

HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Graham Allen MP

Summary

When Gordon Brown made his first statement to the Commons as Prime Minister on 3 July 2007 he chose to make it about constitutional reform. Already during his leadership campaign the only legislation he had specifically committed to was on this subject. Of all the areas he could have chosen - poverty, education, welfare - it was this one that he picked. Understandably he caused much excitement amongst those of us who have campaigned for a generation to bring about a major democratic overhaul in the UK. But since then, momentum has been lost. Perhaps he meant to dissipate his initial promises, or perhaps they have been ground down within Whitehall because of the threat they pose to executive power. Whatever the reason there is now a danger that we will one day look back at this period - and the Constitutional Renewal package in particular - as a missed opportunity for reform. For this reason I urge the committee to take what is an appropriate standpoint for pre-legislative scrutiny and consider these documents not only on a basis of what is in them, but what is missing, and make recommendations accordingly.

The Draft Bill and White Paper address constitutional issues in urgent need of attention. While the proposals contained within it are important within the wider constitutional context, they do not fundamentally alter the UK settlement. The set of proposals under consideration by the committee amount largely to a redistribution of power within the geographical-political Westminster/Whitehall elite. A fully codified UK constitution would need to address issues including the weakness of local government; clarifying the position of the UK within the European Union; participation by citizens in policy-formation at all levels; the rights of the individual, including economic and social rights; and the Royal Prerogatives that remain personal to the monarch, including the right to select the Prime Minister. The contents of Constitutional Renewal appear disparate because they are not yet part of a clearly defined process for establishing a new constitutional settlement. For this reason the Bill when it is brought forward should include provision for the establishment of a Constitutional Commission, composed of parliamentarians but required to conduct its proceedings outside the Palace of Westminster. The present contents of the draft bill, while comprising valuable measures, require some modification and correction if they are to properly address the imbalance of power between executive and legislature.

How do the proposals set out in the Draft Bill and White Paper fit into the wider constitutional context?

1. The Draft Bill and White Paper address constitutional issues in urgent need of attention, in particular parliamentary involvement in war-making and treaty-ratification; the status of the Civil

Service; and the independence of the judicial system. Some of the changes embodied in the government proposals were first called for more than a century ago; and have remained on the agenda thereafter. Events around UK participation in the invasion of Iraq heightened interest in the relationship between the legislature and executive and the relative weakness of the former in influencing the actions of the latter. In 2002 I began tabling motions - with cross-party support - on the Remaining Orders every day, calling amongst other things for parliamentary approval for armed conflict.

2. In the sense that they reflect concerns both of longstanding and current salience the plans set out in the Draft Bill and White Paper are important within the 'wider constitutional context'. But they do not fundamentally alter the UK settlement. At best they are a first step towards such a transformation, and a faltering one at that. In its Governance of Britain green paper (Cm 7170) published in July 2007 the government held out the possibilities of a Bill of Rights and a written constitution (see pages 60-3). Neither the current White Paper nor Draft Bill come remotely close to achieving these goals; and they fail even to provide to provide a possible route towards them.

3. The set of proposals under consideration by the committee amount largely to a modest internal redistribution of power within the geographical-political Westminster/Whitehall elite; in particular away from the executive and towards the judiciary and the legislature. They do not perform this function entirely satisfactory. Other proposals I have tabled on the Remaining Orders that might assist here include the election of members of select committee members by a secret ballot MPs, to replace the Whip-dominated process; and the establishment of a Business Committee of eight elected by the House, to ensure that Parliament controlled its own timetable. Moreover, the contents of Constitutional Renewal do not formally recast the relationship between these different components of the state in the formal fashion that would be required were a written constitution to be established.

