Book Review: Vernon Bogdanor, *The New British Constitution*

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1. Professor Vernon Bogdanor's latest treatise on constitutional reform could not have come at a more opportune moment. Popular interest in constitutional reform has been aroused from its usual stolid indifference by the recent revelations of inappropriate Parliamentary expense claims. The result of this crisis of legitimacy currently being suffered by Parliament is a general consensus of the need for constitutional reform. In *The New British Constitution* (Hart Publishing, 2009) (ISBN 978-1841136714, £17.95, sbk, 334pp) Bogdanor attempts to define the quieter revolution of constitutional change which has taken place in the last 30 years. He describes this seismic shift as nothing less than "the replacement of one constitutional order by another" (p. xi).

2. Bogdanor focuses on the changes which took place following Britain's entry into the European Economic Community in 1973. This process of reform accelerated markedly after the general election of 1997. Labour's election manifesto had painted a stark picture of the sclerotic state of politics, whilst promising wholesale reform: "There is unquestionably a national crisis of confidence in our political system, to which Labour will respond in a measured and sensible way". But after centuries of organic change, recent reforms have been introduced in piecemeal fashion, often with little care for the coherence of the edifice as a whole. Bogdanor sets out 15 key developments, which, he argues, have been central to the creation of a new constitutional settlement. These range from the devolutionary settlements in Wales, Scotland, Northern Ireland (and, to an extent, London), to the passing of both the Human Rights Act 1998 and Freedom of Information Act 2000, and to the holding of referenda on various constitutional issues.

The old constitution

3. *The New British Constitution* is divided into three broad sections. The first undertakes a descriptive analysis of what is labelled "the Old Constitution", best described by the twin pillars of constitutional scholarship supplied in the nineteenth century by Walter Bagehot in *The English Constitution*,[1] and by Professor AV Dicey in *Introduction to the Study of the Law of the Constitution*.[2] Bogdanor makes such comparisons explicit in his argument right from the outset. The overarching theme of *The New British Constitution* is his repudiation of the Diceyan model of Parliamentary sovereignty which was "from a legal point of view the dominant characteristic of our political institutions".[3] This is no small task given the influence of Dicey's arguments, which are still frequently cited in judicial decisions.[4]

[1] W Bagehot, *The English Constitution* (Oxford University Press, 2001).
[2] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (Macmillan, 1959).
[3] Dicey, ibid., p. 39.
[4] For example, see the discussion of Lord Bingham in *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55 [2007] 2 AC 105, in T Dyke, "Focus on Article 11" [2009] JR 185, para. 6.

4. Under his analysis, Dicey's model of Parliamentary sovereignty has been eroded, not by a genuine transfer of power, but by a diffusion of responsibility amongst the ruling class. Despite the flurry of reforming zeal since 1997, there has been a manifest failure to engage with voters. In a recent article in the *New Statesman*, Bogdanor attributed this failure to a government which "redistributed power not between government and the people, but between elites, between politicians in London, Edinburgh, Cardiff and Belfast, and between politicians and judges. The next stage of reform must be to distribute downwards, not sideways. That will involve much more direct democracy to supplement, though not to replace, our representative system".[5]

5. Whilst this argument is sound enough in itself, it begs the question of what can be done to overcome the popular disengagement with the political process. Bogdanor's analysis fails to deal with the "chicken and egg" issue it creates. Will devolving power to the citizen raise the level of political consciousness, or is it a necessary condition which must be present to prevent that power being hijacked by various interest groups? This is a difficult question and raises a number of normative issues. To an extent, it is a question which will always arise when constitutional reform is imposed on a top-down basis. The inadequacy of employing traditional mechanisms of implementing policy is highlighted by one example from the Government's 2007 Green Paper, entitled *The Governance of Britain*.[6] This was introduced shortly after Gordon Brown became Prime Minister, and set out his reform agenda, including a proposal to change the rules governing exactly how many days the Union Flag may be flown over government buildings. Hardly the sort of stuff likely to grip a disengaged voter with democratic fervour.

6. There are also instances of such top-down "devolving" legislation having been taken over by pressure groups and individuals. One such example involves the Freedom of Information Act 2000, a piece of legislation cited by Bogdanor as one of his 15 constitutionally important changes. At the end of 2006, the Ministry of Justice looked into the question of how effective the freedom of information legislation had been. In its consultation into the Freedom of Information and Data Protection (Appropriate Limit and Fees Regulations) 2007, the Ministry of Justice discovered that a disproportionate number of requests had been made by a small number of individuals. It estimated that these requests counted for 26 per cent of requests made by value. In the case of the Freedom of Information Act, many of the requests will have been made by journalists and opposition political parties, with the intention of placing the information in the public domain. However, it does illustrate the point that, when passing such legislation with the intent of devolving power to the citizen, there is a very real possibility that it will be taken over and used as a campaigning tool by a relatively small number of individuals and groups.

