THE UNIVERSITY OF HULL

"The Constitutional Position of the British Civil Service: an assessment of the impact of managerialism on the notion of 'the servant of the Crown' via a case study of HM Prison Service"

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Dedication

In memory of my late father, B.H. Loh (1947 - 1987)

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R v Secretary of State for the Home Department, ex p Pierson, 24 July 1997, judgment to be found on the World Wide Web: (www.Parliament.the-stationery-office.co.uk/pa/ld199798/ ldjudgmt/ jd970724/piers01.htm)

Raymond v Honey [1983] 1 AC 1

Riordan v War Office [1959] 1 WLR 1046

Chapter 1

Research outline

Focus of Study

(i) Introduction

The institution of the civil service is of much contemporary interest here in Britain and elsewhere. The phenomenon of civil service reform forms a significant part of the wider movement to remould public services or in the now legendary phrase, to "reinvent government" on what could be perceived as a global scale, ranging from the more sophisticated democracies such as in the USA, Britain, Sweden, Canada, Australia, New Zealand, to the newly emerging ones such as Eastern Europe and South Africa.[1] The apparent trend of globalisation is arguably not only confined to the field of public service reform; it can also be seen in other contexts such as the growth of the intergovernmental cooperations within Europe and the Far-East, as well as the proliferation of the Information Superhighway which facilitates an electronic exchange of ideas across geographical frontiers. The reasons for this apparent global convergence fall outside the immediate province of this chapter. This thesis questions one of the enigmas of the modern British constitution, which is that the civil service does not

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[1]. There is a growing body of academic literature in this area. See generally: Osborne, D & Gaebler, T (1992) *Reinventing Government.* Addison-Wesley. On **Australia**, see: Zifcak, S (1994) *New Managerialism: Administrative Reform in Whitehall and Canberra.* Open UP. On **Canada**, see e.g.: Guy Peters, B & Savoie, D.J (eds)(1995) *Governance in a Changing Environment.* Canadian Centre for Management Development; Price, E.S & McAdams, L.P (1996) Bringing Accountability for results to government in British Columbia, Pub. Admin & Development 305-16. On **New Zealand**, see e.g.: Boston, J et al (eds.)(1991) *Reshaping the State: New Zealand's Bureaucratic Revolution.* Auckland: OUP; Walker, B (1996) Reforming the public sector for leaner government and improved performance, *Public Admin & Development*, 397-412. On **Eastern Europe**, see e.g.: Kronig, K (1996) Policy planning and management dialogue with countries in transition, *Public Admin & Development*, 417-29; Pogany, I (1996) Constitution-making or Constitutional Transformation in Post-Communist Societies, *Political Studies* XLIV 568-91.

have a statutory footing. So, it is the Executive rather than Parliament which has the prerogative power of regulating the civil service. The enigma is encapsulated in the position where the Executive regulates the civil service, which in turn serves the Executive qua their historical status as 'servants of the Crown'. The thesis is concerned with the cumulative impact of managerial reforms within the British civil service during the Conservative administration from 1979 - 1997 on the idea of civil servants as 'servants of the Crown'. It argues that the key managerial initiatives introduced into the civil service by the Conservative government during this period, illustrate the dangers of the notion of 'servant of the Crown' being captured by the Executive for their short-term political ends. The thesis shows that the managerial transformation collides not only with established constitutional doctrines relating to the civil service but also with the broader norm or theory of constitutionalism embedded in British constitutional history.

A recurrent theme in the literature on civil service reform in Britain since the late 1960s is the development of a greater concern with managerial, as opposed to the legal, political or even constitutional considerations of the machinery of government. The idea and ideology of management, as popularised by academic commentators,[2] appeared almost seductive in an era when public administration was undergoing a period of self-doubt.[3] As the public management agenda became more prominent, activities of public administration which were concerned with 'the processes of making decisions in areas of public life' slowly came to embrace the cloak of management which involved 'the search for the best use of resources in pursuit of objectives subject to change'.[4] This has culminated in short-hand metaphors such as "managerialism" or "New Public Management" which have been taken to encompass the structural, organisational

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2. Drucker, P (1974) *Management: Tasks, Responsibilities, Practices*. Lon: Heinemann; Chandler, A.D.J (1977) *The Visible Hand: The Managerial Revolution in America*. Mass: Belknap Press; Koontz, H & O'Donnell, C (1978) *Essentials of Management*. New York: McGraw-Hill, 2nd edn.; Merkle, R (1980) *Management and Ideology: the legacy of the international scientific management movement*. Berkeley: University of California Press; Peters, T & Waterman, R.H (1982) *In Search of Excellence*. New York: Harper Row.

3. for this view of public administration, see e.g.: Ridley, F.F (1972) Public Administration: cause for discontent, *Public Administration* 65-77; Johnson, N (1976) Recent Administrative Reform in Britain in Leemans, A.F (ed.)(1976) *The Management of Change in Government*. Martinus Nijhoff.

4. Keeling, D (1972) *Management in Government*. Lon: Allen Unwin.

and cultural changes which have taken place in the public service.[5] Lord Armstrong. writing just shortly after the 1968 Fulton report, argues that the shift towards managerialism merits a constitutional study of the civil service for several reasons: (i) '[The shift to managerial issues] in turn has led to an increasing interest in what civil servants as opposed to ministers do...in what are called the processes of decision-making, the promotion of efficiency, the proper allocation of resources and their wise use'[6]; (ii) as civil servants are seen to assume greater roles and responsibilities over governmental functions, a discernible convention developed to the effect that ministers cannot be held personally responsible for all the work of civil servants, and so, 'the old doctrine of ministerial responsibility is now seen plainly to be what perhaps it always was, a myth'.[7]

It has been widely accepted in academic circles that the British civil service has changed even more markedly since 1979. The Conservative government under the leadership of Margaret Thatcher (1979 - 1991) and John Major (1991 - 1997) introduced measures which had the overall effect of exploding the myth of the anonymous, detached and impartial civil service. One of the central challenges for the British civil service since its inception in 1854 has been the issue of how to transform its elitist structures to respond to the growing complexities of modern government as well as be subject to apparently conflicting demands for its accountability on the one hand, and efficiency on the other. Over the eighteen years from 1979 - 1997 in particular, the civil service has undergone a rather profound re-orientation. One aspect of that revolution has been the emergence of managerialism in its governance (and indeed in the governance of other public services). Managerialism in the British civil service seems to have many facades which have developed over time. The reforms which effected the critical changes, appear in retrospect to have evolved and metamorphosed in distinct stages: the first set of priorities of the Conservative government in 1979, which inherited the legacy of

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5. e.g. see Massey, A (1993) *Managing the Public Sector*. Aldershot: Edward Elgar; Hughes, O (1994) *Public Administration and Management*. New York: St Martin's Press; Dunleavy, P & Hood, C (1994) From Old Public Administration to New Public Management, *Public Money & Management*, July-September.; Farnham, D & Horton, S (1996) *Managing the New Public Services*. Macmillan, second edn.

6. Lord Armstrong (1970) *The Role and Character of the Civil Service*. Oxford University Press, p.4. My additions.

7. Lord Armstrong (1970) *The Role and Character of the Civil Service*. Oxford University Press, p.4.

rising public expenditure from the preceding Labour administration, were to curtail civil service pay and personnel,[8] look for room for further economies through the Rayner efficiency scrutinies[9] and emphasise the need for proper financial accountability.[10] The second stage of reform emphasised the idea of policy advice and implementation as a form of "Service to the Public",[11] an idea which eventually found slightly more tangible expression through the Citizen's Charter Initiative.[12] The third wave of reform, arguably the most far-reaching, resulted in a fundamental re-structuring of the civil service along "agency" lines, which were first proposed in the Ibbs Report in 1988.[13] The fourth stage came in the White Paper[14] in 1991 which took the Next Steps idea significantly further by proposing market-testing and contracting-out in part or whole, as additional options to the agency idea.

The central theme in my thesis is that managerial reforms in the civil service have largely neglected the constitutional dimension, or at any rate, have been applying a static model of the constitution to the dynamic realities of administration and management. It argues that the close relationship admitted in official government literature between constitutional and management considerations in recent civil service reforms rests on a hollow concept of the constitutional underpinnings of the civil service. In seeking to explore the "constitutionality" of recent civil service reforms, this thesis takes, as its basepoint for measurement, the classical constitutional proposition that the civil servant is a servant of the Crown.[15] The problems presented by the managerial reforms are analysed in the context of the Next Steps reform where they are most acute in high-profile areas such as prisons, welfare and immigration among others. The thesis

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8. See *Administrative Forms in Government* (1981-82) Cmnd 8504; *Megaw Report on Civil Service Pay* (1982) Cmnd 8590.

9. See *Efficiency in the Civil Service* (1981) Cmnd 8293.

10. Through the Financial Management Initiative which first appeared in a White Paper (1982) Cmnd 8616 in response to the Treasury and Civil Service Committee's report on efficiency and effectiveness (1982).

11. Cabinet Office (1987) *Service to the Public.* Occasional Paper. Lon; HMSO.

12. Cabinet Office. *The Citizen's Charter: Raising the Standard.* (1991) Cm 1599.

13. Efficiency Unit (1988) *Improving Management in Government in Government: The Next Steps.* Lon: HMSO.

14. Cabinet Office. *Competing for Quality: Buying Better Public Services* (1991) Cm 1730.

15. As we will see in chapter 2 of the thesis, it is now widely accepted that 'the Crown' in this context is synonymous with 'Ministers of the Crown'.

adopts a case study of the HM Prison Service as an agency to highlight the underlying constitutional concepts and principles, or arguably their absence, in the implementation of the Next Steps idea. Insofar as the Prison Service is a unique case (see 1C below), the case study here will be used to show how it fits in with the developing body of theoretical and empirical literature on the impact of post-1979 reforms. It will be evident however that the case study of the Prison Service does raise themes which touch upon **wider** questions of this thesis, namely: (i) what are the underlying purposes of the civil service? Are there now *competing* conceptions of the purpose of the modern civil service; (ii) What are the cumulative implications of the key stages of recent reforms for the position of the civil service in the British constitutional order?

(ii) Why choose the British Civil Service post-1979?

The idea of studying the British civil service has been formulating in my mind since my undergraduate study of Government, Law and Economic Regulation in 1994-95 when I was introduced to the public law issues arising out of recent public sector reforms. The recent reforms of public services have become a fashionable topic of discussion among scholars of public law and political science in Britain and elsewhere. In the British context, much of this scholarship attempts to relate recent reforms to the traditional canons of British public law and public administration. Many recent government reforms have been the subject of such scholarly analysis, evidence abound in the fast-developing literature on various areas of public administration such as land-use planning,[16] redress of grievance,[17] Non Departmental Public Bodies,[18] the phenomena of contractorization[19] and privatisation[20] as well as reforms to the health,[21] education[22] and social security systems.[23]

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16. e.g. McAuslan, P (1988) Public Law and Public Choice. *Modern Law Review*, 681-705.

17. e.g. Birkinshaw, P (1995) *Grievances, Remedies and the State*, Lon: Butterworths.

18. e.g. Lewis, N (1994) Reviewing Change in Government, *Public Law*, 86-113.

19. e.g. Daintith, T (1979) Regulation by Contract, *Current Legal Problems*, 41-64; Freedland, M(1994) Government by Contract and Public Law, *Public Law*, 86-104.

One of the basic aspirations of these academic works is to reconstitutionalise the changes within the British political and administrative landscape. In other words, these works attempt to locate public service reform initiatives within a larger jigsaw of tradition, convention and principles which we understand as the British constitution. A review of recent literature[24] reveals that this technique of analysis has hitherto not been systematically applied to the study of reforms in the British civil service in general and the Prison Service in particular. It seemed to me then that there was a developing undertone of a tension between the notions of constitutionalism and managerialism in the growing literature on the civil service which was ripe for further research. In addition, new academic works[25] as well as empirical developments by way of official publications[26] then also underscored the gap for the kind of work I had in mind.

So I used the initial themes of managerialism and constitutionalism as broad compasses with which to navigate my way around the pool of official publications, books, articles, and newspaper materials, focusing my reading on two sorts of contexts: (i) the broad constitutional landscape of the British civil service; and (ii) the more precise contexts of three new "Next Steps agency" arrangements in the civil service such as the Prison Service Agency, the Child

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20. e.g. Graham, C and Prosser, T (1991) *Privatising Public Enterprises*, Oxford University Press.

21. e.g. Longley, D (1992) *Health Service Accountability*, Open University Press.

22. e.g. Feintuck, M (1994) *Accountability and Choice in Schools*, Open University Press.

23. e.g. Greer, P (1994) *Transforming Central Government*, Open University Press.

24. See Chapter 2.

25. See for example some of the more prominent works published in 1995 alone: Campbell, C & Wilson, K (1995) *The End of Whitehall*. Oxford: Blackwells; Dowding, K (1995) *The Civil Service*. Lon: Routledge; Theakston, K (1995) *The Civil Service since 1945*. Oxford: Blackwells.

26. E.g.: Treasury & Civil Service Select Committee, The Role of the Civil Service (1994) HC 27; Government White Paper on "The Civil Service - Continuity and Change" (1994) Cm 2627; Government White Paper on "Taking Forward Continuity and Change" (1994) Cm 2748; First Report of the Committee on Standards in Public Life referred to hereinafter as the Nolan Report (1995) Cm 2850; Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods To Iraq and Related Prosecutions (1995) HC 115 referred to hereinafter as the Scott Report; Public Service Committee, Ministerial Accountability and Responsibility (1995) HC 313.

Support Agency and the Court Service. The product of that first line of enquiry will be set out in further detail in Sections II on the macro-political context of my thesis. The second line of my enquiry was refined to a case study of the Prison Service Agency after a further review of existing literature, taking into account, personnel, cost and time constraints.

(iii) Why focus on the Prison Service?

It has been said that academic attention on administrative reform usually focus on case studies which "provide invaluable information on the reform processes and structures, and on the causes of failure or success".[27] As Gerald Caiden argues, "the study of failure may sometimes be more revealing than the study of success".[28] One area of general consensus within academic literature is that recent civil service reforms have brought into question the unity of the civil service. The use of a single case study of the Prison Service in my thesis tends to confirm that assessment, but beyond this, there are also other aims underlying my study: namely, to investigate the practical complexities that can arise in the drive to improve management in government, arguably without the framework of meaningful constitutional discourse.

There is in this section, a defensive response and a set of positive ones. The former speaks to the argument that the Prison Service is a unique case in many senses - due to its coercive role, the political sensitivity surrounding its governance and operation, its relationship with the State/ central government and its relationship with its ultimate end-user (prisoners). Case study research methods are well-placed to study unique cases or what Yin[29] calls "critical cases". Unique cases serve well to illustrate the problems and tensions which can arise in the implementation of apparently radical policy initiatives which are largely conceived on the basis of abstract general principles.

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27. Leemans, A.F, *Overview* in Leemans, A.F (ed.)(1976) *The Management of Change in Government*, The Hague: Martinus Nijhoff, p.61.

28. Caiden, G.E (1976) Implementation - the Achilles Heel of Administrative Reform in Leemans, A.F (ed.)(1976) *The Management of Change in Government*, The Hague: Martinus Nijhoff, p.145.

29. Yin, R.K (1994) *Case Study Research: Design and Methods*, Cal: Sage, 2nd edn.

Nevertheless as Stake[30] argues, the highly focused setting of a case study often raises and repeats many observations, analyses and interpretations in a way which connects the study to wider themes and principles of more general concern. And so, as will be evident in the case study discussion of the Prison Service later on, qualitative case studies can often provide a subtle combination of particularity and generality which other research methods lack.

Insofar as the Prison Service is a unique case, there are also positive justifications for its use as a case study. One would be to show how the case of the Prison Service fits in with the growing body of literature of both a theoretical and an empirical nature, on the impact of post-1979 civil service reforms. This conceptual link was absent from existing literature at the time the study was conceived.[31]

Another reason relates to the prospects of access to relevant information and to fieldwork contacts. The informational avenues are evolving at a noticeable pace with the publications of annual reports, corporate plans and key performance indicators by the Prison Service Agency; phenomenological account of insiders such as that by Derek Lewis[32] which provided a rather perceptive insight into the internal workings of the Prison Service; and technology-based information, for example a dedicated website for the HM Prison Service.[33]

Access is also governed by fieldwork considerations. The author was able to establish contact, for research purposes, with key personnel at different echelons of the Prison Service

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30. Stake, R.E (1995) *The Art of Case Study Research*, Cal: Sage.

31. The literature on prisons has been rich on specific themes, see on the legal and political framework for accountability: Ryan, M (1983) *The Politics of Penal Reform*. Lon: Longman; Maguire, M and Vagg, J (1985)(eds.) *Accountability and Prisons: Opening Up A Closed World*. Cal: Sage; Livingstone, S & Owen, T (1993) *Prison Law: Text, Cases and Materials*. Oxford C. P.; Richardson, G (1993) *Law, Process and Custody: Prisoners and Patients*. Lon: Weidenfield & Nicolson; de Smith, S, Jowell, J & Lord Woolf (1995) *Judicial Review of Administrative Action*, chap. 24. Lon: Sweet & Maxwell; Creighton, S & King, V (1996) *Prisoners and the Law*. Lon: Butterworths. On penal political theorising, see Foucault, M (1977) *Discipline and Punish: The Birth of the Prison*. Lon: Penguin. On new managerialist writings on Next Steps and the Prison Service, see e.g. Talbot, C (1995) The Prison Service: A Framework of Irresponsibility? *Public Finance Foundation Review* No. 8, November 1995.

32. Lewis, D (1996) *Hidden Agendas*. Lon: Hamish Hamilton.

33. http://www.hmprisonservice.gov.uk

management through a fortuitous contact with a senior gatekeeper who works within the Prison Service headquarters.

The case study will, as far as practicable, consider events up to 1 May 1998, which marks the first anniversary of the New Labour administration. Some lessons and comparisons may be drawn from this period to explore the points of distinction, if any, of reforms driven by the previous Conservative government. However, any comparisons between these administrations are unlikely to be based on detailed assessments as the cut-off point for this thesis is such that not sufficient time would have elapsed for a considered judgment to be made.

(iv) Significance of the thesis

It is hoped that my work will help, within a period of apparently turbulent change in the history of the civil service in general and the Prison Service in particular, (i) to relocate the critical focus of constitutional authority and responsibility of the civil service in British public administration generally and the administration of prisons specifically; (ii) to shed light on the conceptual links between policies on civil service reforms over a period of nearly two decades in contemporary Britain; (iii) to examine the cumulative impact of key recent reforms on the constitutional status of the civil service; (iv) to clarify possible future directions for research.

Nature of Study

(i) Introduction

The constitutional understandings which inform the theory and practice of contemporary public lawyers have changed noticeably in the last decade or so. Contemporary public lawyers now place a fresh emphasis on importance of the appropriate conceptual as well as methodological

tools in exploring the nature of their subject. And so, there has developed, what can be considered a rich tapestry of *contextual* constitutional analysis of recent developments in the spheres of government and administration as will be evident in the next section.

The *theoretical* and *methodological* orientations of this thesis subscribe to that growing school of contextual constitutional analysis. The term of "contextual" is used here in the spirit defined by C. W. Mills.[34] My thesis does not, in its substance, set out to codify every piece of ancient and recent law relevant to the British civil service or to the involvement of civil servants within penal administration. Neither does it in its methodology, seek to codify all methodological rules relevant to legal research. Rather, my work seeks to present information about actual ways of working out my theoretical and methodological orientations. These orientations will now be discussed in more detail.

(ii) The theoretical orientation of the thesis

This section highlights the more critical features of the growing body of scholarship on British constitutionalism which inform this thesis. The central starting point as well as reference point for my thesis is not so much the nuts-and-bolts of legal and political details of recent civil service reforms but more the idea of British constitutionalism against which an assessment of the "constitutionality" of recent reforms can be made. A recurring theme of my thesis, in common with most socio-legal analyses, is that the *manifest* objectives of civil service reforms have tended to diverge from the *latent* effects of those reforms. The challenge that this chasm between policy and implementation throws up for the legal scholar is to muster up some deeper constitutional norms against which some kind of assessment can be meaningful.

This is by no means a novel proposition. A critical literature review which is to follow highlights a growing movement towards a contextual approach to studying the implications of government initiatives for the British constitutional order. This approach is however not without its critics. It has often been said that the British constitution is an institution of

[34]. Mills, C.W (1970) *The Sociological Imagination.* Middlesex: Penguin, p.215.

common sense, and of pragmatism.[35] If it has been strong on common sense, it has arguably tended to be weak on theory (or perhaps a common theory) to the point that it has bred scepticism about the appropriateness of constitutional theorising. We can perhaps locate the fertile debate over critical constitutional discourse in this context. The ensuing exchange and critique of each other's work has for instance sparked a jurisdictional debate with a distinct but kindred field,[36] as well as set off public disagreements about the precise historical or political context in which to situate the normative account of the subject.[37]

There are several reasons why contemporary discussions of the idea of constitutionalism are now of heightened significance. The first relates to the apparent phenomenon in which the developments in the modern state have widened the disjunction between constitutional theory and constitutional practice to such an extent that some reform-minded writers have started rethinking the idea and logic behind the constitution.[38] Secondly, any kind of assessment of the constitutionality of events in the empirical sphere can only be meaningful if we make explicit the normative underpinnings of our guiding model of the British constitution. Thirdly, at a time when the *enabling* virtues of managerialism and the marketplace are being extolled by government as well as other quarters,[39] there is a need for public lawyers to reassert the importance of the *constraining* values of British constitutionalism. Fourthly and perhaps more importantly for the purposes of my work, a basic picture of British constitutionalism can serve as a framework within which to make sense of the changing structures and roles of the civil service. The current debate on the recent civil service reforms has arguably not fully grasped the nettle of constitutionalism. My work argues that we need a fundamental constitutional critique which articulates its base assumptions about the British constitution to be used as a focal point for any assessment and evaluation within the project. If there is evidence that a new

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35. For more recent work on this theme, see e.g.: Prosser, T (1996) Understanding the British Constitution, *Political Studies* pp.473 - 87.

36. as that between O'Leary (a political scientist) and Craig (a public lawyer): see (1990) *OJLS* starting at p.404 and p.564 respectively.

37. see e.g. between Loughlin, M (1988) Tinkering with the Constitution (a review of *The Noble Lie*) and Harden, I & Lewis, N (1988) The Noble Lie: A Rejoinder in *MLR* at p.531 and p.812 respectively.

38. Galligan, D.J (1982) Judicial Review and Textbook Writers, *OJLS* p.257.

39. See e.g.: Osborne, D & Gaebler, T (1992).

model of the British constitution is emerging or indeed has taken shape, then we need as scholars to articulate its basic contours and features for further review and discourse.

There has been a discernible growth in critical constitutional law writing. In recent times, public lawyers have attempted to "constitutionalise" modern developments such as changes in central-local relations,[40] privatisation,[41] the Citizen's Charter,[42] the provision of public services,[43] supplementary mechanisms of accountability such as the Ombudsman[44] and Select Committees.[45] There appears to be at least two quite complex questions which lie at the root of these enquiries in general and those relating to central-local relations and privatisation in particular. They are: firstly, "How if at all, can we measure the effects of these developments on the constitution?" and secondly, "How do we measure the *constitutionality* of these developments?". We might reach a *cul de sac* if we are faced with the response that most of the changes are "legally constitutional"[46] in that they have largely been effected by legislation for instance, local government Acts and specific privatisation acts. However, academic discourse in public law will probably lose steam if legality (stemming from statutes) were to be

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[40]. e.g.: Elliott, M (1981) *The Role of Law in Central-Local Relations*, SSRC. Also Loughlin, M (1986) *Local Government in the Modern State*, Sweet & Maxwell.

