

The British 'Republican' Constitution

W.T. Eijsbouts

ADAM TOMKINS, *Our Republican Constitution*, (Oxford, Hart 2005) 156 p., ISBN 1-84113-522-4.

Adam Tomkins' latest book is timely to the point of being readable in conjunction with David Feldman's case note in the last issue of *EuConst*, on the important *Belmarsh* decision by the House of Lords. And all this with the London bombs of July 7 in mind. The book is an enlarged version of the author's inaugural address at Glasgow. It is powerful, inspired and uncompromising; its proposals for change are daring and invite comment.

Our Republican Constitution targets 'legal constitutionalism'. Legal constitutionalism is the trend to consider law and the courts a sufficient check on government, and even superior to the checks provided by politics. A special version of legalism generally (read the 1960 classic on the topic by Judith Shklar), it is seen to produce arrogance and conceit in the legal profession, in the courts and in legal scholarship.

Once legal constitutionalism was a home-grown English ideology centring around 'the ancient constitution' and the common law. In its present variety it is mostly imported from abroad, in particular from the US and the continent, says Tomkins, who considers that it affects the ways and wisdom of the British constitutional tradition. A long excursion into British constitutional history and theory serves to argue, first that the British constitution is essentially republican, and second that it is built on parliamentary, not judicial, accountability. And that it should stay that way.

Republican the British constitution is, under its monarchical cloak, for being concerned with freedom of the body politic and the exercise of legitimate authority. The opposite of a *republican* constitution in this sense of the word is a *liberal* constitution, one mostly concerned with individuals' freedom from government interference. Such liberalism is associated with the *legalist* notion of the constitution. Legalism has always had its adherents mostly among the conservatives; presently it also has a stronghold in progressive thinking.

The present liberal and legalist infection has six dominant channels, Tomkins argues. They are:

... the internal reform argument of the Charter 88 liberals, who wanted much the same for Britain as the post-Communist states of eastern Europe wanted for themselves; the juristocratic argument for a Bill of Rights; the regional pressures within the United Kingdom for devolution of power; the vast impact of European Union law; the juridical influence of other leading nations in the Commonwealth; and the fact that the world's liberal exemplars had, by the 1990s, become the US and the German constitutions rather than the British. (p. 9)

So most of the sources are foreign, but there are the local helping hands. Culprits named and cornered are academics, such as T.R.S. Allen, Jeffrey Jowell and Dawn Oliver, and sitting judges such as Sir John Laws. Upon reading David Feldman's case note in the last issue of *EuConst*, one is inclined to add Lord Bingham to the list.

What is wrong with legal constitutionalism? The basic problem is that it may be detrimental, in thought and in fact, to the practice and the capacity of *political* accountability of government in Parliament, supplanting this by *legal* accountability before the courts.

Consider the government's anti-terrorist policies and decisions, leading to expulsions from the territory and to other measures based on administrative discretion. Persons subject to expulsion and internment orders come under protection of the courts. These seek to check the administration on the basis of the European Convention for Human Rights. Tomkins wonders:

Why should it be the courts rather than the home secretary, accountable as he is to the democratically elected House of Commons, who decide whether such a decision is in accordance with the spirit of 'tolerance and broad mindedness' [as required by the European Convention]? How could a court weigh and assess the various factors that must go into making a decision such as this: the intelligence advice, the risks to public order, the sensitive issues of inter-community relations, even the delicate foreign affairs considerations, and so forth? (p. 21)

The author argues against legal constitutionalism from four angles, two practical and two theoretical. The latter two provide fine excursions into British political history and political theory. These serve, interestingly, as a sort of normative foundation for his republican (political) constitutionalism and for general criticism of the new legalism. This is where the argument differs from mainline political constitutionalism (Jennings, Griffith), which is rooted in raw reality, so to speak, and which opposes legalism from the basis of *description*, not principle. His normative

basis makes Tomkins more of a radical than the realist opponents of legalism. For him, legalism is not merely unwise or undesirable, but unconstitutional:

... the republican ideal of the British constitution would hold that whenever the government is less than fully and openly responsible to Parliament, ... the government is acting unconstitutionally and it is the constitutional right, indeed duty, of the Parliament to say so and to put it right. (p. 52)

The two *practical* angles concern actual performance of legal and of political accountability. Against the legalists' claims, Tomkins argues that courts in reality are no effective check on government. On a close look it appears that all too often the courts have been helpers of the executive, rather than its effective critics. In favour of Parliament and its political control of government, he argues against the grain that Parliament proves to be a much better check on government than it is often held to be.