The new constitution

7. The second section of the book deals with what Bogdanor has labelled "the New Constitution". The cornerstone of this arrangement is formed by the Human Rights Act 1998. It is true that the formal incorporation of the European Convention on Human Rights into UK law was a watershed moment in constitutional reform. In one of the early cases involving the Act, Sedley LJ, in *Redmond-Bate v Director of Public Prosecutions* (1999)

[5] V Bogdanor, "End of the Party", *New Statesman*, 28 May 2009.
[6] Ministry of Justice, *The Governance of Britain*, Cm. 7170 (2007), pp. 57–58.

163 JP 789 at [795], described it as representing a "constitutional shift". Since then it has become so embedded into the legal fabric that it has been described as part of the pantheon of constitutional statutes. Laws LJ noted in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) at [62] that:

> "We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998."

8. Professor Sir Bernard Crick noted astutely that enshrining rights in a domestically enforceable statute would not just change the way the law was applied, but would change the way our judges judge.[7] To some extent this prediction has come to pass, and judges are certainly more conscious of the balance between rights and responsibilities, even if the media might not like to admit it.

9. Nevertheless, it is ironic for Bogdanor, that "human rights", the cornerstone of his new constitution, has passed into the lexicon of pejorative terms employed by the British media, alongside "political correctness", as shorthand for something that runs contrary to a deeply ingrained British sense of fair play. Dominic Grieve, the Conservative shadow home secretary, has highlighted one popular criticism: "The Act has attracted a huge amount of public hostility and helped to create a rights culture which has been seen by many people as forcing the state to make concessions to the undeserving . . . public bodies routinely hide behind the Act to hide their own incompetence".[8] As a result of this popular perception, and despite their early enthusiasm for the legislation, Labour ministers have been quick to distance themselves from it.

10. Nonetheless, all sides of the political debate have proved keen to "decontaminate the brand", and there is a widespread consensus on the need for a Bill of Rights. On taking office as Prime Minister, Gordon Brown argued in his first detailed policy statement that the country is at a constitutional crossroads. In July 2007 the Green Paper, *The Governance of Britain*, was published, detailing proposals to introduce a "Bill of Rights and Duties [to] give people . . . a framework for giving effect to our common values".[9] It was proposed that this document would sit on top of the existing Human Rights Act and extend the rights contained within it, while protecting existing Convention rights, a position known as "ECHR plus". Similar proposals mooted by the main opposition parties seem virtually indistinguishable. David Cameron has stated the Conservative Party's desire for a "modern British Bill of Rights to define the core values which give us our identity as a free nation".[10] Against this, the Liberal Democrats have argued for

[7] As reported in Helena Kennedy QC, *Just Law: The Changing Face of Justice – and Why It Matters To Us All* (Vintage, 2004), p. 307.
[8] Conversation with the author, 15 October 2007.
[9] Ministry of Justice, n. 6 above, p. 61.
[10] David Cameron, "Balancing freedom and security: A modern British Bill of Rights", speech to the Centre for Policy Studies, 26 June 2006.

a "new Bill of Rights" to "entrench the rights presently enshrined in the ECHR in the British constitutional framework".[11]

11. However, all three parties have shied away from the project of mapping out the nature of British "core values" in precise juridical terms. Within this "ECHR plus" model, various additional rights have been suggested, such as enshrining the right to vote, a right to jury trials in criminal cases, or a clarification of a householder's right to self-defence. One central theme running through the proposals is the need to balance rights against responsibilities. This is largely in response to widespread criticism of anti-terror and human rights legislation which failed to distinguish between rights granted to those inside the state and those outside it. This may well create a tension between existing human rights law and future legislation. Cross-party commitment to an "ECHR plus" model would mean that all the parties were committed to a doctrine of human rights based on universal "core" rights, with a periphery of rights predicated on citizenship. Resolving this tension will be the key to advancing a multi-party platform for the introduction of a Bill of Rights. However, the difficulties involved in the level of political co-operation this would require are formidable.

The future

12. The third and final section of the book takes a rather tentative look at what lies in store for the future of this settlement, particularly in the increasingly politically fashionable areas of "New Localism" and citizen participation in the democratic process. Both are touted as potential solutions for the lack of popular interest in democratic participation. Localism has long been seen as the fashionable solution in progressive politics, championed by think-tanks such as Policy Exchange on the right and the Institute for Public Policy Research and Demos on the left.[12] In his pamphlet for Policy Exchange entitled *Big Bang Localism*, Simon Jenkins urged the Government to "go for localism, and with a bang".[13]

13. However, the Government has a mixed record when it comes to local government reform. Since the Local Government Act 2000 gave the power to local communities to hold a referendum on whether or not to introduce an elected mayor, only 12 have been created outside of London. Proposals to create elected regional assemblies were voted down in a 2004 referendum by a huge margin. As it currently stands, regional assemblies will be abolished in 2010 under plans to transfer their functions to the various regional development agencies. Outside London, confusion over repeated changes to local government have largely failed to ensure increased transparency and accountability.

