HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Professor Adam Tomkins (Ev 01)

Putting the Draft Constitutional Renewal Bill in Context

1. The Draft Constitutional Renewal Bill is more of a tidying-up exercise than it is a fundamental reform to the British constitution. This is not to trivialise it or to say that it contains no measures which are important in their own right. But, when compared with previous rounds of constitutional reform witnessed in recent years (e.g. the Human Rights Act 1998, the Scotland Act 1998 and arguably even the Constitutional Reform Act 2005), the Draft Constitutional Renewal Bill is not of the same order of importance, constitutionally. More pressingly, perhaps, neither is the Draft Constitutional Renewal Bill the most significant set of proposals currently being debated in the arena of constitutional reform. The 'national conversation' initiated by the Scottish Executive in August 2007 has at least the potential to lead to radically more fundamental constitutional reform than any proposal contained in the Draft Constitutional Renewal Bill. Parliamentary scrutiny of the future of the Union is a matter for another day, no doubt. Nonetheless, a sense of perspective is called for.

2. This is especially the case, perhaps, given the size of the gap between some of the Government's rhetoric in its various 'Governance of Britain' papers and what is actually proposed in the draft legislation. In last summer's Green Paper, for example, the Government wrote about 're-invigorating our democracy' and suggested that its proposals would go a long way 'to rebalance power between Parliament and Government'. From the Green Paper of July 2007 to the White Paper and Draft Bill of March 2008 there appears to have been a substantial shrinkage of the Government's ambitions. While it may be the Government's intention that the 'Governance of Britain' or 'constitutional renewal' agenda should be ongoing and should not be confined to the present Draft Bill, there is much that was canvassed in last year's Green Paper that has not been taken forward in the White Paper and Draft Bill. Some matters remain, apparently, for the future (e.g., the commitments to establish a Youth Citizenship Commission, to start a national debate on a British Bill of Rights and Responsibilities, and to revisit issues of House of Lords reform). Others are seemingly being taken forward, but elsewhere (e.g., changing the conventions governing the dissolution of Parliament, such that the Prime Minister will be required to seek the approval of the House of Commons before asking the Monarch for a dissolution; and amending the Standing Orders of the House of Commons so as to enable backbench and opposition Members to seek a recall of Parliament - both of these matters, as I understand it, are currently before the House of Commons Modernisation Committee).

3. Perhaps of more concern for this Joint Committee, however, is the fact that even within the areas of the Green Paper that do find some expression in the Draft Bill, there appears to be considerable slimming down of ambition. In the Green Paper, for example, it was stated that 'the Government believes that the executive should draw its powers from the people, through Parliament' (para. 14). I agree. But there is nothing in the Draft Bill to write such a principle into our constitutional law. In the Green Paper it was further stated, of the Government's prerogative powers to deploy troops and to ratify treaties, that 'In a modern 21st century parliamentary democracy, the Government considers that basing these powers on the prerogative is out of date' (para. 17). Again, while changes of detail are proposed in the White Paper and Draft Bill with regard to both powers, it is clear that both are intended to remain firmly based on the prerogative, albeit that the exercise of these prerogative powers will be subject to moderately enhanced parliamentary oversight.

Constitutional Renewal and Constitutional Principle

4. I will return to the detail below but, before doing so, it may be worth pausing to reflect a little on the constitutional principles that may be said to underpin this incredibly important area of our constitutional law. One of the most striking features of the Green Paper were its citations of history. The proposals explored in the Green Paper were explicitly set in the context of the United Kingdom's ongoing, historical constitutional development. A major theme of that development is the transfer of power from Crown to Parliament. As the Green Paper expressed it, 'reforms have developed our country from a feudal monarchy where the King's word was law and only a tiny minority had any real influence, to a representative democracy governed through a sovereign Parliament elected by universal suffrage' (para. 2). As matters stand, however, the transfer is incomplete. Britain's constitution, even now, is not a full parliamentary or democratic one. The Crown retains very significant powers. Some continue to be exercised by the Monarchy itself (e.g., appointment of the Prime Minister, dissolution of Parliament, and royal assent to legislation) but the bulk of the Crown's powers are now exercised by the Prime Minister and by other Cabinet Ministers and officials (e.g., the making of treaties, the deployment of the Armed Forces, the conduct of diplomacy, the governance of Britain's overseas territories, the appointment and removal of Ministers, the appointment of peers, the grant of honours, the claiming of public interest immunity, and the granting and revoking of passports, as well as others).

