

## BRITAIN'S QUIET REVOLUTION

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The British political and administrative machine has been undergoing a quiet revolution since, at the latest, 1988. This revolution is formally described as the 'Next Steps Initiative' and was intended to improve management in government. The form that it has taken is that of hiving off the administrative activities of government to Executive Agencies (EAs) leaving policy formulation to a thinned-down Whitehall cadre. This, in itself, may perhaps be regarded as uncontroversial but I am not alone in believing that it is accompanied by important constitutional considerations. The whole exercise has been conducted almost entirely without legislation and with precious little in the way of Parliamentary debate. We are continuing to pretend that ministerial accountability to Parliament is the only constitutional guarantee required even though a huge tranche of government work is being carried out by EA staff for most of whose actions the minister cannot, by definition, be responsible. No regime such as the *United States Administrative Procedure Act* has been introduced and the concept of the public service ethic has been left twisting in the wind.

### THE BACKGROUND

At the time of writing (late Spring 1992) the total number of EAs had reached 72. 290,000 civil servants, about half the total, are working in Agencies and other organisations operating on Next Steps (NS) lines. It is intended that perhaps 75% of public servants will eventually be so employed. NS Agencies cover a wide variety of organisations ranging in size from the Social Security Benefits Agency (BA) with 63,000 staff to Wilton Park Conference Centre with just 30. The EAs have responsibilities as diverse as weather forecasting, issuing driving licences, issuing passports and providing support services for the Armed Forces.

Some trace the origins of these developments to the Fulton Committee Report of 1968 which argued for the introduction of management by objectives and the selective hiving off of departmental functions. During the Thatcher years value for money developments in central government heralded the emergence of NS. First of all the so-called Rayner scrutinies occurred. These were a programme of quick studies of departments, directed at reducing expenditure in the short term. The Financial Management Initiative (FMI) on the other hand began in 1982 as a longer term financial strategy designed intentionally to restrict expenditure programmes. FMI was also supposed to involve the devolution of financial control down to staff who are in the best position to know where resources may be deployed efficiently. This is perhaps one of the first acceptances of the weakness of traditional accounts of ministerial responsibility.

FMI was very successful in putting the budgeting systems in place which provide information on how much the activities of government cost, but less successful in delegating responsibility to the budget holders. NS was to go further. It emerged from a 1988 report to the Prime Minister entitled *Improving Management in Government: the Next Steps*. It was based on the belief that there was an insufficient sense of urgency in the search for better value for money and steadily improving services. There was a general acceptance within the civil service that developments towards more clearly defined and budgeted management were positive and helpful. It was also recognized that senior management in the civil service was largely skilled in policy formulation and had little experience of managing or working where services are actually being delivered. As a result the report recommended that agencies should be established to carry out the executive functions of government within a policy and resources framework set by a department. This was to set out the policy, budget, specific targets and the results to be achieved. A full permanent secretary was to be established as project manager.

The revolution to be worked is that a quite different way of conducting the business of government should be established. The central civil service would consist of a small core engaged in the function of servicing Ministers who will be the sponsors of particular government policies and services. Responding to those departments would be a range of agencies employing their own staff who may or may not have the status of crown servants. Managers should be free to take all decisions for their organisations within the policy they are assigned to carry out, except where the wider needs of government must override that assumption.

The rest is almost history. The Prime Minister accepted the report and the first agency (the Vehicle Inspectorate) was established in August 1988. In announcing this the Minister said that local management would have enhanced responsibilities in the areas of finance, contracts and personnel management and more scope to develop new business initiatives. For example, powers to recruit, promote and dismiss staff up to specified levels was increasingly to be assumed. Performance incentives would be introduced and, in particular, Chief Executives (ACEs) would have a performance related element to their pay. This pattern has largely been followed since. It is worth mentioning that in recent times many more ACEs are being appointed from outside the civil service. For example the head of the Defence Research Agency was recruited from private industry at a salary of £140,000, a salary somewhat higher than that of the Head of the Civil Service. The heads of the largest agencies under

the aegis of the Department of Social Security may be paid up to 12.5% of basic salary as an annual bonus according to their performance set against their published targets.

