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Re-thinking British Government

Richard H. Pear

Walking home at night through the West End, Teddy Prager and I would discuss the political events of the day, the day at LSE, in Britain and in Europe. From LSE to Trafalgar Square most probably it would be Hayek's latest, confusing, lecture on the causes of the slump (no realistic cures were offered), and Harold Laski's clear (and correct!) analysis of the political consequences of capitalist crisis. On to Marble Arch and we had covered Keynes (sympathetically), Strachey (enthusiastically) and on the long haul up the Edgware Road to Maida Vale we confronted the menace of European fascism and the Chamberlain government's pathetic appeasement policies.

This was political talk, of course, but on reflection it was political talk over a rather limited field of enquiry, for our talk was a quite proper mix of politics and economics. And while it was strong on policies we were little interested in *government machinery* and the means by which policy decisions were arrived at and the methods of implementing them. That was called "public administration" in the few University calendars which then offered a degree course in government and politics, and was regarded along with *local government* as rather less than compelling intellectually. Our teachers did mention from time to time some of the landmarks in the development of British government, the Northcote-Trevelyan reforms in the Civil Service, the Haldane Committee on the Machinery of Government and the Committee on Ministers' Powers. Parliament was not thought of as the perfect governing instrument but when led by a powerful Cabinet, British government (now correctly labelled by Ivor Jennings "Cabinet Government") gave a degree of satisfaction (in terms of the efficiency with which it reached its objectives) which was not equalled by the governmental systems of

the USA, France – and such other countries as were selected for comparison!

When other countries' governmental structures were examined they all came off as less efficient (and therefore less desirable) than the Westminster model. Harold Laski and Ivor Jennings in the 1930s had thoughts about the possibility of transferring one of the better features of the London County Council committee system to the Westminster parliament and it was thought at the time that the new constitution of Ceylon (being based on the London County Council committee system) was working very well. But major overhauls of central government were not advocated.

The few progressive University teachers of politics and related subjects had specific reforms which they advanced in articles and books but the important point here is that whatever views University teachers had there were few University politics teachers of any sort. (LSE had one professor and 5 other teachers, Manchester had just one lecturer in public administration, Cambridge had just one political scientist [the occupant of the Chair of Political Science and no lecturers]. Oxford was rather better off with a fair number of college fellows tutoring in political philosophy). There were flurries of interest – which meant an article or two in a learned journal – on delegated legislation, the immunity of the Crown (which meant civil servants) from suits in tort, the need for a Ministry of Justice to supervise the system of law courts and to train and appoint judges, the need to smooth the career path of those in the middle and lower ranks of the Civil Service to move into the top (Administrative) class. One LSE teacher, Richard Greaves, wrote a wholly radical book on the British Constitution but this did not get published until after the war. The activities of Mosley's British Union of Fascists and the counter marches of anti-fascists gave rise to some concern about the neutrality of the police on demonstrations and about the existence (or absence) of basic rights to assemble, speak freely, and march. It is significant that interest in these basic rights (which we thought were secure but which were weakened by a few high court decisions) was re-kindled by an American legal scholar who had taught at Oxford since the 1920's – Professor Arthur Goodhart. Laski's "Parliamentary Government" (1938) was a critical work, but his postwar "Reflections on the Constitution" was surprisingly traditionalist in tone.

How does one explain this paucity of comment on matters of great political interest in a nation not renowned for its lack of interest in politics? One point has already been mentioned – the small number of teachers and writers on these subjects which can only be put down to the materials and personnel of the educational system at that time. Secondly, Parliament showed little interest in these matters; imperial defence, trade, unemployment all took priority, and as far as its own procedures were concerned MPs felt quite happy with the part time poorly paid rôle which they had accorded themselves. And thirdly must be noted lawyers and legal education. In many other countries law studies embrace aspects of political and economic studies or as in the

U. S. may be superimposed on a first degree in the social or political sciences. Not so in England. Law students were not required to study anything but law and were not encouraged to consider the social implications or social roots of public law. Public and Administrative Law had a hard struggle to gain acceptance in University curricula and what is now called Civil Rights (following the American usage) is only now being regarded as a subject to be taught in University law departments. The first book on Civil Rights in Britain (Harry Street's "Freedom, the Individual and the Law") did not appear until 1963 – this in the country which liked to think of itself as the originator of the idea of human freedom and tolerance.

