Constitution Unit Commentary on Constitutional Renewal Bill

16 May 2008

Summary

The Constitutional Renewal Bill needs to be viewed in a wider context. The changes it introduces are not nearly as big as the Labour government's earlier constitutional reforms, nor as big as those promised and still to come. It introduces a series of small but desirable reforms, whose central theme is to strengthen Parliament. In some respects the reforms do not go far enough:

- There could be closer scrutiny of the civil service, and greater independence for the Civil Service Commissioners
- The model resolution on War Powers should specify the size of the forces to be committed, and timescale of the operation
- Parliament should scrutinise appointments of the most senior judges (Supreme Court, and heads of division in the Court of Appeal)
- Parliament should consider establishing a dedicated committee to scrutinise Treaties.

Political context

1.1 In March 2008 the government published its plans for legislation to take forward the next stage of its constitutional reform programme. These plans were first announced by Gordon Brown in the Green Paper *The Governance of Britain* in his first week as Prime Minister in July 2007. There can be no doubt about Gordon Brown's longstanding interest and commitment to constitutional reform (Hazell *et al*, 2007 ch 1). The political difficulty Brown faces is that the big constitutional reforms have all been done. Devolution to Scotland, Wales and Northern Ireland, the Human Rights Act, removal of the hereditary peers from the House of Lords, freedom of information, and the new Supreme Court were all introduced under premiership of Tony Blair. These reforms leave some loose ends and unfinished business, which the Brown government is planning to address; but there is bound to be a sense that Brown's constitutional reforms are less substantial than Blair's.

1.2 This is reflected in the Constitutional Renewal Bill, which contains a range of small reforms, none of great significance. They are the things which can be legislated for now. Other, bigger reforms are in preparation, but in slower time, because they are politically more difficult and need more consultation. The government is planning a further White Paper on Lords reform, further proposals to control party funding, a Green Paper on a British bill of rights, and a wide ranging consultation exercise on a British statement of values. Further publications on these can be expected from the government in the summer of 2008.

Parliamentary Scrutiny of Public Appointments

2.1 Other changes are also in train which do not require legislation. The most significant of these are the plans for greater parliamentary scrutiny of public appointments. Following the initial list of half a dozen public appointments suggested last July in *The Governance of Britain* (para 77), the government added 25 more posts in January 2008, and the Liaison Committee added 40 more in March (Liaison Committee 2008). A lot more thought has also been given to the procedure for pre-appointment scrutiny hearings (PASC 2008, House of Commons Library 2008). If all these appointments are opened up to parliamentary scrutiny, the overall effect will be much

greater than the changes to the civil service in Part 5 of the draft bill. But because the changes do not require legislation, no one has yet noticed.

Constitutional Renewal Bill

3.1 The main theme connecting the disparate items in the Constitutional Renewal Bill is reforming the Royal Prerogative and strengthening Parliament. It might more properly have been called the Parliamentary Reform Bill; or the Strengthening Parliament (Miscellaneous Provisions) Bill. It contains a small number of relatively modest reforms, all worthwhile, but none of them justifying the ambition of the bill's title. In order of importance, the proposed changes are as follows:

- *Civil Service* : placing the Civil Service on a statutory footing by enshrining in statute the core values of the Civil Service, and giving the Civil Service Commissioners a statutory basis.
- *Role of the Attorney General* : abolition of the Attorney General's general power to halt a trial on indictment by entering a *nolle prosequi*. Narrowing the Attorney's power to give a direction to the prosecuting authorities to cases of national security. Requiring the Attorney General to submit an annual report to Parliament.
- *War Powers*: the Government will propose a House of Commons resolution which sets out in detail the processes Parliament should follow in order to approve any commitment of Armed Forces into armed conflict.
- *Judicial Appointments* : reducing the role played by the Lord Chancellor in judicial appointments below the High Court.The Government also proposes to remove the Prime Minister from the process for appointing Supreme Court judges.
- *Church Appointments*: reducing the role played by the Prime Minister in the appointment of bishops and senior church appointments.
- *Treaties* : formalising the present procedure to ensure a treaty cannot be ratified unless a copy of it is laid before Parliament for a defined period of 21 sitting days.
- *Managing Protest around Parliament* : repealing sections 132-138 of the Serious Organised Crime and Police Act 2005, to remove the requirement to give notice of demonstrations in the designated area around Parliament.