14. It is in his examination of the quasi-devolutionary arrangement reached to accommodate the unique position occupied by London where Bogdanor is at his most forceful and persuasive. Attempts to regulate London are almost as old as the city itself. The post of mayor was created in the twelfth century in exchange for Richard I levying taxes on London's merchants to pay for the Crusades.[14] Since then, the many attempts

[11] Liberal Democrat Policy Paper 83, "For the People, By the People" (2007), para. 4.2.4; available at *http://www.libdems.org.uk/party/policy/paperlist.html*.
[12] See, e.g. R Muir, *The Power of Belonging* (ippr, 2007); and T Bentley (ed.), *The Adaptive State* (Demos, 2003).
[13] S Jenkins, *Big Bang Localism: A Rescue Plan for British Democracy* (Policy Exchange/Localis, 2004), p. 133.
[14] T Dyke, "Is London really able to govern itself or is it simply too chaotic?", *The Times*, 21 August 2008.

to reorganise London government have been so chaotic that Tony Travers, of the London School of Economics, has questioned whether it is "an ungovernable city".[15] With an annual budget of £12 billion and the largest directly elected mandate in Britain, the Mayor of London has one of the most powerful political offices outside central government. The Greater London Authority Act 1999 established the elected office, which was to be kept in check by an elected London Assembly. With 425 sections and 34 schedules, the Act was the longest piece of legislation passed by Parliament since the Government of India Act in 1935. It granted a wide range of powers from transport and policing to housing and culture.

15. In the hierarchy of government, the mayor sits between Whitehall and London's 32 local boroughs. This position has been a source of tension, with former mayor Ken Livingstone enjoying an openly fractious relationship with both sides. During his eight years as mayor, he both brought and defended actions for judicial review, with his attempt to prevent the Government's decision to close post offices, and Porsche's challenge to the increase in the congestion charge. Recent powers granted to the mayor by the Greater London Authority Act 2007 over housing, planning and education may well prove to be the source of even greater friction. As Bodganor notes, London has always been particularly susceptible to partisan political forces: "The Left has generally sought a strong city-wide layer of government, while the Right has tended to champion the rights of the boroughs, and in particular the outer, suburban boroughs" (p. 198).

16. Bogdanor ends his discussion of London government with the observation from Tony Travers that "Londoners continue to survive despite their government rather than because of it".[16] As an observation, this echoes the issue raised earlier of whether engagement should precede power or vice versa. As such, Travers' remark applies just as much to central government as much as it does to devolved administrations.

17. It is in this final section of the book that its primary shortcoming is most apparent. Bogdanor has a frustrating habit of surrounding his most interesting conclusions with unnecessary caveats as to their applicability. The limitations of enquiry are set out from the start, with his proviso in the introduction that his description "cannot be complete because the new constitution is not yet complete . . . the time is not yet ripe for a final analysis" (p. xi). This reluctance carries shades of Zhou Enlai, the former Chinese Premier, in his assessment of the French Revolution. Asked in 1960 about its effect, he replied, "it is too early to say". For a political observer of Bogdanor's stature, there is little need for such reticence, and his concluding chapters on the future effects of recent constitutional change suffer greatly as a result of it.

18. However, the success of *The New British Constitution* ultimately comes down to how successful Bogdanor is at persuading the reader that Dicey's analysis is flawed. Whilst there is no doubt that the doctrine of Parliamentary sovereignty has come under considerable pressure in the last 30 years, the point remains that all of the reforms which Bogdanor describes have come about as a result of government initiative, and not from popular pressure. After all, even Laws LJ in *Thoburn v Sunderland City Council* (above),

[15] T Travers, *The Politics of London: Governing an Ungovernable City* (Palgrave Macmillan, 2004).
[16] Travers, ibid., p.210.

whilst extolling the sanctity of constitutional statutes, was careful (para. 64) not to restrict the doctrine of Parliamentary sovereignty, arguing that his decision "preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts [that] the relation between legislative supremacy and fundamental rights is not fixed or brittle".

Conclusion

19. *The New British Constitution* is written with the rare combination of erudition and elegance that places it firmly in the tradition of Dicey and Bagehot. Despite its inexplicable timidity in places, it represents the culmination of Bogdanor's engagement with the constitutional reform debate. After four decades of observing and writing about constitutional affairs, Bogdanor has become part of the constitutional furniture. Baroness Helena Kennedy QC once noted that "laws are the autobiography of the nation". If so, then they have a fine biographer in Professor Bogdanor. Hopefully his next foray into the constitutional debate will be less restrained in its conclusions.