4. A codified UK settlement would need to address other issues which are nowhere to be found in these documents. They include:

- The weakness of local government and the lack of democratic accountability within England at regional level
- The atrophy of political parties themselves at local and national level
- The ambiguous nature of UK participation within the European Union. I have proposed on the Remaining Orders that the government seek the agreement of the House to a British draft Constitution for the EU, to put forward for consideration by member states (but not to mandate our government)

- The ability of citizens to participate in policy formation at all levels, taking into account in particular the need to involve marginalised social groups

- The rights of the individual, including economic and social rights; and

- The Royal Prerogatives that remain personal to the monarch, including the right to choose a Prime Minister and to grant a dissolution. In circumstances of a hung Parliament, with competing credible candidates for the premiership, it is unacceptable that the decision should be made through any means other than a vote in the Commons. On the Remaining Orders, I advocate that within two days of a new Parliament meeting, or within 25 days of the death or resignation of a serving Prime Minister, the Commons should name one of its members and ask the monarch to invite her or him to form a government. Similar arrangements are effective in countries such as Germany; and closer to home, Scotland. Also I have a motion calling for General Elections to take place only every five years, on 1 June - no Prime Minister should have the unfair advantage of being able to determine the date of a Poll by requesting a Dissolution from the monarch

5. The government remains committed to bringing forward consultations and proposals related to some of these issues. But their absence from the package currently under examination means that the title 'Constitutional Renewal' exaggerates the sum of the parts within it. There is a serious risk of completely dissipating any momentum which has been generated by the Prime Minister unless significant additions are made to the Draft Bill, which I propose below.

The Government have stated that a key goal is to "rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account" (White Paper, paragraph 2). The Draft Bill covers a number of disparate subjects. Is it appropriate for one single Bill to contain such a range of provisions?

6. While the contents of the Constitutional Renewal White Paper and Draft Bill are in a sense disparate, they deal largely with issues on which urgent action has been recommended. In 2004 the Commons Public Administration Select Committee recommended that the Royal Prerogative as a whole be placed on a statutory basis, but called for immediate moves over war-making, treaties and passports.[1] There are various reasons why reform of the office of Attorney General is required immediately, though some of the details are sub judice. Were it clear that the collection of reforms contained in Constitutional Renewal were an early, determined step towards a fuller settlement, they would not appear such a hotch-potch. A broader context and sense of direction is required.

A Constitutional Commission

7. For this reason the government should negotiate with other parties in Parliament to agree to add clauses to the Draft Bill as it stands to give effect to the following measure (since clauses dealing with the National Audit Office will be added into the Bill proper, there is clearly not an absolute barrier to this practice). Democratic renewal is not the province of one party and certainly not the property of government. For it to be sustainable requires openness and consent. New clauses should establish a Constitutional Commission, comprising members of both houses with no majority for any one party on it. Initially it would produce a work programme by the end of the 2008 parliamentary session, subject to approval by a free vote in the Commons. This document would be required to set out how the Commission intended to collect evidence (no public meetings would be permitted within the Palace of Westminster); what precisely its plans were to ensure that the views of a balanced cross-section of society were represented; what mechanisms it advocated to adopt or veto its proposals; and what action it intended to take in the event they were not accepted. The final purpose of the Commission would be to draft, perhaps in clearly set out stages, a codified UK constitution and Bill of Rights. The former would regulate the functions and protect the status of all institutions from national to local level and succinctly state the position of the UK within the European Union. The latter would give effect in domestic law to UK human rights commitments under international law, including those providing for economic and social provision. An emphasis on plain English (and Welsh) would be a statutory requirement. The Commission would be required to recruit a drafter or team of writers through open competition. It would have to stipulate the role of the courts with respect to upholding the constitution and bill of rights; and what the requirements were for amendments to them.

8. Through establishing such a body the government would signal that its Renewal bill was part of a determined process towards a new democratic settlement; and increase the likelihood of an effective and inclusive cross-party process.

Do the proposals set out in the Draft Bill and White Paper move towards achieving the Government's aim of giving Parliament more ability to hold the Government to account?

Declarations of War

9. Having recorded some general reservations about the overall constitutional process currently taking place, I will now engage with some specifics about the White Paper and Draft Bill. The following problems required correction if the proposals are to be effective in 'giving Parliament more ability to hold the Government to account'.