[41]. e.g.: Graham, C & Prosser, T (1987) Privatising Nationalised Industries: Constitutional Issues and New Legal Techniques, *MLR* 16-51. See also: Prosser, T (1994) Privatisation, Regulation and Public Services, *Juridical Review* 3-17.

[42]. e.g.: Drewry, G (1993) Mr Major's Charter, *Public Law,* 248-57; Barron, A & Scott, C (1992) The Citizen's Charter Programme, *Modern Law Review* 526-46; Connolly, M et al (1994) Making the Public Sector More User-Friendly? A Critical Examination of the Citizen's Charter, *Parliamentary Affairs* 23-36.

[43]. On healthcare, see e.g. Longley, D (1993) *Health Service Accountability*. Buckingham: OUP. On education, see e.g. Feintuck, M (1994) *Accountability and Choice in Schooling*. Buckingham: OUP. On the provision of housing for the homeless, see e.g. Loveland, I (1994) *Housing the Homeless: Administrative Law and the Administrative Process*. Oxford C.P.

[44]. e.g.: Mowbray, A (1987) PCA and Administrative Guidance, *Public Law* 570-85. See also Mowbray's piece in Finnie, W et al (eds.), *Edinburgh Essays in Public Law* (1991).

[45] e.g.: Drewry, G (1989) *Select Committees*, Oxford: Clarendon Press.

[46]. this distinction has been drawn by Elliott, M (1981) *The Role of Law in Central-Local Relations*, SSRC to characterise the changes to the structure and functions of local government.

the sole measure of constitutionality. Even if it was, there would be a strong argument for widening our concept of law.[47]

Similarly in constitutional theory, matters are not that simple. As Elliott[48] and Harden[49] have pointed out, it is important to distinguish between two meanings inherent in the idea of "constitution". If used in the *descriptive* sense, the term refers to a snapshot view of the official map of public power.[50] If used in the *normative* sense however, it concerns the normative principles of legitimate government. It is at this second level that much of the debate relating to the British constitution has taken place.[51] Perhaps ironically, it is also the area in which academic opinion is most unsettled. However, this is not just an academic concern - a member of the Bench has recently expressed his concern on this as well. Writing extra-judicially, Sir Stephen Sedley characterises the problem as follows:

> '[I]n this country, we have constitutional law without a constitution, not because our constitution is unwritten, but because our constitution, historically at least, is merely descriptive: it offers an account of how the country has come to be governed; and importantly, in doing so it confers legitimacy on the arrangements it describes. But if we ask what the governing principles are from which these arrangements and this legitimacy derive, we find ourselves listening to the sound of silence'.[52]

It is not possible to consider all the different accounts of British public law in their specific details in this chapter. As such, I shall confine myself to a thematic appraisal, with which

47. e.g. Harden, I & Lewis, N (1986) *The Noble Lie*, Lon: Hutchinson, esp. chap 3.

48. Elliott, M (1981) *The Role of Law in Central-Local Relations*, SSRC.

49. Harden, I (1991) The Constitution and its Discontents, *British Journal of Political Studies*, 489 at 491.

50. See also, Duchacek, I (1973) *Power Maps: Comparative Politics of Constitutions*, Santa Barbara, ABC.

51. Daintith, T (1991) Political Programmes and the Content of the Constitution, in Finnie, W et al (eds.)(1991) *Edinburgh Essays in Public Law*, Edinburgh University Press, p.43.

52. Sedley, S (1994) The Sound of Silence: Constitutional Law without a Constitution, *Law Quarterly Review*, p.270.

others may find the problem of superficiality. I shall instead limit my comments to one or two works to illustrate what appears to be a common detraction of most normative accounts. That detraction centres on the observation that "new styles" of writing in public law do not fill the existing gaps which stimulated the project in the first place.

One problem is that in seeking to demythologise Diceyan principles of the British constitution, public lawyers have formulated broad notions such as participation and rationality, without necessarily *relating* them to the British constitutional experience. What is sometimes forgotten is precisely because those notions appear conceptually new to the Diceyan tradition, their relationship with Diceyan principles have to be articulated. It is in this light that Daintith[53] criticised the works of McAuslan[54] as well as Harden and Lewis.[55] These writers have been concerned about what they perceive to be unconstitutional developments in the modern state, but at the same time, they acknowledge the open-ended test of what counts as 'constitutional'. McAuslan bases his assessment of the constitutionality of the reforms during what is conveniently termed the Thatcher era from various standpoints such as a theory of collective consumption (1983),[56] legitimacy (1985)[57] and public choice (1988)[58]. Similarly, Harden and Lewis appraise current governmental practice from a platform of immanent critique. For them, this critique entails the assessment of the latter based on a consistent audit of the expectations of the British people.[59]

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[53]. in Finnie, W et al (eds.) (1991).

[54]. Administrative law, collective consumption and judicial policy (1983) *MLR* 1; Public Law and Public Choice (1988) *MLR* 681.

[55]. *The Noble Lie* (1986).

[56]. (1983) MLR 1.

[57]. Legitimacy and the Constitution in McAuslan, P & McEldowney J.F(1985)(eds), *Law, Legitimacy and the Constitution*, Lon: Sweet & Maxwell.

[58]. Public Law and Public Choice (1988) *MLR* 681-705.

[59]. *The Noble Lie* (1986) p.10.

Our concern here is with their choice of the criterion of constitutionality. As lawyers,[60] we are bound to enquire about whether there are precedents for a particular test, choice or decision.[61] In the context of our enquiry into constitutional law writing, we manifest this legal habit in our concern with the historical fit of new interpretations of constitutional values as well as new formulations of the test of constitutionality. In other words, the reasoning on the normative values that are thought to underpin the constitution "must connect with the historical development in the British polity".[62] On this test, the claim to "openness" as a constitutional principle reveals the standpoint of the commentator as one aspiring to a vision of what the constitution ought to be.[63]

However, a lawyer's concern with precedents does not mean he or she is bound to accept them, merely that any aberrations be accompanied with reasons. In this second respect also, Daintith finds the accounts of McAuslan as well as Harden and Lewis wanting. McAuslan in his inaugural lecture in 1988 for instance, contrasts the new administrative values such as value for money, consultative procedures, efficiency and management through contract with broad constitutional norms of 'openness, fairness and impartiality'.[64] His choice of words in the former lacks an explanation as to why and how they are constitutional norms. Similarly, Harden and Lewis' use of the constitutional expectations of the British people as a yardstick seem a curious one given that they accept that these expectations have been historically narrow.[65] Loughlin[66] further points out that their justification for this choice of immanent critique is ultimately circular insofar as they contend:

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60. By this I have in mind those who approach issues by drawing upon their legal education though in not so exclusive a manner as to preclude other perspectives.

61. Daintith, T.C (1989) Legal Research and Legal Values, *MLR* 352-68.

62. Daintith, T.C (1991) in Finnie, W et al (1991) Political Programmes and the Content of the Constitution, *Edinburgh Essays in Public Law*, Edinburgh University Press, p.50.

63. There is also the more fundamental point about the nature of normative theorising which positivists argue to be the distinguishing feature of morals as opposed to law. I do not propose to deal with this debate in my essay.

64. (1988) *MLR* p.699.

65. *The Noble Lie* (1986) p.20.

66. (1988) *MLR* 531 p.545.

> '[t]he fact that our analysis of the British constitution has taken the form of an immanent critique...suggests that the proposals here canvassed are for the most part not alien to British traditions, but simply contemporary accompaniments to them'.[67]

The problems considered above can be summarised as follows. The recent attempts to theorise about the constitution have largely moved from the old high plane, where the tendency was to *describe* the way government operated, to a new high plane, where the tendency is to introduce broad non-legal concepts without elaborating its relationship to the tasks of public law. As Daintith argues:

> 'The missing dimension here is some lower-level normative expression of principle which will *relate* a general requirement such as that of openness, to the circumstances of the particular type of governmental tasks.'[68]

In other words, what is needed is some middle-ground approach to conceptualising public law which illuminates the complex context in which it operates. The precise contours of this approach have for instance, been delineated by Neil Walker.[69] He sets himself the task 'to develop a framework of enquiry which addresses with some precision the possibilities, difficulties and limitations inherent in the idea of public law as a distinct and evaluative critical project...'.[70] He argues that the solution which meets this specification must be able to provide 'formal integrity' as well as generate 'substantive integrity'. The former acts like a principle of selection or 'common criteria in terms of which debate might proceed'. The idea of substantive integrity relates to 'a set of principles and forms of institutional design which provide a blueprint for public law'. This method of studying of public law brings us some distance forward, away from the idea that we are merely seeking a method to extract constitutionalism, to the idea that a common method is far more likely to approximate our substantive accounts of the subject.

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67. *The Noble Lie* (1986) p.252.

68. in Finnie, W et al (eds.)(1991), p.49. My emphasis.

69. The Middle Ground in Public Law in W. Finnie et al, eds. (1991) 57-95.

70. ibid. p.62.

As alluded to earlier, the idea of the constitution having both a descriptive and a normative dimension is a product of recent critical insights by public lawyers from law schools at Oxbridge,[71] London,[72] Edinburgh,[73] Sheffield[74] and Warwick.[75] The descriptive and the normative aspects, are inevitably linked, but it is the normative aspect, the study which focuses in particular on the concept of accountability and the study of institutional design, on which I will rely in my analysis of recent reforms to the civil service and in my case study of the Prison Service.

(iii) The methodological orientation of the thesis

Case study research method

This thesis is an exercise in contextual constitutional scholarship not only in terms of its socio-legal orientation as outlined above. It will also be methodologically contextualised in a real-life case-study of the Prison Service, supported by fieldwork in the form of semi-structured interviews with elite civil servants at different echelons of prison administration.

The empirical focus here will be on a case study of the elite civil servants in the Prison Service - (see chapters 6 - 8). I have chosen the case study model because it will enable me to undertake a *contextual* study of events as they occur within a chosen field, according to certain

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71. e.g.: Craig, P.P (1990) *Public Law and Democracy*, Oxford: Clarendon Press; Turpin, C (1995) *British Government and the Constitution*, Lon: Butterworths; Allan, T.R.S (1993) *Law, Liberty and Justice: The Foundations of British Constitutionalism*, Oxford: Clarendon Press.

72. e.g.: Griffith, J.A.G (1992) *Politics and the Judiciary*, Lon: Fontana; Harlow, C and Rawlings, R (1996) *Law and Administration*, 2nd edn.; Jowell, J & Oliver, D (eds.)(1994) *The Changing Constitution*, 3rd edn.

73. e.g.: Finnie, W et al (1991)(eds) *Edinburgh Essays in Public Law*.

74. e.g.: Harden, I & Lewis, N (1986) *The Noble Lie*, Lon: Hutchinson; Graham, C & Prosser, T (1988) *Waiving the Rules*, Open University Press. There are also inter-school ventures such as between Hull and Sheffield as with Birkinshaw, P, Harden, I & Lewis, N (1990) *Government By Moonlight: the Hybrid Parts of the State*, Lon: Unwin Hyman.

75. e.g.: McAuslan, P & McEldowney, J.F (1985)(eds), *Law, Legitimacy and the Constitution*; Loughlin, M (1992) *Public Law and Political Theory*.

theoretical propositions. Yin for instance explains that case studies are employed "especially when the boundaries between phenomenon and context are not clearly evident".[76] Case studies have often in the past been used by researchers in political science where there is a need to track developments within the target administrative area whilst simultaneously preserving the wider socio-legal context of its development.[77]

The case study will comprise: (a) some background discussion of civil service involvement in penal administration and (b) a small-scale empirical study to examine both official and unofficial responses hitherto to civil service reforms which affect the work of civil servants involved in administering prisons in England. The empirical work involves a series of semi-structured interviews with current and former senior civil servants concerned with the work of the Prison Service.

Elite interviewing

The principal fieldwork technique will be semi-structured elite interviewing. Laswell defined the elite as 'the influential'.[78] In my research, my interview respondents comprise mainly civil service elites in the Prison Service at different echelons of management such as the Executive directors in the Prisons Board; Area Managers; and Governors of unit prisons, youth offender institutions and remand centres. Another category of potential interviewees comprises elites outside of the Home Office and the Prison Service. The membership of this category is potentially large and may include spokespersons of bodies with an interest in reforming the administration of the criminal justice system and more specifically, in penal matters, such as the Penal Affairs Consortium, the Prison Reform Trust and the Howard League for Penal Reform. The interviewees eventually consulted by the author for this research are discussed further in chapter 7.

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76. Yin, R.K (1994) *Case Study Research: Design and Methods*. Cal: Sage, 2nd edn., p.13.

77. See for instance: Kellner, P & Lord Crowther Hunt (1980) *The Civil Servants: An Inquiry into Britain's Ruling Class*. Lon: MacDonald; Heclo, H & Wildavsky, A (1981) *The Private Government of Public Money*. Lon: MacMillan.; Osborne, D & Gaebler, T (1992) *Reinventing Government*. Mass; Addison-Wesley; Zifcak, S (1994) *New Managerialism*. Open University Press.

78. see Lasswell, H (1951) *The Analysis of Political Behaviour: an Empirical Approach*, Lon: Routledge & Kegan Paul.

Overview of the thesis

Chapter 1 explains how the research was conceived and developed. It sets out in greater detail the rationale for focusing on: (i) the "Civil Service" as an institutional tile within the mosaic of the "Public Service"; (ii) the "Prison Service" as a subset of the "Civil Service". It will also explain the potential significance of the thesis in the advancement of current research on this subject. It will then outline the methodology for empirical research undertaken as well as the theoretical template to be used to interpret the research data. Due to limitations of time and professional expertise, this review will not engage in substantive comparisons with the civil service models in other jurisdictions.

Chapters 2 - 4 cover the macro-context of British civil service reforms. Chapter 2 sets out a critical review of the *constitutional* context in which post-1979 managerial reforms in the British civil service have taken place. In particular, it argues that the traditional concept of civil servants as 'servants of the Crown' has gradually been eroded by the piecemeal but progressive managerialisation of significant parts of the civil service. The chapter argues that the Executive has been able to transform the civil service through a series of *ad-hoc* managerial reforms due to the peculiar position of the civil service within the British constitution. The civil service does not have a separate legal or constitutional identity but is instead subsumed under the broad umbrella of the 'Executive'. By virtue of this, the Executive has been able to regulate, manage and re-organise parts of the civil service largely on an extra-legal basis i.e. Crown prerogative.

Chapters 3 and 4 then explore some of the other reasons behind the gradual erosion of the concept of 'servant of the Crown'. Chapter 3 argues that the emerging concept of 'public management', or of management in central government, has slowly but noticeably reconfigured the underlying roles and responsibilities of senior civil servants. The central problem from a public lawyer's perspective is that as the empirical practice of civil servants' roles has been updated and broadened to take account of their right to manage, the underlying constitutional model of regulating the civil service as reflected in the constitutional documents

such as the Armstrong memorandum (now the Civil Service Code) and the Ministerial Code (previously Questions of Procedure for Ministers) has remained relatively static.

The survey of policy intentions using official literature in chapter 4 reveals an impoverished conception of management in government, which readily embraces the private sector model in an apparently unquestioning way. Chapter 4 goes on to argue that the managerial reform agenda in the context of the British civil service has 'crowded out' longer-term considerations of constitutional implications in the pursuit of managerial objectives.

Against the broader canvass outlined in chapters 2 - 4, the thesis then looks at the Prison Service as a case study on the problematic consequences of the generic implementation of managerial reforms without sufficient 'pre-implementation' planning, debate or thought on its suitability or feasibility. Chapter 5 sets out the rationale for the case study of the Prison Service, details of the fieldwork as well as the nature of the case study research methodology. Chapter 6 discusses the progress of managerial reforms, outlined in chapters 2 - 4, in the context of the Prison Service. Chapter 7 catalogues the fieldwork data by way of interview narratives in order to minimise the risks of 'researcher bias' by which the *presentation* of the interview data is considered to have been contaminated or influenced by the preconceptions of the interviewer.

Chapter 8 then integrates the fieldwork data into a wider discussion of the case study findings in the light of the body of theoretical discussion set out in earlier chapters. In particular, chapter 8 locates the problems encountered by the Prison Service in its initial years as an agency in the context of 'pre-implementation' factors. It argues that these 'pre-implementation' flaws are symptoms of a much deeper problem with the peculiar position of the civil service within the British constitution. As chapter 2 makes clear, the British civil service does not have a separate constitutional identity and is regulated by the Executive on the basis of extra-legal means i.e. by 'Crown prerogative'.

Chapter 9 revisits the constitutional conundrum raised in chapter 2 by re-examining the wider constitutional backcloth of the issues raised in the case study of the Prison Service. The thesis argues that the underlying problem which permeates the managerial reforms of the civil service

is fundamentally a *constitutional* one insofar as the Executive is able, through its reliance on Crown prerogative, to manage, regulate and re-organise the civil service which is in theory supposed to be impartial of its political masters. The enigma of this fundamental issue has been considered by Parliamentary select committees in both Houses of Parliament recently but their reports have failed to galvanise any discernible political momentum for reform. It may be that there are vested political interests behind the inertia for the *status quo*. The potential for statutory reform may well be limited because the fundamental issue is a high-level question: where should power for the management and regulation of the British civil service reside? This thesis does not advocate that hard law is necessarily the solution to that question because form is not so important as the protection of substantive constitutional norms. If the underlying constitutional norms are subject to constantly shifting interpretations, as this thesis argues they are, then the task of protecting them becomes even more urgent.

Chapter 2

The changing concept of 'servant of the Crown' as a constitutional norm from 1979 - 1997

Introduction: the constitutional enigma

Much has already been written about the programme of managerial initiatives during this period which encompasses the Rayner scrutinies, the Financial Management Initiative, Next Steps agencies, the Citizen's Charter and contracting out.[79] A recurring argument is that as a policy, far from being concerned with the preservation of constitutional conventions, managerialism in the civil service has largely been based on arguments of efficiency at best, and pragmatic convenience at worst. Much of the constitutional law literature that exists, explores the phenomenon of managerialism from the point of its implications for the doctrine of ministerial responsibility. Comparatively little has been written about the impact of managerialism on ministers' constitutional alter-ego, civil servants. No doubt, a major part of this tendency has been due to the indivisibility, in legal and constitutional terms, of civil servants from their ministers, and of the government of the day from the notion of the Crown. In the absence of a codified constitution separating the Executive, the civil service and the Crown, these remain the problematic cornerstones of public administration in Britain.[80] This chapter probes one of the constitutional enigmas which has been sorely exposed as being deeply flawed by the management reforms in the British civil service during the Conservative period in office from 1979-97. The British civil service, like its constitution, has no statutory basis, and like the constitution, is largely run on the prerogative of the Crown, which in modern

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[79]. See e.g., Gretton, J & Harrison, A (1987) *Reshaping Central Government*, Oxford: Transaction Books; Pollitt, C (1993) *Managerialism and the Public Services*, Oxford: Blackwells; Fry, G (1995) *Policy and Management in the British Civil Service*, Lon: Prentice-Hall; O'Toole, B & Jordan, G (1995) *Next Steps: Improving Management in Government?*, Aldershot: Dartmouth.

[80]. See the arguments put forth by Brazier, R in his memorandum to the Commons Public Service Committee (1996-97) HC 313-II, Memorandum 1.

day, means the government of the day. Since their early days in the courts of royalty, the official occupation of civil servants within the British constitution has been encapsulated in the term 'servant of the Crown'. The contention of this thesis is that the concept of 'servant of the Crown', itself relatively untrammelled by Parliamentary or judicial articulation, has been progressively corroded by the managerial programme of reforms in the civil service post-1979. Without a statutory basis for the civil service, the gargantuan administration of central government in Britain, even in this modern day, rests precariously on essentially *political* mechanisms of accountability, namely - the twin conventions of ministerial responsibility to Parliament, and the responsibility of civil servants to ministers - both of which are increasingly over-stretched, to the detriment of civil servants as will be seen later in this chapter, in the light of managerial reforms. This chapter now attempts to address that apparent gap in the literature on managerialism by considering the constitutional context of the programme from the point of the ministers' alter-egos: the civil servants.

By tracking the developments in the constitutional position of civil servants as 'servants of the Crown', this chapter sheds further light on one area which has arguably been overlooked in constitutional literature on managerialism. It asks the fundamental question: 'to whom are civil servants accountable in the new managerial setting: is it to the constitution (Parliament), the ruling party (government) or individual ministers?'. There has tended to be a confusion within the British constitution over the answer to this complex but critical question. This confusion is perhaps most acute in cases where there are tensions between the interests of different ministers within the government, for example in the Westland episode which will be discussed later in this chapter. The term, 'servant of the Crown', is an age-old expression of the constitutional position of civil servants but it does not take us very far, particularly in the absence of a definitive clarification from Parliament or perhaps even the judiciary. This is one of the gaping holes in the British constitution, itself unwritten and amorphous, which is ripe for reform.

This chapter examines the changing notions of 'servant of the Crown' as a constitutional norm, in particular as it is understood in orthodox theory, as it is re-interpreted by the Conservative government (and to a certain extent, acquiesced in by the New Labour government), and as it now manifests in management practice. These are in effect subtle but distinct transformations

which, combined with a managerialist reform agenda characterised by a distinct absence of legal technique, have neglected that critical dimension - the notion of servant of the Crown - constituting the umbilical cord linking the civil service to the British constitution. The changes to the constitutional underpinnings of the civil service have often been obscured by the rhetoric of flexibility, continuity and evolution, poignantly epitomised by then Cabinet Secretary and Head of the Home Civil Service, Sir Robin Butler's recent evidence to the Lords select committee on the public service: 'I do not think it (civil service reform) amounts to a constitutional change, but I suppose it is a characteristic of the British constitution that it evolves all the time'.[81] The precise nature of the managerial 'programme' or 'policy' of reforms during this period, which range from the Rayner scrutinies to the FMI, Next Steps, Citizen's Charter and contracting out will be considered in the next two chapters. The use of the term 'policy' in this context, however, has to be treated with caution. Firstly, it is a matter of fertile debate as to whether the reform of the civil service, or indeed the public service, has been based on a coherent policy. Secondly, the focus on managerial economy, efficiency, effectiveness is not new insofar as it was not invented in 1979, so the critical question then becomes - 'what is novel about the agenda on civil service post-1979'?

'Servant of the Crown': orthodox theory

According to leading textbook writers, "the legal test of a civil servant is that he should be in a non-military service of the Crown, i.e. there must be a legal relationship of master and servant".[82] The orthodox representation of this relationship has tended to be based on *hierarchy* rather than *partnership*. The other key feature of this "master-servant" relationship is that it has also tended to be *protective* rather than *predatory* or *accusatory*. For instance, Lord Beveridge once cast the relationship between civil servant and their master, differently, as "that of the husband and wife in a Victorian household" ,[83] while Sir Douglas Wass first

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81. Select Committee on the Public Service (1997-98) HL55, at para 135 (Q2135).

82. Wade, H.W.R. & Forsyth, C.F (1994) *Administrative Law*, Oxford Clarendon Press, p.57.

83. in his Introduction to a book, Critchley, T.A (1951) *The Civil Service Today*, Lon: Victor Gollancz, p.10.

described "the official (as) the creature and servant of the minister", [84] and later called the relationship "an implicit contract"[85] between politicians and the civil service. But as civil servants are endowed with ever more managerially-oriented tasks and responsibilities in the past two decades, commentators now write of "a very close partnership between politicians and civil servants".[86] The civil service is regulated by a mixture of rules such as the Official Secrets Act 1989; Civil Service Management Functions Act 1992; Deregulation and Contracting Out Act 1994, Orders in Council,[87] the Civil Service Management Code issued under the Order and the Civil Service Code. Nevertheless, the precise legal foundation for the argument that the relationship between civil servants and ministers is no longer hierarchical is arguably far from clear. One of the main reasons for this can arguably be attributed to the unwritten nature of the British constitution insofar as developments on the legal and the constitutional fronts have tended to lag behind, rather than lead, empirical or management practice.[88] As will be seen in later chapters of this thesis, statutes have tended to be used on an *ad hoc* basis such as to confer additional powers on the Crown (e.g the Civil Service Management Functions Act 1992 enabled ministers to delegate to non-ministerial office holders) or withdraw existing privileges (e.g the Criminal Justice and Public Order Act 1994 outlawed industrial action among prison officers).

