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ENGLAND

A New Wave of Constitutional Reform for the UK?

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The late 1990s marked a major period of constitutional reform in the UK with devolution to Scotland, Wales, and Northern Ireland; the Human Rights Act 1998; the House of Lords Act 1999; and the Freedom of Information Act 2000 only some of the main changes that took place. Since then, other changes over the years have included reforms to the role of the Lord Chancellor; to judicial appointments; to parliamentary procedure; and to the judicial system, with a new Supreme Court scheduled to begin work in October 2009.¹ It had seemed more recently that the zeal of the Labour Government for major constitutional change had dampened. That was, at least, until a change of Prime Minister in June 2007 saw Gordon Brown entering 10 Downing Street. One of his early initiatives in office was to promise another wave of constitutional change, not quite as encompassing as the programme set out a decade earlier but potentially significant nonetheless. In this rapport, we will outline these proposals and observe both where advances have been made in giving effect to them and those other areas where proposed change seems to have stalled.

The agenda for change was set out in the Green Paper, *The Governance of Britain*, published only one month after Gordon Brown became Prime Minister.² This was followed by substantial plans for legislation in a White Paper, *The Governance of Britain: Constitutional Renewal*, which was published jointly by the office of the Prime Minister and the Secretary of State for Justice on 25 March 2008. This develops the Green Paper further, building upon a consultation exercise and firming up the government's position.³ Together with the White Paper, the Government also published a draft *Constitutional Renewal Bill*. Since then, the White Paper and draft Bill have been scrutinized in the

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¹ Constitutional Reform Act 2005.

² Cm 7170 (London: The Stationery Office, 2007), <www.official-documents.gov.uk/document/cm71/7170/7170.pdf>.

³ Cm 7342 (London: The Stationery Office, 2007), <www.justice.gov.uk/publications/governance-britain-consultation-analysis.htm>.

Commons by the Justice Committee,⁴ the Public Administration Select Committee,⁵ and a parliamentary Joint Committee.⁶ Subsequently, the Ministry of Justice published a report on progress, *Governance of Britain: One Year On*, on 3 July 2008.⁷

The White Paper and draft Bill offer a wide-ranging miscellany of matters for possible change, which combine a mixture of prosaic 'tidying up' measures; responses to current problems; and more ambitious 'vision statements', the latter particularly in the areas of citizenship and human rights. As such, it is difficult to identify a clear narrative behind these proposed reforms. The key planks of these proposals as set out in the Green Paper are 'limiting the powers of the executive', 'making the executive more accountable', 're-invigorating our democracy', and 'Britain's future: the citizen and the state'. We will address each in turn.

The first of these initiatives includes a wide range of measures, and we can identify several main points of focus. The first is the surrendering of certain important royal prerogative powers to Parliament, including the power to deploy Armed Forces abroad. This initiative is of course a response to the controversies surrounding the invasion of Iraq and the posting of British troops in Afghanistan. This proposal was further developed in the White Paper, which in turn was followed by a consultation paper published by the Ministry of Justice in October 2007.⁸ One significant possibility is an amendment to the law to the effect that in the future a parliamentary resolution should be needed for the posting of troops abroad. Another proposal relating to foreign affairs is that the 'Ponsonby Rule' would be formalized in statute. At the moment, this constitutional convention provides that major treaties should be laid before both Houses of Parliament in Command Paper form for a minimum period of twenty-one sitting days prior to ratification. The Government now proposes that this opportunity for parliamentary scrutiny and debate should be legally codified.

The second point of focus under the 'Limiting the powers of the executive' heading is a proposed restriction on the Government's role in ecclesiastical, judicial, and public appointments and in the granting of honours. Yet another aim is to place the Civil Service on a statutory footing. The Civil Service of course currently operates largely through the royal prerogative under the authority of the Prime Minister as Minister for the Civil Service. As well as placing the independent Civil Service Commissioners on a statutory footing, the Government proposes to clarify the role of Special Advisers within the government,⁹ the role of these advisers, and their relationship to the traditional civil service being a very controversial issue since at least 1997. Finally, on

⁴ Justice Committee, Second Special Report of Session 2007-2008, Constitutional Role of the Attorney General: Government Response to Committee's Fifth Report of Session 2006-2007, HC 242.

⁵ Public Administration Select Committee, Tenth Report of Session 2007-2008, Constitutional Renewal: Draft Bill and White Paper, HC 499.

⁶ Joint Committee on the Draft Constitutional Renewal Bill First Report of Session 2007-2008, HC 551-I, HL 166-I, <www.publications.parliament.uk/pa/jt200708/jtselect/jtconren/166/16602.htm>, 31 Jul. 2008.

