Article

The coalition and constitutional reform revisited

by Stephen Barber

When in 2011 Vernon Bogdanor published his article "The coalition and constitutional reform" in *Amicus Curiae* it still seemed that the biggest constitutional implications of the still fresh Conservative/Liberal Democrat coalition would surround its legislative programme of reform. But as the most ambitious of these have fallen by the wayside and as the next general election moves clearly into sight, it is apparent that the most significant constitutional impact of this coalition has been the behaviour of political actors in their interpretation of constitutional practice.

Taking Bogdanor's original piece as a point of departure by highlighting the shortfall in the promised reform programme, this article reviews the experience since 2010 of two of the most important constitutional practices of British Parliamentary government in the form of collective responsibility and prerogative powers of the Prime Minister to appoint ministers to office. It suggests that constitutional norms have been strained during this historic Parliament but that as the administration has survived and in some ways prospered, it might be time to readjust our concept of some constitutional customs.

REFORMING THE CONSTITUTION

For Bogdanor, not only was the spectacle of Britain's first peacetime coalition following a hung parliament a constitutional innovation, but with its installation in 2010 came proposals for a raft of reforms about which he quotes Deputy Prime Minister Nick Clegg describing as "the most significant programme of empowerment by a British government since the great enfranchisement of the 19th century". The programme of change, hammered out in five days of negotiations following the general election, was certainly momentous but while important constitutional reforms have taken place during the Parliament, the record is perhaps more notable for what it did not achieve than for its accomplishments.

Heading up the reforms which made it onto the statute book is the five year, Fixed-term Parliament Act (2011) meaning that for the first time in history, the electorate knows the date of the next general election in advance of the dissolution of Parliament. Constitutional reformers had long called for this relatively modest measure which supports the sustainability of coalition government and removes a significant prerogative power of the Prime Minister to determine the timing of the electoral process.

Elsewhere, select committees saw their chairs elected by secret ballot for the first time rather than being appointed by government whips and the Parliament has been notable for a number of effective and newsworthy hearings including the interrogation of Rupert Murdoch and directors of large companies paying minimal UK corporation tax. Away from Westminster, the first elected Police Commissioners took up their posts in 2013 and government engaged in a limited decentralisation agenda.

Such changes, however, fall markedly short of the "programme of empowerment" promised by Clegg and the coalition's record in this area is more notable for its failure to realise change. The two big disappointments for constitutional reformers were the Parliamentary Voting and Constituencies Bill (2010) and the House of Lords Reform Bill (2012). The first of these would have reduced the number of MPs from 650 to a fixed 600, attempted to equalise constituency sizes and seen the replacement of the first past the post electoral system with the alternative vote subject to ratification in a referendum. The second would have seen the unelected and largely appointed House of Lords replaced with a mainly elected chamber. Alas, the electorate did not approve electoral reform in the May 2011 referendum, the Prime Minister failed to muster sufficient Conservative votes to deliver Lords reform and the Liberal Democrat retaliation was to pull the plug on the remainder of the Voting and Constituencies Bill.

But while the programme of reform is not as significant as it might have been, the practice of coalition government has challenged some assumptions about acceptable constitutional behaviour. Collective responsibility and prerogative powers of appointment are perhaps the two most significant of these.

COLLECTIVE RESPONSIBILITY

Collective responsibility is a crucial doctrine for the effective management of government and means that all ministers are "bound by the collective decision of Cabinet". The idea is that

if ministers cannot speak for government, the Prime Minister cannot be said to command their confidence. Practice is that ministers who cannot support government policy tender their resignation. The behaviour of ministers (and government party leaderships) during the 2010 parliament has, however, stretched the principle. Such behaviour is not entirely novel. Remember that even recently Overseas Development Secretary Clare Short expressed public opposition to the policy of Tony Blair's government to go to war in Iraq while still a member of the Cabinet. But during coalition there has been acquiescence from the very top of the executive. This has manifested itself in both formal suspension of collective responsibility and outright breach.

One might expect parties in coalition to disagree; indeed their published manifestos highlight their differences with the Coalition Agreement representing their agreed programme of government. It is worth making the point that ministers disagreeing in public is not necessarily a breach of collective responsibility since the Ministerial Code explicitly connects collective responsibility to "decisions" made by government and the business of Cabinet and Cabinet Committees engaging in "major issues of public policy because they are of critical importance to the public" (Ministerial Code, 2010, 2.2). Furthermore, unlike the "presidential" administrations of Blair or Margaret Thatcher, coalition demands collectivism to be sustained which is why the Coalition Agreement for Stability and Reform (2012) requires "an appropriate degree of consultation and discussion among ministers to provide an opportunity to express their views frankly as decisions are reached".

Unusual for those used to single party administrations, the 2010 Coalition Agreement, set out the areas where the Conservative and Liberal Democrat ministers "agreed to differ" including around tuition fees, nuclear power and Trident. Additionally there was agreement to suspend collective responsibility during the referendum campaign on electoral reform, though the legislation in the form of the Parliamentary Voting and Constituencies Bill was a matter of collective responsibility. The main precedents for such a suspension was in 1975 when Cabinet Ministers were free to campaign on either side of the on EEC referendum and then again in 1977 regarding of elections to the European Assembly.