One further organisational matter might be mentioned here. There are Agencies which are fully within Parliamentary Supply and there are those with a trading capacity. A trading fund provides a financing framework for accountable units of government to operate outside the normal restrictions of Vote finance. This framework covers all operating costs and receipts, capital expenditure, borrowing and the fund's net cash flow. A trading fund has standing authority to meet outgoings from receipts; i.e. there is no detailed advanced approval by Parliament of its income and expenditure. A trading fund has powers to borrow and create reserves in the form of cash deposits. This financing regime also provides a more flexible means than is possible for a body operating on-Vote to meet unanticipated demands for its output and higher or lower than anticipated capital expenditure. Seven agencies presently operate as trading funds. This allows them to manage their finances more like a commercial company, including making a return on capital.

So far, so good. What was missing, and remains missing, was a constitutional reassessment of the sort recommended by the Fulton Report, especially where sensitive matters such as social and educational services were involved. In fact, it is widely believed that the original "lbbs" report on which the 1988 document was based also expressed the view that such changes would necessitate a reconsideration of our system of constitutional accountability. That has not, however, happened. It is true that a great deal more information on the workings of government is available than was the case before the establishment of the EAs. Yet the only "constitutional" element of the new package is the establishment of Framework Documents for each agency which lay down aims and objectives, relations with Parliament, the department and other agencies, financial responsibilities and the measuring of performance. These are important new areas of information made available to the public but they do not directly address the dilemma of effective accountability under an altered regime. I shall return to this matter in due course.

## PARLIAMENTARY ACCOUNTABILITY AND THE AGENCIES

I shall not rehearse the familiar version of Parliamentary accountability which lies at the heart of the British Constitution. Traditionally, of course, the Minister in principle accounts to Parliament for everything which civil servants do, whether we are speaking of high policy, executive actions or operational detail. The Government has constantly asserted that NS will not change these arrangements. A moment's thought, however, will reveal these assertions as somewhat hollow. The ACEs, after all, are given delegated power to conduct defined aspects of departmental work according to the Framework Document and the performance indicators/targets. They are increasingly seeking, and obtaining, more

autonomy in the field of personnel and budgetary matters. Indeed, one of the main objects of the exercise is to reduce central government control over day to day policy *implementation*.

It is clear then that little or no Parliamentary control is possible in these circumstances and yet the protestations of continuity are everywhere heard. This is because ordinary MPs buy the official version of general Parliamentary accountability when its heyday is long since past. Ministers are perfectly happy to collude in this collective self-deception. In fact a warning had been posted by the Expenditure Committee of the House in 1977 that hiving off necessarily involved a weakening of ministerial control. Departmental officials will be understandably reluctant to account to ministers for matters over which they have no control. Ministers, in their turn, will feel the same in the discharge of their responsibility to Parliament. Insofar as the orthodox version holds up at all, NS should logically be confined to parliamentary supervision of the primary objectives and targets set in the Framework Documents and elsewhere, leaving day to day administration with the professionals in the Agencies. Not to mention of course the continuing role of the Parliamentary Commissioner for Administration or Ombudsman whose jurisdiction naturally includes the Agencies since they have no legal personality of their own. Indeed the Ombudsman, who has been traditionally amongst the most conservative of his ilk, might gain added impetus by the attachment of the "Citizen's Charter" to the work of the Agencies. However, what is worrying is that the Home Affairs Select Committee of the House has complained about the failure to consult them over draft Framework Documents. The Government response is that it is not policy to let Parliament contribute to the policy process at the working document stage, an interesting constitutional confession.

The Treasury and Civil Service Select Committee sub-committee (TCSC) has been by far the most active in monitoring the progress of NS. Under the chairmanship of Giles Radice it has done notable work in questioning the Project Manager, Sir Peter Kemp, other leading civil servants and the ACEs themselves. The Committee has published a report each summer to which the Government has responded with a Command Paper in the autumn at the same time as the publication of the Government's Annual Review of the NS programme. The Committee has seen itself acting as guardian of Parliament's interest in such matters. There is no doubting the importance of the TCSC's contribution but it does, naturally, operate post hoc and has, in my view, paid too little attention to non-Parliamentary forms of accountability.