Despite this rather crowded field of definitions, rules and regulations, there was until relatively recently, however, no clear statement, either statutory or non-statutory, of the notion of civil servants as 'servants of the Crown'. The fact that the characterisation of civil servants as 'servants of the Crown' *preceded* the establishment of the modern civil service is not readily

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[84]. Wass, D (1983) *Government and the Governed*, Lon: Routledge, p.48. Sir Douglas was, until 1983, joint Head of the Home Civil Service.

[85]. Wass, D (1985) The Civil Service At Cross-roads, *Political Quarterly*, at p.228.

[86]. Campbell, C & Wilson, G.K (1995) *The End of Whitehall*. Oxford: Blackwell, p.18. For a slightly different line of analysis, an account of the 'political' roles that civil servants play, see: Christoph, J.B, High Civil Servants and the Politics of Consensualism in Great Britain, in M. Dogan (ed.)(1975) *The Mandarins of Western Europe: The Political Role of Top Civil Servants*, New York: Sage, pp.25-62.

[87]. The current version, made in 1995, was amended by the Civil Service (Amendment) Order 1995 and the Civil Service (Amendment) Order 1996.

[88]. This argument is further developed in chapters 6 and 9 of this thesis.

apparent from most contemporary accounts of the civil service.[89] Up until 1854, the year in which by Sir Stafford Northcote (secretary of the Board of Trade) and Sir Charles Trevelyan (assistant secretary at the Treasury) produced their seminal report which set the basic principles of the modern British civil service,[90] there was no single, unified and cohesive body known as the civil service. So, for example in 1797 when Britain was fighting France, "there was no civil service, no civil servants, no regular pay or hours or leave, no general recognition of even the need for a civil service".[91] Instead, what was in place was an *ad hoc* arrangement by which the King "appointed secretaries to discharge the business of the State (who in turn) had recruited small staffs, personal friends and friends' friends, all servants of the King".[92] The system of remunerating the King's staff and of taxing these remunerations were just as haphazard, and soon, this system of appointment by patronage spawned what seemed like an empire within an empire which had begun to impose noticeable strains on public finances, which prompted Burke to write at the time:

> "Neither the present, nor any other first Lord of the Treasury, has ever been able to make a survey, or even a tolerable guess, of the expenses of government of any one year, so as to enable him with the least degree of certainty...to bring his affairs into compass".[93]

The cost and inefficiency of this closed coterie of servants who were appointed by patronage to service the King, eventually sparked a battery of sustained reforms, first through a cap on spending and through proper auditing of the public expenditure, but soon culminated in a report commissioned by Parliament in 1854. The report, widely known as the Northcote-Trevelyan Report,[94] has often been hailed as "a historic landmark in the evolution of the

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[89]. For a deeper account of the historical background, see e.g. Moses, R (1914) *The Civil Service of Great Britain*, New York: Columbia University; Critchley, T.A (1951) *The Civil Service Today*, Lon: Victor Gollancz; Robson, W (ed.)(1956) *The Civil Service in Britain and France*, Lon: Hogarth Press.

[90]. *Report on the Organisation of the Permanent Civil Service* (1854) HC XXVII, pp.1-23.

[91]. Critchley, T.A (1951) *The Civil Service Today*, Lon: Victor Gollancz, p.27.

[92]. Critchley, T.A (1951), ibid., p.27.

[93]. quoted in Critchley, T.A (1951), ibid., p.28.

[94]. (1854) HC XXVII, pp.1-23.

modern civil service".[95] Set against a widespread political mood to ease the pressures imposed by an expanding class of administrative officers on the public purse, the report, despite some cogent objections from Rev. Jowett,[96] an eminent academic, made two key recommendations: (i) the replacement of appointments by patronage with the introduction of open competitions (which were only to become fully operative during Gladstone's prime ministership in 1880), and (ii) the creation of an independent body, the Civil Service Commission, to control and monitor recruitment. Despite being endowed with rather wide terms of reference to make recommendations to Parliament affecting the long-term future of the civil service, Northcote-Trevelyan, perhaps true to their mandarinate "highly developed sense of caution",[97] made virtually no sustained analysis in their 23-page report on the constitutional position of the civil service. The Report did however recommend steps to professionalise the civil service towards a system of meritocracy and perhaps crucially, it recommended that these reforms should be carried out through statute.[98] Northcote-Trevelyan also set out their vision of the civil service in the following terms: "the Permanent Civil Service...essentially contributes to the proper discharge of the functions of Government".[99] Set within the context of a report which essentially established the modern British civil service, this formulation arguably apotheosises the orthodox model of hierarchical, master-servant relationship between the civil service and the Executive.

A succession of royal commission reports on the civil service which broadly worked towards the progressive professionalisation of the service followed,[100] but the precise status of civil

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95. Critchley, T.A (1951) ibid., p.28.

96. Jowett was Master of Brasenose College, Oxford, and was the only outsider to have submitted his considered evidence to the Inquiry. The letter from Rev Jowett to Sir Charles Trevelyan is enclosed as evidence to the Inquiry, (1854) HC XXVII, pp.24-31.

97. Sir Edward Bridge (1950) *Portrait of A Profession*, Lon: Cambridge, pp5-33, compiled by Chapman, R & Dunsire, A (eds.)(1971) *Style in Administration*, Lon: George Allen & Unwin, pp.44-60, at p.58.

98. (1854) HC XXVII, p.23.

99. (1854) HC XXVII, p.3.

100. e.g. *Report of the (Playfair) Royal Commission on the Civil Service* (1875) Cmd 1113; *Reports of the (Ridley) Royal Commission on Civil Establishments* (1887-90): *First Report* (Cmd 5226); *Second Report* (Cmd 5545); *Third Report* (Cmd 5748); *Fourth Report* (Cmd 6172); *Reports of the (MacDonnell) Royal Commission on the Civil Service* (1912-15): *First Report* (Cmd 6209/10); *Second Report* (Cmd 6534/5); *Third*

servants within the British constitution remained unclear for a period of time, until 1931, when the Tomlin Royal Commission[101] expressed a formula which was to be repeated in subsequent reports by two royal commissions on the civil service.[102] This formula described civil servants as:

> "servants of the Crown, other than holders of political and judicial offices, who are employed in a civil capacity and whose remuneration is paid wholly and directly out of moneys voted by Parliament".[103]

The reforms and benefits which stemmed from the succession of royal commission inquiries helped to shape as much as consolidate an "implicit new contract between the service and the politicians it served".[104] One of Fulton's abiding contributions is that it recommended reforms for strengthening the permanence of the civil service. At the same time, it also proposed the importance of the civil service being adaptable to change:

> 'We propose a simple guiding principle for the future. The Service must continuously review the tasks it is called upon to perform; it should then think out what new skills and kinds of men are needed and how these men can be found, trained and deployed'.[105]

It is perhaps worth noting that the Fulton report is, to date, the most recent royal commission inquiry into the civil service this century. Given this fact, it is arguably unfortunate that the inquiry was precluded from 'examining the place of the civil service in the machinery of

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Report (Cmd 6739/40); *Fourth Report* (Cmd 7338-40); *Fifth Report* (Cmd 7748); *Sixth Report* (Cmd 7832).

101. *Report of the (Tomlin) Royal Commission on the Civil Service* (1931) Cmd 3909.

102. *Report of the (Priestley) Royal Commission on the Civil Service* (1955) Cmd 9613; *Report of the Fulton Committee* (1968) Cmnd 3638, vol.1. For a fuller discussion of Fulton, see eg Fry, G (1986) *The Changing Civil Service*, London: George Allen & Unwin.

103. Fulton (1968) Cd 3638, p.107.

104. Wass, D (1985) Political Quarterly, pp.227-40 at p.228.

105. Fulton (1968) Cd 3638, p.104.

government'.[106] It would thus appear that the uncertainties that surround the concept of civil servants as 'servants of the Crown' have arisen through missed opportunities for clarification in a succession of royal commission reports.

For all its ambiguities, the notion of civil servants as 'servants of the Crown' carried with it, by virtue of custom and practice, certain undertakings implicit in the so-called contract, namely that of anonymity and political neutrality or impartiality.[107] The reforms instituted after the Northcote-Trevelyan and Fulton reports strengthened a third pillar, that of permanence of the civil service. However, just like other conventions of the British constitution, the conventions governing the civil service, were not, in the early days, to be found in any constitutional document, formal or otherwise. They were instead, accepted as matter of course, practice and common sense. The image of the faceless, anonymous, neutral and impartial adviser who enjoys the constitutional protection of its ministers, is nicely captured in Lord Beveridge's analogy, cited earlier, of a Victorian wife vis-à-vis her husband:

> "Like the Victorian wife, the Permanent Secretary (the most senior civil servant in a government department) has no public life; is quite unknown outside the home, wields power by influence rather than directly. Like the Victorian husband, the Minister is *responsible* for the acts and mistakes of the Permanent Secretary, and is expected to be."[108] (emphasis added).

The twin conventions of *anonymity* and *impartiality* are rooted in a distinction between politics and administration which became firmly embedded in the British constitution in the late 17th century.[109] It was during this period that Parliament introduced a number of statutes to tackle

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106. Fry, G (1986) *The Changing Civil Service*, London: George Allen & Unwin, p.7.

107. see Bridge, E (1950) *Portrait of A Profession*, Lon: Cambridge University Press, compiled by Chapman, R & Dunsire, A (eds.)(1971) *Style in Administration*, Lon: George Allen & Unwin, pp.44-60, at p.45.

108. in his Introduction to a book, Critchley, T.A (1951) *The Civil Service Today*, Lon: Victor Gollancz, p.10.

109. see e.g., Moses, R (1914) *The Civil Service of Great Britain*, New York: Columbia University, chapter 1; Lowell, A.L (1926) *The Government of England*, New York: MacMillan, chapter VII; Wass, D (1983) *Government and the Governed*, Lon: Routledge, Lecture 3.

the problem of corruption by patronage which, stretching from the cabinet, the Commons to the civil service, had "poisoned the whole political life of the nation".[110] Statutes were introduced in 1694, 1699 and 1707 to curb the ability of the King to procure the support of Parliament for his reforms through express promises of civil offices and pensions.[111] Parliament also put in place measures in 1705 to limit the number of political offices which a Member of Parliament could hold. By the Act of Anne, and Burke's Act of 1782, Crown servants were also prohibited from lending partisan assistance to Members of Parliament during elections. Perhaps most significant of all, the practice of soliciting and brokering civil offices was also prohibited by an Act of 1809, but as has been noted, this law had not apparently been enforced effectively.[112] The cumulative effect of these measures was not only to draw a definite wedge between political and non-political office, thus sealing the importance of an impartial class of administrators, but also to prevent "the development of anything in the nature of a spoils (or hybrid) system in this country".[113] C.H. Sisson, drawing from his experience as a civil servant earlier this century, suggests that the impartiality of British administrators is a *quid pro quo*, so that officials are able to be "genuinely indifferent to the political colour of the government (they) serve because politicians accept the constitutional limitation of their field".[114] Sisson's view is triangulated by Wass (joint head of the Civil Service until 1983) who wrote in the mid-1980s, that an *implicit contract underpinned the constitutional relationship between civil* servants and their ministers.[115]

The formula which the Fulton Committee adopted was, until the early 1980s, and in the absence of pronouncements from Parliament, or dictums from the court, the only official and

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[110]. Moses, R (1914) *The Civil Service of Great Britain*, New York: Columbia University, p.20.

[111]. see further: Moses, R (1914) *The Civil Service of Great Britain*, New York: Columbia University, pp.19-47.

[112]. Moses, R (1914) *The Civil Service of Great Britain*, New York: Columbia University, ibid.

[113]. Bridge, E (1950) *Portrait of A Profession*, Lon: Cambridge University Press, compiled by Chapman, R & Dunsire, A (eds.)(1971) *Style in Administration*, Lon: George Allen & Unwin, pp.44-60, at p.45. My addition.

[114]. Sisson, C.H (1966) *The Spirit of British Administration, and some European comparisons*, Lon: Faber & Faber, pp109-18, compiled by Chapman, R & Dunsire, A (eds.)(1971) *Style in Administration*, Lon: George Allen & Unwin, pp.448-56, at p.451.

[115]. Wass, D (1985) *Political Quarterly*, pp.227-40.

concrete expression of the convention which governs the constitutional status of civil servants. In the absence of either statutory or judicial basis, the British civil service therefore has no specific legal status, and this remains the case still.[116] Nevertheless, there are patchy and rather circular references in certain pieces of statutes which are essentially *reflections* rather than *sources* of the orthodox conventional position of civil servants as employees of the Crown. For instance, section 2(6), Crown Proceedings Act 1947 which limits tort actions against the Crown, defines Crown officers as "those who have been directly or indirectly appointed by the Crown and who are paid wholly out of the national exchequer".

The ambiguities surrounding the notion of 'servant of the Crown', however, are only a part of the problem in defining the constitutional status of the British civil service. The other problem, as hinted earlier, is that there is similar confusion surrounding the concept of 'the state' within which the civil service has also been anchored. The Superannuation Act 1965, for instance, defines the civil service, in a somewhat circular fashion, as 'the civil service of the State' [s 98(1)]. This is a peculiar manner of expression not least because the state is neither a concept nor an independent entity which is given legal form or expression by the British constitution. The reticence of the British constitution on key concepts, for instance the Crown, has on occasion allowed the Executive to inject their own interpretation: the Armstrong memorandum,[117] which endowed the Crown with essentially the same meaning as its ministers, is perhaps a classic example. The lack of legal form of the 'state' in the United Kingdom represents, to many commentators,[118] a perpetually insecure scaffold for the British constitution which explains, in part, the confusion even among judicial experts on the meaning of national

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116. Within Britain however, the civil service is sometimes differentiated from 'public service' which encompasses not only the civilian staff who work in government departments but also civilian personnel working in the armed forces, the judiciary, local government, public corporations, schools and universities, the police and other agencies: see further, *The Blackwell Encyclopaedia of Political Institutions* (1987).

117. as per earlier citation, see HC Debs. vol.74, cols.128-30 (WA), 26 Feb 1985, and revised in HC Debs. vol.123, cols.572-5 (WA), 2 Dec. 1987.

118. see e.g., Marshall, G (1971) *Constitutional Theory*, Oxford Clarendon Press, esp Chapter II; Dyson, K (1980) *The State Tradition in Western Europe*, Oxford: Martin Robertson; Harden, I & Lewis, N (1986) *The Noble Lie*, Lon: Hutchinson; Prosser, T (1982) Towards A Critical Public Law, *Journal of Law and Society*, pp.1-19; Prosser, T (1996) Understanding the British Constitution, *Political Studies*, pp.473-87; Himsworth, C.M.G (1996) In A State No Longer: the End of Constitutionalism, *Public Law*, pp.639-60.

interests of the state on the one hand, and those of the government of the day on the other. For instance, in *Chandler v DPP,*[119] counsel for the civilian appellants, who had attempted to enter and immobilise an airfield, a prohibited place under the 1911 Act, tried to argue that the phrase 'interests prejudicial to the safety or interests of the State' under s2(1) meant the inhabitants of the country and not just the organs of government. The House of Lords, in upholding their convictions, unanimously rejected this argument, but only by interpreting 'the interests of the state' in rather disparate ways: as 'the organised community' (per Lords Reid and Hodson), as 'the organs of government of a national community' (per Lord Devlin), and as 'the interests of the State according to the policies laid down for it by its recognised organs of government and authority' (per Lord Pearce).

Over two decades later, the issue resurfaced when Clive Ponting, an Assistant Secretary in the Ministry of Defence, was prosecuted under the same section for passing on a set of internal documents classified as 'TOP SECRET' and 'CONFIDENTIAL' relating to the sinking of an Argentinian vessel, The Belgrano, during the Falklands war to an unauthorised person (Tam Dalyell MP). During the trial, Ponting's solicitors attempted to argue that though unauthorised, the act of disclosure was justified because he was performing a moral and civic duty in helping to shed proper and accurate light on a written Parliamentary question legitimately posed by a Member of Parliament. In his summing up, McCowan J, directed the jury on the meaning of 'interests of the state' by adopting the narrow definition given by Lord Pearce in *Chandler.*[120] Despite this strong guidance towards a conviction from the judge, Ponting was eventually acquitted by the lay members of the jury. Although s2(1) of the 1911 Act has now been replaced by a new provision in the Official Secrets Act 1989, this does not necessarily constitute an improvement because Ponting could still have been charged under the 1989 Act which specifically excluded a public interest defence. These cases illustrate not only the unfortunate reluctance of the British judiciary in giving substance to the concept of the 'State', an essentially impoverished and ill-defined notion within the British constitution,[121] but

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[119]. *Chandler v DPP* [1964] AC 763, HL.

[120]. see *R v Ponting* [1985] Crim LR 318.

[121]. cf. the expansive approach taken by the European Court of Justice in *Foster v British Gas PLC* [1991] AC 306.

also how ill-equipped the judiciary can be when arbitrating the dilemmas of conscience affecting the civil service.

'Servant of the Crown': new slants on old theory

The underlying role of civil servants as 'servants of the Crown' arguably changed during the Conservative administration from 1979-1997. As will be seen later in this thesis, it was during this period that noticeable chinks slowly began to emerge in the hierarchical, master-servant relationship, or in what Wass, as noted earlier, has called "the implicit new contract between civil servants and politicians".[122] While there may have been episodes in which this implicit contract was executed according to the terms as they are understood in conventional theory of ministerial responsibility (e.g. Crichel Down, Westland, Maze prison escape, Falklands), gradually, the nature of the relationship began to change from that of a *protective* hierarchy to more of a *predatory* hierarchy in which the boundaries of burdens and responsibilities are constantly shifting, some would argue, to the disadvantage of civil servants.

The background in which the orthodox model has been reoriented is provided by a sustained programme of reforms to improve the management of the civil service (see further chapter 3). While there may have been a progressive *cultural* revolution for the improvement of the machinery of management of the civil service in pursuit of efficiency, effectiveness and economy, the inadequacy of the *constitutional* values and principles which once preserved and protected the civil service began to emerge. The notion of an *anonymous* civil service has been severely qualified in a number of important ways by what a former Under-Secretary calls "the legitimate non-facelessness"[123] of senior civil servants, as to stretch the concept of anonymity to incredulous proportions. Firstly, permanent secretaries, in their capacities as departmental accounting officers, are personally responsible to the Public Accounts Committee for the legality of departmental expenditure. This unique position allows civil servants qua

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122. Wass, D (1985) *Political Quarterly*, pp.227-40, at p.230.

123. Johnstone, D (1986) Facelessness: Anonymity in the Civil Service, *Parliamentary Affairs*, pp.407-39.

accounting officers the legitimate ability to reveal the advice they have given to ministers, where their advice has been ignored or overruled by ministers. The importance of this forum for officials to give their version of events is highlighted in the Pergau Dam affair[124] which involved ministerial authorisation of overseas aid towards the development of a hydro-electric project in Malaysia despite civil servants' advice that the expenditure was an uneconomical (and thus illegal) use of public money according to the criteria set out in statute.[125] The grant of the aid was subject to judicial review in a case brought by a pressure group,[126] and there, the Divisional Court, relying in part on the fact that ministers ignored civil servants' advice about the economics of the development project, held the grant to be *ultra vires*. Secondly, it is now common practice that civil servants are named in the reports of the Parliamentary Commissioner of Administration in his investigations of complaints of maladministration. Thirdly, under the reform of select committees in 1979, departmentally-related select committees are endowed with the remit to investigate the expenditure, administration and policy of the department they shadow. According to rules enshrined in Standing Orders 93 and 95(5)(a) of 1983, select committees can also send for persons (ministers and civil servants), papers and records relevant to their terms of reference.[127] These rules are now largely consolidated in a document normally referred to as the Osmotherly rules,[128] which are guidelines published by the government without either Parliamentary standing or approval, but their function in regulating the conduct of civil servants when giving evidence to select committees of both Houses of Parliament has by practice been acquiesced to by those committees. A further inroad into the precious sanctum of civil service anonymity has come

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124. The problems raised by the Pergau Dam expenditure first emerged in the Comptroller and Auditor General's Report, see: National Audit Office (1992-93) Report: *The Pergau Hydro-Electric Project*, HC 908. The matter was then subsequently investigated by two Commons select committees, see: Foreign Affairs Committee (1993-94) *Public Expenditure: The Pergau Hydro-Electric Project*, HC 271; Public Accounts Committee (1993-94) *The Pergau Hydro-Electric Project*, HC 155.

125. Overseas Development and Co-operation Act 1980, s1.

126. *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement* [1996] 1 WLR 386, on which see Hare, I [1995] Judicial Review and the Pergau Dam, *CLJ* 227; Harden, I, White, D & Hollingsworth, K (1996) Value for Money and Administrative Law, *Public Law*, pp.661-81.

127. see generally, Drewry, G (1989) *The New Select Committees: a study of the 1979 reforms*, Oxford Clarendon Press, second edn.

128. Cabinet Office (1997) *Departmental Evidence and Response to Select Committees* (the Osmotherly rules).

through a recent revision of the Osmotherly rules in 1997: now, chief Executives of the Next Steps agencies can also be called to account before select committees, albeit not "to give evidence to select committees on his own behalf about what he has done as head of an agency", as the TCSC[129] would have liked, but on behalf of the minister, pursuant to "that Minister's instruction".[130]

On the one hand, these key incursions into the multi-layers of civil service anonymity can be seen within the context of helping to improve explanatory accountability as well as to open up the closed world of government. However, there are episodes in which the prerogative of ministers has been exercised (or abused) to keep civil servants at bay from the inquiries of select committees. The way in which the Executive can manipulate the civil service for their own ends of self-preservation and political point-scoring is poignantly illustrated in the Westland case.[131] The episode involved a fundamental disagreement between Michael Heseltine (then Defence Secretary) and Sir Leon Brittan (then Trade and Industry Secretary) about the preferable option to bail out Westland plc, a British helicopter manufacturer which was caught in a financial mire. Heseltine was angling for a rescue package by a European consortium but Brittan wanted to entertain other bids which came mainly from a US-owned firm. Each tried, through their press briefings, to rally public opinion to their way of thinking on this issue, but the key incident arose from the disclosure of a confidential letter from Sir Patrick Mayhew, then Solicitor-General, to Michael Heseltine, advising him that his response to a commercial bank representing the European consortium of helicopter manufacturers might contain "material inaccuracies". It later emerged that Colette Bowe, a civil servant, had leaked the letter to the media, not of her own volition, but on the instructions of Brittan. In purporting

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[129]. see e.g. TCSC (1987-88) *Civil Service Management Reforms: the Next Steps*, HC 494-I, para 46; TCSC (1993-94) *The Role of the Civil Service*, HC 27-I, para 171.

[130]. Osmotherly Rules (1997) para 43 states: '...While Agency Chief Executives have managerial authority to the extent set out in their Framework Documents, like other officials they give evidence on behalf of the Minister to whom they are accountable and are subject to that Minister's instruction'.