⁷ Ministry of Justice, <www.justice.gov.uk/publications/governance-britain-one-year-on.htm>, Jul. 2008.

⁸ War Powers and Treaties: Limiting Executive Powers, Cm 7239 (London: The Stationery Office, 2007), <www.justice.gov.uk/publications/cp2607.htm>.

⁹ <www.official-documents.gov.uk/document/cm71/7170/7170.pdf>, 22.

the issue of executive power, the proposed reforms would also reduce the role played by the Prime Minister in the appointment of bishops and other positions in the Church of England.

The second plank of the proposals, accountability, is concerned with two main issues. The first is national security. Again related to the engagement of troops abroad, but also to the current terrorist threat to the UK, there has been a concomitant concern for civil liberties. The Government has proposed, as a balance to anti-terrorism legislation provisions, improved mechanisms to ensure that government decisions on security and intelligence will be 'subject to proper scrutiny'.¹⁰ Secondly, in the context of devolution and the lack of enthusiasm for any extension of regional government to the regions of England, the government has proposed the creation of Regional Ministers in England. It is intended that these would make people within their communities better able to hold the executive to account over local issues. Proposals for regional select committees have accompanied this proposal.

The third initiative, re-invigorating British democracy, came with various proposals. The first concerns House of Lords reform. This had stalled since initial reforms in 1999, which were intended to be the first step to a final settlement on the composition and powers of the second chamber.¹¹ In May 2006, a Joint Committee was established to examine the conventions governing the relationship between the two Houses of Parliament. In addition, during this period cross-party talks on House of Lords reform were ongoing. Some measure of consensus was reflected in the White Paper on Lords reform of February 2007.¹² On 7 March 2007, free votes were held in the House of Commons on various proposals for reform of the composition of the second chamber. A large majority favoured a wholly elected House of Lords, which for a long time had not been a favoured option (largely it seems due to concern among House of Commons MPs that such a system would make the Lords too powerful). There was also support for an 80% elected, 20% appointed composition. In *The Governance of Britain* White Paper, the Government welcomed the results of the free vote and declared itself 'committed to enacting the will of the Commons'.¹³ Another proposed step is the Government's intention to remove 'the anomaly'¹⁴ of the remaining hereditary peers, ninety-two of whom survived the 1999 reforms. Again the House of Commons endorsed such a move in March 2007. In July 2008, the Ministry of Justice published *An Elected Second Chamber: Further reform of the House of Lords*.¹⁵ This reports on the deliberations of the cross-party group that, chaired by the Lord Chancellor, had been meeting over the previous two years. It remains to be seen how reform will proceed. There is much support it seems for

¹⁰ *Ibid.*, 31.

¹¹ House of Lords Act 1999. See S. Tierney, 'Reform of the House of Lords and the Labour Government', *European Public Law* (2000): 506-516.

¹² The House of Lords: Reform, Cm 7027 (London: The Stationery Office, 2007).

¹³ <www.official-documents.gov.uk/document/cm71/7170/7170.pdf>, 42.

¹⁴ *Ibid.*

¹⁵ Cm 7438 (London: The Stationery Office, 2008).

an 80% elected, 20% appointed composition although disagreement among the parties on other issues makes unclear exactly how these proposals will be implemented.

Electoral reform is another issue under this third heading. The Government is considering the benefits of advance voting at the weekend or indeed moving general and local elections to a weekend day (British general elections by convention take place on Thursdays), and the potential benefits of remote electronic voting using the internet and telephone systems.¹⁶ In June 2008, the Ministry of Justice published *Election Day: Weekend Voting*.¹⁷ This paper seeks to initiate a debate on the merits of moving the polling day from Thursday to a weekend. This was intended to include the direct input of citizens through so-called 'citizens' summits'.

The fourth strand of proposed reforms, 'Britain's future: the citizen and the state', has proven to be controversial with the civil liberties lobby. The impetus behind this citizenship agenda emerges in the context of a debate about Britishness. This debate seems to be partly a response to devolution, which has raised the question whether 'Britishness' is weakening as more and more people come to identify primarily with sub-state national identities. However, it is also a consequence of a UK that becomes ever more culturally diverse through immigration and the challenges that come in trying to forge a common set of values. The Green Paper *The Governance of Britain* declared:

The Government believes that a clearer definition of citizenship would give people a better sense of their British identity in a globalised world. British citizenship – and the rights and responsibilities that accompany it – needs to be valued and meaningful, not only for recent arrivals looking to become British but also for young British people themselves.¹⁸

The focus on social cohesion has led to an emphasis on responsibilities as well as rights and an implicit notion of a contract, particularly for new immigrants: 'The Government believes that everyone in the UK should be offered an easily understood set of rights and responsibilities when they receive citizenship'.¹⁹ The Government also announced new initiatives involving education to encourage the participation of the young in politics, given that only 39% of 18- to 24-year olds cast a vote in the 2001 election compared to 68% in 1997. One possibility being considered is reducing the voting age to 16. A Youth Citizenship Commission will consider these various possibilities in an attempt to renew a sense of national identity for all citizens.