Statutory regulation of the Civil Service

4.1 The Civil Service has been managed under the Royal Prerogative by Orders in Council. The Committee on Standards in Public Life, the Civil Service Commissioners and the Public Administration Select Committee (PASC) have all recommended that it should be put on a statutory footing. The government resisted. In January 2004 PASC published a draft Civil Service Bill (PASC 2004b), and later in 2004 the government launched a consultation on its own draft Bill. But the government failed to find legislative time to enact the Civil Service Bill, and declined to publish the responses to the consultation. The responses are now summarised in Part 5 of CM 7342-3 (*The Governance of Britain: Analysis of Consultations*).

4.2 Part 5 of the draft Constitutional Renewal Bill places the Civil Service and the Civil Service Commissioners on a statutory footing. The opportunity has been missed to place on a statutory footing the other constitutional watchdogs sponsored by the Cabinet Office: the office of the Commissioner for Public Appointments, the House of Lords Appointments Commission, the Committee on Standards in Public Life and the Advisory Committee on Business Appointments. To these should now be added the Independent Adviser on Ministers' Interests. Like the Civil Service Commissioners, these bodies are currently appointed, financed, housed and staffed by the Cabinet Office. PASC recommended that they should all be put on a proper statutory footing, with a

more collegiate set of arrangements, and stronger parliamentary involvement in their governance arrangements. This was to be through an arms length body with parliamentary representation, a Public Standards Commission (PASC 2007a). The Government response of November 2007 promised to examine the PASC conclusions on establishing permanent structures for such ethical watchdogs as part of the *Governance of Britain* process (PASC 2007b); but it has evidently decided not to embark on comprehensive reform.

4.3 It makes little sense to single out the Civil Service Commissioners (CSC) for special treatment and do nothing about the other Cabinet Office bodies. Under the new statutory regime the CSC staff with a staff of eight will have to establish separate human resources and payroll functions, annual accounts etc. They could have shared these functions with the other Cabinet Office bodies (which all have tiny staffs), if they had all been put on a statutory basis. Alternatively, Part 5 of the draft bill could have created an umbrella body, or prototype statutory framework for each body, into which the other bodies could have been slotted in due course.

4.4 The Civil Service Commissioners are to be an executive non-departmental public body, funded by the Cabinet Office and appointed on the recommendation of the Minister for the Civil Service. They must uphold the principle of appointment on merit, on the basis of fair and open competition, and publish a set of recruitment principles. The Bill also enshrines the core civil service principles of integrity and honesty, objectivity and impartiality. The main vehicle for managing the Civil Service will continue to be the Civil Service Code and the Civil Service Management Code. Civil servants can complain to the Commissioners if they believe they are being required to act in breach of the Code, but the existing Code requires them to exhaust internal lines of appeal first, and that requirement is likely to be retained.

4.5 The draft Bill also provides for separate codes for the diplomatic service, civil servants serving the Scottish Executive and Welsh Assembly Government, and Special Advisers. All the detail is left to these codes, with the Bill providing a broad statutory framework. It thus leaves room for considerable flexibility, and should not impede any further civil service reform. In some respects there is too much flexibility, and parliamentary scrutiny could be tightened in the following respects:
Appointment of First Civil Service Commissioner. In addition to consulting the leaders of the two main opposition parties, the government should also be required to consult the chairman of PASC. Appointment should be by resolution of each House.
Dismissal of Commissioners should require resolutions of both Houses.
Codes should be subject to parliamentary approval. The bill merely requires the codes to be laid before Parliament. They should be subject to the affirmative resolution procedure, so that Parliament can debate the codes.
Ministerial Code should also be approved by Parliament. The Ministerial Code is an important counterpart to the Civil Service Code. It is reviewed by each incoming Prime Minister. The revisions they make are important but little noticed. The new Code should be laid before Parliament and made subject to parliamentary approval. This will not in any way undermine the Prime Minister's role as the ultimate arbiter of breaches of the Ministerial Code.
Limit on number of Special Advisers. There should be a cap on the number of Special Advisers, just as there is a statutory cap on the number of Ministers under the Ministers of the Crown Act. The PASC bill provided for a cap on numbers to be approved by a resolution of each House (PASC 2004b).