[131]. for a detailed account of the Westland case, see Linklater, M & Leigh, D (1986) *Not With Honour: the Inside Story of the Westland Scandal*, London: Sphere Books. For a discussion of the public law issues, see Oliver, D & Austin, R (1987) Political and Constitutional Aspects of the Westland Affair, *Parliamentary Affairs*, pp.20-40.

to unravel the causes behind the leak, the Defence Select Committee[132] summoned key civil servants from Downing Street and the DTI including the latter's Director of Information and Principal Private Secretary but these requests were refused by the Prime Minister on the arguably precarious grounds that to do otherwise would bring about "major implications for the conduct of government and for relations between ministers and their private offices".[133] This anomaly is now apparently tackled by the 1997 edition of the Osmotherly rules, paragraph 42 of which provides that in cases where officials are summoned contrary to the Minister's wishes, select committees can issue an order of attendance and request the relevant House to enforce it. So, it now seems that, come what may, the officials "would have to appear before the Committee but, in all circumstances, would remain subject to Ministerial instructions" under the terms of the Osmotherly rules and *the Code of Practice on Access to Government Information.* This rule consolidates the position in which ordinary civil servants, unlike Accounting Officers, are still unable to step outside the shadows of their ministers, however wayward, in order to facilitate legitimate inquiries by select committee into suspected mischief or malpractices at ministerial level.

As with the notion of anonymity, the principle of a *permanent* civil service has also gradually been eroded.[134] The permanence of a career civil service, which has long given "a kind of inner life to government",[135] has been compromised by the use (or abuse) of Executive discretion, or Crown prerogative, in appointing key officials and advisers of their choice. In 1965, Barbara Castle, then Labour's Transport Secretary, attempted to, but found that she could not, dismiss Sir Thomas Padmore, her permanent secretary. The constitutional difficulty which beset Castle was that the power of hire and fire of the generalist civil servants lies with the Crown, or in practical terms, the Government, rather than with individual ministers.

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[132]. Defence Committee (1985-86) *Westland plc: the Government Decision-making*, HC 519.

[133]. cited in Oliver, D & Austin, R (1987) Political and Constitutional Aspects of the Westland Affair, *Parliamentary Affairs*, pp.20-40, at p.31.

[134]. On this theme of politicised appointments, see especially, Plowden, W (1994) *Ministers and Mandarins*, Lon: IPPR, pp.88-98; Richards, D (1997) *The Civil Service under the Conservatives, 1979-1997*, Sussex Academic Press, chapter 1.

[135]. Heclo, H (1984) *Washington and Whitehall Revisited: An Essay in Constitutional Lore*, paper presented at the British American Festival, Durham, North Carolina, 12-13 June, cited in Wass, D (1985) *Political Quarterly* at p.229.

During their period in office, the Conservative administration overcame this hurdle through a series of arguably innovative management restructuring. So when Margaret Thatcher, in exercising her PM-related role as Minister for the Civil Service, abolished the Civil Service Department in 1981 and brought about the premature retirement of Sir Ian Bancroft and Sir John Herbecq, respectively the civil service head and deputy head who had served the previous Labour government. Similarly, when a new Office of Public Service and Science (OPSS) was established in 1992, William Waldegrave effectively removed Sir Peter Kemp, then manager of the Next Steps project, by failing to appoint him as the permanent secretary for the OPSS. The restructuring effected along Next Steps lines has also brought with it, an instability in tenure of office. When the Prison Service became an agency in April 1993, Derek Lewis, formerly chief Executive of Granada Group and UK Gold TV with no previous experience of prison or public administration, was chosen via open competition to fill the position of chief Executive over Joe Pilling, the internal incumbent favoured by the prison staff.[136]

The broader issue of whether the Conservative government was politicising the civil service in the sense of appointing political sympathisers to key positions in the Senior Civil Service came into sharp focus even back in the 1980s: for example, in 1987, the Royal Institute of Public Administration conducted its own empirical survey and concluded that there was no evidence of overt politicisation.[137] In a research published ten years later, David Richards also reaches similar conclusions, but he argues that the typical profile of those promoted or appointed during the Thatcher period, rather than being Conservative sympathisers, are "managerially-oriented, can-doers".[138] Arguments of politicisation are however only one strand of the debate; the other issue, that of job impermanence, insecurity or instability, is not so easily dispensed with.

Early indications are that the apparent trend of civil service employment instability, so criticised by the Labour Party when in opposition, seems unlikely to be reversed by them now

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[136]. Pilling was moved sideways into the Department of Health, and is, at the time this thesis was written, permanent secretary of the Northern Ireland Office.

[137]. RIPA (1987) *Top Jobs in Whitehall: Appointments and Promotions in the Senior Civil Service*, Lon: RIPA.

[138]. Richards, D (1997) *The Civil Service under the Conservatives, 1979-1997*, Sussex Academic Press, p.234.

that they are in government. Barely a year into office, Robin Cook, the Foreign Secretary, citing reasons of personal and political differences, brought about the early retirement of Anne Bullen, his diary secretary, amidst claims by the Conservative Opposition that he was intending to pave way for the appointment of his then companion as successor.[139] There have also been casualties at higher levels: according to recent reports, the directors of information (or senior press officers) in the Lord Chancellor's Department, Department of Trade and Industry, the Northern Ireland Office, and the Scottish Office have all left the civil service prematurely for the private sector.[140] The contemporary landscape of employment instability (charted in **Appendices A and B** at the end of this chapter) is a stark contrast to Sir Edward Bridges'[141] time when appointments made by the previous Minister were left undisturbed by subsequent administrations.

Beyond the headline episodes relating to employment impermanence and job insecurity charted above, there is a complex legal question which underlies the employment status of civil servants. To understand this, we need to explore the legal framework governing the employment of civil servants. Traditionally, the Crown holds prerogative powers in the appointment and dismissal at will of civil servants. There has in recent times been some statutory and common law clarification on the issue of the right of the Crown to appoint its servants. There is now legislation[142] which creates the presumption that for limited purposes, civil servants are employed under contracts of employment. There is an old common law authority which holds that where there is a contract of service, the plaintiff may be able to sue for salary due before the period of dismissal.[143] The position is also now, arguably, significantly better in the light of recommendations in the Government White Paper on the

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139. see e.g. Perkins, A & Norton-Taylor, R (1998) Cook Attacks Ousted Secretary. *The Guardian*, 28 January, p.8.

140. see Abrams, F (1998) Lord Irvine aide to quit, *The Independent*, 17 April, p.8.

141. Sir Edward Bridge (1950) in Chapman, R & Dunsire, A (eds.)(1971) *Style in Administration*, Lon: George Allen & Unwin, pp.44-60, at p.45.

142. see s.30 Employment Act 1988 consolidated in s.245 Trade Union and Labour Relations Consolidated Act 1992.

143. *Kodeeswaran v AG of Ceylon* [1970] AC 111, PC.

Civil Service[144] and the TCSC Inquiry on The Role of the Civil Service.[145] With effect from April 1996, the new Senior Civil Service Grade, proposed in the 1994 White Paper,[146] was put on written contracts. However, as Mark Freedland[147] argues, this exercise generates more questions than it does answers. In particular, Freedland suggests that the law is not quite clear on several key issues: firstly, whether the prerogative of the Crown is now embedded in the contract, or has it been effectively superseded by the existence of contracts. This question is important insofar as it asks whether the contract is now the exclusive source of all employment rights and responsibilities of the Senior Civil Service, or does the Crown still retain any residual power to dismiss or vary the terms of the contract?. Early authorities in the form of a judgment from the Court of Appeal suggest that "there is nothing unconstitutional about civil servants being employed by the Crown under contracts of service",[148] and that once an appointment has been made, the Crown has no right to alter at will the terms of employment of any civil servant.[149] The second issue relates to whether the prerogative power to dismiss, if still extant, can be excluded by contract or by statute. At common law,[150] the Crown still retains a prerogative to dismiss without notice any civil servant, and so the aggrieved party will be left without the protection of civil law remedy for wrongful dismissal. The potential difficulties left by this apparent anomaly re-surfaced when Derek Lewis brought an action against the then Home Secretary, Michael Howard over his dismissal as Director General of the Prison Service Agency. The issue never reached judicial determination because the Home Office's offer to pay pecuniary compensation without admitting liability was ultimately accepted by Lewis. Apart from the common law, there are other avenues for civil servants to seek redress for wrongful dismissal, namely the public law action for judicial review as well as recourse to internal mechanism for dispute resolution in the form of the Civil Service Appeal

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144. (1994-95) Cm 2627 pp.36-38 and 43-45.

145. (1993-94) HC 27-I, para 302.

146. (1994-95) Cm 2627 pp.36-38 and 43-45.

147. Freedland, M (1995) Contracting the Employment of Civil Servants - A Transparent Exercise? *Public Law* 224-33.

148. *R v Civil Service Appeal Board ex p Bruce* [1988] 3 AER at 694.

149. *R v Civil Service Appeal Board ex p Bruce* [1988] 3 AER at 698.

150. See e.g.: *Dunn v R* [1896] 1 QB 116; *Hales v The King* [1918] 34 TLR 589; *Denning v SoS for India* [1920] 37 TLR 138; *Riordan v War Office* [1959] 1 WLR 1046.

Board. As a body established under prerogative powers, the decision of the Board is itself subject to judicial review and it has certain duties to give reasons for its decisions.[151] Despite various suggestions for reform,[152] the Parliamentary Ombudsman does not have jurisdiction to deal with complaints on civil service personnel issues.[153] So it would appear that the Crown through its ministers still retains the upper hand in deciding whether to dismiss civil servants, a situation which underlines the changing nature of hierarchical relationship between minister and civil servant, moving from the role of 'protector' to that of 'predator'.

Apart from the uncertainties over the validity of the principles of anonymity and permanence considered above, recent management reforms have also contributed to the confusion surrounding the third pillar thought to underlie the implicit contract between civil servants and the Crown, namely that of *impartiality*. Early accounts of this concept focus on the role and contribution of civil servants towards the processes of policy-making and policy-implementation.[154] The modern-day reality of the relationship between civil service and the government of the day, or between civil servants and ministers, has been far more complex than that. Commentators now characterise the relationship in a different jargon. For instance, Campbell and Wyszomirski[155] argue that the legitimacy of the civil service derives not from its political neutrality - which itself is rather questionable - but instead from "its relative preparedness to change clients from one party to another". In an earlier article, Rose[156] similarly suggests that the modern civil servant is, far from being non-political, rather politically promiscuous. In a recent work, Campbell and Wilson conclude that the nature of

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151. *R v Civil Service Appeal Board ex p Bruce* [1988] 3 AER at 699.

152. See e.g. Memo of the PCA to the Select Committee on the Parliamentary Commissioner, Fourth Report (1977-78) HC 615, p.150.

153. Schedule 3, para 10 Parliamentary Commissioner Act 1967.

154. see e.g.: Christoph, J.B, High Civil Servants and the Politics of Consensualism in Great Britain, in M. Dogan (ed.)(1975) *The Mandarins of Western Europe*, New York: John Wiley & Sons; E. Bridges, Portrait of A Profession in Chapman, R & Dunsire, A (eds.)(1971), *Style in Administration*, Lon: George Allen Unwin, p.52.

155. Campbell, C & Wyszomirski, M.J (1991) *Executive Leadership in Anglo-American Systems*. University of Pittsburgh Press, p.15.

156. Rose, R (1987) Steering the Ship of the State, *British Journal of Political Science*, pp.409-53.

the minister-civil servant relationship is more akin to "a close partnership".[157] Whilst an intimate relationship between bureaucrats and politicians may facilitate smooth, effective and efficient governance, critical questions of a constitutional nature start to arise if that professional intimacy is betrayed in such a way as to create ethical dilemmas for civil servants. This can happen in a number of situations, for example if the official is asked or coerced by the minister to act in an improper manner (as, for example, in Westland), or if the official is in a situation as to be aware of malpractice of colleagues on behalf of their ministers, or of the ministers themselves (as, for instance, in Ponting).

Up until the mid-1980s, it was not entirely clear how ethical issues faced by civil servants ought to be resolved. The rules and guidelines which have been developed in a piecemeal and *ad hoc* fashion over time, have helped to clarify the basic principles of proper conduct and grievance procedures. Unfortunately, as matters stand, the rules relating to the proper conduct of civil servants and ministers are to be found, not in a unified document, but in separate non-statutory codes circulated almost exclusively within the closed respective communities of ministers and civil servants. Civil servants are now governed by the Civil Service Code introduced in 1996, in addition to the Civil Service Orders in Council and the Civil Service Management Code. The standards for ministerial conduct are to be found in the Ministerial Code.[158] Previously called the Question of Procedure for Ministers, this document has always been hidden from public view until its publication by John Major in 1992. The earliest guidance for the civil servants first came in an internal memo circulated to all permanent secretaries by Lord Armstrong in the aftermath of the Ponting trial. It is perhaps legitimate to ask why the government responded to the important constitutional issues raised by the Ponting case by ordering an internal inquiry by the Head of the Home Civil Service rather than to initiate a Parliamentary debate on, or a select committee inquiry into, the wider issues.

The Armstrong memorandum itself has also been criticised on other grounds, namely that: (i) it presented a lop-sided view of the responsibilities of civil servants, and it failed to seize the opportunity to protect the civil service against the encroachments of an interventionist

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157. Campbell, C & Wilson, G.K (1995) *The End of Whitehall*. Oxford: Blackwell, p.18.

158. Cabinet Office (1997) *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers*.

Executive by charting out the rights of civil servants;[159] and (ii) the procedure for resolving disputes through the internal line management has, as the TCSC noted in 1993,[160] only ever been used once in relation to a conscientious objection about a department's approach to theoretical research. The lack of frequency of its use may well be an indicator of the success of internal grievances resolution, but it does not escape notice that the Armstrong procedures, whilst they were still valid, had apparently not been resorted to by civil servants in the arms to Iraq affair. The dangers of too cosy a partnership between ministers and civil servants, as much as the inadequacies of the formal procedures set out in the Armstrong memorandum, were exposed, not only during the Scott Inquiry, but also earlier in the 1980s during the Westland affair. Sir Leon Brittan, then Defence Secretary, authorised Colette Bowe, Director of Information in the Ministry of Defence, to publicly disclose a letter from the Solicitor-General which implicated Michael Heseltine, then Trade and Industry Secretary. A civil servant who followed the letter and spirit of the Armstrong memorandum could not in any way be blameworthy because paragraph 4 of the memorandum stated in peremptorily narrow terms that "the duty of the individual civil servant is first and foremost to the minister of the Crown who is in charge of the department in which he or she is serving". Armstrong does not appear to have countenanced the position where there is a conflict between different ministers' interests such that the civil servant, in obeying one, would be violating the other. Kellner and Crowther-Hunt capture the situation well when they say, "the civil service remains a concept governed by administrative convenience rather than by legal authority".[161]

A central theme in the relations between government and the civil service (as servants of the Crown) in the past decade or so has been that there is much potential for Parliamentary control over the civil service to be not so much *exercised through* ministers, as to be *manipulated by* ministers. This theme is explored further in the next section.

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[159]. See: Plowden, W (1994) *Ministers and Mandarins*, Lon: IPPR, p.112; Tomkins, A (1998) *The Constitution After Scott*, Oxford University Press, pp.79-81.

[160]. TCSC (1993-94) HC 27, para 97.

[161]. Kellner, P & Lord Crowther Hunt (1980), *The Civil Servants: An Inquiry into Britain's Ruling Class*, Lon: MacDonald & Jane's, p.11.

'Servant of the Crown': partners in management practice?

As alluded to in the previous chapter, the Conservative administration openly pursued a policy of managerialising the civil service through a number of key reforms. The Financial Management Initiative[162] began with the apparently modest objective of improving the effectiveness with which resources were used through a clear statement of objectives, an identification of the cost centres and a clear delegation of responsibilities to unit managers. FMI failed to galvanise the management culture in the civil service, and in 1988 was replaced by the Next Steps programme,[163] which established Executive agencies as off-shoots of government departments. The basic principle of Next Steps is that the *operational* functions (such as the delivery of services and the implementation of policy) should be separated from the *Executive* functions (such as policy advice and ministerial support work). Executive agencies are not creatures of statutes but are instead established by a simple reorganisation of departmental structures: in place of previously hidden internal blocks of responsibilities are discrete boards of management led by chief Executives with some generic responsibilities set out in framework documents, annual performance targets and key performance indicators. By the end of 1997, "some 383,000 Civil Servants (representing 76% of the total) work in 138 agencies and 4 departments operating on Next Steps lines".[164] Next Steps agencies, like their parent departments, are subject to the requirements of market-testing set out in the Competing for Quality[165] White Paper in 1991, as well as to the objectives set out in the Citizen's Charter.[166] Arguably, the cumulative effects of these reforms are not only to expose the civil service in ways never witnessed before but also to transform the implicit contract between civil servants and ministers from a protective hierarchy to that of a competitive, predatory one.

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162. *Efficiency and Effectiveness in the Civil Service* (1982-83) Cm 8616.

163. proposed in a report under the direction of Sir Peter Kemp: Efficiency Unit (1988) *Improving Management in Government*, Lon: HMSO.

164. *Next Steps Review 1997*, Cm 3889.

165. Cm 1730 (1991).

166. Cm 1599 (1991).

It was against this background of uncertainty at best, and confusion at worst, that the government published its White Paper to address the growing concerns about the future of the civil service.[167] The Treasury and Civil Service Select Committee also conducted its own inquiries into the constitutional role of the civil service.[168] Two months later, the government published its response to the TCSC report as well as the responses received on its original White Paper.[169] These, combined with the inquiries of by Scott LJ (now Sir Richard Scott) into the background to the sales of arms to Iraq,[170] and those of the Nolan Committee into the issue of standards in public life,[171] all contributed to the sense of urgency of taking stock of the impact of the Executive behaviour on the constitutional principles which underpin the complex processes of government. More recently, the Public Service Committee, the successor to the TCSC, also published the findings of its inquiries into the nature of minister-civil servant relations.[172] All these seem to suggest a vigorous momentum in the attempt to clarify the principles underlying the civil service, but what have they achieved, and more specifically for present purposes, how do they impact on the notion of 'servant of the Crown'?

It would seem, that the overall effect of these inquiries has been three-fold in terms of the way the responsibilities and burdens of that implicit contractual relationship has been slowly and subtly shifted from the minister to the civil servant. This has been achieved via an unfortunate trilogy of obscure distinctions with equally suspect foundations, namely through: the phrase of 'knowingly mislead'; the distinction between 'policy and operation'; and the separation of 'ministerial responsibility' from 'ministerial accountability'.[173] By redrawing the boundaries of ministerial responsibilities through these avenues, the government has in effect heaped more onerous burdens upon the civil service. Since these distinctions go to the heart of two fairly recent episodes of constitutional import, in particular the events which formed the subject of

167. *Continuity and Change*, 1994, Cm 2627.

168. *The Role of the Civil Service*, 1993-94, HC 27.

169. *Taking Forward Continuity and Change*, 1994, Cm 2748.

170. (1995-96) HC 115.

171. (1994-95) Cm 2850.

172. (1996-97) HC 313.

173. see generally, Tomkins, A (1998) *The Constitution After Scott*, Oxford University Press, chapter 1.

the Scott Inquiry, and the dispute between Michael Howard (then Home Secretary) and Derek Lewis (former chief Executive of the Prison Service), some attention will be paid on how each of these came about.

The origins of the phrase 'knowingly mislead' can be traced to a letter dated 5th April 1994 from John Major, then Prime Minister, to the TCSC's inquiry in 1993 into the role of the civil service. In an apparent attempt to breathe a new interpretation into paragraph 27 of the 1992 edition of *Questions of Procedure for Ministers* (QPM),[174] Mr Major stated that "it is clearly of paramount importance that ministers give accurate and truthful information to the House. If they *knowingly* fail to do this, then they should relinquish their positions except in quite exceptional circumstances, of which devaluation or time of war or other danger to national security have been quoted as examples".[175] The issue of how much light ministers should shed on the closed corridors of government is not new, and has had an earlier reincarnation in a memorable admission by Lord Armstrong (then Cabinet Secretary), when cross-examined by defence counsel, Malcolm Turnbull, in the Spycatcher[176] trial in New South Wales, that he had been "economical with the truth" with certain aspects of his evidence. Lord Armstrong's successor, Sir Robin Butler, exorcised his predecessor's ghost when giving evidence to the Scott Inquiry by asserting that "Half a picture can still be true".[177] Scott criticised this approach on the grounds that "if part of the picture is being suppressed and the audience does not know it is being suppressed, the audience will be misled into believing the half picture to be the full picture".[178] The Nolan Committee on Standards in Public Life which was

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174. Para 27 of the *QPM* (1992) provided that: "Each Minister is responsible to Parliament for the conduct of his or her Department, and for the actions carried out by the Department in pursuit of Government policies or in the discharge of responsibilities laid upon him or her as a Minister. Ministers are accountable to Parliament, in the sense that they have a duty to explain in Parliament the exercise of their powers and duties....This includes the duty...not to deceive or mislead Parliament and the public".

175. cited in the government's response, *Taking Forward Continuity and Change*, 1994 Cm 2748, to the recommendation in para 134 of the TCSC's report on *The Role Of The Civil Service*, 1993-94 HC 27. Emphasis added.

176. *AG v Heinemann Publishers (Australia) and Peter Wright*, the full extracts of which can be found in Fysh, M (ed.)(1989) *The Spycatcher Cases*, Lon: European Law Centre, pp.349 et seq. Also see, Mann, F (1988) Spycatcher in the High Court of Australia, *LQR* pp.497-50; Turnbull, M (1989) Spycatcher, *LQR* pp.382-6.

177. cited by Scott LJ himself in (1995-96) HC 115-I, para D4.55.

178. (1995-96) HC 115-I, para D4.55.

established in October 1994,[179] examined the issue of the relations between ministers and Parliament in its first report and concluded that there was still a lack of clarity about the standards of conduct expected of ministers, and by implication, of their official alter-egos, i.e. their civil servants as well.[180] While the Nolan report only stated that "ministers must not mislead Parliament",[181] the government, in its response to the Nolan report,[182] seemed determined not only to maintain the phrase "knowingly mislead" but also to leave open the possibility that information can be legitimately withheld "if disclosure would not be in the public interest".[183] Scott LJ, in dealing with these two assertions in his inquiry into the conduct of ministers and civil servants during the arms to Iraq affair, took the view that the first principle, that the act of issuing misleading statements in ignorance of the true facts, has never been regarded as a breach of the ministerial obligation of honesty.[184] As for the allowable exceptions to the principle of open government, Scott stated that the key considerations "should never be based on reasons of convenience or for the avoidance of political embarrassment, but should always require special and carefully considered justification".[185]

The formula which is now enshrined in the Ministerial Code, the successor document to QPM introduced by the New Labour government in July 1997, simply states, apparently without the qualifications indicated in John Major's letter in 1994, that "ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister".[186] This expression was in fact coined by the previous Conservative administration, in their revision of the old QPM in November 1995,[187] in response to the recommendations by the first Nolan report. There are very real problems that the phrase 'knowingly mislead' has been introduced

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[179]. (1994-95) Cm 2850.

[180]. (1994-95) Cm 2850, chapter 3.

[181]. (1994-95) Cm 2850, para 3.16 (ii).

[182]. (1994-95) Cm 2931.

[183]. see (1994-95) Cm 2931, Annexe A.

[184]. (1995-96) HC 115, para K8.5.

[185]. (1995-96) HC 115, para K8.5.

[186]. Cabinet Office (1997) *Ministerial Code*, para 1(iii).