The substance of citizenship has also been placed on the table and one measure being undertaken is a reinvestigation into 'the nature of the rights and responsibilities that come with citizenship'.²⁰ It is intended that: 'A clearer understanding of the common core of rights and responsibilities that go with British citizenship will help build

¹⁶ <www.official-documents.gov.uk/document/cm71/7170/7170.pdf>, 45.

¹⁷ CP 13/08 (London: The Stationery Office, 2008).

¹⁸ <www.official-documents.gov.uk/document/cm71/7170/7170.pdf>, 54.

¹⁹ *Ibid.*

²⁰ *Ibid.*, 57.

our sense of shared identity and social cohesion.²¹ It was felt that a substantive set of values that reflect Britishness should be articulated. Here the White Paper is directive. These values 'have not just to be shared but also accepted. There is room to celebrate multiple and different identities, but none of these identities should take precedence over the core democratic values that define what it means to be British. A British citizen, fully playing a part in British society, must act in accordance with these values'.²² In attempting to articulate what these values might include, the Green Paper tentatively mentions: 'liberty, democracy, tolerance, free speech, pluralism, fair play and civic duty'. This initiative is intended to begin 'an inclusive process of national debate'. The Government 'will work with the public to develop a British statement of values that will set out the ideals and principles that bind us together as a nation'.²³ It is also thought that this national conversation could lead to a British Bill of Rights and Duties. It seems that this would complement rather than replace the rights already embedded within the Human Rights Act, which broadly incorporates the European Convention on Human Rights (ECHR) into UK law. The tentative proposal in the White Paper is, however, still very vague, and as will be noted below, it remains to be seen what, if anything, will come of it. Building on this 'Bill of Rights and Duties' and citizenship initiative, the government commissioned a citizenship review by Lord Goldsmith QC. This report was published by the Ministry of Justice in March 1998.²⁴ It proposed a tidying up and simplification of the very complex categories of citizenship that exist in UK law. In a detailed and wide-ranging review, the report also engages with the rights and responsibilities debate, setting out in more substantive terms the wide range of issues that could be addressed in a general review of citizenship.

The most dramatic suggestion is that the outcome of all of these deliberations might finally be a written constitution for the UK.²⁵ This is set out as a long-term project that should be approached with 'caution';²⁶ and of course it would likely depend for its fruition upon the success of the Labour Party at the next General Election. In fact, politics has served to intervene to put many of these plans on hold. We see this for example in reference to the idea of a British Bill of Rights. The government had suggested that a consultation paper would appear in Spring 2008. With delays, this did not appear even in the Summer, and in August the parliamentary Joint Committee on Human Rights set out its own proposals and even issued a draft bill, *A Bill of Rights for the UK?*²⁷ This proposed a Bill of Rights and Freedoms, which would include aspirational and non-justiciable rights in the social and economic realm such as rights to education, health, housing, and an adequate standard of living. This is notably different

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*, 58.

²⁴ 'Citizenship: Our Common Bond', <www.justice.gov.uk/reviews/citizenship.htm>.

²⁵ <www.official-documents.gov.uk/document/cm71/7170/7170.pdf>, 62-63.

²⁶ *Ibid.*, 63.

²⁷ Joint Committee on Human Rights, *A Bill of Rights for the UK?* HL Paper 165-I, HC 150-I (London: The Stationery Office, 2008).

in philosophy from the Government's intention, which is to emphasize responsibilities. However, by the Spring of this year, with the Government facing other preoccupations, particularly the economy, we have seen no progress on this matter. Nor does it seem that there is much popular or political impetus for a new wave of constitutional reform. Indeed, two years later it seems that many of the plans set out in the Green and White Papers will either not be taken forward or will await the outcome of the next General Election. The Constitutional Renewal Bill was not included in the Government's legislative plans set out in the Queen's Speech in November 2008. Much then will depend upon how economic and political difficulties play out and indeed on whether Labour survives in office after the next election, which must be held no later than May 2010.