This aside, there has not been a flurry of activity over NS in the other Select Committees, presumably because they are issue-oriented rather than organisation oriented. Their general lack of interest, however, is known to have caused surprise to Sir Peter. Such interest as there has been has caused some commentators to remark that they are more

concerned with administration than policy. Interesting, since it is believed that Mrs. Thatcher only agreed to the institution of the Select Committee system in 1979 on the basis that they concentrated on value for money issues and general efficiency! The formal position is that Ministers decide who is to represent them before the Committees but they will normally regard the ACE as the person most suited to represent them.

Whatever else is thought to be necessary, it would be beneficial if Select Committees were to play a part in policy-making. They should be encouraged to comment on Framework Documents as they are produced or on their renewal. Policy-making in departments needs to become more transparent if the department's role in setting targets and performance objectives is to be adequately assessed.

The formal position on Parliament and audit is unchanged. Mrs. Thatcher assured the House in 1988 that the normal rules of accountability and audit should apply to the EAs and that the National Audit Office and the Public Accounts Committee should play the same role in relation to them as they have traditionally done with departments of state. In fact, at the time of writing, the NAO had published only three value for money reports on the agencies. In one at least, that on the Vehicle Inspectorate, they were able to conclude that agency status had had a telling beneficial impact on performance achieved. This is to be expected or at least hoped for. In concept at least the EAs should improve management performance and should improve efficiency and deliver better service to customers. Being neutral about these developments initially I have become converted to the cause. This does not, however, affect my concern about constitutional accountability.

## CUSTOMER SERVICE

NS is clearly about greater efficiency. Targets and indicators are intended to be robust and to be tightened with the passage of time. But the other side of the equation is improved performance and 'customer' satisfaction. How does NS fare here?

"Service to the Public" was a Cabinet Office publication in 1988 and an excellent appraisal of what is necessary for customer satisfaction. It is known to have been sunk by Treasury opposition. However in 1989 the Cabinet Office produced "Basic Issues in Customer Service Training and Management" which was to be followed up by an "action learning programme." In fact, this seems to have been swallowed up by Prime Minister Major's commitment to the Citizen's Charter, which is currently the subject of considerable debate.

The first thing to say is that the publication of targets produces important customer information about the service which can be expected. Each public body is expected to provide its own charter for the public which, in the case of the

EAs, will refer to timetables for performance of tasks. Thus the Employment Service Agency's (ESA) charter for job seekers is displayed in each local office. This includes standards to be met on waiting times, the promptness and accuracy of benefit payments and the like. The customers' charter for the BA is similarly couched. What does not appear to be happening at this time is the practice of using the number of consumer complaints as a quality control exercise - something that the British are notoriously bad at.

My own view is that the greatest failure of constitutional/administrative law in Britain relates to the lack of institutional structures for consultation. It is the greatest weakness of the NS programme. What is occurring, however, is a move towards testing customer needs through market research and surveys. New-right politics are the dream time for market research and consultancy firms. Thus the ESA conducts a customer satisfaction service and also an internal attitude survey amongst its staff. The BA also has recently carried out a national survey and are encouraging local offices to find out more about what their customers want with the possibility of carrying out more local surveys. On the other hand we have seen that neither the unions, staff generally, or the public are uniformly involved in the construction of business and corporate plans.

At this point I should say a little more about the Citizen's Charter. Space does not permit of extensive treatment here but an outline should be helpful. The idea was born in a White Paper of July 1991 when the Prime Minister pledged to make public services answer better to the wishes of their users and to raise quality overall. Each public body was required to produce a charter of promises about service performance and the best would be awarded a "chartermark" by the Cabinet Office. Most of this exercise would be carried through without legislation, so that, for example, each public body is asked to provide a complaints procedure for the public but the only penalty for non-compliance is government censure. For a country that boasts of the rule of law Britain is remarkably coy about using the law for the purposes of defending citizens' rights. Only the churlish would oppose the sentiments lying behind the Citizen's Charter but the very real danger exists of the exercise falling between two stools - the legal system and Parliament. Absent legal obligations speedily enforced and the distancing of MPs from the agencies it is possible that the expectations of the Prime Minister might never be realised.

Just one more word about market research. These initiatives are very valuable but suffer from several defects. One is that they are commissioned by government itself, another is that we cannot be sure that all details are published and the last, but certainly not least, is that customers or their representatives cannot cross-examine questionnaires. I shall return to this theme when talking further about policy formulation.