[187]. see HC Debs, vol 265, col 456, 2 November 1995.

into the Ministerial Code such as to revise the orthodox principle of individual ministerial responsibility: firstly, as Tomkins argues, "if Ministers are (only) constitutionally responsible when they know that Parliament is being misled, who (then) is responsible when ministers do not know?";[188] secondly, as Bogdanor suggests, the formula confuses inadvertence with recklessness because it does not seem to countenance a situation in which the minister ought to have apprised himself of the full facts;[189] and thirdly, rather than impose a *positive* duty to be rigorously truthful to Parliament, the act of narrowing or delimiting the circumstances in which ministers can be held 'responsible' sends out rather *negative* signals to civil servants insofar as it implies that ministers of the Crown are actively seeking to minimise their constitutional responsibilities by getting away with the littlest of liability which the constitution is willing to tolerate. The basic question underlying these three concerns is "if a Minister didn't know, should he have known?".

The ramifications of this vexed issue are now just unfolding in two fairly recent episodes in the New Labour administration: the first, surrounding the publication of Gitta Sereny's book about, and the payment by Sereny to, the convicted childkiller, Mary Bell; and the second, about the sale of arms by Sandline International, a British firm, to Sierra Leone, in breach of United Nations resolution no.1132 passed in October 1997. In both cases, one of the central issues revolved around the allegation that civil servants withheld relevant and important information from ministers, or that they had acted without the knowledge of, and advice from, ministers. In each case, the Home Secretary[190] and the Foreign Secretary[191] informed the House of Commons that internal inquiries as to the background circumstances were pending. In the arms to Sierra Leone case, the Foreign Secretary sought to ward off any relevant

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[188]. Tomkins, A (1998) *The Constitution After Scott*, Oxford University Press, at p.44.

[189]. Bogdanor, V (1997) Ministerial Accountability, *Parliamentary Affairs* at p.74.

[190]. The Home Secretary, Jack Straw, first confirmed that the Permanent Secretary has started an inquiry into the role of the Home Office officials in Sereny's book through the media (see e.g. Davies, C (1998) Straw Orders inquiry into Mary Bell book row, *Daily Telegraph*, 1 May) and then, through an answer to a Parliamentary written question from Peter Atkinson MP (HC Debs, col 399, 6 May 1998).

[191]. The Foreign Secretary, Robin Cook, announced in response to an emergency Commons debate initiated by the Shadow Foreign Secretary, Michael Howard, that he will order an independent inquiry by "a person from outside the Foreign Office and the diplomatic service": see HC Debs, cols 722-24, 6 May 1998.

comparisons with the arms to Iraq affair by arguing that "the central problem there was the way in which the then ministers sought to cover up what had happened and their own involvement. By contrast, we are being full and open in co-operating with an investigation which we ourselves have requested".[192] He invoked in defence, a constitutional crutch introduced during the Major administration, that "ministers are found to be in error if they *knowingly mislead* the House of Commons or if they have adopted the wrong policy".[193] With the independent inquiry under Sir Thomas Legge ongoing at the time of writing, Riddell.[194] in his editorial on the Sierra Leone case, asks poignantly if it is not the duty of ministers "to ask awkward questions", particularly after allegations about the British role had resurfaced earlier in the year. At the very least, the Mary Bell case and the Sierra Leone case confirm that ministers in the New Labour government have willingly embraced the convenient formula, 'knowingly mislead', first introduced by the previous Conservative administration to exculpate ministers of awkward allegations concerning their deception of Parliament.

The second distinction in the trilogy, that between policy and operation, was thrown into sharp focus during the dispute between Michael Howard (then Home Secretary) and Derek Lewis (then chief Executive of the Prison Service). This distinction has been described as another "one of the Major government's attempted refinement of the doctrine of individual ministerial responsibility".[195] Part of the problem stemmed from the fact that the framework document, which is a non-statutory document setting out the basic principles of the relationship between the Prison Service agency and the Home Office and drafted by the Home Office, only sets out the responsibilities of the Home Secretary and the chief Executive in rather vague terms.[196] The location of the precise boundaries between the two kindred concepts of policy and operation was severely tested when high-risk prisoners escaped in close succession, in September 1994 (from Whitemoor prison) and in October 1995 (from Parkhurst prison). In a

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[192]. HC Debs, col 724, 6 May 1998.

[193]. speaking on BBC1's *Breakfast with Frost*, 10 May 1998, cited in Pierce, A and Binyon, M (1998) Cook to Go If Inquiry Accuses Ministers, *The Times*, 11 May, p.10. Emphasis added.

[194]. Riddell, P (1998) Robin Cook's Brief Encounters, *The Times*, 11 May, p.20.

[195]. Tomkins, A (1998) *Government After Scott*, Oxford University Press, at p.47.

[196]. See further next chapter.

report[197] commissioned by Michael Howard on the general prison security provisions throughout England and Wales, Sir John Learmont outlined his criticisms of the poor management leadership within the Prison Service agency including that provided by Derek Lewis personally, as well as of the weak relationship between the agency and its parent department, the Home Office. In the aftermath of the publication of Learmont's findings, attention began to shift to the issue of accountability for the catalogue of incompetence and mismanagement identified in the report. Michael Howard argued before Parliament that he was responsible only for policy while Derek Lewis was responsible for operation. Lewis, on the other hand, maintained that Howard interfered so frequently and intensely in the day-to-day management of the agency as to evaporate any sensible boundaries between policy/operation. In spite of having achieved all the key performance indicators (KPIs) set by the Home Office for that year, Lewis was eventually dismissed by Howard. The constitutional foundations of this policy/operation distinction are however precarious indeed, as Lewis and the FDA among others, have argued in evidence to the Public Service Committee.[198] The Committee advised that the distinction should not be abused as to "put the blame onto civil servants for the effects of unworkable policies and their setting of unrealistic targets"[199] and ultimately defined its position as being in sympathy with those who are critical of a clear distinction between policy and operation.

The last in the trilogy, the separation of ministerial accountability from ministerial responsibility, first surfaced in the evidence given by Sir Robin Butler (then Head of the Home Civil Service) and William Waldegrave (then chancellor of the Duchy of Lancaster) to the TCSC in 1993.[200] They tried to argue that while ministers have a duty to provide an explanatory account to Parliament for the work of civil servants in their departments, they cannot be responsible in the sense of being personally blameworthy for all the errors, actions and omissions of their officials. Despite its rejection by the TCSC, the government reasserted

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197. (1995-96) Cm 3020.

198. (1996-97) HC 313.

199. (1996-97) HC 313-I, para 20.

200. (1993-94) HC 27, para 120.

this distinction in their reply to the TCSC's report by explaining further what they meant.[201] In his report on the arms to Iraq affair, LJ Scott did not challenge the government's view on this responsibility/accountability divide but instead took a different approach by suggesting that if ministers are to be above reproach on the basis of an absence of personal involvement or knowledge, this places a corresponding obligation on them to be as forthcoming as possible to Parliament on the incidents on which they are queried.[202] The arguments over the distinction between responsibility/accountability remain unresolved despite the most recent inquiry by the Public Service Committee into this very subject, with the amount of evidence in support of the distinction (e.g. from Sir Richard Scott, Sir Robin Butler, Rodney Brazier, and perhaps surprisingly, even senior civil servants such as Michael Bichard and Richard Mottram) almost as equal in vehemence as those against it (e.g. from the CCSU, Graham Mather MEP and Norman Lewis).[203] The constitutional enigma of this distinction is that it is not supported by the government's own guidelines either. For example, the arrangement as set out in the 1997 Osmotherly rules, which govern the conduct of civil servants summoned before select committees, provides that civil servants do so "on behalf of their Ministers and under their directions".[204] If in all circumstances, the *direct* chain of responsibility lies between ministers and Parliament, and never, between the civil servants and Parliament, then upon whom does the call of answerability fall when ministers, for one reason or another, disclaim 'constitutional responsibility'? The TCSC acknowledged this lacuna in 1993 and cautioned that such a situation can give rise to what Ridley and Thompson[205] describe as "a bureaucratic Bermuda Triangle in which accountability disappears". The uncertainties which envelope this invidious distinction between responsibility/ accountability have been re-ignited by the arms to Sierra Leone affair (referred to earlier).

Beyond the reformulations considered above, there is a deeper constitutional issue to be considered. As there is presently no definitive statement of the constitutional position of the

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201. (1994-95) Cm 2748, pp.27-9.

202. (1995-96) HC 115, para K8.16.

203. (1996-97) HC 313-I. See the oral and written evidence in volumes II and III.

204. Osmotherly rules (1997) para 37.

205. Ridley, R.E & Thompson, B, Memorandum to the TCSC (1993-94) 27-III, p.49.

civil service, either by Parliament (in statutes) or by the courts (via common law), the constitutional understandings that underpin the civil service are to be found, primarily, in a mixture of documents[206] emanating from the Executive branch of the constitution i.e. the government of the day. This, as we have seen, can give rise to problems, especially if the government puts forth clarifications and interpretations of the convention in a manner that may be more convenient for the immediate ends and needs of the political masters (ministers) rather than be unequivocally tailored to the requirements of a constitutional democracy. One of the central issues in the debate about civil service reform is: who bears constitutional responsibility for the regulation and management of the civil service? It will be recalled that the White Paper, Continuity and Change (Cmnd 2627, 1994) is unequivocal in its view that these issues are for "Ministers alone". The irony that this position poses is that the thrust of management reforms - in promoting greater personal responsibilities of individual civil servants - has *de facto* been to distance ministers from the complex tasks of management in government. As often stated in the Armstrong memorandum, and more recently in the Civil Service Code issued in January 1996, the orthodox view is that civil servants are servants of the Crown, responsible to ministers, and through ministers to Parliament. There is evidence to suggest that the link between this conventional model, and the policy on managerialising the civil service, is an extremely tenuous one indeed. In some critical cases involving officials in the Next Steps agencies, the principle may be more accurately crystallised as civil servants being responsible, not so much as to ministers, but for ministers: see for example, the case study on the Prison Service discussed in chapters 6 – 8 of this thesis.

The British constitution has always prided itself on its largely tacit and unspoken assumptions which underpin its essential distinction between political actors and administrative officials. An attempt by one to monopolise the other effectuates a breakdown in that unspoken understanding, and as William Robson explains, upsets the wheel of good government:

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[206]. Of these, see in particular, *Note of Guidance on the Duties and Responsibilities of Civil Servants in Relation to Ministers* (better known as the Armstrong Memorandum) HC Debs. vol.74, cols.128-30 (WA), 26 Feb 1985, and revised in HC Debs. vol.123, cols.572-5 (WA), 2 Dec. 1987; Cabinet Office (1994-95) *Continuity and Change*, Cm 2627; Cabinet Office (1994-95) *Taking Forward Continuity and Change*, Cm 2748; Cabinet Office (1996) *The Civil Service Code*; Government's response (1996-97) HC 67 to the report by the Public Service Committee (1995-96) *Ministerial Accountability and Responsibility*, HC 313.

> "There are, in the Cabinet system of government, three principal factors in the Parliamentary equation: ministers, Members of Parliament, and civil servants. They comprise the essential elements, representative or bureaucratic; and they are indispensable to one another. They are partners in a common enterprise - 'the endless adventure of governing men'. Unless the terms of the partnership are understood and accepted by all the partners, the enterprise may not succeed."[207]

Certainly, an assumption that has long underpinned the indirect relationship between civil servants and Parliament is that the intermediate brokers, ministers, have the capacity and inclination to act in the wider interests of the constitution, rather than just the narrow, short-termist, preoccupations of the Executive. As this assumption appears to be breaking down, there is a heightened need to put in place alternative safeguards to restore the basic tenets which lie behind the constitutional model of the civil service so that it becomes clear once again that civil servants, as servants of the Crown, have some kind of duty to act in the wider public interest rather than to merely serve the immediate demands of their ministers.

'Servants of the Crown': towards the public interest?

Since their *ad hoc* beginnings in the King's Court, civil servants have played a key role in British public administration, but the notion of 'servant of the Crown' has, in itself, had rather precarious foundations. Many of the rules, traditions, and understandings which regulate the functions of a civil servant, were also until relatively recently, hidden from public view. One of the problems that remain now is that the civil service suffers from an ill-defined conception of its constitutional role, as manifested in the vague expressions such as 'servants of the Crown', or as we shall see, 'civil service of the state'. Unfortunately for the civil service, the Crown and the state have been interpreted so narrowly by the Executive and the judiciary respectively that it is hard to see how the civil service can function as sufficiently neutral guardians of the constitution. Yet, the rules and traditions which have been conceived within

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207. Robson, W.A (ed.)(1956) Bureaucracy and Democracy, in *The Civil Service in Britain and France*, Lon: Hogarth Press, p.7.

such a system have been vehemently defended, albeit a long time ago, by Lord Beveridge, as representing "a typically ingenious device for combining democratic control with the efficiency and expertness that come of permanency".[208] In a similar vein, Earl Attlee, Churchill's successor, once described the system of impartial, anonymous and neutral civil service as a "bulwark of democracy".[209] On the other hand, defenders of the civil service, such as Sir Douglas Wass, deny that the civil service can be, or should be, endowed with such an onerous constitutional role: "the civil service cannot be thought of as an in-built safeguard against the excesses of a radical or reforming government"; instead, "the only effective safeguards have to be found in the *political* and *judicial* processes".[210] These sentiments, however, miss the critical point that it is the precisely the apparent mischief of the *political* branch that often belies the civil servants' dilemma and further, that there may be a potential conflict of interest in a system in which the Executive is able to regulate itself in the course of regulating the civil service. The approach taken by the trial judge in *R v Ponting*[211] is also a poignant reminder that the British judiciary is not necessarily the best institution to arbitrate disputes involving civil servants and their wayward political masters. So, there are limitations in the use of political and judicial processes to resolve issues which may involve fine lines between personal conscience, professional loyalty and public duty.

How has the debate on this issue progressed so far? The momentum for clarifying the rules relating to the constitutional position of civil servants in service of the Crown picked up in the early 1990s. The limitations of the Armstrong memorandum, as exposed in the Westland saga, in part helped to focus much attention on the grievance procedures appropriate for civil servants facing crises of conscience. Draft codes published by the First Division Association[212]

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208. in his Introduction to a book, Critchley, T.A (1951) *The Civil Service Today*, Lon: Victor Gollancz, p.9.

209. Earl Atlee, "Civil Servants, Ministers, Parliament and the Public", in Robson, W.A (ed.)(1956) *The Civil Service in Britain and France*, Lon: Hogarth Press, p.16.

210. Wass, D (1983) *Government and the Governed*, Lon: Routledge, p.53. Emphasis added.

211. Wass, D (1983) *Government and the Governed*, Lon: Routledge, supra.

212. FDA (1993) *Draft Civil Service Code of Ethics*, Lon: IPMS.

(FDA) and the Institute of Public Policy Research[213] (IPPR), the latter largely modelled on the FDA draft, recommended that issues that remained unresolved through the usual internal procedure should be referred to a specially constituted Civil Service Ethics Tribunal. Para 14 of the IPPR draft goes into some detail about the work of the proposed tribunal, which is to be composed of 3 Privy Councillors appointed for the term of each Parliament by the Prime Minister from nominations from the TCSC (para 14.1). The cautious tone of the IPPR draft is evident in its suggestion that the Tribunal be endowed with the power to order the ministerial instructions contrary to law or to the provisions of the Code be simply 'withdrawn' (para 14.4). These recommendations echo earlier suggestions by Wass that there should be an 'Inspector-General'[214] to resolve any disputes between civil servants and ministers. None of these ideas were adopted by the TCSC in its own draft code proposed in its report on the role of the civil service in 1993. The TCSC acknowledged that the existence of different documents on the values which underpinned the civil service conveyed an impression of fragmentation and uncertainty.[215] It was concerned that a new Civil Service Code should be seen as commanding 'some clear public status, public endorsement, *going beyond the government of the day*'.[216] The TCSC recommended, firstly, that the code should incorporate an independent line of appeal, not to a Civil Service Ethics Tribunal, but to a newly strengthened and independent Civil Service Commissioners;[217] and secondly, that the reform should be introduced by statute.[218]

In its response[219] to the TCSC, the government accepted the main thrust of the TCSC's recommendations on the need for a new civil service code, a new appeals procedure and the principle of selection on merit, but stopped short of accepting the TCSC's recommendation for

213. The IPPR draft code can be found in the Appendix to Plowden, W (1994) *Ministers and Mandarins*, Lon: IPPR, pp.150-60.

214. Wass, D (1985) *Political Quarterly*, pp.235-8.

215. (1993-94) HC 27-I, para 101.

216. (1993-94) HC 27-I, para 103. Emphasis added.

217. (1993-94) HC 27-I, paras 108-12.

218. (1993-94) HC 27-I, paras 113-17.

219. (1994-95) Cm 2748, especially paras 2.8-2.15.

an implementation of the reforms through statute even though it expressed an 'open mind'[220] on the matter. It is not yet known how the New Labour government is likely to approach this issue of statutory backing of civil service rules but the previous Conservative government, cited reasons connected with the preservation of the status quo and the importance of flexibility in their opposition to legislative reform.[221] Putting existing rules which govern the civil service on statutory footing would surely consolidate, rather than weaken, the foundations of those rules. The mixed response of the government to the TCSC report is widely[222] perceived as a half-way concession in a period of vulnerability as it was still awaiting the potentially awkward findings of the Scott Inquiry. The first Nolan report also contributed to this enthusiasm for reform, suggesting in particular that:[223] (i) the definition of ministerial wrongdoing be wide enough to cover situations in which civil servants are asked "to act in a way which is illegal, improper, unethical or in breach of constitutional convention"; (ii) crises of conscience can arise not only when civil servants are personally involved but also in cases in which they are aware of wrongdoing or maladministration; and (iii) the formal internal line of appeal be supplemented by a system in which civil servants are first able to raise matters in confidence with an appointed staff without necessarily having to go through the management structure.

Against this background of solid support for reform, the Civil Service Code (the Code) finally came into effect on 1 January 1996, under the prerogative authority of the Civil Service Order 1995. The Code has generally been well received by public lawyers: Oliver and Drewry[224] see it as "a step in the right direction...as even quasi-legislation can serve to enhance responsibility and accountability"; Brazier[225] calls it "the most recent, detailed and authoritative statement of

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220. (1994-95) Cm 2748, para 2.16.

221. (1994-95) Cm 2748, para 2.17.

222. see e.g. Thompson, B (1995) Whitehall's Cultural Revolution, 1 *Web JCLI*; Woodhouse, D (1997) *In Pursuit of Good Administration*, Oxford University Press, p.23.

223. (1994-95) Cm 2850-I, paras 2.50-2.53.

224. Oliver, D & Drewry, G (1996) *Public Service Reforms: Issues of Accountability and Public Law*, London: Pinter, p.83.

225. Brazier, R (1997) *Ministers of the Crown*, Oxford University Press, p.136.

ministers' relationships with civil servants"; Woodhouse[226] praises the Code for establishing "principles which inform the concept of good administration"; and similarly, Tomkins[227] argues that the Code contains small but important strides "towards answering some of the concerns about the civil service raised by the Scott report". But does the Code, taken as a whole, really strengthen the constitutional position of civil servants? Paragraph 1 of the Code does not alter, and in fact reiterates, the primary constitutional obligations of civil servants as first stated in the Armstrong memorandum; the primary duty of civil servants is still to assist the duly constituted government of the day in the formulation and implementation of the government's policies, as well as "to administer services for which the government is responsible". As if to highlight that the ultimate locus of civil service loyalty lies with the government, rather than with Parliament or any abstract notion of the public interest, the government rejected the formula in the TCSC's draft which provided that the role civil servants is "to assist the duly constituted Government...in administering services for which the Government is responsible *in the interests of the public*."[228]

Instead of opting for the bolder approach of the TCSC, the Code subjects the *primary* duty of civil servants to serve ministers in the government of the day to a only number of *softer* safeguards: paragraph 1 itself places civil servants' duties within the broader objectives of "integrity, honesty, impartiality and objectivity"; and paragraph 2 envisages that the loyalty of civil servants to the duly constituted government of the day may sometimes transcend the loyalty owed to the minister as it is now "subject to the provisions of the Code". Paragraph 3 addresses the imbalance between the responsibilities of civil servants and ministers by explicitly incorporating, among other things, some of the *duties* of ministers as outlined in the 1992 draft of the QPM to uphold the impartiality of the civil service, and to give fair consideration and due weight to official advice. Not all the provisions in the Code, however, are necessarily compatible with each other: there are seeds of an ethical tension, for instance, between the obligation on civil servants not to "deceive or knowingly mislead Ministers,

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226. Woodhouse, D (1997) *In Pursuit of Good Administration*, Oxford University Press, p.23.

227. Tomkins, A (1998) *The Constitution After Scott*, Oxford University Press, p.83.

228. See the Government's Response to the TCSC Report (1994-95) Cm 2748 (emphases added).

Parliament or the public" (para 5) and their duty not "to frustrate or influence the policies, decisions or actions of Government" (para 10). This tension may manifest itself in situations where a civil servant is instructed by his Minister to draft an answer to a Parliamentary question which he knows to be incomplete or inaccurate. Such a conflict may well be inevitable, and presumably if it arises, then the civil servant has recourse to the new procedures for ventilating his grievance or concerns. The likely direction in which such a tension is to be resolved has also to be read in the light of more recent clarifications from Parliament itself, on the proper standards of conduct expected of ministers vis-à-vis civil servants who may be giving evidence on their behalf. This will be discussed in the next section under developments since the introduction of the Code.

Paragraphs 11-13 of the Code introduce for the first time, new procedures for raising ethical issues, sometimes called whistleblowing. These incorporate the recommendations of the TCSC as well as the Nolan report. The current position is that civil servants who are faced with wrongdoing, broadly defined in para 11 to accommodate the dilemmas of the sort defined in the first Nolan report, can first raise the matter through the internal line of management culminating in the permanent secretary (in government departments) or the chief Executive (in agencies), and if these civil servants are still dissatisfied, they can then raise the matter in writing with the independent Civil Service Commissioners (para 12). If, however, having exhausted both these avenues, the civil servant is still unable to reconcile himself with the minister, then para 13 makes it clear that he has either to carry out the minister's instructions or to resign. Resignation is not a conduit for freedom of expression as he will continue to be bound by the normal rules of confidentiality such that he will never be able within the current framework of the Official Secrets Act 1989, to bring his concern ever to his own MP, to Parliament (via select committees) or the public. Civil servants are, as even the First Division Association (which represents senior civil servants in Britain) concedes, in 'no circumstances' to 'leak information to the British public' about any information of suspected ministerial malpractice, wrongdoing or deception.[229] So, despite the new safeguards and new grievance procedures it contains, the Code still returns to the same default position as before, that is, that

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[229]. see evidence by Liz (now Baroness) Symons to the Public Service Committee (1995-96) HC 313-II, QQ33-35.

civil servants are ultimately servants of the Executive rather than Parliament. It remains to be seen whether the grievance procedures established in the new Code will be much resorted to.

One may legitimately question the extent to which the Code has helped to preserve or protect the constitutional position of the servants of the Crown. It is clear that the constitutional underpinnings of the civil service nonetheless remain rooted in conventions and norms which are prone to vacillating interpretations and convenient spins of the government of the day. While the provisions of the Code are welcome developments, the oddity they manifest is that, "in the absence of both a codified constitution and a developed notion of the state independent of Government, a Code is the superior set of values which may override loyalty to the duly elected Government".[230] The input of Parliament, to whom civil servants are ultimately accountable, seems to have been adeptly kept at bay through a half-way measure like the Civil Service Code. In particular, it was made clear in the White Paper which preceded the Civil Service Code that the Code was modestly designed: (a) to "reflect the existing constitutional position rather than seek to change it",[231] (b) with a *declaratory* intent in mind, intended only:

> "to set out with greater clarity and brevity than existing documents the constitutional framework within which all civil servants work and the values they are expected to hold".[232]

Beyond the Civil Service Code: the path to clarity?