Power of Civil Service Commissioners to undertake inquiries. The Civil Service Commissioners should have power to undertake inquiries without a complaint being made. PASC, CSPL and the CS Commissioners all supported this in consultation on the government's earlier draft bill. The draft Bill provides for such inquiries but only with the agreement of the government and the Head of the Civil Service. The government should not be able to block an inquiry if the Commissioners believe that one is justified.
Commissioners for Scotland and Wales. There should be Commissioners appointed specifically to represent Scotland and Wales (cf Equality Act Schedule 1 for analogous provisions for the Commission for Equality and Human Rights)

4.6 No one should expect Part 5 of the Bill to transform the standing of the Civil Service, or halt the gradual erosion of its power and influence. That started under Mrs Thatcher and continued under Tony Blair. It is attributable to a wide range of factors which have served to erode the confidence and authority of the Civil Service. Not all of these are necessarily negative: it was time to end the Civil Service monopoly of advice. But the pendulum has swung too far the other way. One central problem is the attitude and behaviour of certain Ministers, who exclude civil servants from proffering advice and discussion of that advice. The tone is set by the Prime Minister. If the Prime Minister is in the habit of excluding civil servants from key meetings, of sometimes excluding relevant ministers, of not encouraging proper advice or a written record, it is not surprising if some Ministers follow the same exclusionary behaviour in the way they treat their ministerial colleagues and run their own departments.

Role of the Attorney General

5.1 The government's main concern was to restore public confidence in the role of the Attorney General, following three controversies which had dogged Lord Goldsmith QC, Attorney General from 2001 to 2007. These were over his advice on the legality of the invasion of Iraq in 2003; the decision in Dec 2006 to stop the Serious Fraud Office investigation into BAE's alleged bribes to secure a defence contract with Saudi Arabia; and the controversy over whether the Attorney should be involved in the decision whether to bring prosecutions in the 'cash for peerages' affair.

5.2 In July 2007 the government issued a consultation paper (CM 7192) on the role of the Attorney General, which asked whether:

- the Attorney General should continue to be both the Government's chief legal adviser and a Government Minister
- the Attorney General should remain as superintending Minister for the prosecution authorities
- the legal advice of the Attorney General should be made public
- the Attorney General should attend Cabinet only where necessary to give legal advice
- a parliamentary select committee should be established specifically to scrutinise the Attorney General.

5.3 Ten days before, on 17 July 2007, the Constitutional Affairs Committee of the House of Commons (CASC) produced a report on *The Constitutional Role of the Attorney General* (HC 306). It concluded that there were "inherent tensions in combining ministerial and political functions, on the one hand, and the provision of independent legal advice and superintendence of the prosecution services, on the other hand, within one office". CASC effectively recommended the abolition of the office of Attorney General, saying that "the current duties of the Attorney General be split in two: the

purely legal functions should be carried out by an official who is outside party political life; the ministerial duties should be carried out by a minister in the Ministry of Justice".

5.4 Responses to the government's consultation did not support this radical conclusion. There were 52 written responses. Of those who responded on this point, three quarters (27 out of 38) favoured the Attorney General remaining as the chief legal adviser to the government, and continuing to be a Minister. There was also strong support for the Attorney retaining the function of superintending the main prosecution authorities (Crown Prosecution Service, Serious Fraud Office, and Revenue and Customs). The majority of respondents also favoured the Attorney General attending Cabinet only when necessary to provide legal advice, and retaining a general presumption that the Attorney's legal advice should not be disclosed.

5.5 In line with these views, the government has concluded that the Attorney should remain the government's chief legal adviser, should remain a Minister, and a member of one of the Houses of Parliament. (There is a growing convention that the Attorney General is a member of one House, and the Solicitor General a member of the other). In keeping with previous convention, the Attorney will attend Cabinet only when required. The only changes proposed are that:

- the Attorney General may not give a direction to the prosecuting authorities in relation to an individual case (except in cases of national security)
- the requirement to obtain the consent of the Attorney General to a prosecution in specified cases will, in general, be transferred to the DPP or specified prosecutors
- the Attorney General's power to halt a trial on indictment by entering a *nolle prosequi* will be abolished
- the Attorney General must submit an annual report to Parliament.