Together his four angles of criticism, erecting political accountability as the single foundation of the republic, provide a stable platform from which to target domestic and foreign legalist influence on the British constitution. Continental constitutions are basically legalist, including the European Union Treaties and the European Convention. And the American Constitution, *idem*.

Now here is where his idealism and radicalism may carry the author away. Is there really no republican hope for the US, for the continental countries? Is there no republican *future* for the European Union? One may agree to criticise the pretence of legal scholarship and the courts when they rank themselves above politics in the settlement of social and constitutional conflict. Indeed the European court and European legal scholarship have long pretended to build a constitution solely on the basis of a legal order. That is legalist conceit. But does it, conversely, mean that *political* accountability is all and everything, superior to any other form of public control?

The *Belmarsh* decision by the House of Lords (see case note Feldman in *EuConst* last issue) is a case in point, especially when read in conjunction with the facts of the London 7/7 bombs. On the basis of the Anti-terrorism act ATCSA 2001, only foreigners could be locked away on suspicion of terrorism without a criminal charge. In December '04 the Lords declared this to be discrimination of foreigners, in conflict with the European Convention. In July this proved to be more than just legal good sense when the London bombers turned out to be British citizens. In the mean time, in March, and in response to the Lords' decision, legislation had been improved (see Feldman, conclusion). Although this could not prevent the attacks, it was the product of a healthy interaction between the courts, government and parliament.

It is probably too simple to consider every increase in legal control of executive action as legalism and hence detrimental to political accountability. To be sure, it may work out that way. But the law and the courts may also in fact help or boost political accountability and other forms of political control. In a radical analysis there is little room to acknowledge actual forms of synergy between courts and political institutions, as exist on the continent and as are finding their way into Britain, nor, conversely, for punctual criticism when the courts go too far.

An idealisation of political accountability as the sole foundation of the republic has other blind spots. I would suggest two: one concerning other democracies or republics and one concerning the UK. There are systems in which democratic control needs to be ensured otherwise than by political accountability, simply because governments are in power on fixed terms and cannot be sacked. The best example is the US. Indeed, public accountability will in those cases normally take a more legal form. But to consider the US a lesser form of democracy on account of only this, and rank it below *any* parliamentary constitution, is too simple. It is to forget the forms of political control, other than by accountability, exercised between the President and Congress: budget, legislation, appointments, etc.

Another relevant example is the European Union. This is at first sight no less than a laboratory of legal constitutionalism. Does it make the Union impervious to forms of political control and to democracy? It is the question of the day. Indeed, political accountability in the Union is, and will always be, weak. It works only in the European political sideshow, between the European Commission and the European Parliament, leaving the Union's main executive authority, the European Council, untouched. Does this mean there is no future for the European Republic? Not at all! It only means there is no understanding of the Union's real constitutional structure by focusing on political accountability as the only form of control.

Finally about the UK. One proposal by Tomkins in order to reinforce political accountability would be

... the removal of party and of party loyalty from the working of Parliament. Thus, whips should be prohibited. There should be no whipped votes... There should be no institutional means – save by seeking to justify the merits of their policies in open parliamentary debate – by which the government is able to secure parliamentary support. (p. 138)

This is telling not only as it seeks to remove an element from parliamentary work which is simply indispensable in any modern parliamentary system. I wonder if it does not also betray an idealist concept of accountability and of politics. The idea is Habermas-like, expecting the solution of all difference and the creation of legitimacy only from communication, debate and persuasion. This is soft and one-

sided. Governmental accountability is there not only, and maybe not even primarily, as a rule used by Parliament to enforce political control. It is that, to be sure. But it is also and even essentially the opposite: an instrument at the disposal of the government and meant to discipline, to bully or arm twist if needed, its parliamentary majority and its party support structure, down to the people. Here is the ugly side of politics and accountability, involving three line whips and all the rest. In 1972 Edward Heath made the second reading of the European Communities Bill a vote of confidence in order to force, via his majority, also his party and the British people to accept the Treaty and the EC. The same was done by John Major for the EU Treaty in 1992. Tony Blair used it to force his party's support for going to war in Iraq.

If political accountability is superior to its legal sister, and with this one may fully agree, it is not only, and maybe not mainly, because it is a more legitimate mechanism to control the executive. That is only the sunny side. It is superior above all because it is a more ugly and more powerful way for the government to press its authority and its responsibility all the way down the system, on the parties, the members, the voters.

Political accountability is necessarily and vitally ugly at times. This is where the law comes handy. Instead of decrying legalism, why not just accept a little help from the law now and then, if only to remedy or redeem some of the inevitable injustices and mistakes inherent in the exercise of political accountability?