5. Now, it is clear that, as the Government accepted in its Green Paper, 'when the executive relies on the power of the royal prerogative ... it is difficult for Parliament to scrutinise and challenge government's actions' (para. 15). This is a reflection of the view established by the House of Commons Select Committee on Public Administration, which reported in 2004 that, when exercising the Crown's prerogative powers, Ministers have 'very wide scope to act without parliamentary approval' (Taming the Prerogative, HC 422 of 2003-04, para. 12).

6. If we take seriously the claim - and it is the Government's claim - that our country is a 'representative democracy governed through a sovereign Parliament' (above), then it follows that current constitutional practice with regard to the prerogative is contrary to principle. The transfer of power from Crown to Parliament must be completed. In a representative democracy governed

through a sovereign Parliament such a claim would surely be axiomatic. There would be no reason to regard it as either bold or controversial. The starting principle for executive power should be the same for central government as it already is for local government: namely, that the government may exercise only those powers which are expressly or by necessary implication conferred upon it by statute. If this is sufficient for local government why should it not also be for central government? The personnel of central government is already drawn from Parliament and once in office the government is of course accountable to Parliament for its policies. Given this, there is no reason not to extend the control by Parliament over the government also to its powers. Thus, Government should possess only those powers which the people, through their elected representatives in Parliament, have expressly or by necessary implication conferred upon it by statute. This, it is respectfully submitted, is the constitutional principle on which the governance of Britain and on which a programme of constitutional renewal should be based.

7. One of the more disappointing aspects of the White Paper and Draft Bill is that, unlike last year's Green Paper, they do not seem to reflect this underlying principle. In the Green Paper the Government expressed its belief that 'in general the prerogative powers [exercised by Ministers] should be put onto a statutory basis and brought under stronger parliamentary scrutiny and control' (para. 24). (There was no suggestion that the powers exercised by the Monarchy itself should be amended in these ways.) In the White Paper and Draft Bill, by contrast, only one prerogative power is proposed to be put onto a statutory footing (i.e., the power to manage the civil service - clause 27) and the proposed increases in parliamentary scrutiny and control fall considerably short of what they might have been.

8. Three areas of the prerogative are proposed to be reformed in the White Paper and the Draft Bill: the management of the civil service, the ratification of treaties and the deployment of the Armed Forces. It is not clear why these particular prerogative powers (and not others) have been selected for 'renewal'. While the most recent political controversy concerning a prerogative power revolved around one of these three - the Blair Government's deployment of the Armed Forces in the Iraq War - recent decades have witnessed controversy in other areas, not touched on in the Government's present proposals. One obvious example is the use by Ministers in John Major's Government of the prerogative power to claim public interest immunity (PII) in order to attempt to prevent what turned out to be material evidence from being disclosed to the defence in a series of criminal trials in the early 1990s, trials concerning the export of arms and 'dual-use' goods to Iraq. It was the scandal which this gave rise to that led to the establishment of the Scott Inquiry, which reported in 1996. One question which may usefully be explored, perhaps, is why the Government finds it necessary or appropriate to make amendments only to some of its prerogative powers, and not to others. As the example of PII suggests, it cannot be because all other prerogative powers operate without difficulty. The Government's current proposals for piecemeal reform are difficult to reconcile with its more robust statements in last year's Green Paper (e.g. at paras 15 and 24, cited above).