The last issue I wish to raise on customer care is that of the establishment of steering groups or advisory boards by the EAs. A number of the EAs have such bodies, though the terminology used varies. For example, Companies House and the Insolvency Service have steering boards while the more controversial Benefits Agency and Employment Service do not. As we have seen the latter have chosen to rely on market surveys though in the case of social security an Act of 1980 established a Social Security Advisory Committee whose role I do not have the space to describe here.

What is of interest is that the commercial agencies will frequently have boards on which their main customers or their representatives will serve. This not only affords them information about customer needs but also provides a kind of policy community. So, for example, Companies House's user group regularly has a policy item on the agenda. Customer or citizen representation for the larger and more politically controversial agencies is, however, largely lacking. The Companies House example also says something about the conceptual divide between administration and policy and indicates yet again the incoherence of our administrative law in relation to the policy-making process.

### THE POLICY-MAKING PROCESS AND ACCOUNTABILITY

The policy/execution divide is, of course, illusory. It would be absurd to imagine that those in the firing line did not have valuable information on battle plans, and so it has proved in relation to the Agencies. Furthermore, because of the high visibility of the EAs and the attempts to clarify their relationships with Whitehall, responsibility for the policy process is higher than it was previously. This is most marked perhaps in relation to social security where the process of "agencisation" produced illuminating working documents made available to the enquiring public. Even so, the lightly lifted veil reveals more starkly the hidden face of effective power.

Let me first deal with the newly emergent policy communities. We have already noticed the policy input of advisory boards which presumably formalise previously informal working practices. However, it is clear beyond doubt that the ACEs have a considerable influence on the policy process. The Fraser Report, for example, was adamant that Agencies should make a full contribution to policy formulation and was hostile to any artificial divide between policy and execution. In fact, in proceedings before the TCSC the head of the ESA claimed that his agency made a "very important input" into policy thinking. Indeed the Department of Employment looks to the Agency for information vital to policy-making, a matter which is enshrined, perhaps ironically, in the Framework Document. That allows the Chief Executive direct policy access to the Secretary of State and furthermore prohibits him from making policy proposals affecting the work of the Agency without consulting with the Chief Executive. Furthermore, a forum exists for influencing policy in the BA and the Contributions Agencies. More generally the TCSC has de-

clared that managers should have a clear input into policy thinking, a view recently accepted by the Government itself.

At the outset some thought that the EAs were simply accountancy-led regimes, that government was concerned only with targets and inputs and that after a while targets would be sharpened to the point where the Agencies were simply seen as cost-cutting mechanisms. Time no doubt will tell all but there is clear concern being expressed by central government that emphasis is being turned to outputs. In other words, the quality of delivery and satisfying the customers' needs has assumed increasing importance. Thus the renewed emphasis on quality rather than quantity targets. This trend, if such it is, is greatly to be welcomed as is the whole thrust of NS. After all, one of the prime rationales for the Whitehall revolution is supposed to be the liberating effect on departmental policy-making that delegation of operational responsibilities to agencies would achieve. It must be said that little public information is currently available on the effect of the changes on Whitehall policy-making as opposed to Agency operations. The policy process is still shrouded in secrecy, one of the pitfalls of working dramatic change without debate or legislation. At the formal level there is discouragement from providing information about policy debate and advice in the form of the "Osmotherley" rules which restrict the evidence which civil servants can give to Select Committees. Policy options cannot be revealed and so the quality of advice remains immune to public assessment. The New Zealand approach to the NS equivalent, on the other hand, was more open and introduced through legislation. Their new financial regime clarified the role of policy advice by requiring the connection between outputs and outcomes to be identified. Policy advice has become simultaneously the output of advisory agencies. Unless advisory bodies, operating in the sunshine, become part of our new culture there is little hope that the enormous potential released by the NS initiative will be properly realised. All of this brings me to my conclusions concerning NS and constitutional accountability.