5.6 The decision whether to establish a new Select Committee on the Attorney General has been left to Parliament. It is unlikely that either House will wish to establish a new Committee, so the Attorney will continue to be scrutinised by the Constitution Committee in the House of Lords, and the Justice Committee in the Commons.

5.7 In April 2008 the Lords Constitution Committee published their own report into *Reform of the Office of Attorney General* (HL 93). It sets out the background to the controversies which had dogged Lord Goldsmith, and analyses the arguments for and against reforming the office, drawing on two divergent opinions published as Annexes to the report from Professor Anthony Bradley and Professor Jeffrey Jowell QC. Without coming to strong or clear conclusions, the report does not support CASC's call for radical reform. With two former Attorneys General (Lord Lyell and Lord Morris) on the Committee, their sympathies appear to lie in favour of retaining the *status quo.* The report concludes with a powerful argument against the CASC (and Jeffrey Jowell) model of having the Attorney become an independent legal adviser outside the government:

> Lord Morris of Aberavon, appearing before the Constitutional Affairs Select Committee, quoted the words of former Attorney Sam Silkin QC on this point: "to whom would [an] independent non political law officer be accountable? If there were no minister through whom he could be accountable we should have to invent one and, if there were, we would have returned full circle, for accountability without control is meaningless and whatever minister was answerable for an independent law officer would in practice have to control him, else we should have the semblance of accountability and not the reality, and in my experience there is no more potent weapon in a democratic society than the reality of accountability to Parliament". Lord Mayhew of Twysden's conclusion was

categorical: "I do not see how [the Attorney] can be accountable to the Parliament unless he is a member of it, and I think it is absolutely essential for public confidence reasons that he should be".

War Powers

6.1 Ever since the Iraq war in 2003 there has been growing agreement on the need for parliamentary authorisation before any future commitment of armed forces overseas. The Lords Constitution Committee recommended a new convention to this effect in their 2006 report on *Waging War: Parliament's role and responsibility* (HL 236, July 2006). The government accept the need for approval, and in their consultation paper on *War Powers and Treaties* (CM 7239, October 2007) asked whether the mechanism for seeking parliamentary approval should be set out in a parliamentary resolution or prescribed in statute.

6.2 The government have now decided to go for a parliamentary resolution, and a draft resolution is appended to the Green Paper (Cm 7342-1 at 53). We have no objection to that, nor to the exceptions proposed for urgent or secret operations. The key question is the information supplied to Parliament before any debate on whether to go to war. The draft resolution leaves that to the discretion of the Prime Minister, requiring him to supply "the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances". We think that the Prime Minister should also supply information about the size of the forces to be committed, and the expected timescale of the operation.

Judicial Appointments

7.1 In *The Governance of Britain* the government proposed to surrender or limit its powers over the appointment of judges, and asked whether Parliament should have a stronger role in relation to judicial appointments. More detail was offered in the subsequent consultation document on Judicial Appointments (Ministry of Justice 2007). The government now proposes to retain the Lord Chancellor's involvement in the appointment of High Court judges and above, but leave the appointment of Circuit judges and below to the Judicial Appointments Commission (JAC). To prevent an accountability gap, the JAC would become more tightly accountable, to the Lord Chancellor and to Parliament.

7.2 We welcome the government's decision to retain its involvement in senior judicial appointments. It is very important for the Lord Chancellor to retain such a role, for reasons of accountability, and in order for the government to retain trust and confidence in the judges. If the final decision were left to the JAC, the government would be excluded from the process, and would be less inclined to respect the judiciary or defend them when they came under attack. But we agree that there is no need for the Prime Minister to be involved, and his post box role can be removed. The Lord Chancellor can submit names direct to The Queen.