The Ratification of Treaties

9. The Government proposes in essence to convert the existing convention governing Parliament's role in the ratification of treaties (the Ponsonby rule) into a rule of law by enacting it in statute. While doing so, it should be pointed out, the rule will be strengthened in terms of its legal effect, in that, under the Government's proposals (and subject to exceptions - clauses 22-23), it will be legally impossible for the Government to ratify a treaty should the House of Commons vote against its ratification. Thus, while the power to ratify treaties will remain a prerogative power in the hands of Ministers, the lawful exercise of this power will be conditional upon the Commons' approval. (Such approval does not have to be express: as the Draft Bill stands a treaty may be ratified as long as neither House resolves that it should not be ratified - clause 21.) If these proposals are enacted, were the Government then to purport to ratify a treaty in the face of a Commons vote that it should not be ratified, a court of law would likely be able to quash such a ratification on a claim for judicial review. I say 'likely' because there is House of Lords authority in support of the proposition that the ratification of treaties is a non-justiciable issue (Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 418, per Lord Roskill). Notwithstanding its source, it may be doubted that this ruling would survive the passage of legislation such as that proposed here. For the avoidance of doubt, however, it may be that Parliament should consider whether it might expressly provide that any future ministerial attempt to ratify a treaty in the face of the opposition of the House of Commons is intended to be a matter amenable to judicial review.

10. Parliament might also be advised to consider whether the extensive ministerial discretion retained in clause 22(1) is appropriate (the 'exceptional cases' clause). Parliament's position might be better safeguarded, for example, by the addition of a statutory duty on the Secretary of State to take all such steps as are reasonably practicable to ensure that no treaty is ratified without the conditions in clause 21 having been met. Whether such a duty should be enforceable by Parliament or in the courts of law (or both) is a further matter that might usefully be considered.

The Deployment of the Armed Forces

11. The Government proposes the creation of a new resolution of the House of Commons, detailing Parliament's role in decisions to deploy Her Majesty's Armed Forces in armed conflict overseas. The principle, new to our constitution, to be articulated in the resolution, is that the approval of the House of Commons should in general be obtained before the Government deploys the Armed Forces in conflict overseas. Currently there is no such requirement for parliamentary authorisation, even if, as was the view for example of Prime Minister Tony Blair, the events of 2002-03 leading up to the Iraq War had made it politically unthinkable that Government would in the future deploy troops in overseas combat without parliamentary debate. The new principle is warmly to be welcomed. It is an important step in the rebalancing of power from Crown to Parliament that was referred to above.

12. However, while the headline move is to be welcomed, the detail of the Government's proposals leaves much to be desired. The following are examples (see White Paper, paras 218-23):

a) The Government currently proposes that there should not be a requirement to obtain retrospective approval for a conflict where prior approval was unable to be sought;

b) Similarly, the Government does not currently accept the need for a requirement for any regular parliamentary re-approval;

c) The Government is opposed to making any special arrangements for the recall of Parliament if a deployment is necessary when it is either adjourned or dissolved;

d) The Government believes that it is for the Prime Minister to determine what information should be supplied to Parliament in the approval process;

e) The Government is opposed to allowing the legal advice of the Attorney General as to the legality of the proposed action to be disclosed to Parliament;

f) The Government is of the view that it is for the Prime Minister to determine the appropriate timing for the involvement of Parliament in the approval process

Each of these facets of the Government's proposals has the potential significantly to reduce - perhaps even to undermine - the headline move.

13. For reasons of constitutional principle, this is greatly to be regretted. But it is not difficult to remedy. What is needed is a clear starting point. Three such starting points suggest themselves: (i) priority should be accorded to the fundamental constitutional principle that in the exercise of its powers the Government should be as fully accountable to Parliament as possible; (ii) priority should be accorded to what the Government calls the 'imperative of the safety and effectiveness of our Armed Forces' (White Paper, para. 221), bearing in mind all the time the great variety of circumstances in which they may find themselves, and the consequent need for flexibility and speed of response; (iii) recognition should be given to the fact that these principles collide and that a sensible policy approach would be to seek to balance or reconcile them as far as possible.