One must not blame this lack of concern on the Conservatives though they did dominate the politics of the 1920s and the 1930s in Britain, for in a very profound sense the radicals were equally convinced that the British Constitution whilst not the perfect instrument of government was certainly superior to any other system then to be seen. (In this sentence I have linked 'British Constitution' and 'system of government' together for in the way in which most people then thought of the British Constitution it *was* the system of government, and the system of government *was* the British Constitution. The British Constitution was as the world knows said to be unwritten, flexible, unitary and rested all power in a sovereign body, Parliament – or more correctly the "King/Queen in Parliament", it being assured that in practically all conceivable circumstances the King/Queen would sign into law all bills passed by majorities in the two Houses of Parliament. And sovereignty meant in a phrase remembered by all pupils of Harold Laski's – "the power to give orders to all, and to take orders from none", a power which could not be alienated, or reduced, or qualified without destroying sovereignty itself. When other countries pointed to their constitutions as the basic document which laid down the relationship between the government and the governed we would point to Parliament and its sovereignty. If further elaboration were necessary the questioner would be told that Parliament worked in particular ways, controlled the government, allowed the government to do this but not that and that Parliament, via MPs, protected the individual citizen against oppressive governmental action. Parliament would protect Civil Rights. A justiciable Bill of Rights would only encourage lawyers and judges to mystify the citizenry with sophistries – so leave your rights in the caring hands of MPs!

Today this constitution/system of government is increasingly criticised and the clear and immediate reason for the criticism is the comparative failure of Britain to sustain economic growth and to provide ever higher living standards and work for all. (As this essay is not concerned with the economic reasons for Britain's dim performance it is perhaps nonetheless relevant to state that the country is magnificently affluent if compared with the 1930s, twice as affluent as it was in the 1950s and even with 3 million unemployed in 1981 25% more affluent than it was in 1971). It is now thought that our system of

government must be in some way responsible for the country's poor performance. (There are of course other possible explanations – trade unions are too strong and prevent healthy competition; management is lazy, incompetent technically, upper class biased and unwilling to mix on or off the job with the work force; Treasury policy is still floating on a 19th century *laissez faire* free trade cloud etc. etc.) In general it is reasonable to suggest that were Britain at the top of EEC tables instead of near the bottom the British politician and the public would worry not about their system of government.

It is now accepted by the people that Britain has declined as a first class world power. Gone are the days of the big navy, soldiers of the Queen off to civilize (i. e. conquer) weaker peoples, Viceroy's on jewelled elephants and Imperial glamour generally. This decline started just over a century ago at a time in our history when the growth of confidence¹ in our political system was just beginning to swell the bosoms of patriots. The economic decline was slow at first but by 1914 it was clear to even the most patriotic Briton that the U. S. A. was in every way a greater country and that the Kaiser's Germany was technologically and educationally in advance of Britain. Yet despite not exactly winning the battle of Jutland and doing no more than create an obscene mess on the Western Front, Britain came out of the 1914 War with an even bigger Empire and not too severe dents on its system of government. World War II was run with brilliant efficiency in comparison with the 1914 war and the victory in that war, followed by the smooth transition from War to Welfare State, reinforced for many the view that we did have the best possible system of government. All the main policy objectives of the Labour Party in 1945 were achieved peacefully by 1951 without changing anything of significance in our system of government.

The British Constitution/system of government which must now be subjected to re-thinking came into being about 100 years ago, by which I mean that about a hundred years ago the educated Briton could read a description of his country's constitution and a defence of its excellencies. He would read about a few statute laws, some historic judicial decisions, some precedents set by political practice in the formation and break up of governments, about the role of the Crown since monarchs ceased refusing to sign bills and had given up the practice of bribing MPs, and how slowly with the advance of public education the ordinary working man was being given a say in electing his governors. Above all he would have been instructed about the secret of success in the British Constitution – that it was unwritten and flexible, not a fundamental legal document and above all based upon the recognition of certain constitutional "conventions" – that is convenient and universally observed practices in government and politics which though without legal authority were regarded as binding upon the politicians, civil servants and monarchs involved in working the system. Walter Bagehot's "English Constitution" (1867) was the first readable book on the system and Professor A. V. Dicey's "Introduction to the Study of the Law of the Constitution" (1885) promulgated the notion of "conven-

tions" and their importance in our constitutional thinking. Our educated Briton may have puzzled over what a "convention" really was and how a convenient practice advanced to the superior status of a "convention", for Dicey's attempt to link conventions to law was not persuasive. Nor indeed was his demonstration that Britain, thank God!, had nothing like French '*droit administratif*' any more convincing as it was not even true of his day, let alone being a central principle of British law. Both these criticisms were brought out with great force and clarity by Ivor Jennings in his "The Law and the Constitution" (1938).