7.3 More controversially, we believe that there should be a role for Parliament in relation to very senior judicial appointments (Supreme Court justices, the Lord Chief Justice and other heads of division in the Court of Appeal). We recognise there is little support for this at present, not even in Parliament. But the same arguments for subjecting senior public appointments to parliamentary scrutiny apply also to the senior judiciary. In brief,

- It is now recognised that in landmark cases the top courts effectively have law making powers. Appointment to such powerful positions should be subject to parliamentary scrutiny.
- Parliament nowadays has little contact with the judges. The senior judges are largely unknown to MPs. Supreme Court justices will be unknown to the Lords once the law lords have departed. There is value in a formal presentation of the senior judges to Parliament, to foster continuing dialogue.
- The top judges should meet the body vested with the constitutional power to dismiss them. Senior judges can be removed only by resolution of both Houses of Parliament.

These arguments are developed at greater length in our submission to the Constitutional Affairs Committee inquiry into Judicial Appointments (CASC 2004, vol 2 Ev 121).

7.4 Two final points about the Judicial Appointments Commission. First, the arguments for a single non-renewable term (which the government has accepted for the Civil Service Commissioners, and similar watchdogs) apply with equal force to the JAC. Second, the early operation of the JAC has brought out the political difficulties when a watchdog like the JAC has a high degree of independence but limited accountability. There have been operational difficulties and unacceptable delays. The Lord Chancellor still feels responsible for the overall system of judicial appointments, but has few levers to improve matters. The White Paper proposes he should be given a power to set targets and give directions to the JAC. We would support this, provided that it is accompanied by close scrutiny by parliamentary committees (the Lords Constitution Committee, and Commons Justice Committee), and power for the JAC to issue a special report at any time if it feels that it is being improperly pressured by the Lord Chancellor. The JAC should not be made accountable for individual decisions, but it does need to be made more accountable for its overall performance.

Church and State

8.1 The White Paper (paragraphs 254 -6) confirmed the proposals in *The Governance of Britain* that the government should withdraw from any active involvement in senior Church of England appointments. When appointing bishops the Prime Minister has previously received two names, and made a choice. Now he will receive only one name from the Crown Nominations Commission, which he will then forward to The Queen. In future the Church will have the decisive voice.

8.2 This step does not mean disestablishment but the manner of the change does call into question both the Crown's continuing links with the Church of England, and the basis upon which its bishops can remain members of the House of Lords. This is because, for the Crown, the sovereign would no longer be acting on the advice of a responsible minister. As to the bishops, a committee of the Church of England responsible to no external authority would be appointing 26 members of the House of Lords.

8.3 The sovereign's new position can probably be defended adequately. As Supreme Governor, the sovereign can henceforward be seen as a sort of statutory patron where the margin of difference between making appointments and approving/taking note of them can be interpreted generously. But it is harder to reconcile the new position of the bishops with the view upon which the present appointment system – operating since 1976 - was based. Then the Prime Minister insisted that he had to have a real choice, and that was why the Church has had to submit two names on every occasion for episcopal appointments.

8.4 When in the negotiations leading up to the 1976 system the Church suggested they might forward just one name, an analysis for ministers put it

> The Sovereign would thus be placed in the anomalous position of being able neither to exercise a personal choice nor to have effective recourse to the normal channels of advice – since the Prime Minister could say only that he had no objection but to endorse the Church's decision. Short of altering the present constitution of the House of Lords, the proposal would also mean that nominations for the membership of that House were being made by a body outside the normal political spectrum and not answerable to Parliament. (TNA HO 304/33, memorandum 24 January 1975)

8.5 These considerations had force then and continue to have force: they call into question continued episcopal membership of the House of Lords on the present basis. The Church of England's wish to continue a role in episcopal appointments for the Prime Minister's Appointments Secretary revealed the Church's concern to maintain some political cover.

8.6 But there was also a further twist. When the Lord Chancellor, Jack Straw, introduced the White Paper and draft Bill on 25 March, he seemed at one point to suggest that the government was prepared to look deeper into the late seventeenth/early eighteenth century religious settlement that still governs church/state relations as well as the personal religion of the sovereign. This arose when he replied to a supplementary question from a Scots Labour MP, Jim Devine, about the future of the Act of Settlement 1701. Jack Straw said

> Let me say to my honourable Friend that I speak on behalf of the Prime Minister: because of the position that Her Majesty occupies as head of the Anglican Church, this is a rather more complicated matter than might be anticipated. We are certainly ready to consider it, and I fully understand that my honourable Friend, many on both sides of the House and thousands outside it, see that provision as antiquated. (Hansard, Commons, 25 March 2008, col. 25)

8.7 The Act of Settlement bars the throne to Roman Catholics or anyone who marries one. There have been various attempts in recent years to raise the question of reform or repeal of the Act.[1] None of these initiatives either was allowed to or could make progress. All would in effect imply disestablishment because it would be intolerable to the Church of England to have as Supreme Governor a person whose religious authority recognised neither the validity of Anglican orders nor, therefore, the validity of the Church of England.