Perhaps more constitutionally significant, however, were suspensions which were not so well planned. The collapse of the House of Lords Reform Bill at the hands of Conservative MPs, for instance, led to an instruction from the Deputy Prime Minister for Liberal Democrat MPs to vote against boundary change provisions found in the Government sponsored and collectively agreed Electoral Registration and Administration Bill. For the Leader of the House of Commons, Andrew Lansley, this was "not only an abuse of parliamentary process, but a democratic travesty…to deny fairness and equality in the franchise and fundamentally to manipulate the basis on which this House is to be elected" (HC Deb 29/1/13, c799). And he had a point. While Clegg could justify his actions on the basis of the Conservative party dishonouring the Coalition Agreement, no minister who voted against the House of Lords Reform Bill remained in office. On the vote to change constituency boundaries, however, collective responsibility was fairly clearly breached mitigated only by some rather late and certainly unplanned agreement between the Prime Minister and his deputy to see it suspended. Clegg, it seems, took a broader view of collective agreement to include MPs not in government.

A further episode underlines the situation. The Prime Minister was sufficiently "relaxed" to allow (Conservative) ministers to vote "against" the government's Queen's Speech by way of the amendment regretting "that an EU referendum Bill was not included" (HC Deb 15/5/13, c749). Such behaviour is counter to both constitutional practice and even the Coalition Agreement (2010, 5.2) which demands that "in all circumstances, all members of both parties will be expected to support the government on all matters of confidence" Then there were the separate responses of the Conservative and Liberal Democrat leaderships to the Leveson Report on media regulation, which appeared rather bizarre since the government collectively appointed the Commission.

Serious as these breaches would appear in theory, however, a constitutional observation must be made and that is that not only did they happen without ministerial resignations but the coalition government also survived and continued to carry out an ambitious policy programme in other areas. The conclusion is that we might need to readjust our conceptions of just what is acceptable constitutional behaviour in respect of collective responsibility. The uncodified British constitution is nothing is it is not flexible and once again it can be seen to be adapting and accommodating to the political needs of coalition.

PREROGOTIVE POWER

An often criticised constitutional power is the exercise of the so-called Royal Prerogative by the Prime Minister of the day and means that the head of government can make certain decisions in the name of the Monarch without recourse to Parliament or Cabinet. The prerogative cannot work in a functioning coalition, however, and so once again our conceptions of its operation perhaps need to be adjusted. To take an extreme example, a Prime Minister in coalition could not independently declare war or now because of fixed terms, dissolve Parliaments at will. But neither does he have a free hand in the most visible manifestation of these powers: the appointment and dismissal of government ministers.

While constitutionally the Prime Minister retains the

right to appoint or dismiss ministers, the politics of coalition mean that such decisions can only be made within the agreed framework. Proportions of ministers in government drawn from the respective parties have and will be determined by their parliamentary strength and their political leverage of given circumstances. The experience of the 2010 coalition would seem to be that junior ranking portfolios are open to negotiation during reshuffles but while personnel have changed in some cases, none of the Cabinet jobs have changed parties.

Furthermore, when the Cameron-Clegg coalition was being formed in May 2010, new ministers drawn from both parties were met jointly by the Prime Minister and the Deputy Prime Minister in Downing Street to invite them to join the administration. There were further clues to the constitutional arrangements pertaining to ministerial appointments as time went on. Here it is instructive to view the actions relating to Liberal Democrat ministers since they, as the junior partner, represent the governmental novelty in comparison to single party administrations to have gone before. When Energy Secretary Chris Huhne resigned from the Cabinet in 2012, his replacement (Liberal Democrat Ed Davey) was announced by Nick Clegg, the Deputy Prime Minister, officially from Whitehall. This suggests that having negotiated Cabinet portfolios, the two party leaders were able to appoint MPs to those posts from within their own parties.

This notwithstanding, of the three Liberal Democrat ministers to have left the Cabinet, Huhne and Chief Secretary David Laws each tendered their resignation directly to the Prime Minister alone as is constitutional custom. However these ministers were forced to resign because of their personal circumstances rather than as a result of the prerogative powers of the Prime Minister. The only Liberal Democrat Cabinet Minister to have been reshuffled out of government was Scottish Secretary Michael Moore in October 2013. In this instance the official correspondence was between Moore and Clegg. Indeed it was the Deputy Prime Minister who thanked his colleague for "the vital role you have played as Secretary of State for Scotland over the past three years" (Clegg, 7/10/13). While David Cameron announced the appointment of Alistair Carmichael as his replacement by Twitter, it was Clegg who greeted him in Whitehall before the press.

CONCLUSION

In his conclusion, Bogdanor (2011, 24) argued that there

> *is a profound conflict between the politics of Parliamentarism and the politics of a democratic age. So the constitutional changes proposed by the coalition will not end the era of constitutional reform. That era will come to an end only when our political system has come to be congruent with the public philosophy of the age.*

His warnings might help explain the substantive failure of the programme of constitutional reform agreed by the Cameron-Clegg government in 2010. But in accommodating Britain's first peacetime coalition to be formed from a hung (or balanced) Parliament, the constitution has shown itself to be adaptable to the political realities of two separate parties working together in government. The principles of collective responsibility and prerogative powers of the Prime Minister have been stretched. But given that they have not broken, it is possible to argue that our conceptions of constitutionally acceptable behaviour and practice need to be adjusted. The era of reform is surely not over but we should not lose sight of changes which come about through the practice of government as well as those detailed in legislative programmes.

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