So the British Constitution was and is a set of interconnected principles, beliefs, practices and aspirations buttressed from time to time by statutes and high court decisions which indicate how government should be carried on². Far more than being a collection of legal or philosophical principles (and a thousand miles removed from any contact with a philosophy of law) is it an assembly of apparently simple ideas about the way in which British government is done, and why these are the right ideas about how to govern Britain.

Politics is now taught at school, polytechnic and University level to an extent undreamt of in the 1930s. More and more press, radio, and television presenters have a good grounding in academic studies of politics. Greater scope is now given to investigatory journalists and conservative newspapers are no longer afraid of digging behind the scenes. A fashion for rather gentle muckraking in public affairs, this plus the publication (against the wishes of Cabinet Secretaries) of the memoirs of Cabinet Ministers and others closely concerned with national decision-making have meant that many of the comforting beliefs about British government (so long protected by those who know them not to be true) are now examined and found not to be as the text books say. This is not to suggest that (espionage apart!) British government is rife with scandal. It is not. It is merely to say that the time has now come to examine whether British government works in the way that generations of Cabinet ministers, and politicians, text book writers and civil servants and many MPs have said it works. And if it does not work in *that* way, – and it obviously does work in some way for governments carry on fairly well – how does it really work? And is it not now desirable to describe the system as it is rather than as it would be convenient for the 'governors' to have us believe it is?

If we can get a picture of its actual working it would be possible presumably to begin to describe the British system of government as consisting of sets of practices and ideas which are not the story as to be told to the children. In fact we will be in the title of Nevil Johnson's recent work "In Search of the Constitution".

If we can now look at the great pillars of our constitutional structure, some will be fond to be very frail, some still strong, some having been strengthened no longer look like the original structures and some of the pillars never perhaps existed except in the minds of myth makers.

Starting with the well known adjectives let us try *unitary*. We still have a unitary constitution even if Northern Ireland – or some elements

there – do not seem to appreciate this point. (The Rev. Paisley's view of *unitary* seems to lead to an independent Ulster while the IRA want unity with southern Ireland despite the fact that the Dublin government does not want to own Northern Ireland at any price.) The two referendums³ on Welsh and Scottish devolution were lost by the nationalists of those parts; overwhelmingly lost in Wales and clearly lost in Scotland (1978). Various local government reforms in Britain have not significantly strengthened the forces of regionalism and the present Minister of the Environment (Mr. Heseltine) whose department controls finance to local government is fast becoming known as a great centraliser. So unitary we remain.

The constitution is still of course *unwritten* though political and legal minds as diverse as those of the Lord Chancellor (Lord Hailsham) and Lord Scarman both favour the addition to our statute book of a Bill of Rights though the manner of entrenching it in laws is not yet clear.

Parliament is no longer sovereign. In addition to the actual constraints imposed by financial and/or military weakness, our signing in 1972 of the Treaty of Rome and related agreements and Parliament's passing of the European Communities Act incorporated EEC law into British law. Parliament can not legally now refuse to acknowledge EEC law, nor can British courts of law refuse to apply it. In addition the European Court will judge the actions of the British government and order Britain to comply. Parliamentary sovereignty is no more.

The position of the Crown as a neutral signer of bills and a ceremonial part of the process of government formation has not changed significantly in recent years, though some over eager patriots tried to make the point that joining the EEC would somehow detract from the Queen's authority. The position of the Crown has if anything been made even more neutral than it was for the Queen need not be consulted now in the choice of a Conservative Prime Minister. The Conservative party now has a means within the party for choosing their leader who if the party is in office will become the Prime Minister. There are however still commentators who try to disturb their readers with the scenario of how the Queen will be involved in choosing for Prime Minister between the Liberal party leader or the new Social Democratic Party's leader in the event that the new Lib-SDP Alliance wins the largest number of seats at the next election. Intelligent readers should ignore such slippery speculation.