8.8 In the past, the Government has always said that it has no plans to end the religious discrimination in the 1701 Act. During the debate on Lord Dubs' Bill, the then Lord Chancellor, Lord Falconer of Thoroton, described the necessary changes in the law

[1] Lord Forsyth of Drumlean, Conservative, introduced a motion to that effect (Hansard, Lords, 2 December 1999, cols 917-919), Kevin McNamara, Labour, a Treason Felony, Act of Settlement and Parliamentary Oath Bill (Hansard, Commons, 19 December 2001 cols 319–323), and Lord Dubs, Labour, a Succession to the Crown Bill (Hansard, Lords, 14 January 2005, cols 495-513). Edward Leigh, Conservative, sought leave to introduce a Marriages (Freedom of Religion) Bill (Hansard, Commons, 8 March 2005, cols 1392-4), and John Gummer, Conservative, similarly sought permission for a Catholics (Prevention of Discrimination) Bill two years later (Hansard, Commons, 20 February 2007, col. 154-6).

as 'complex and controversial' and said that they would raise major constitutional issues which would involve the amendment or repeal of a number of statutes. Moreover:

> I should make it clear that this Government stand firmly against discrimination in all its forms, including discrimination against Catholics, and will continue to do so. The Government would never support discrimination against Catholics, or indeed any others, on the grounds of religion. The terms of the Act are discriminatory, but we should be clear that for all practical purposes, its effects are limited… There is a difference between applying new legislation such as the Human Rights Act to existing legislation, and altering legislation which is part of the backbone of our constitutional arrangements. Indeed, this legislation is interwoven within the very fabric of the constitution and has evolved over centuries. It is not a simple matter that can be tinkered with lightly. (Hansard, Lords, 14 January 2005, cols 510-511)

8.9 Jack Straw appeared to go further in saying "We are certainly ready to consider it" [ie ending the discrimination in the Act of Settlement]. The Lord Chancellor has not subsequently been asked how he plans to do this, or when legislation might be brought forward. Although desirable, it is unlikely to be a high priority for the government because of the complexities involved.

Parliamentary scrutiny of Treaties

9.1 The government proposes that the present arrangements for parliamentary scrutiny of Treaties should be put on a statutory footing. Under the present arrangements a Treaty which the government proposes to ratify is laid before Parliament for a minimum period of 21 sitting days prior to ratification. The government has improved the process by providing an Explanatory Memorandum, and forwarding details of Treaties to the relevant Select Committee (for further details see House of Commons Library 2008b). There is no more which the government can do to provide Parliament with the necessary information.

9.2 The challenge now is for Parliament to establish effective scrutiny machinery. Select Committees have shown little interest in scrutinising Treaties, despite the information supplied direct to them. They lack expertise, and there are many other demands on their time. The one exception is the Joint Committee on Human Rights. Its experience suggests that there are important issues in Treaties which deserve parliamentary scrutiny, but that in other subject areas they go unscrutinised. How might the JCHR's good practice be spread more widely? One answer might be a dedicated Treaties committee. The Wakeham Commission proposed such a committee for the Lords (Wakeham Commission, 2000 Rec 56). An alternative might be a Joint Committee of both Houses, as has been successfully established in Australia (Harrington, 2006).

What will happen next

10.1 On 8 May Parliament established a Joint Committee to scrutinise the draft Constitutional Renewal Bill.[2] The committee will produce a report in July. The Constitutional Renewal Bill will be redrafted during the summer recess, taking account of the Committee's report and other comments. On 15 May the government confirmed that the bill will be included in the Queen's Speech, and introduced into Parliament in the 2008-09 session.

[2] Its website is at http://www.parliament.uk/parliamentary_committees/jcdcrb.cfm

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