The Civil Service Code, introduced on 1 January 1996, in itself, has arguably achieved little of the 'clarity and brevity' that the White Paper recommending it had sought. Parliamentary interest in clarifying the constitutional rules underpinning minister-civil servant relationship against a background of active managerial change has continued, if not accentuated, since then. On 20 March 1997, just before Parliament was prorogued for the general election, the House of

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230. (1995) 1 Web JCLI.

231. (1994-95) Cmnd 2748, para 2.8.

232. *Taking Forward Continuity and Change*. Cmnd 2748, January 1995, para 2.8.

Commons and the House of Lords, each passed a resolution[233] on the nature of ministers' responsibilities to Parliament. One of the aspects which both resolutions touched on was the relationship between ministers and the civil service: para 3 of the Lords resolution places a clear duty on ministers to 'require civil servants who give evidence before Parliamentary committees on their behalf and under their direction to be as helpful as possible in providing accurate, truthful and full information'. These resolutions are deeply significant for public lawyers: as Tomkins puts it, 'no longer is ministerial responsibility an unwritten constitutional convention'.[234] These rules may now be written but not necessarily entrenched because the sovereignty of Parliament means that these resolutions, as with any Parliamentary rule (save perhaps the statute ratifying the EC Treaties[235]), are subject to all kinds of revisions and modifications by future Parliaments. But the articulation of these rules, and especially of paragraph 3 (see above), on Parliamentary papers, may help to clarify how potential conflicts arising between provisions of the Civil Service Code (for example, between paras 5 and 10) ought to be interpreted. The commitment to 'accurate, truthful and full information' in para 3 of the Lords resolution, if incorporated into the Civil Service Code, would contribute to the general presumption that civil servants, who may feel trapped between a duty not to knowingly mislead Parliament (para 5 of the Code) and a duty not to frustrate the policies of the Government (para 10 of the Code), cannot be legitimately asked by ministers to be economical with the truth as has often enough happened in the past.

More recent Parliamentary interest in the civil service under the New Labour government has revived an interest in the idea of legislation as a means of protecting and preserving the constitutional status of civil servants as 'servants of the Crown'. On 11 February 1998, the

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233. See, HC Debs, vol 290, cols 273-93, 12 Feb 1997 (Commons debate); HL Debs, vol 579, col 1055, 20 March 1997 (Lord resolution); HC Debs, vol 292, cols 1046-7, 19 March 1997 (Commons resolution).

234. Tomkins, A (1998) *The Constitution After Scott: Government Unwrapped*, Oxford University Press, p.62.

235. for the debate on the effect of EU membership on Parliamentary sovereignty in Britain, see for example Bradley, A, The Sovereignty of Parliament – in Perpetuity? in Jowell, J & Oliver, D (eds)(1994) *The Changing Constitution*, Oxford University Press.

House of Lords Select Committee on the Public Service published the findings of its inquiry,[236] chaired by Lord Slynn, into the central core of the 'public service'.[237] The terms of reference of the committee, first appointed on 30 April 1996 during John Major's administration, was 'to consider the present condition and future development of the "Public Service" with particular regard to the effectiveness of recent and continuing changes and their impact on standards of conduct and service in the public interest' (para 1). In this report which was published nearly two years later, the committee took the opportunity to add its voice to the chorus of caution on the intense pace of managerial reforms within the civil service: 'The civil service traditions of integrity, loyalty to the Crown, commitment to the task and lack of political bias have been responsible for the high regard in which the civil service has been held. These qualities, together with the principle that Civil Servants are constitutionally the alter ego of their Ministers, with not merely the right but the duty when necessary to proffer unwelcome advice to Ministers, mean that a post in the civil service is not merely a job but is genuinely a form of service to the public, so that analogies with the terms and conditions of employees in the private sector must not be pushed too far' (see paragraphs 183, 247-259, 263-267). Echoing the views of the Commons Treasury and Civil Service Committee (now the Public Service Committee) in 1993-94, the Lords select committee also recommended, among other things, that a Civil Service Act be introduced as the primary constitutional safeguard against the dangers of further managerialisation of the civil service, a phenomenon which has so far been characterised by a scarcity, if not an absence, of legal technique. The committee was not convinced by earlier objections voiced at earlier inquiries that legislation represented an inflexible hurdle in the path of change.

Instead, they opted for the view that an Act was much needed at the very least to 'define the Civil Service' (para 465) and to 'give statutory force to a Civil Service Code of the kind which was promulgated in 1996' (para 466). The committee was, however, implicitly critical of the

[236]. Select Committee on the Public Service (1997-98) HL 55. The report is also available on the web at (http://www.Parliament.the-stationery-office.co.uk/pa/ld199798/ldselect/ldpubsrv/055/psrep22.htm).

[237]. The committee was instructed to exclude certain areas of the public service in their inquiry, namely, local government, the National Health Service, schools and institutions of higher and further education, but to include all Government Departments, Executive agencies, non-departmental public bodies and other organisations created by or working for the public service, see (1997-98) HL 55, para 1.

current boundaries of the Civil Service Code in its suggestion that the proposed statute should go much further towards clarifying the rules underlying the idea of 'servant of the Crown' in several ways: firstly, unlike the current Code, 'the Act should clarify whether Civil Servants have any duties over and above their duties to Ministers and whether they owe independent duties as an organ of the constitution' (para 466). Clarity also meant that the Act 'should set out the duties of Ministers in relation to Civil Servants' (para 466); secondly, it 'should specify a mechanism by which Civil Servants could in the public interest report breaches of the provisions of the Act, which they might otherwise be prevented from doing by their obligations of obedience and confidentiality (para 468); thirdly, 'it should also indicate the grounds upon which an application may be made by those seeking judicial review of the action of Civil Servants or Ministers' (para 468); fourthly, it 'should replace the Civil Service (Management Functions) Act 1992 and give uniform and clear guidelines on the recruitment and management of Civil Servants as servants of the Crown. It should also replace the Deregulation and Contracting-Out Act 1994 and define what changes to the ambit of the Civil Service could be effected only by primary legislation' (para 467). Taken together, these recommendations for such a robust legislative package would indeed be significant strides towards greater clarity on the nature of the constitutional position of civil servants in an increasingly managerially-oriented constitution: they would, in other words, bring the constitutional underpinnings of the civil service more into line with the management realities of today. That they are seeking to reorientate the civil service, as 'servants of the Crown', more clearly in the 'public interest', by statute, reflects an acute awareness on the committee's part of the limitations inherent in the *political* regulation of the civil service. However, the report did not define the notion of 'public interest', and it may well be that potential or likely disagreements over this concept may yet prove to be the stumbling block of future initiatives towards legislation. The other potential problem area of the report lies in its recommendation for the grounds of judicial review of administrative action to be clarified by statute: it is not entirely clear whether this proposal is intended to supplement or replace the common law heads of judicial review. It is also not clear whether civil servants seeking to rely on a 'public interest' defence might be able to succeed before the judiciary where Clive Ponting failed in the 1980s.[238] In all, this report

[238]. In *R v Ponting* [1985] Crim LR 318, McCowan J rejected Ponting's definition of 'interests of the State' by directing the jury that the term referred to 'the policies of the state as laid down for it by the recognised organs of government and authority'. The jury nevertheless acquitted Ponting. It is arguably open to speculation whether the jury

has reactivated the arguments for statutory, rather than political, regulation of the civil service. It may be recalled that these arguments were so deftly quelled by the Major administration through the introduction of the present non-statutory Civil Service Code. The path to 'clarity and brevity' on the idea of 'servant of the Crown' may now be in sight, but it also seems a long one yet.

Conclusion: servants of whom?

This chapter has argued that there are critical issues of a *constitutional* nature which have been overshadowed by the focus on *managerial* reforms in the civil service. Several public law themes consistently lie behind the arguments relating to the changing concept of the servant of the Crown. Firstly, despite rather sophisticated developments in the management of the civil service, the status of the civil service within the British constitution remains unclear, and has, especially in the past decade or so, appeared to be trapped in theories, definitions and conventions inherited from past constitutional practices. Secondly, the terms of the implicit contract between civil servants and politicians have, in practice, changed over time such as to alter the nature of the relationship between the servant of the Crown vis-à-vis ministers from a *protective* hierarchy to a *predatory* one. Thirdly, and perhaps most importantly, the principal mechanism by which the terms of the 'implicit contract' have changed has been through the use of prerogative power emanating from the Executive rather than the legislative branch of the constitution.

The third theme can be unpacked further. It means that, in practical terms, the civil service is regulated by the Executive branch of the constitution, the very institution they have an obligation, according to the Civil Service Code, to serve. There are problems inherent in this kind of arrangement: conflicts of interest on the part of the Executive can arise when ministerial instincts collide with civil service values as we have seen in Westland, Ponting and more recently, in the arms to Iraq affair as well as the Howard/Lewis dispute. These 'problem cases' illustrate how the constitutional accountability of civil servants to Parliament can be disturbed, rather than enhanced, by the Executive. If civil service accountability to Parliament

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would have acquitted Ponting had he leaked the documents relating to the sinking of The Belgrano to the media rather to a Member of Parliament.

is to prevail, then Parliament needs to reassert its authority by codifying rules and regulations which strike an appropriate balance between the constitutional jurisdictions of ministers and civil servants in a single source, rather than in the fragmented and incoherent nature of the *status quo*. The situation at present is that there are resolutions from both Houses of Parliament on only the *ministerial* perspective of the implicit contract between ministers and civil servants.[239]

The uncertainties which now surround the concept of 'servant of the Crown' project questions about the civil service that, despite important strides by the TCSC and PSC, have not been unequivocally resolved: what does it mean to be a 'servant of the Crown'? Is the use of term 'Crown' apt in this modern day? The concept of the Crown seems more likely to confuse than enlighten because, as Turpin argues, it "distorts reality in representing the different elements of the Executive as a unified whole, concealing their inter-relationships (for example between the prime minister and his minister, or between ministers and civil servants)".[240] Allied to this concern is the question of the guiding model of the civil service that has underpinned the policy of managerialising the civil service. Various, and sometimes conflicting, explanations have been put forward on the roles of the Whitehall model of governance. Beetham[241] suggests that the direction of reform is heavily influenced by political motivation, insofar as "the Right seeks to limit it in the name of the free market; the Centre to reform it in the name of openness and accountability; the Left to replace it in the name of participation and openness". There has perhaps been a tendency in the past towards mutual distrust and dislike between the civil service and those on the Left end of the political spectrum.[242] On the other hand, those on the

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239. See, HC Debs, vol 290, cols 273-93, 12 Feb 1997 (Commons debate); HL Debs, vol 579, col 1055, 20 March 1997 (Lord resolution); HC Debs, vol 292, cols 1046-7, 19 March 1997 (Commons resolution).

240. Turpin, C (1995) *British Government and the Constitution*, Lon: Butterworths, second edn, p.138.

241. Beetham, D (1996) *Bureaucracy*. Open University Press, second edn, p.1.

242. see e.g. Castle, B (1980) *The Castle Diaries* 1974-76; (1984) *The Castle Diaries* 1964-70, both published by Lon: Weidenfield & Nicolson; Also see, Chapman, L (1979) *Your Disobedient Servant*, Harmondsworth: Penguin; Young, H & Sloman, A (1982) *No Minister*. Lon: BBC; Ponting, C (1986) *Whitehall: Tragedy and Farce*, Lon: Sphere Books.

Centre-Right, like Campbell and Wilson[243] for instance, adhere to a more liberal view of the functions of the civil service:

> "- to give democratic direction to the machinery of government;
>
> - to reconcile differences between the various goals and priorities of government; and
>
> - to solve the problems of the relationship between bureaucrats and politicians identified by Weber".

The constitutional position of the civil service is too important to be left to the exigencies of political predilections of the government of the day to be grounded only in documents emanating from the Executive branch of the constitution. In the absence of a definitive pronouncement from Parliament, there will always be a danger, realised in the most epigrammatic way in the events investigated by the Scott inquiry, as well as that of the Howard/Lewis dispute, that the notion of 'servant of the Crown' can be hijacked by the government for its short-term political ends. As Brazier perceptively notes in his evidence to the Public Service Committee on ministerial accountability and responsibility, without a codified British constitution, "it is possible for politicians to assert, in effect, that the constitution is what they say that it is".[244]

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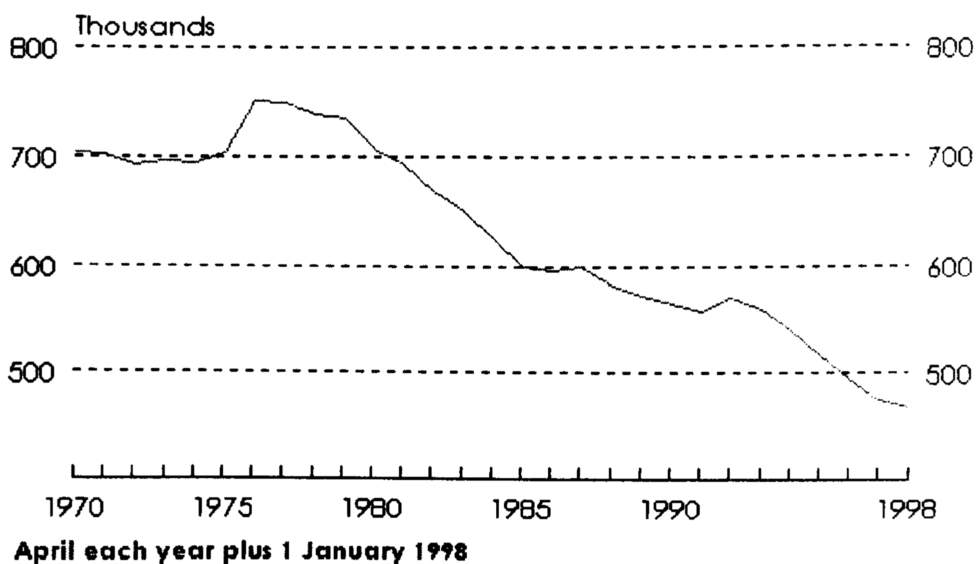
[243]. Campbell, C & Wilson, G.K (1995) *The End of Whitehall*, Oxford: Blackwell, p.19.

[244]. (1995-96) HC 313-III, p.11.

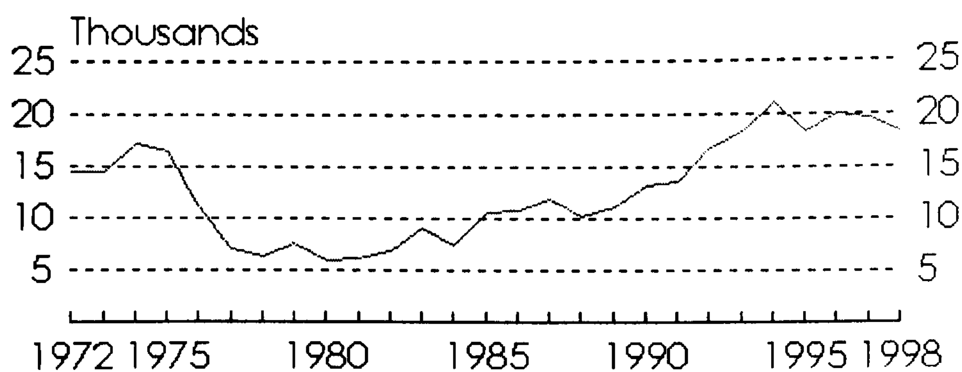
APPENDIX A



SOURCE:

NEXT STEPS REVIEW 1997, CMND 3889

APPENDIX B



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Chapter 3

Problems of enforcing the idea of 'servant of the Crown' as a constitutional norm (i): the doctrine of NPM

Introduction

The previous chapter sought to demonstrate that the notion of civil servants as 'servants of the Crown' is a constitutional norm that is undergoing subtle but recognisable transformation. In here and the next few chapters, contemporary challenges to this notion of civil servants as 'servants of the Crown' will be explored. Briefly, it will be argued that the challenges to the enforcement of the idea of 'servant of the crown' are manifest in three separate contexts which relate to the New Public Management (NPM) phenomenon:

- firstly, in the tensions posed by one of the central ideas underlying NPM, namely the doctrine of separation between policy and implementation hereinafter to be referred to as the doctrine of separation (which will be dealt with in this chapter);
- secondly, in the policy intentions of government in plugging perceived gaps in the implementation of ministerial policies by civil servants (see chapter 4); and
- thirdly, in the implementation of the doctrine of separation in sensitive areas of civil service such as the HM Prison Service (see chapters 6 and 7).

The doctrine of separation between policy and implementation is most evident in the Next Steps initiative, although the other managerial initiatives pre-dating Next Steps such as the Financial Management Initiative, and those post-dating Next Steps such as the Citizen's Charter and Competing for Quality, are also associated with the doctrine insofar as they were aimed either at improving the machinery for implementing government policies, or opening up the implementation process to competitive participation by external stakeholders.

The key underlying agenda of NPM, according to this doctrine of separation, was to reconfigure the way civil servants *implement* government policies. This chapter retraces the abundant literature on doctrinal origins of NPM, and seeks to understand how one of its central doctrines - the separation between policy and implementation - challenges the central constitutional underpinning of the civil service as 'servants of the Crown'.

Large parts of the Conservative programme of civil service reforms were thought to be inspired by NPM.[245] The NPM reforms in the civil service as well as other areas of the public sector such as health and education were among the reform initiatives instituted during Thatcher's long period in office. A prominent political scientist suggested that one of the legacies of her government was to have exposed the absolute limits of the British constitution by awakening the body politic from the 'thinking that we had a fine constitution, and only to discover that we had no real constitution at all'.[246] The body of public sector reforms that was set in motion during the Conservative period in office from 1979 – 1997 attracted its own distinct ideological identity which was conveniently christened by leading commentators simply as NPM.

One of the main assumptions underlying NPM reforms in the civil service is that the machinery for *implementing* government policies is out of date and in need of improvement. Some of the concepts of management espoused by the NPM movement are not new, yet ironically, to many prominent scholars,[247] NPM heralded a paradigmatic shift from 'public administration' to 'public management'. Management in the former era was, for various reasons, not as distinct in its supporting theories, nor as entrenched as a concept, nor was it seen so much as an end in

245. See e.g. Drewry, G & Butcher, T (1991) *The Civil Service Today*, Lon: MacMillan; Campbell, C & Wilson, K (1995) *The End of Whitehall*, Oxford: Blackwells; Dowding, K (1995) *The Civil Service*, Lon: Routledge.

246. Ridley, F.F (1992) What happened to the constitution under Mrs Thatcher? in Jones, B and Robins, L.J (eds)(1992) *2 Decades in British Politics*, Manchester University Press, p.128.

247. see e.g. Hood, C (1990) Public Administration: Lost an Empire, Not Yet Found A Role, in Leftwich, A (ed)(1990) *New Developments in Political Science*, Aldershot: Elgar; Rhodes, R (1994) The Hollowing Out of the State: the changing nature of the public service in Britain, *Political Quarterly*, pp.138-51; Gray, A & Jenkins, B (1995) From Public Administration to Public Management: reassessing a revolution?, *Public Administration*, pp.75-99.

itself. Contemporary political scientists such as Rhodes[248] and Gray and Jenkins,[249] in their commentaries on NPM, are universal in the view that public administration as a discipline has, in comparison with public management, been poorly theorised. This was also the view taken by earlier commentators: for example, in 1972, Keeling[250] argued that the idea of management in the public service had 'developed greatly in status, but not in definition; in application, but not in analysis; in assertions of realised or potential benefits but less frequently in their measurement of proof'. NPM has developed in terms of the first limb (definition), but is still growing in terms of the second limb (analysis) and third limb (measurement).

NPM: a conceptual sketch

Much has apparently been made of the concept of NPM. The use of the term 'new public management' presupposes that there is a discernible concept of public management which is somehow new, and which is different from its predecessor, whatever that may have been. This may not necessarily be so. As Metcalfe and Richards[251] observe, 'public management is not a self-explanatory, fully-developed concept'. The task of constructing a concept of public management in Britain has in this sense something in common with the public lawyer's difficulty in building a concept of the constitution: both have to rely on essentially empirical exercises rather than doctrinal ones, that is to say, finding out what the concept means by looking at what happens rather than by reading an authoritative or constitutional document. So for example, in order to find out what management in government means - i.e. to construct a concept of public management - we have to reflect on the recent developments in civil service reform ranging from the Efficiency Strategy in the early 1980s to more recent initiatives such as market-testing and the Citizen's Charter. The methodology of this chapter in developing an analytical perspective on public management is to consider academic commentaries on the

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[248]. Rhodes, R (1991) Theory and Methods in British Public Administration: the view from political science, *Political Studies*, pp.533-54.

[249]. Gray, A & Jenkins, B (1995) From Public Administration to Public Management: reassessing a revolution?, *Public Administration*, pp.75-99.

[250]. Keeling, D (1972) *Management in Government*. Lon: Allen Unwin, p.11.

[251]. Metcalfe, L & Richards, S (1990) *Improving Public Management*, London: Sage, 2nd edn, p.viii.

concept in order to draw out the cluster concepts and criteria which can be used to assess the progress of implementation which is discussed further in Part III of this thesis.

Academic literature on public management is varied and complex. This is mainly because the genesis of the concept lies not in a single ideology but in a cluster concept of theories ranging from public choice (espoused for example by Niskanen[252] and Tullock[253]) to scientific management (propounded by Fayol[254] and Taylor[255]) and neo-classical economics (driven mainly by Friedman[256] and Hayek[257]). The common underlying thread that unites these theories is that their political perspective on the structure and functions of the state assumes that the traditional bureaucratic structure of administration in government is not sufficiently efficient. It further assumes that the state, bound by layers of hierarchical Weberian bureaucracy, is congenitally predisposed to inefficiency, and so, its basic theoretical premise is about reconfiguring the role of the state from an interventionist concept towards a minimalist conception, or to use the metaphors coined by Osborne and Gaebler,[258] 'to steer' rather than 'to row'. There is however less of a consensus between the theorists when it comes to the issue of how best to restructure the role of the state as 'rower': one strand of thought underlines the 'freedom to choose', sometimes known as the public choice theory, while another strand emphasises the 'freedom to manage', which is sometimes called 'managerialism' or 'neo-managerial' theory.[259]

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252. Niskanen, W (1973) *Bureaucracy: Servant or Master?*, London: Institute of Economic Affairs.

253. Tullock, G (1965) *The Politics of Bureaucracy*, Washington: Public Affairs.

254. Fayol, H (1967) *General and Industrial Management*, London: Pitman.

255. Taylor, F.W (1911) *The Principles of Scientific Management*, New York: Harper and Brothers.

256. Friedman, M (1962) *Essays in Positive Economics*, University of Chicago Press.

257. See eg Hayek, F (1960) The Constitution of Liberty, London: Routledge & Kegan Paul; (1962) The Road to Serfdom, London: Routledge.

258. Osborne, D & Gaebler, T (1992) *Reinventing Government: How The Entreprenurial Spirit Is Transforming The Public Sector*, Mass: Addison-Wesley.

259. For this argument, see Metcalfe, L & Richards, S (1990) *Improving Public Management*, London: Sage, 2nd edn, chapter 1. Also see Dowding, K (1995) *The Civil Service*, London: Routledge, chapter 4. In particular, Dowding (1995, p53) argues that 'public choice theorists assume that everyone is self-interested'. It is argued that this self-interest drives the notion of 'freedom to choose' advanced in the text above.