There is much to be said however about the concept of Cabinet government. Bagehot's description (1867) of the Cabinet as the hyphen that joins the buckle that binds the executive arm to the legislature does not really (apart from being a memorable phrase) tell us much. The idea that the Cabinet is a Committee of the majority party in the Commons is also misleading because the majority party in the Commons does not formally or informally commit anything to the care of the Cabinet. The Cabinet relies on the loyal support of its friends in the Commons to do what *it* wants – whether or not the party in Parliament or elsewhere wants it. Cabinet government has many advantages – those of speed,

decisiveness and coordinated decision making. But is decision making done in Cabinet? The train of thought that now suggests that decisions are taken elsewhere and agreed to by the Cabinet was set in motion by the late Richard Crossman MP who contributed a thoughtful and scholarly introduction to a new edition of Bagehots "English Constitution" in 1963. Crossman's point was made by describing the way in which the Attlee government's decision to manufacture the atom bomb was taken by a handful of Ministers and civil servants and was never discussed on its merits in Cabinet, and how on the report from the Defence Committee of the Cabinet (to which at the end of an agenda the Cabinet agreed) there was no specific mention of the financial, military and political pros and cons of the decision which the Cabinet endorsed. In a similar way Parliament agreed to proceed with the manufacture of the bomb not being aware that it was an atom bomb that they were agreeing to!

When Crossman (who was not, nor had then been, a Cabinet Minister) disclosed the result of his investigations, protestations were heard from some quarters that Cabinet decision making had *not* been by passed. But Crossman won his point. Nobody now believes that Cabinets are effective decision makers and Crossman's assertion that what we have now is "Prime Ministerial" government is reinforced by the actions of every post-Attlee government.

Decisions are arrived at by submitting the reports of sub-Cabinet committees (in which high civil servants are crucially influential) for the somewhat formal endorsement of the Cabinet. This may be the best way of doing it, but it raises the question of the influence and neutrality of the Civil Service. Here again we have departed from the accepted myth - i. e. that civil servants do exactly what their Ministers ask of them, never resisting only gently suggesting helpful ways of achieving the Ministers' objectives. Civil Servants protest that they are still acting only as advisers and defenders of their Ministers, but nobody now believes that Civil Servants are not exceptionally powerful forces working (often in collusion with permanent heads of a group of departments) to get what they want (or to prevent the Minister from getting what he wants). The popularity in the higher Civil Service of a current T. V. series "Yes, Minister", a sophisticated and witty comedy about Minister-Permanent Secretary relations bears witness to the fact that in spirit it is far from being a travesty of the life at the top in Whitehall. The criticism of the higher civil service today is not so much that it frustrates the hopes of democratically elected Ministers but that it is not coming up with the solutions that work. Top civil servants are too urbane and cultured, too good at soft soaping Ministers, but not good enough technically to hit on the right solutions to problems.

Parliament was supposed to be there for redressing the citizens' grievances prior to voting moneys to the Crown (i. e. the Government). When it was not occupied with these matters it was adding desirable legislation to the Statute book. Citizens' grievances were supposed to be redressed by asking, at the famous "Question Time", the Minister

responsible why your constituent had been so unfairly treated by his Ministry. If the MP did not get a satisfactory answer he could announce that he intended to confront the Minister again on the adjournment debate at the end of the day. The myth of redress through "Question Time" remained aloft for generations with hardly any means of visible factual support. It was too easy for the Minister to answer very shortly – merely to say NO – or YES constituted an answer, and the Speaker will not allow a question to develop into a long interpellation of the Minister. There is now some welcome improvement here. A Parliamentary Commissioner for Administration (The Ombudsman) has been appointed (as have Local Commissioners for Administration). They receive complaints of maladministration. They have access to most official files and can recommend remedies, but cannot award damages to victims of maladministration. This most desirable development was strongly resisted by Minister on the grounds that it would detract from the MPs responsibility for getting his constituents' grievances attended to. In most cases the MP could do nothing. Once the Ombudsman system was introduced (by the first Wilson administration) it has not worried MPs one bit and is seen as a most useful innovation.