14. Now, it may be argued that, in a process of 'constitutional renewal', if we are to take the idea of renewal seriously, the matter should be approached in the first of these ways. As the Government's proposals stand, it is clear that the second of these ways has dominated the Government's thinking. This explains the Government's stated preferences in points (a)-(f) above. Wherever there is a clash between the interests of constitutional accountability to Parliament and those of retaining maximum government flexibility and control, the Government's current proposals come down uncompromisingly in favour of the latter.

15. By way of contrast, it may be worth sketching what points (a)-(f) might look like if either the first or third approach were to be adopted instead. The first approach, rooted most strongly in constitutional principle, would lead to the following proposals: (a) that retrospective parliamentary approval would always be required should prior parliamentary approval not be available; (b) that regular parliamentary re-approval would be a routine aspect of the system; (c) that Parliament should be recalled if its approval was needed when it was adjourned or dissolved; (d) that

Parliament should have the right to demand any information it required in order for it to have as full knowledge and understanding as possible of what it was being asked by the Government to approve (albeit that there might need to be special provision made for some such information not be released into the public domain); (e) that while the legal advice of the Attorney General should not normally be disclosed, the decision to send the Armed Forces into conflict overseas is of such importance as to warrant an exception to that general position; and (f) that the Speaker of the House, or the Chairman of the Liaison Committee (or of the Defence Committee or the Foreign Affairs Committee, etc) should determine matters of timing.

16. Alternatively, were it to be felt that the two approaches should be balanced against one another, the position might look something like this: (a) retrospective parliamentary approval should in principle be required where prior parliamentary approval is for some reason unavailable; it would surely be only in the most exceptional circumstances that such retrospective approval would be refused - Parliament would not act in this manner unless it had a compelling reason for doing so; if such a compelling reason exists, then it follows that Parliament ought to have the power to intervene; (b) regular parliamentary re-approval should be a part of the system; the arguments in favour are stronger than those against - in particular it is important to guard against 'mission creep' and this would be difficult without some facility for regular re-approval; (c) Parliament should be recalled if necessary; the Government has offered no strong counter-argument, and none exists; (d) Parliament should have as much control over the information flow as is possible; disputes between Government and Parliament about access to information could be referred for mediation to the Information Commissioner; peculiarly sensitive information could be communicated to senior parliamentarians on Privy Counsellor terms; (e) where there was cause for disquiet about the legality of proposed conflict, the Attorney General's advice to the Government should be disclosed; the decision to deploy the Armed Forces in conflict overseas is of such a magnitude that it trumps otherwise sound arguments in favour of legal confidentiality; (f) questions of timing ought to be negotiated between the Prime Minister, the Speaker and senior parliamentarians such as the Chairs of relevant Select Committees.

17. The conclusion is self-evident: whether an approach rooted in constitutional principle is adopted, or whether what I have called a more balanced approach is taken, the shape and the workings of parliamentary involvement in decisions to send the Armed Forces into conflict overseas look very different from the proposals currently offered by the Government. To add a footnote to this point, it is worth noting that a large majority of the respondents to the Government's consultation exercise on war powers and treaties were in favour of incorporating retrospective approval into the system, of recalling Parliament where necessary, of requiring the Prime Minister to provide much fuller information than the Government is suggesting, and of incorporating regular re-approval in the system so as to guard against mission creep (see Governance of Britain - Analysis of Consultations, Cm 7342-III, paras 309, 315, 321, 335).

18. Even if either of these approaches were to be adopted, however, the reform effected by such a resolution would be relatively modest. It would still not be the case that the executive power to deploy Her Majesty's Armed Forces in conflict overseas would be 'drawn from the people, through Parliament' (cf Green Paper, para. 14, cited above). On the contrary, it would remain firmly rooted in the prerogative powers of the Crown. Only statute could effect reform to this, the underlying

constitutional problem from which the issues addressed here flow. Subjecting the Government's prerogative power to wage war to parliamentary oversight is a welcome move, but it is no substitute for the constitutional reform we really need.

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