10. Provision for parliamentary involvement in war-making should be set out in statute, rather than - as is currently intended - a Commons resolution, in order to ensure it is binding and justiceable. (as I have recommended daily on the Commons Order Paper since 2002). Observation of other

countries, including the US and Holland, show that more formalised arrangements than a convention are workable in practice. It is proposed by the government that the Prime Minister should be able to bypass the requirement for prior parliamentary approval in an emergency or on grounds of security ('Draft detailed war powers resolution: 3. Exceptions to requirement for approval: emergencies and security issues'). While I accept that there is need for flexibility, there must be provision for rapid subsequent endorsement (or disavowal) by the Commons, which is currently lacking in the White Paper. It is also regrettable that activity by the Special Forces is specifically excluded from the provisions of the draft resolution ('4. Exceptions to requirement for approval: special forces'). Furthermore the Prime Minister should not have full control over the timing of any vote and the information that is made available to Parliament. There is a need for the mandate for any action to be subject to regular renewal. This provision is essential from the point of view of avoiding 'mission-creep' and ensuring that democratic oversight of war-making was an ongoing process, not simply a one-off occasion. It would have to be accompanied by reconfigurations in the parliamentary committee system. In particular there is a need for a properly resourced committee capable of exercising 'joined-up' scrutiny of military activity to inform the plenary in its deliberations.

Recall of the House

If a military emergency occurred at a time when the House was not convened, such a committee would have the power to order a Recall, or exercise the powers of the plenary if reconvening was not practically possible. In addition, Parliament should be given a genuine power to Recall itself (as I have called for on the Remaining Orders since 2002). It should not be dependent, as is currently intended, on the discretion of the Speaker. Moreover the planned requirement for a majority of MPs asking to reconvene is too great.

Treaty making

11. While the proposal for treaties will be established in statute, at present the circumstances in which ministers may bypass the procedure are too vaguely drawn. It is simply stated in clause 22 of the Draft Bill that they can do so 'exceptionally' if in their 'opinion' they should. While it is to be welcomed that the Commons will be given the power to veto ratification (clause 21), at present, under the 'Ponsonby Rule', there is no effective mechanism for triggering debates and votes on treaties. Appropriate procedures, possibly with a newly-established sifting committee at its centre, must be put into place. Finally, the definition of treaty employed in the legislation (clause 24), is too narrow and could mean that important understandings, declarations and non-binding arrangements escape oversight.

Civil Service

12. The plans to place the Civil Service on a statutory basis are in principle to be welcomed. However in practice they do not mean that parliamentary accountability will be enhanced. While there are limits to the engagement of the legislature in the work of Whitehall - the constitutional principle is that ministers, not officials, are held accountable - it would be desirable to require affirmative parliamentary approval for codes for civil servants and special advisers issued under the Act when it comes into force. I note further that frequent reorganisations of Whitehall take place with Transfer of Functions Orders under the Ministers of the Crown Act 1975 and in practice escape any form of effective parliamentary oversight.[2]

Legal System

13. Government proposals for reform of the legal system make some reference to the role of Parliament, but do not provide the full overhaul of the relationship between the legislature and judiciary that is required. It is intended that the system of pre-appointment hearings currently being developed will take in the Chair of the Judicial Appointments Commission (JAC). While this development is welcome, the process should be extended to take in senior judges with a leadership role including the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division and the Chancellor of the High Court. Parliamentary committees have a long record of proceeding through consensus and fears of 'politicisation' of the process are exaggerated. In order to facilitate closer working between Parliament and the judiciary, and avoid damaging public disputes, there should be specially reserved places for MPs on bodies such as the JAC and the Sentencing Guidelines Council. Finally I welcome the government's stated openness to the idea of forming a parliamentary committee specifically to monitor the Attorney General and the Attorney General's Office. Any such body must have access to adequate legal advice to enable it to provide authoritative views to assist Parliament in its deliberations. This latter requirement is particularly important because the government does not intend amending the presumption that the Attorney General's Advice should remain confidential, even if over matters as grave as war and peace. Ideally, certain classes of advice would usually be disclosed, enabling Parliament to compare the internal views of the Attorney General with those of the experts it had at its disposal. Parliament itself should be able to access its own legal advice, something that proved impossible to do in the run up to the Iraq War.

Protests around Parliament

14. On this subject, it should be noted that there never existed a right to demonstrate in Westminster, it was a right to lobby, which should of course be preserved. Parliament Square should not be 'squatted' by any one individual, as it has been for some years. The best means of ending this problem would be to establish a 'Speakers' Corner' type arrangement for Parliament Square, meaning that anyone could come and direct their thoughts at Parliament, subject to proper regulation, including limitations on banners and a ban on electronic and other amplification equipment.

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[1] Taming the Prerogative, HC 422, 2003-04.

[2] See: House of Commons Public Administration Select Committee, Machinery of Government Changes, HC 672, 2006-7.