Control of finance is almost wholly outside the ambit of Parliaments' effective control, though it is the field on which by history and tradition Parliament fought for the freedoms of Britishers against greedy monarchs and their hangers on. Not only does the Parliamentary time table prevent adequate discussion of taxation and appropriations ("supply"); after the Chancellor of the Exchequer presents the budget it is unlikely that MPs will be able significantly to alter its shape. The government whips are there to see that the Treasury gets *its* votes. There is nothing new here however. What is new is the refusal of Ministers to allow the new (1979) array of select committees to inquire into matters that might embarrass the Minister or make more work for the civil servants, in particular in this connection the refusal of a parliamentary select committees request to examine the finances (and financing of) the nationalised industries. The excuse used here is that nationalised industries are not the "government's" industries. While the equity of the nationalised industries (with a few exceptions) is wholly provided by the taxpayer, the taxpayer's representations – the MPs – may not ask questions about the financing of those industries. It has been estimated that by this device about half of all public expenditure is safe from Parliamentary scrutiny.

The specialised Select Committees (started in the first Wilson administration by the then Leader of the House, Richard Crossman and greatly extended in number and scope by the Thatcher Government in 1979) were set up in part response to the cry from MPs and academics that the overwhelming power of the Executive should be balanced to an extent by increasing the power of MPs to scrutinise, inquire, and recommend on the basis of information obtained from Ministers and civil servants and from professional researchers. But the next logical step – to put these committees in charge or the "committee stage" of the

legislative process has not yet been taken. If taken it would weaken the government's almost total control of the law making process.

Here we may begin to see the confusing picture of the present day MP. He is more a full time professional than he was in the 1930s. He/she is better paid, has an office, a secretary and research facilities where previously he had none. His travel and living allowances are adequate if not lavish; previously he had no living allowance. He is able if he so wishes to devote himself to specialism by working on the new select Committees. If he is an opposition party MP his party is supported in its research and briefing activities from public funds. His name (and a few words of his) will be mentioned on the nightly radio report "Today in Parliament" and TV studios in the Parliament building will be working from time to time to give live interviews with selected MPs – at the discretion of the broadcasting companies. In terms of rewards the MP is doing very much better than his colleague of the 1930s, but it is doubtful if as an individual MP he has any more influence on events than in those days. It is, again, one of the political myths that modern party politics and party organisation have diminished the individual MP to mere lobby fodder. As no writer has conclusively demonstrated when in our history the individual MP had power it is reasonable to assert that the "Power of Parliament" was no greater 100 years ago than it is today.

Finally in this catalogue of things that are changing, have changed, or never were, we must consider the fate of certain assumptions taken to be true by conservatives and radicals in the 1930s. Firstly coalition governments widespread in Europe then and now were held to be undesirable by British writers. Politics should present to the simple (but not stupid) citizen a choice between clear alternatives. If the winning alternative proves to be a failure at least the voter knew what he was voting for and next time can choose the other party. If coalitions or alliances are offered to the voter it will do nothing for his political education and the policies of a coalition government are bound to be compromises representing the worst of both teams. This little exercise in logic was then followed up by examples of coalition governments in Britain – Asquith, a weak war time coalition which ran the war very badly and in which the Tories had to intrigue to oust Asquith to put in Lloyd George. Lloyd George's Coalition 1918–22 ineffective in facing postwar problems and corrupt to boot! Ramsay MacDonald 1931–36 – the less said about that the better!

On Proportional Representation as it led to coalition governments the above criticisms apply. That P. R. did not lead to coalition government in Eire was ignored and that France had weak governments under the 3rd Republic was laid at the door of French P. R. systems when, there being so many changes in electoral law in France, there were periods of weak government which were not the result of P. R. But sentiment is changing on this topic. The new SDP is pledged to bring in P. R. and the feeling now is that it is the Westminster model with its first past the post system of single member constituencies which is out of line with the best modern practices. P. R. is a fairer system of representation. A

governmental system based on unfair representation cannot result in good government say the P. R. reformers. What was clear, good, and don't criticise the referee's decision, now is seen as bad, short sighted, insular and resulting in decisions well worth appealing against. The Professor of Government and Public Administration at Oxford University, Professor S. E. Finer has written a volume entitled "Adversary Politics and Electoral Reform" (1975) in which he attacks the good clean fight where the Opposition says No to everything the Government wants to do, and then when the Opposition comes to power it reverses what the previous government did. The educational pay-off of this exercise is too often quite negative. Government and Opposition front benches not only trade blows about the day's proposals but reach back into the promises made or broken in action or in electoral manifestoes reaching into the long forgotten past. Adversarial politics are seen as puerile and unproductive.

