

Constitutional Responsibilities of the Civil Service

A Personal View by Sir Christopher Foster

The Coalition Government's interest in Civil Service reform has prompted a flood of papers from Government and others, notably the Institute for Government. Many refer to the traditional Civil Service values of integrity, honesty, objectivity and impartiality, but do not consider the significance of these values as an important component of our unwritten constitution.

The Civil Service has a duty to support the elected government of the day in developing and implementing its policies; but it also has a duty to the State to seek to ensure that the business of government is conducted honestly and properly. I am concerned that in recent years there has been a decline in the Civil Service's ability to perform this function effectively.

In my 2005 book *British Government in Crisis* I argued that the British Civil Service had a constitutional function generally performed elsewhere by statutory or constitutional review bodies or the courts. Various aspects of that constitutional role were considered in early chapters of my book.

1 Accountability

The accountability of government to Parliament (*Ch. 1*) was for centuries the fundamental principle of British government. A consequential principle was that ministers should avoid telling untruths to Parliament in statements, debates, answers to PQs, letters to parliamentarians and in government documents for discussion in parliamentary committees. Advice from civil servants consistently stressed the importance of adhering to that principle. Most ministers told the truth because they believed it right. Some may have been persuaded that the chances of being found to be lying were very high when MPs (and also peers) saw so much of each other and came to know each other so well. No doubt some took the risk and got away with it. Some are known to have done so. A few, however, had to resign calamitously as Eden had to over Suez, and, in very different circumstances, Profumo under Macmillan.

There is a widespread impression that in recent years government ministers, while still wary of telling outright untruths, have been increasingly willing to resort to "spin" in their dealings with Parliament – tendentious presentations that obscure the underlying facts - and that advice from officials not to do so has been unpopular. In part this may be a response to the way news is now reported in an electronic age. Since around 1990 traditional newspaper reporting of Parliament has largely disappeared. News stories develop quickly in electronic media and Ministers increasingly behave as if their accountability is to the media rather than Parliament. Press releases and comment are increasingly delivered by Special Advisers (spads) acting as "spin doctors", often in partisan or emotive language. Many permanent civil service press officers have been cleared out and the practice of having a second "official" press release with a factual account of what has been decided and why is dying out.

2 Recording of Decisions

What had helped ministers (my Ch. 2) know and keep to the truth not only in Parliament but in relations with their colleagues, outside bodies and the media, was the careful recording of decisions undertaken throughout Whitehall. It was standard practice for meetings within and between departments and other public bodies, and between them and outside persons and institutions, both when ministers were present and when they were not. This ensured that a factually accurate record of decisions and how they were arrived at was available to support the information provided to Ministers and to Parliament. It also protected ministers from misinterpretation after meetings with outside interests. The system was not perfect. No system of records ever is. But undertaken in accordance with the civil service values of integrity, honesty, objectivity and impartiality it offered advantages over other nations' more rule-bound systems in terms of accuracy, terseness yet comprehensiveness, thoroughness and speed.

The practicality of these arrangements depended on ministers' working in close partnership with their officials. In my experience spads were not exempt. As a spad in the 1960s and 1970s I can remember having to produce a record, or have someone else do so, summarising what was significant about every meeting, including those with the press and other outsiders, and circulate them to my ministers and the appropriate civil servants. The factual accuracy of the records kept by civil servants and spads enabled them to be used with confidence to communicate between ministers, their departments and other public bodies.

From the 1980s into the 1990s there was a decline in such comprehensive keeping of records. Among its causes were the increased complexity of government business, cuts in the number of civil servants, the increased use of rapid response communication, worries about leaks to the media and, later, concern about the release of material under freedom of information provisions. As a consequence accountability and accurate communication within and outside government suffered. Government needs to re-consider how records of the decision making process are kept and ensure the permanent civil service is engaged in the process.

The absence of accurate records often makes it difficult to distinguish between decisions reasonably based on evidence and those based on pressure from lobbies or political considerations. The Government's use of anti-secrecy laws to refuse to publish an analysis of HS2 could hardly differ more from past practice (*The Times*, 31.1.14).

3. Decision making based on fact and propriety

UK ministers make more decisions than any other nation's ministers. They can only be set aside through judicial review if they can be shown to be unlawful or reached through some defective procedure.

Until recently the relationship of partnership between a minister and his or her officials could be assumed to be close enough (*Ch. 3*) for officials always to be able to give ministers frank advice and then implement decisions that had been properly reached. Moreover, as formalised by Haldane in 1918, the relation of partnership between ministers and their civil servants was held to be close enough that ministers did not need to take personally all the many decisions for which they were responsible. Many - on the Carltona Principle - were taken by officials on their behalf, it being assumed that the relation of partnership was close enough for officials to know the decisions ministers would have taken had they the time to do so while continuing to bring any cases where there was doubt, or might be dispute, to the minister's attention.

When ministers are making decisions they are sometimes faced with pressure to put political or electoral advantage before factual, national or longer term considerations. Impartial advice from permanent civil servants, appointed on merit through a process independent of politicians, helps make clear to ministers, and sometimes to their colleagues and others, when such decisions would go beyond the bounds of propriety. The evident desire of some ministers to be far more directly involved in appointment, dismissal and career development of civil servants through Extended Ministerial Offices and new arrangements for senior appointments could clearly undermine the impartiality of the advice received.

4. Policy Approval

Decisions requiring a change of policy usually need approval through the Cabinet Committee system. Associated documents - cabinet papers, white papers and other policy documents, and draft legislation - need to maintain the highest level of clarity, factual accuracy and reasoned argument throughout. Those that are published should also be readily intelligible to parliamentarians and interested members of the public. Insofar as ministers wish to spin their argument they should do it elsewhere, in non-government publications and occasions.

In the past this approach helped ministerial colleagues, Parliament and the media understand the case being made and permitted officials to reflect the civil service values of integrity, honesty, objectivity and impartiality when preparing government publications.

Since the end of the 1980s, spin has crept into the majority of government documents as concern over presentation has become pre-eminent. Over the same period there has been a steady stream of policy blunders, in part attributable to an increase in poorly explained and drafted legislation, with incomplete bills not infrequently entering Parliament. The standards for bill preparation proposed by the Political and Constitutional Reform Committee on the recommendation of the BGI and others are intended to meet this problem but they have been flatly rejected by the government.

There was never a golden age when all processes were fit for purpose and rigorously followed. Nor was there a single point at which things started going wrong. My concern is that we are now well into a long drift away from some sensible principles and practices and are failing to see the cumulative damage to our decision making processes and consider how these things should be managed in the future.

The requirement, now with statutory force, for civil servants to act with integrity, honesty, objectivity and impartiality provides a powerful defence against the abuse of power by elected ministers to divert the resources of the State in furtherance of personal or party political objectives. As I argued in my book (pp 271, 3), deteriorating standards have already provided a strong argument either for reasserting these values in this context, and the ability of the Civil Service to support them, or, as most democratic nations have done, for introducing some form of legal rules subject to judicial review to help maintain acceptable standards.