There are possible tensions between the public choice argument (the right to choose) and the managerialism argument (the right to manage) insofar as the exercise of one can imply restrictions on the other. Suffice it to say that both doctrinal strands underpin, at different times, different parts of the political programme to reform management in government in Britain. Political impetus for the reform of the British civil service has however been predominantly driven by the freedom to manage (managerialism) argument. The thrust of these reforms has been aimed at improving the machinery for *implementing* government policies by refocusing the management freedoms and responsibilities of senior civil servants in relation to the implementation of their ministers' policies. Managerialism as a theory is itself underpinned by a presupposition that 'implementation' is a separate and distinct process from 'policy-making'. This assumption has proven to be problematic in sensitive areas of administration such as the Prison Service as will be evident in Part III of this thesis.

Why was 'the right to manage' argument used as a basis for legitimising the introduction of reforms in the management of central government? Hood[260] explains that the typical justification for it is that 'accountability requires clear assignment of responsibility for action, not the diffusion of power'. Metcalfe and Richards[261] observe that the pre-existing idea of public management at the time was so restrictive that they termed it 'impoverished'. They summarised the nature of this concept as comprising the following components: (i) that 'management is an Executive function presupposing clear definition of objectives, policies and performance measurement; (ii) that management is concerned with internal routines and procedures; (iii) that managerial control is achieved through well-defined hierarchies and responsibilities; and (iv) that broad principles of management apply with minor adaptation to all organisations'.[262] The poverty of management as an empirical practice was diagnosed as one of the central barriers to an effective implementation of ministerially-backed policies, and which was responsible for the waste and inefficiency that were thought to be the hallmark of

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[260]. Hood, C (1991) A Public Management for All Seasons?, *Public Administration*, pp.3-19 at p.4.

[261]. Metcalfe, L & Richards, S (1990) *Improving Public Management*, London: Sage, 2nd edn, p.17.

[262]. Metcalfe, L & Richards, S (1990) *Improving Public Management*, London: Sage, 2nd edn, p.17.

public service at the time. It was thought that if management was confined to the restrictive four elements of administration outlined by Metcalfe and Richards, then there was strong case for reconfiguring the concept of management to a broader one which the same authors formulate as 'taking responsibility for the performance of a system'.[263] Metcalfe and Richard argue that this broader notion of public management would have fundamental implications for the traditional roles of senior civil servants by bringing with it unique issues such as responsibility, performance and unit of management.

The underlying rationale of public management is therefore three-fold:[264] firstly, the freedom to manage argument is closely tied with an allocation of responsibility insofar as 'managers individually and collectively are those who accept responsibility for the performance of a system'; secondly, managers will not only be subject to a framework of objectives but will also 'participate in defining what is attainable and accept responsibility for achieving results': and thirdly, as managers operate in definable units of management or in networks comprising several departments, it would become easier to allocate responsibility to individual civil servants or where appropriate, to systems in the event of failure.

Hence, the theory of managerialism which captured the political agenda during the Conservative administrations under Thatcher and Major essentially comprised two distinct but related elements:

(i) the *cost-cutting* or *constraining* elements in the early 1980s (such as Rayner scrutinies and FMI), and

(ii) the *creative* elements in the late 1980s into the early 1990s (such as the Next Steps).

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263. Metcalfe, L & Richards, S (1990) *Improving Public Management*, London: Sage, 2nd edn, p.37.

264. Metcalfe, L & Richards, S (1990) *Improving Public Management*, London: Sage, 2nd edn, p.37.

As Hood[265] puts it, managerialism is a reflection of 'sigma-type values' that is to say, its claims to legitimacy 'have lain mainly in the direction of cutting costs and doing more for less as a result of better-quality management and different structural design'. The emerging empirical practice of public management no longer holds to the Weberian view of civil servant of administrator whose principal role was to apply predetermined rules in implementing ministerial policies or in advising government ministers. Put another way, the promotion of managerialism in the civil service has been predominantly motivated by a concern with economy and innovation in government rather than the requirements of Bagehot's dignified constitution.

However, 'public management' as a concept does not end there: it goes further and competes with the traditional boundaries of 'public administration'. Strand[266] captures the essence of this contrast between public management and public administration roles well through his four templates: administrator, producer, innovator and integrator. He explains that the traditional model of public administrator places emphasis on the 'administrator' role whose functions include ensuring procedural regularity, applying general rules to particular cases, and generally working within given policy parameters. The 'producer' role involves more concern with results and output than the administrator but it is still a role that is designed to work within pre-determined policy constraints. The tasks of 'innovator' and 'integrator' entail advising on new policies as well initiating responses to change among other things. 'Innovators' have management responsibilities for developing new policies to achieve existing objectives better or to prompt a strategic change of direction, whilst integrators complement 'innovators' by mobilising a widespread support base for any new initiatives or other management-driven changes. Strand's analysis provides useful templates with which to understand the changing, or indeed expansive, nature of the underlying management roles of senior civil servants in Britain.

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265. Hood, C (1991) A Public Management for All Seasons?, *Public Administration*, pp.3-19 at p.15.

266. Strand, T (1984) *Public Management, Conceptual Issues and Research Suggestions*, paper presented to a conference on Public Management in Europe, The Hague: Netherlands, discussed in Metcalfe, L & Richards, S (1990) *Improving Public Management*, London: Sage, 2nd edn, pp.39-41.

The central problem from a public lawyer's perspective is that as the empirical practice of civil servants' roles has been updated and broadened to take account of their right to manage, the underlying constitutional model of regulating the civil service as reflected in the constitutional documents such as the Armstrong memorandum (now the Civil Service Code) and the Ministerial Code (previously Questions of Procedure for Ministers) has remained static. Metcalfe and Richards[267] express the problem in a slightly different way: 'civil servants are publicly claiming the right to manage without fully explaining the doctrine of legitimacy on which their claims rest. Nor is it clear that they square with broader constitutional doctrines'. This, as will be evident in the case study of the Prison Service in Part III of the thesis, can lead to situations in which senior civil servants are seen as being saddled with more management blame and responsibilities than envisaged or indeed allowed by constitutional convention. The argument is summarised pictorially in figure 3.1 below:

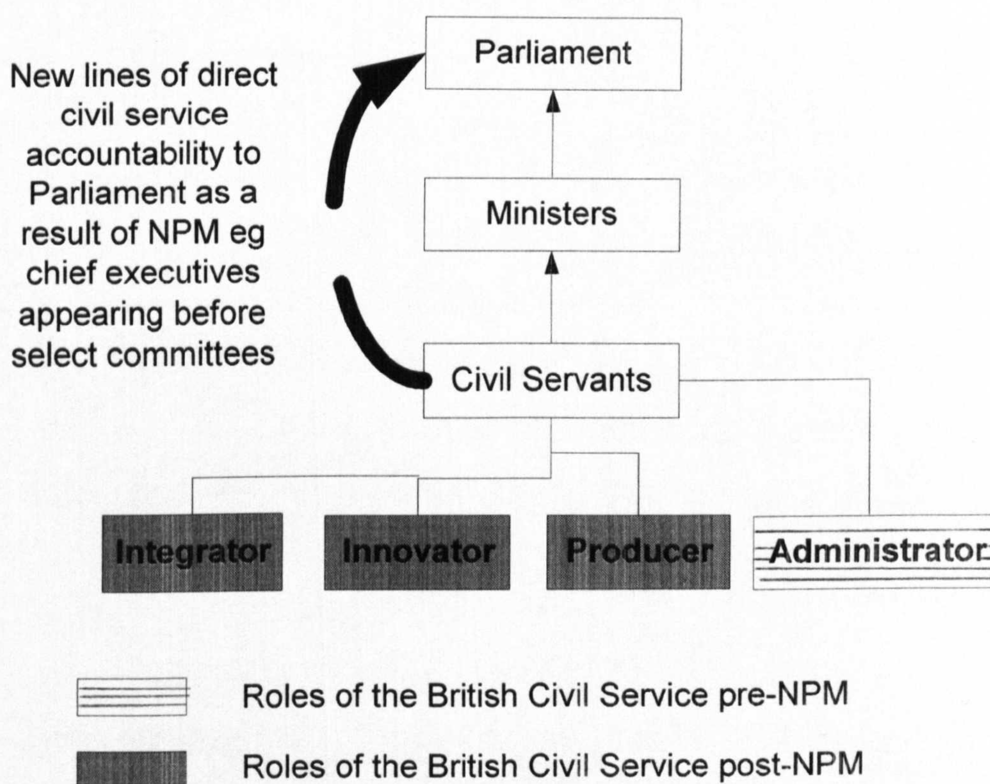

Fig 3.1 Impact of NPM on the relationship of civil servants with Parliament

267. Metcalfe, L & Richards, S (1990) *Improving Public Management*, London: Sage, 2nd edn, p.45.

Conclusion

This chapter has argued that the emerging concept of 'public management', or of management in central government, has slowly but noticeably reconfigured the underlying roles and responsibilities of senior civil servants. Where previously, the concept of civil servant as 'administrator' occupied centre-stage, the impact of NPM has been to superimpose additional priority roles of 'initiator' and 'innovator' onto the same stage. The administrative components that traditionally underpinned the role of civil servants as 'servants of the Crown' have gradually been overtaken by more exacting management roles and responsibilities which have been primarily legitimised by the concept of decentralisation. One of the central concerns of this thesis is that whilst the empirical effect of NPM has been to displace the traditional Weberian bureaucratic model of administrative structure, the underlying constitutional model which still governs the British civil service as mirrored in constitutional documents such as the Civil Service Code and the Ministerial Code (previously Questions of Procedure for Ministers) still clings to the old Weberian ideal.

The resulting dislocation between empirical reality and constitutional convention harbours the likelihood of a 'Bermuda Triangle' of accountability, as two commentators once observed in their evidence to the Treasury and Civil Service Committee.[268] The challenge of NPM for constitutional accountability is that the British constitution should reflect the full complexity of the management roles and responsibilities of senior civil servants now thrusted upon them through successive management reforms. The next chapter considers how one of the key doctrinal components of NPM - the distinction between policy and operation - thought to have underpinned the post-1979 civil service, is reflected in the policy statements of the government. It will be seen that the thrust of government reforms has been aimed at improving the machinery for the *implementation* of government policies, based, arguably, on the underlying idea that it was the *implementation* aspect rather than the *formulation* aspect of the policy-making process that needed to be rejuvenated.

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268. Ridley, R.E & Thompson, B, Memorandum to the TCSC (1993-94) 27-III, p.49.

Chapter 4

Problems of enforcing the idea of servant of the Crown as a constitutional norm (ii): government policy intentions on separating policy from implementation

Introduction

Chapter 2 set out the *constitutional* context of managerial reforms within the British civil service since 1979 as well as the fertile debate surrounding the subtle changes to the constitutional fundamentals thrown into focus by these reforms. Chapter 3 focused on one of the central ideas underlying NPM - the doctrine of separation between policy and implementation - in the context of the civil service. It argued that the doctrine relies on a series of assumptions which are not readily transferable to every area of civil service activity. This chapter will consider, with reference to official publications, the empirical applications of this doctrine in the context of government policy statements during the Conservative administration from 1979 to 1997. It will argue that the whole NPM reform programme has been premised, among other things, on a fundamental dichotomy between policy and implementation. It was also based on the belief that the civil service machinery for implementing the policies of ministers needed to be improved, or more clearly demarcated from the other policy-formulation functions. The clearest empirical manifestation of this doctrine in the context of the civil service is the Next Steps agency initiative which will be discussed later in this chapter.

Just as the doctrinal elements of managerialism have been subject to fertile debate,[269] their application and implementation have been equally fraught with difficulties. Sir Christopher

[269]. See chapter 3.

Foster in his evidence to the recent House of Lords select committee report[270] on the public service, suggested that 'the trouble was that Executive agencies were established on a model taken from private management without much consideration of the likely constitutional consequences'. Sir Christopher observed that, 'most previous reforms in the Civil Service had been preceded by very considerable thought and a Royal Commission, and that was not the case with the recent reforms; they were preceded by inquiries often by those already committed to the answers and there was not sufficient time or public debate before the reforms were implemented and that is why now, after the reforms have been implemented, we are discovering that there are serious problems involved with them'(at Q 128).

This argument raises the possibility that the principal emphases in official literature on "improving management in government or in the delivery of public services" have somewhat *crowded out* a more rigorous review of the possible constitutional implications of implementing abstract policy ideas across the diverse areas of the civil service. There seems to be a consensus within the literature surveyed in chapter 2 that managerialism has brought about a radical change in the *constitutional* underpinnings of the civil service. This chapter argues that the traditional understanding of civil servants as 'servants of the Crown' may have been systematically undermined by the Conservative government's policy intentions – whether express or latent – in their pursuit of managerially-driven goals such as efficiency and economy in the civil service. The rest of this chapter will adopt a policy-focused analysis in tracking the development of 'policy intentions' to improve the civil service machinery for implementing government policies by managerialising it. The more recent developments within the civil service under the New Labour government will not be dealt with here but will instead be considered in the concluding chapter of this thesis.

270. *Select Committee on the Public Service* (1997-98) HL 55, para 146.

Politico-constitutional context: rationale for reform

Before we delve into government intentions on civil service reform, it would be useful to be aware of the wider backdrop against which the reform proposals have been formulated. A combination of economic, political and constitutional factors have in effect contributed to the relative ease of passage of the government initiatives on injecting ideas about economy, efficiency and effectiveness into the civil service.

Firstly, there were economic problems in Britain, some of which were also mirrored in the international sphere. Inflationary pressures were being generated by a combination of factors, chiefly, a liberal economic policy of the previous Labour government, increases in union pay settlements as well as the Middle East oil crisis.[271] In its first expenditure White Paper,[272] the Conservative government allied itself to three broad monetarist objectives namely: keeping a firm control of money supply as a means of tackling inflation; reducing public expenditure and borrowing; and lowering income tax as well as shifting the burden of taxation from earnings to expenditure.

Secondly, the period in question was dominated by a political ideology which was espoused by a Prime Minister who was deeply committed to the reform of the civil service, and indeed of the public services generally:

> "I was determined to change the mentality exemplified in the early 1970s by a remark attributed to the then head of the civil service that the best Britain could hope for was the 'orderly management of decline'."[273]

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[271]. see generally, Thatcher, M (1993) *The Downing Street Years*, Lon: Harper Collins, pp.41-45.

[272]. HM Treasury (1981) *The Government Expenditure Plans 1980/81 - 1983/84*, Cmnd 7866. Also see, HM Treasury (1984) *The Next Ten Years in Public Expenditure*. Cmnd 9189.

[273]. Thatcher, M (1993) *The Downing Street Years*, Lon: Harper Collins, p.46.

This approach set in motion a series of reforms which outlived even Thatcher's 11-year tenure in office. Her thinking about the civil service was influenced by a coterie of key advisers in her exclusive policy network. In her days on the Opposition benches, Leslie Chapman, former employee of the Property Services Agency, was appointed to advise the Conservative Party on its policy on the civil service. When in office, Thatcher tapped into the commercial wisdoms of leading industrialists such as Sir Derek Rayner (appointed to carry out efficiency scrutinies in Whitehall), Sir John Hoskyns (appointed head of the Prime Minister's Policy Unit) and Sir Robin Ibbs (appointed to lead a study which culminated in the creation of Next Steps agencies).

Thirdly, the constitutional ordering in Britain presents few insurmountable hurdles by way of *a priori* debate, scrutiny and review of the reform proposals of a government determined to introduce efficient practices into a public service which they considered too bureaucratic and wasteful.[274] A government is deemed constitutional and legitimate if it commands a simple majority in the House of Commons, and this, combined with the modern demands of party discipline, make for what Lord Hailsham[275] has famously called "an elective dictatorship".

The upper house of Parliament have also been notably silent on the reform of the machinery of government as most the civil service reforms were not executed by legislation. As will be made evident later, some of the reform proposals - such as the Next Steps initiative – have been carried through with little opportunity for critical debate and thorough scrutiny in Parliament, partly because the reports containing reform recommendations have not been presented to Parliament, and in many cases, legislation has been little used to implement the proposals.

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274. see e.g. Harden, I & Lewis, N (1986) *The Noble Lie*, Lon: Hutchinson; Graham, C & Prosser, T (eds)(1990) *Waiving the Rules: the Constitution under Thatcherism*, Buckingham: Open University Press.

275. Lord Hailsham (1978) *Elective Dictatorship*, Lon: Collins.

The three seasons of reform: hidden agendas?

Against the broader context outlined above, we now turn to consider the discourse in official literature on civil service management reforms predominantly from 1979 – 1997 but account will also be taken of the reform initiatives pre-1979. It would appear that during this period, there have been different dimensions to the policy on managerialising the civil service. The concept of management in the civil service does not seem to have been systematically defined anywhere in the official reports, and it may be argued, as Fry[276] has done, that there is perhaps no such - or if there was, it was an impoverished - conception of management as a task in its own right even within the British civil service whose mindset seemed dismissive of the management agenda in favour of policy-work.

Fry suggests that "the Thatcher government gradually introduced its own version".[277] Others argue that the new focus on the importance of management in the civil service is underpinned by an evolving concept of "efficiency". Wildavsky[278] identifies three distinct species, namely "pure efficiency" (meeting objectives at lowest cost), "mixed efficiency" (altering the objective to suit available resources) and "total efficiency" (when the most efficient means for accomplishing ends cannot be secured without altering political relationships or the machinery for making decisions).

In a more recent paper, Dilman[279] argues, with reference to Wildavsky's definitions, that the civil service reforms during the Thatcher years have moved slowly but noticeably from the stage of "pure efficiency" to that of "total efficiency". As will become evident later, in the

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276. Fry, G (1995) *Policy and Management in the British Civil Service*, Hemel Hempstead: Prentice-Hall, p.144.

277. Fry, G (1995), ibid, p.145.

278. Wildavsky, A (1966) The Political Economy of Efficiency, *Public Administration Review*, pp.292-310, at p.307.

279. Dilman, D.L (1994) The Thatcher Agenda, the Civil Service and "Total Efficiency" in Farzmand, A (ed)(1994) *Handbook of Bureaucracy*, New York: Dekker, pp.241-52 at p.241.

initial stages (from 1979 - 1987), the reform proposals seemed keen to maintain the autonomy of individual departments to formulate their own responses to the calls, mediated through the Rayner scrutinies, MINIS as well as the FMI, for greater efficiency within central government. However, when these initiatives showed little sign of galvanising the culture of management in the civil service, more radical proposals (from 1988 - 1997) were introduced to kick-start the drive for efficient management in government. The next section will consider whether the official statements bear out this argument, as well as questions whether there is now a further stage - which we can call the post-total efficiency stage - that focuses on consolidating the ethical dimension and constitutional underpinnings of the civil service.

Stage I: tinkering with machinery for implementation

Since the Fulton report in 1968,[280] the government has visibly been developing more professional approaches to management, as a means of promoting "accountable management". In one of its first few White Papers since taking office, the Conservative government took the opportunity to spell out three of its key aspirations on the civil service, formulated visibly within the tight constraints of hard economic policies, namely:

> "- to improve the efficiency of the Civil Service;
>
> - to eliminate waste and to promote methods of administration which enable and encourage staff; and
>
> - to give the best possible value to the taxpayer".[281]

It also prescribed, in rather crisp terms, an unpretentiously managerialist view of its role as government: "The business of government is - in reality - a collection of many different

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280. *The Civil Service*, Cmnd 3638 (1968).

281. *Efficiency in the Civil Service*, Cmnd 8293, July 1981, para 1.

business, big and small, all serving the community, directly or indirectly".[282] In another White Paper soon after, it concretised broad aspirations into firm policies by reaffirming "good management throughout the Civil Service as an aim to be pursued *as a matter of policy in its own right*".[283]

To this end, it pursued a two-pronged policy, which had the hallmarks of a quantitative approach to accountability, or in Wildavsky's terms, characterised a pure efficiency approach: firstly, to set a financial framework - by way of cash limits and manpower targets - to create what it called a "general incentive"[284] but which seemed more like an unnegotiable imperative towards economy and efficiency; and secondly, to ensure that the "general incentive" was put into action to achieve better value for money. The policy developed momentum over time, serviced in part by critical external scrutinies which were commissioned by the Prime Minister. The policy first embraced financial management and gradually, more general areas of civil service management. These will be considered in turn.

(i) Rayner scrutinies: pure efficiency?

As part of the initial reconnaissance, efficiency scrutinies were employed to survey the financial and attitudinal proclivities of government departments. Sir Derek Rayner, then head of Marks and Spencer, was commissioned to head the scrutiny programme. Statements from Thatcher herself make clear the nature of the scrutinies which she considered to be necessary preconditions for wider management reforms:

> "I took a close interest in senior appointments in the civil service from the first, because they could affect the morale and efficiency of whole departments...It became clear to me

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[282]. ibid, para 2.

[283]. *Efficiency and Effectiveness in the Civil Service*, Cmnd 8616, September 1982, para 5. Emphasis added.

[284]. Cmnd 8293, July 1981, para 8.

that it was only by encouraging or appointing individuals, rather than trying to change attitudes *en bloc*, that progress would be made."[285]

"There was problem even at the very top. Some Permanent Secretaries had come to think of themselves mainly as policy advisers, forgetting that they were also responsible for the efficient management of their departments."[286]

"I asked Sir Derek Rayner to set up an Efficiency Unit that would tackle the waste and ineffectiveness of government. The two of us used to say that in politics you judge the value of the service by the amount you put in, but in business you judge it by the amount you get out. We were both convinced of the need to bring some of the attitudes of business to government."[287]

This approach to management in government, which apparently tried to blur the boundaries between the private and the public models of management prompts Hood to argue that:

"the thrust of (NPM) reforms has been to move to a public sector more like the private sector and away from a standard service-wide set of process rules, towards a structure in which process rules are negotiated ad hoc, organisation by organisation, or in which the move is away from process rules altogether in favour of more attention on outputs."[288]

In purely monetary terms however, Rayner's scrutinies made a substantial contribution, resulting in the identification of some £90m annual savings and £28m one-off savings in the year 1980-81,[289] and the figures quickly snowballed into £300m annual savings and £37m one-off savings in the session 1981-82.[290]

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285. Thatcher, M (1993) *The Downing Street Years*, Lon: Harper Collins, pp.46-7.

286. Thatcher, M (1993) *The Downing Street Years*, Lon: Harper Collins, p.47.

287. Thatcher, M (1993) *The Downing Street Years*, Lon: Harper Collins, pp30-1.

288. Hood, C (1996) United Kingdom: From Second Chance to Near-Miss Learning, in Olsen, J.P & Guy Peters, B (eds.)(1996) *Lessons from Experience: Experiential Learning in Administrative Reforms in Eight Democracies*, Scandinavian University Press, p.40.

289. Cmnd 8293, July 1981, para 12.

The Rayner scrutinies also played a part in providing some impetus for the formulation of MINIS (Ministers' Networked Information System) which was started in the Department of Environment by the then Minister, Michael Heseltine. As Likierman explains:

> "MINIS sought to give ministers a comprehensive grasp of the activities of the DOE, to take decisions on relative priorities, review progress and the effectiveness of policies and to understand the impact of cuts at a political level".[291]

In its report in session 1981-82, the TCSC recommended that MINIS or its close equivalent should be adopted in all departments, and that MINIS-type costings should be reconciled with the departments' conventionally-recorded expenditure. Likierman suggests that the central idea about MINIS that appealed to the TCSC was:

> "that Ministers and civil servants would act more as managers of the resources under their control through the close monitoring of expenditure".[292]

(ii) Financial management: mixed efficiency?

In its attempt to clarify management responsibilities for expenditure through strategies such as the cash limits, manpower targets and efficiency savings, the government found that there was a shortage of management-related data, especially relating to financial information in departments. A strategy called the Financial Management Information (FMI) was first launched in May 1982 through a working document and later, formally announced in the White Paper on "Efficiency and Effectiveness in the Civil Service" in September 1982.

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[290]. Cmnd 8616, September 1982, para 8.

[291]. Likierman, A (1982) Public Expenditure: Who Really Controls It and How. Lon: Penguin, p.93.