Finally, the U. K. has accepted the legitimacy of the referendum previously thought to be the property only of unspeakable Hitlers or shiftY dictators of banana republics. We have had a referendum on remaining in the EEC, and the people of Wales and Scotland have had referendums on devolution proposals. In the 1979 General Election campaign Mrs. Thatcher advocated referendums for deciding major questions of labour-management laws and her Minister of the Environment recently proposed referendums for local authorities which intended to raise rates higher than he thought they should – but he has so far not produced legislation in this.

To conclude, the British Constitution/system of government is not as we in our youth had it outlined for us. Much of the Bagehot – Dicey – Jennings picture still endures, but much is changing or has gone completely. We are still a constitutional Monarchy, a unitary realm with ill defined limits to central government powers over local authorities and with no coherent themes about regionalism, federalism or indeed the "true" role of local government. All is rule of thumb adjustment and sentimentality. We can now forget about the theory and practice of sovereignty – it's gone. We can now in the writer's view safely say we have not parliamentary or Cabinet government now but indisputably prime-ministerial government. We must accept that the senior civil servants are exceptionally powerful in the governing of the country. As they are at the same time very hard working, and, in their own way most loyal and quite uncorrupt (one reported case since World War II of a senior civil servant imprisoned for corrupt activities) we should increase the scope of their pre-appointment experience in the hope that their proposals to Ministers will result in more successful forward planning.

We have accepted referendums and in all probability will accept P. R. and the resulting coalitions. We have not yet decided on a new Bill of Rights which if introduced would do no more than put us in step with the rest of the democratic world – New Zealand has one, Canada will have one, Australia has a written constitution, to mention only some of the ex-colonies of the English speaking world.

It is from these new major platforms that the re-thinking of British government must proceed and the most difficult problem here is to decide on a fruitful role for the Member of Parliament. If the government of efficient bureaucrats advising elected Ministers proceeds apace, or if the radical notions of a fully participatory democracy should bear fruit where does that leave our loyal party hack, semi-professional Member of Parliament?

The condition of British constitutional theorising is that of a desert which is now beginning to receive a modicum of irrigation from a very small handful of talented constitutional lawyers¹. And as we have now no *usable* body of accepted constitutional theory which can guide us, we shall stumble on in evolving theory, while possessed of a system of government which still exhibits the merits of being reasonably simple to understand and which, given the right political backing, does not require supermen to operate it. But a lot of water has flowed under Westminster Bridge since Teddy Prager and I first became enchanted by what the late Richard Crossman called the charm of Politics.

Notes

- 1 The fact that pride in the British constitution did not decline *pari passu* with the decline of Britain's economic leadership must be attributed to the growth in the mystique of Europe, and to the development in the education system of notions of leadership, imperial administration, and Christian (Anglican) sportsmanship. On the theme see Ralf Dahrendorf, "The Politics of Economic Decline" in *Political Studies*, June 1981, James E. Alt, "The Politics of Economic Decline" (1979), and J. J. Richardson and A. G. Jordan, "Governing under Pressure" (1979).
- 2 An example (good or bad) of this is the recent decision of our highest court, the House of Lords, who in December 1981 decided that they, as lawyers, knew what the words "efficient" and "economic" meant in a statute which governed the amount of subsidy paid by the Greater London Council to the London Transport Executive. The amount of the subsidy was declared illegal because too large! (A display of judicial arrogance of this type is rather rare in Britain.)
- 3 The latinists have had a nice time deciding that the plural of referendum is *not* referenda!
- 4 O. Hood Phillips, "Reform of the Constitution" (1970). Geoffrey Marshall, "Constitutional Theory" (1971). S. A. de Smith, "Constitutional and Administrative Law" (3rd Edition, 1977). J. D. B. Mitchell, "Constitutional Law" (2nd Edition, 1968).