The TCSC has spoken of an "explosion of information" produced by NS and to a considerable extent this is true, certainly as compared with the previous position. Each agency produces an annual report, there is the Framework Document, and some publish their business and corporate plans. There is now an annual review of NS produced by the Cabinet Office and the Treasury has also provided guidance on the form of annual reports and accounts. There is as well a highly developed form of financial accountability, not least through the practice of "hard charging" for customers. The price of governmental services is being made more readily accessible. On the other hand, some commentators believe that since NS is about flexibility and innovation there is an increased incentive for calling off the parliamentary watchdogs. That must not be allowed to include the NAO but otherwise it seems to me to be no bad thing. If Parliament were to concentrate more on the large policy issues the state of our democratic health might be a great deal sounder. A full Parliamentary Select Committee on the Machinery of Gov-

ernment has been canvassed by some as a means of achieving this aim. As to the administration of the EAs themselves we must not overlook the role of the Ombudsman. Although a relatively low-key figure traditionally, the Citizen's Charter initiative might re-awaken him. If the charters spell out promises of service, as they are intended to, then presumably the Ombudsman's perception of maladministration will alter to keep pace with the new culture. All this is on the plus side but there are two caveats which I need to enter in conclusion. The first relates to the still inadequate levels of accountability and the second to the ethic of the public service.

The time now seems ripe for an overall institutional examination of NS. This is the view of the TCSC and it is clearly correct. More importantly our new revolution calls for a rethink of our administrative and constitutional law. Parliament can make improvements to its own arrangements but it cannot hope to oversee the whole EA apparatus. *Pace* the Citizen's Charter we need to legislate for public grievance procedures but overwhelmingly we need to do something about the policy-making process to engage all customers and all citizens. The American way forward may not be appropriate but I should like to see all government departments shadowed by a high-powered advisory committee with a research capability and a right to participative dialogue enforceable by the courts. NS has done a great service in a number of ways, not least in opening up tantalising glimpses of the way government is actually run. Its finest service might yet be to expose the shallowness of our constitutional conventions and traditions.

What we must not fail to do is to honour the tradition of public service and the public service ethic. There is a revolution afoot here as well. Although NS has devolved power down the line and given many civil servants a greater sense of purpose and belonging, it has produced much else besides. Greater flexibility in pay regimes means removing national pay scales at the end of the day. Civil service jobs are in the process of being put out to tender as I write. If the fashion for privatisation continues unabated we may dissipate our public service element altogether. The TCSC spoke of the importance of the career civil service, of impartiality and maintaining standards. Others have spoken of the demise of the civil service as we know it. I believe that Next Steps is a very important initiative and one which is working a quiet revolution. We must examine our notion of public service more closely and tie it in with a renewed search for adequate forms of accountability.

### Sheila Noonan (Continued from page 16)

17. On this score, I am far less convinced than I once was that such a distinction can usefully be sustained.
18. "Not a Moral Issue" in *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) 146.
19. *Supra*, note 5 at 704-5.
20. Suzanne Kappeler, *The Pornography of Representation* (Cambridge and Oxford: Polity Press and Basil Blackwell Inc, 1986) at 103.
21. Dawn Currie, "Representation and Resistance: Feminist Struggles against Pornography" in D. Currie and V. Raoul, eds., *Anatomy of Gender* (Ottawa: Carleton University Press, 1992) 191 at 203.
22. *Ibid.*
23. For a compelling argument as to why this may be so see Geraldine Finn, "Against Sexual Imagery" (1986-7) 12(2) *Parallelogram* 315.
24. A similar willingness to broadly characterize the scope of protected expression was displayed in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; and in *R. v. Keegstra*, [1990] 3 S.C.R. 697.
25. Such an approach to characterizing purpose was expressly rejected by the Supreme Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. There the Court found that since the legislation historically had a religious purpose consistently maintained by the courts, a secular purpose could not be attributed to it.
26. *Supra*, note 1 at 493-4.
27. Here the Court relies upon *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232.
28. This is a phrase coined by Robin West in "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report" (1987) 4 *Am. Bar Found. Res. Jo.* 681 at 696 where she suggests:  
  

Good pornography has value because it validates women's will to pleasure. It celebrates female nature. It validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture. Pornography when it is good celebrates both female pleasure and male rationality.
- It should be stressed that such a definition is infused with the notion that heterosexuality is the content of sexuality.
29. (1989), 58 D.L.R. (4th) 577 (S.C.C.).
30. *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise)* M.N.R. (14 July 1992), (Ont. Ct. Gen. Div.), [unreported].
31. Judy Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989) 17 *International Journal of the Sociology of Law* 445.
32. *Ibid.* at 459.
33. *Ibid.* at 449.

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