill of Rights and Duties; and even a 'written constitution'.³

Not surprisingly, this initial announcement and the accompanying Green Paper, *The Governance of Britain*,⁴ raised considerable expectations amongst those interested in constitutional issues. However, they were not fully met by the first full package of solid proposals, which appeared in March 2008 in the form of the *Constitutional Renewal* White Paper and Draft Bill.⁵ Included in these documents were plans to reform the office of Attorney General; reduce the involvement of the executive in judicial appointments; pass a Civil Service Act; provide a clearer role for Parliament in decisions to go to war; and place in statute provision for the scrutiny of treaties by the legislature.

Many of these changes are of historic significance, not least the plan to enshrine the values of Whitehall, such as impartiality and objectivity, in an Act of Parliament, which was first proposed in the so-called 'Northcote-Trevelyan' report of 1854.⁶ But an examination of the small-print and an overview of the bigger picture both suggest that *Constitutional Renewal* does not quite live up to its billing.

on the face of the draft Bill and parliamentary approval for its specifics will not be required. Baroness Prashar, the former First Civil Service Commissioner, told those present that 'The Civil Service Code is an incredibly important document and I have always felt that it should be a living document. It should become part of the DNA of the Civil Service... It is important that it is annexed to the Bill'. She also expressed the view that the parts of the *Ministerial Code* obliging ministers to give proper consideration to the advice of permanent civil servants should be enshrined in an Act of Parliament.

Second, while a procedure for MPs to vote on war-making will be established, it will not have the force of statute. The Prime Minister will seek this approval at the time he or she chooses and personally determine the information about a proposed military action that is submitted to Parliament. There will be no requirement for the advice of the Attorney General on the legality of a conflict to be made available. At the workshop, the Law Lord, Lord Bingham, stated that the full advice on the Iraq war – which was not



Participants at the workshop included (left to right) Professor Vernon Bogdanor FBA, Dr Andrew Blick, and joint convenors Professor Peter Hennessy FBA and Professor Jack Hayward FBA.

There is a sense, as Professor Peter Hennessy FBA put it at the British Academy workshop convened to discuss *Governance*, of 'giving with one hand and taking away with another'. Three examples illustrate the point. First, the text of the *Civil Service Code* is not

released until the government's hand was forced by a leak more than two years after the invasion – 'should have been made available much earlier'. In such circumstances, he argued, Attorney Generals should 'to the best of their judgement ...

tell Parliament what the position is'. Furthermore, it will be possible to bypass a vote on military action altogether on emergency or security grounds; and once the consent of the Commons has been secured to an operation, it can continue indefinitely, with no need to renew the mandate.

Third, for treaties, the draft *Constitutional Renewal Bill* would transfer into an Act of Parliament a practice known as the 'Ponsonby Rule' which provides, in theory, for the legislature to scrutinise international agreements before they come into effect. But in practice neither debates nor votes take place under Ponsonby. While the draft Bill proposes expanding upon Ponsonby by providing the Commons clearly with the ability to block assent to a treaty, such an outcome is dependent upon a vote being held, which would require changes to practice within the legislature. Moreover, ministers will be able to circumvent the entire parliamentary process for international agreements if, in their opinion, it is necessary to do so.

At the workshop Professor Vernon Bogdanor FBA referred to *Constitutional Renewal* as 'just shifting the furniture around', re-apportioning responsibilities between the political 'officer class', but not addressing the relationship between government and governed. Ann Abraham, Parliamentary and Health Service Ombudsman, put forward two suggestions relevant to concerns of this sort. She proposed that consideration be given to the idea of granting citizens 'direct access to the Ombudsman', rather than requiring them to use their MP as intermediary; and placing 'on the face of legislation a requirement that governments have due regard for the findings of the Ombudsman'.

Renewal is more a disparate – though important – set of proposals than a cohesive programme. Though the overall *Governance* Green Paper is potentially a more rounded whole, parts of it have prompted confusion. Lord Bingham said at the workshop that he was 'extremely puzzled by the whole notion of a British Bill of Rights', since withdrawal from the European Convention on Human Rights was not on the agenda of either main party. So far the Brown package has not proved as significant as the changes which

occurred during the Tony Blair premiership. Professor Robert Hazell (University College London) argued that there had been three previous waves of constitutional reform from 1997, taking in such measures as devolution, the Human Rights Act, the Freedom of Information Act; and the setting up of an independent supreme court. The latest instalment is 'smaller than the preceding ones' since the big alterations have already been implemented. Nor has *Governance* added coherence to the shifts that have taken place since Labour came to power in 1997. When Professor Hennessy asked those present whether there had been the cumulative emergence of a 'new constitutional architecture that future historians can call a settlement', the consensus was that there had not. Professor Jack Hayward FBA used the phrase 'fleeing forwards' to describe the process.

So what is the significance of *Governance*? One important feature is that it represents a Prime Minister making constitutional reform his central agenda. Gordon Brown is unique amongst premiers in having done so, though he has subsequently become distracted by wider political problems.

The general reaction to the programme has been either a lack of interest (after a small flurry, media coverage has tailed off) or, amongst constitutional initiates, brief excitement followed by disappointment.

But the likelihood of unintended outcomes means that the chances of *Governance* proving significant, if in unexpected and possibly even undesirable ways, should not be dismissed. Some parts of the programme could serve to undermine its own objectives. For instance, a ten-year term-limit will be introduced for the Comptroller and Auditor General, meaning that the appointment will be less likely to be an end-of-career one. Subsequent posts taken up by former incumbents could generate controversy. And the plan to alter the Intelligence and Security Committee to resemble more closely an open parliamentary committee could discourage the Intelligence and Security Agencies that it scrutinises from co-operating with it.

Often it is simply difficult to spot major constitutional changes until they have time to take root. The development of the Civil

Service has been greatly influenced by *A Place Act* of 1742, the Northcote-Trevelyan report of 1854 and the Fulton Report of 1968; but the importance of none of them was fully recognised at first. So what substantial change might be slipping under our radar at the moment, only to be acknowledged by future generations? I have three possible candidates, though there are others available. The first is the introduction of pre-appointment hearings by select committees for key public office holders. Second is the holding of annual parliamentary debates on the objectives and plans of all Whitehall departments. Third is the publication of draft legislative programmes in advance of the Queen's Speech, giving the legislature advance notice of the bills the government plans to bring forward.

All three of these innovations present Parliament – and in particular the Commons – with the opportunity to wield more extensive influence over the activities of the executive than it has previously, and thereby fulfil some of the stated goals of *Governance*. If MPs are able and choose to act concertedly to exercise these new powers, it may be that the Brown premiership could yet be regarded as one with a significant constitutional legacy.

Notes

- 1 House of Commons Hansard, Debates, 3 July 2007, col. 815.
- 2 E.g. *The Governance of Britain*, Ministry of Justice, Cm 7170, July 2007, p. 11.
- 3 *Ibid*, pp. 58–63.
- 4 Cm7170.
- 5 *The Governance of Britain – Constitutional Renewal*; Ministry of Justice, Cm 7342 – I, March 2008; *The Governance of Britain – Draft Constitutional Renewal Bill*, Ministry of Justice, Cm 7342 – II, March 2008.
- 6 *Parliamentary Papers*, 1854, Vol. xxvii.

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An edited transcript of the workshop on 'The Significance of the Government's Draft Constitutional Renewal Bill' can be found via www.britac.ac.uk/perspectives/