[292]. Likierman, A (1982), ibid, p.93.

The primary objectives of the FMI were to recast the minds of Ministers and civil servants on the importance of the task of management by providing a system in which all managers at all levels have:[293]

> "a clear view of their objectives, and assess and wherever possible measure outputs or performance in relation to these objectives;
>
> well-defined responsibilities for making the best use of their resources including a critical scrutiny of outputs and value for money;
>
> the information (including particularly about costs), training, and access to expert advice which they need to exercise their responsibilities effectively".

In pursuit of what Wildavsky's refers to as "pure efficiency", the FMI allowed departments a certain amount of free rein to formulate their own response. The emphasis on departmental autonomy is evident insofar as:

> "departments are called upon to examine all aspects of their programmes and to work out the best pattern of managerial responsibility, financial accountability and control".[294]

(iii) General management: mixed efficiency?

The drive for pure efficiency went beyond the Rayner scrutinies and financial management, and was, at about the same time, extended to more general areas of management. There is nonetheless a common thread running through all these areas in that they are underpinned by an essentially *ad hoc* approach as the following statement reveals:

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293. Cmnd 8616, September 1982, para 13.

294. Cmnd 8616, September 1982, para 13.

> "the Government agrees with the TCSC that there should be no question of rigidity and that the framework for analysis should be adapted and developed to fit the policy or problem in question, rather than the policy or problem being distorted to fit any particular framework".[295]

As with the FMI, the cudgels of improving the general management of departments were to be taken up by individual Ministers and the civil servants in departments. The White Paper in 1982 clarifies that while:

> "it is the function of the Treasury to promote high standards of administration by a combination of guidance, prescription and scrutiny; to ensure that these standards are reached by all; and to ensure that Parliamentary and other requirements are met", [sic. the onus is still on] "central departments to make full use of the knowledge and experience of other departments to establish clear principles; to provide information and advice about the practical application of principles and to check they are applied in practice".[296]

(iv) Reviews of the FMI

Commentators are keen to emphasise that the FMI did not mark the first political attempt to improve management in government. It seems closer to the truth, as Likierman suggests, to say that:

> "What distinguished the FMI was that it was carried forward with a far greater degree of political energy and conviction and for a longer period than its predecessors".[297]

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295. Cmnd 8616, September 1982, para 18.

296. ibid, para 23. My additions.

297. Likierman, A (1982) Public Expenditure: Who Really Controls It and How. Lon: Penguin, p.92.

In two subsequent progress reports,[298] it was revealed that the strong political enthusiasm behind the FMI was not being filtered down to the administrative ranks. In its White Paper in July 1984, the government was aware that:

> "for the initiative to be successful, attitudes need to change as well. The aim of better value for money requires a more managerial approach to government business".[299]

This finding was also picked up in a study by the National Audit Office on the FMI in October 1986.[300] In order to bring about cultural and attitudinal changes at the middle and lower level of civil service management, the NAO prescribed that:

> "it is essential that managers should feel *personally responsible* for achieving targets which contribute to Ministers' overall objectives".[301]

Apart from the problems of a lack of grassroots response, there were also some other shortcomings which were revealed in the NAO review. Firstly, even though the FMI was designed with the aim of improving the management of resources, it was, as the NAO found, a curious irony that "departments are clearly not in a position to measure the cost-effectiveness of their FMI systems".[302] Secondly, the NAO, whilst positive about the development of the FMI, curiously reserved judgments about whether the FMI had yielded value for money - arguably the most critical issue - on somewhat vague grounds that the programme needed time to take full effect, and that there were:

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298. *Financial Management in Government Departments*, Cmnd 9058, September 1983; *Progress in Financial Management in Government Departments*, Cmnd 9297, July 1984.

299. Cmnd 9297, July 1984, para 6.

300. NAO (1985-86) *The Financial Management Initiative*, HC 588.

301. NAO (1985-86) *The Financial Management Initiative*, HC 588, para 20. Emphasis added.

302. NAO (1985-86) *The Financial Management Initiative*, HC 588, para 21.

"substantial difficulties of principle as well as of practice in measuring outputs, achievement and value for money from public expenditure".[303]

Stage II: demarcating policy from implementation

Many of the critical reviews of the FMI suggested that the shift of emphasis to efficient management could only penetrate into the deeper psyche of the civil service if a formula could be found for balancing individual responsibilities with personal autonomy of the civil servants qua managers. The NAO for example, thought it essential that:

> "managers should feel personally responsible for achieving targets which contribute to Ministers' overall objectives".[304]

Implicit in this observation was that the mechanisms in place and the existing relationships between ministers and civil servants were somehow ill-equipped to accommodate the full throttle of efficiency drives and managerial edicts, or that there was somehow a dislocation of understanding, inclination and priorities between the civil service and its political masters.

As we shall see in the next few subsections, it was within this climate that the re-positioning of the civil service into a pseudo-commercial or quasi-contractual relationship with ministers via the Next Steps initiative, as well as with citizens as users (or the public as ratepayers) through the Citizen's Charter[305] and market-testing, began.[306] The issues raised by all three initiatives are complex but the primary focus of this thesis will be on the Next Steps initiative.

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303. NAO (1985-86) *The Financial Management Initiative*, HC 588, para 25.

304. NAO (1985-86) *The Financial Management Initiative*, HC 588, para 20.

305. *The Citizen's Charter: Raising the Standard.* Cm 1599 (1990-91).

306. *Competing for Quality: Buying Better Public Services.* Cm 1730 (1991-92); also see, Cabinet Office (1996) *Competing for Quality Policy Review*. Lon: HMSO.

On 18 February 1988,[307] Margaret Thatcher, then Prime Minister, announced to the House of Commons that the government had accepted the main recommendations of the previously unpublished report from the Efficiency Unit headed by Sir Robin Ibbs.[308] The report gave birth to the Next Steps initiative, which, put simply:

> "is the name given to the Civil Service reforms under which Executive Agencies are being set up to deliver government services".[309]

The rationale for embracing the Next Steps initiative, as presented by Thatcher to the House of Commons, was:

> "to give more responsibility to the manager of the agency but the manager will be accountable to his Minister and the permanent secretary will continue to be the accounting officer to the appropriate select committee. The whole purpose of this...is to reply to the desire of many people in the civil service to have more responsibility and the wish of the Government to have an organisational arrangement that will increase efficiency and the effective use of resources".[310]

Next Steps represents "the most ambitious attempt at civil service reform in the twentieth century",[311] so concluded the Treasury and Civil Service Select Committee in its third progress report on the initiative. It also presented an opportunity, as the TCSC said in its first progress report, "to overcome the difficulties which have prevented the full implementation of the FMI".[312] The Ibbs report, though aware of the difficulties that beset earlier reform initiatives, was not easily deterred:

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307. HC Debs, col 1149, 18 Feb 1988.

308. Efficiency Unit (1988) *Improving Management in Government: the Next Steps*, Lon: HMSO.

309. Goldsworthy, D (1991) *Setting Up Next Steps: A Short Account of the origins, launch and implementation of the Next Steps Project in the British Civil Service*, Lon: HMSO, p.1.

310. HC Debs., col 1156, 18 Feb 1988.

311. TCSC (1989-90) *Progress in the Next Steps Initiative*, HC 481

312. TCSC (1987-88) Civil service management reforms: the Next Steps, HC 494.

> "while the introduction of systems is a start, real changes in *attitudes and institutions* are needed to get the full benefits of better management".[313]

The concentration on attitudinal and institutional changes in the Ibbs Report fits in with Wildavsky's definition of "total efficiency" as it carries with it an implicit recognition that the most efficient means for accomplishing the desired ends "cannot be secured without altering the machinery for making decisions". So the advocate "not only alters means and ends (resources and objectives) simultaneously but makes them dependent on changes in political relationships".[314]

The progress of Next Steps has been closely monitored not only by the TCSC and the PAC but also in a number of commissioned reports.[315] There have, in particular, been many criticisms relating to the introduction, implementation and impact of the initiative. Questions relating to the *implementation* and *impact* of Next Steps will be dealt with in later chapter, but perhaps a word or two needs to be said about its *introduction.*

There seems to have been some disquiet, evident for instance in the reports by the TCSC,[316] about the way in which the initiative was introduced because it afforded no opportunity for either proper Parliamentary debate or a Commons vote on whether and to what extent Ibbs' proposals should be adopted. In a later Commons debate discussing the TCSC's report in the session 1989-90, Giles Radice,[317] also a member of the TCSC, welcomed the progress made by Next Steps but cautioned that:

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313. Efficiency Unit (1988), p.21. Emphasis added.

314. Wildavsky, A (1966) The Political Economy of Efficiency, *Public Administration Review*, pp.292-310, at p.307.

315. Efficiency Unit (1991) *Making the Most of Next Steps: The Management of Ministers' Departments and their Executive Agencies* (the Fraser Report). Lon: HMSO; OPSS (1994) *Next Steps: Moving On - the Trosa Report*; OPSS (1995) *After Next Steps - the Massey Report.*

316. see, HC 494-I (1987-88), para 50; HC 481 (1989-90), para 6.

317. HC Debs., col 683, 20 May 1991.

"the Next Steps changes were far too important to be left to the Executive alone, and that there should be more Parliamentary input".

Some critics were more forthright. Dr John Marek,[318] Labour MP for Wrexham, described the initiative as "the next step along the road of trying to ensure the triumph of party political dogma [and] a wild leap into the dark for good government". Marek questioned why there was no debate for instance, on the shift of responsibilities for the management of agencies downwards to agency chief Executives nor on the dramatic changes in the way the civil service operates, and "why no pilot studies were conducted before the agency system was imposed on the civil service".

Conclusion: in search of the hidden agenda

To what extent do the Conservative government's policy intentions on reforming the civil service undermine the traditional understanding of the civil service as 'servants of the Crown'? It would be useful to use Hogwood's[319] analytical framework to consider this question. Hogwood suggests that:

- policy innovation involves "the entry of government into an area of activity in which it has not previously been involved";
- policy succession refers to "the purposive replacement of existing policies by others in the same area of activity";
- policy maintenance is characterised by "the continuous replacement type of change"; policy termination is the complete opposite of policy innovation; and
- policy reversal encompasses situations "when a government does not simply terminate a programme, but introduces a new one which has an objective in the opposite direction".

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318. HC Debs, cols 674-5, 20 May 1991.

319. Hogwood, B (1992) *Trends in British Public Policy: Do Governments Make Any Difference?*. Open University Press, pp.18-20.

Some aspects of the FMI approximate to policy innovation but even then, in a somewhat 'soft' sense. The genealogy of the bulk of the reforms - Rayner, MINIS, FMI, Next Steps, Citizen's Charter, market-testing - suggest a strong element of policy succession/policy maintenance type of development. Hogwood's system of classification is perhaps too limited in that it does not seem to allow for a plateau stage - or what we may call the "policy consolidation" stage - since this is arguably the phase represented by the White Papers of 1994 and 1995 in their reaffirmations (or assertions) of the constitutional underpinnings of the now more managerially-oriented civil service.

The bigger underlying question is: why should the development of policy intentions on civil service reform be of interest to public lawyers? As Vernon Bogdanor[320] argues, recent civil service reforms are having profound implications on traditional constitutional principles such as the doctrine of ministerial responsibility, the unity of the Civil Service and the conventions governing behavioural ethics and propriety of civil servants. Bogdanor concluded perceptively "that we are faced, in government, by a revolution which is not merely managerial, but has important constitutional implications".[321]

This chapter has set out to show - through a survey of official statements - the nature of the thrust in recent reform initiatives towards a more managerial approach to the activities of government. What seems to be absent however, from the policy statements in the White Papers, as well as in the scrutiny reports by select committees, is any kind of meaningful constitutional discourse and critique of the focus on 'government as management' as a goal *per se*. It may be because, as Johnson[322] argues, leading Conservative reform thinkers within Thatcher's inner policy circle such as Keith Joseph, whilst interested in redefining social and economic aspects of Conservative philosophy, nonetheless:

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320. Bogdanor, V (1993) Ministers, Civil Servants and the Constitution. IALS Bulletin, Issue 15, October 1993.

321. Bogdanor, V (1993), p.22.

322. Johnson, N (1980) Constitutional Reform: some dilemmas for a Conservative philosophy in Z. Layton Henry (ed.) Conservative Party Politics. Lon: Macmillan, n.24, cited in C. Graham & T. Prosser (eds)(1988) *Waiving the Rules*, Open Univ Press, p.13.

"appear to show little interest in the constitutional implications of their arguments: the impression often conveyed is that political institutions are rather secondary bits of organisation which a management consultant can rejig according to need".

The survey of policy intentions in official literature reveals an impoverished conception of management in government, which readily embraces the private sector model in an apparently unquestioning way. Select committee scrutinies, limited perhaps by their terms of reference, seem to be preoccupied with the state of the road towards a more managerial civil service, but have not questioned the wider constitutional rationale, legitimacy and implications of the single-minded pursuit of efficient management in government.

The authors of a Cabinet Office occasional paper produced after the Next Steps initiative, attempted a qualified critique of the private sector management model:

"Comparison with the private sector has to be treated with caution. In the private sector, there is a direct relationship between commercial success...and the standard of consumer service.

[In the public sector] the reasons for providing the service in the first place, the nature of the service and the manner in which it is delivered, are not dictated by the markets [but are instead] decided on the basis of political judgments about economic and social priorities.

All that said, those who execute public service functions have a professional responsibility to do so to the highest standards of service possible, within the given level of resources".[323]

This was a qualified critique not only because of the tone at which it was pitched, but also because of the detachment from officialdom in which the report was cast. It does not escape

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323. Cabinet Office, Occasional Paper (1988) *Service to the Public*. Lon: HMSO, para 1.5. My additions.

notice that the report - perhaps unusually - was prefaced by a caveat, signposted unassumingly on the inside cover that:

> "the authors are solely responsible for the content of the paper in which views may be expressed which are not shared by the Office of the Minister for the Civil Service".

The tone of their critique also seems even more benign when compared to that set by an editorial in the journal of Public Administration which criticised the managerial assumptions of the Fulton report in 1968. It argues that an undifferentiated managerial model is ill-suited to public administration because:

> "the administrative process is essentially one of regulative action, a process of balancing and optimising, in which by definition, goals can never be exactly fixed, tasks cannot be exhaustively specified..".[324]

So, the question that logically arises is: with what issues would a constitutional critique be concerned? One of the key themes underlying civil service reform stemming especially from the Fulton report has been the almost single-minded emphasis on accountable management, and where administrative accountability has tended to be measured in terms of *quantitative* management criteria, to the virtual exclusion of other *qualitative* values of good administration.[325]

There has been some *ex-post facto* analysis of these constitutional implications within official literature but not quite on the level of pan-optical richness and rigour that has been germinating within academic literature.[326] This disjunction between official and academic discourse throws up a gap that is fertile for further research of a breed which combines both an analytical

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[324]. (1968) *Public Administration* pp.367-74 at p.372.

[325]. For a fuller discussion of 'good administration' in the context of Britain, see e.g. Woodhouse, D (1997) *In Pursuit of Good Administration*, Oxford Clarendon Press.

[326]. Of the more recent works, see e.g.: Bekke, H.A.G.M.(1996) *Civil Service Systems in Comparative Perspective*, Indiana University Press; Beetham, D (1996) *Bureaucracy*, Open University Press; Flynn, N (1996) *Public Sector Management*, Prentice-Hall; Fry, G (1996) *Policy and Management within the Civil Service*, Prentice-Hall; Richards, D (1997) *The Civil Service under the Conservatives 1979-1997*, Sussex Academic Press.

orientation as well as an empirical dimension. This thesis attempts, through both its theoretical and methodological orientations, to fill that gap. The more immediate aim of this chapter, however, has been to focus on the lack of meaningful constitutional discourse in official literature on civil service reform.

Embedded within the proposals for successive administrative reforms, as outlined earlier in this chapter, are particular conceptions of the proper role of the civil service in the modern state. There also seems to have been a shift in conceptions of the civil service over time. In emphasising the policy function of civil servants, the famous founding report by Northcote-Trevelyan in 1854 went no further than to refer to civil servants as:

> "an efficient body of permanent officers, occupying a position duly subordinate to that of the Ministers who are directly accountable to the Crown and Parliament, yet possessing sufficient independence, character, ability and experience to be able to advise, assist and influence...".[327]

By the time the Fulton Committee reported in 1968, the need for civil servants to develop managerial skills was identified as a priority because the Committee was concerned that civil servants "tended to think of themselves as advisers on policy to people above them, rather than as managers of the administrative machine below them".[328] The White Paper in 1994[329] now goes much further by seeming to put an equal emphasis on two potentially conflicting sorts of functions for civil servants: policy advice on the one hand, and management and service-delivery on the other.

The management ideology of Fulton and of the White Papers in 1994 and 1995 are thus only tenuously linked. As Fry puts it:

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327. *On the Organisation of the Permanent Civil Service*, HC XXVII (1854), p.1.

328. *The Civil Service*, Cmnd 3638 (1966-68), para 18.

329. *Continuity and Change*, Cmnd 2627 (1994), para 2.3.

"Such managerialism as the Fulton Committee embraced was largely designed to operate alongside the career Civil Service, only modifying its practices...The New Public Management (*sic* on the other hand) was intended to be more intrusive, in many ways undermining the Civil Service behaviour".[330]

Fry's analysis provides an apt launching pad on which to introduce the case study of the HM Prison Service that follows in the next four chapters.

[330]. Fry, G (1995) *Policy and Management in the British Civil Service*, Hemel Hempstead; Prentice-Hall, p.143.

Chapter 5

Part I of the case study of the implementation of managerial reforms in the HM Prison Service: Qualitative Case Study Methodology

Introduction

This thesis seeks to understand the phenomenon and constitutional implications of managerialism in the civil service by incorporating a case study of the HM Prison Service. The rationale for focusing on the Prison Service as a case study has been set out in chapters 1 and 2, and the significance of the case study itself for the thesis will be expanded upon in chapter 6. It was explained earlier that the primary purpose of focusing on the Prison Service is to explore the underlying constitutional concepts and principles, or the absence of them, in the implementation of the Next Steps agency idea. This chapter seeks to explore the theoretical and methodological questions raised by the use of qualitative interviews within a case study approach. In this sense, the chapter functions as a buffer between the theoretical constitutional fundamentals, and the empirical reality which tests the stated theory. It will also consider the extent to which a qualitative case study methodology is appropriate for extracting maximum information in a study of the institution of the civil service, which has a long reputation for secrecy rather than openness, and diplomacy rather than drama and theatrics. The empirical element of the case study involves a series of semi-structured interviews with current and former senior civil servants involved in the administration of the Prison Service.

Rationale for a qualitative methodology

Before we delve into the nature of the qualitative case study model, a little needs to be said about the decision to adopt a *qualitative* as opposed to a *quantitative* methodology. There

several primary justifications for the use of a qualitative model in this study: one reason is to gain what Fetterman[331] calls an 'emic' rather an 'etic' perspective of reality. The emic or phenomenological perspective is the 'insider's or native's perspective of reality'.[332] As Fetterman explains, 'native perceptions may not conform to objective reality, but they help the field-worker understand why members of the social group do what they do'. The etic perspective, as Fetterman goes on to explain, is 'the external, social scientific perspective on reality'.

Another reason is to gain a sense of what Foucalt[333] first called the 'discursive field'. Weedon[334] sheds further light on this idea of discursive field by describing it as 'competing ways of giving meaning to the world and organising social institutions and processes'. Within the context of this research, the qualitative interviews were designed in particular, to tap into the assumptions, prejudice and perspectives of the civil servants at different echelons of Prison Service management in relation to the managerial initiatives introduced over the last two decades. As will be evident in later chapters, the *attitudinal* aspect is, arguably, as significant as the more *formal* aspects such as the written rules and regulations which have been the predominant focus of traditional public law textbooks. This is primarily because the attitudes of key actors towards reform initiatives such as the Next Steps agency can influence policy implementation and ultimately, policy outcomes.

The qualitative approach was also borne of the need to triangulate the data, evidence or published official sources of data (chapter 6) through primary, empirical, qualitative data (chapter 7) on the impact of agency status on the Prison Service. The role of the researcher is then to bring some sense of order, or of a conceptual schema, to these primary and secondary

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331. Fetterman, D.M (1991) A Walk through the Wilderness: Learning to Find Your Way in Shaffir, W.B & Stebbins, R.A (eds.)(1991) *Experiencing Fieldwork: An Insider View of Qualitative Research*, Cal: Sage, pp.90-91.

332. Fetterman, D.M (1991) ibid.

333. see Foucalt, M (1972) *The Archeology of Knowledge*, London: Tavistock, cited in McLaren, P (1991) Field Relations and the Discourse of the Other, in Shaffir, W.B & Stebbins, R.A (eds.)(1991) *Experiencing Fieldwork: An Insider View of Qualitative Research*, Cal: Sage, p.151.

334. cited by McLaren, P (1991) Field Relations and the Discourse of the Other, in Shaffir, W.B & Stebbins, R.A (eds.)(1991) *Experiencing Fieldwork: An Insider View of Qualitative Research*, Cal: Sage, p.151.

sources of information in order to build up a picture of the concepts, arguments or theories under study. As Silverman[335] writes, 'the trick is to produce intelligent, disciplined work on the very edge of abyss'.

There are precedents upon which to draw as guides in the use of a qualitative, and within that, an emic or phenomenological, approach to studies of public law and public administration. It is worthwhile peering into some of these works to identify some lessons on the extent to which a qualitative methodology can help to animate the subject under study. In some ways, by learning about their less successful as well as successful strategies, these works can help to shed light on not only the methods to emulate but also the pitfalls to avoid in the author's own research. Five of these previous known works are discussed here. They have been selected on the primary basis of their immediate relevance and direct comparability in terms of research subjects in that they were all concerned with the use of senior civil servants as interview respondents.

It can be said at the outset, that one of the themes which these works have in common is a *lack* of a systematic, meaningful or sustained discussion of the methodological principles which have guided their qualitative research. Implicit in this omission is, arguably, the idea that the research methodology is purely incidental to the substantive arguments and theories being argued, proved or disproved. This author's research disagrees with such a premise, and for this reason, has included a specific chapter setting out the theoretical principles and the practical issues generated by the qualitative case study of the implementation of managerialism - in particular, the Next Steps - in the Prison Service which is to follow in the next two chapters. Another important similarity between these works lies in the problems they reveal, and the time they take in occupying the attention of highly-pressured elite respondents for the purposes of the research, and then, transforming the products of what are essentially 'conversations' into concretised points and arguments in the context of the research. Perhaps most important of all, they also illustrate the positive contributions, if not the potential, which qualitative works endow upon the study of the processes of government and administration.

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[335]. Silverman, D (1993), *Interpreting Qualitative Data*, London: Sage, p.221.

The five selected works essentially span the Conservatives' period in government. In a study conceived during the 1970s but only published in 1981, Heclo and Wildavsky, chose an ethnographic methodology for understanding the expenditure process "as it actually operates in British central government".[336] The rationale for this, as they explained, was "to tell our tale largely from the viewpoint of the participants, not to signify our agreement, but to explain their actions".[337] In common with many qualitative works involving civil servants in Britain,[338] they disclose rather scarce methodological details in their book even though their discussion does emphasise some important fieldwork principles. They underlined, for instance, the fact that political elites (ministers and civil servants) "are not used to giving something for nothing",[339] and so the uninitiated or unprepared researcher "cannot get information without at least a small fund to begin with".[340] They also recommend milking sources of information in former participants or those not interviewed too often to build up one's field of background intelligence. At the opposite end of the scale, the authors have tried to avoid the problem of 'fieldwork capture' whereby the interviewer *unquestioningly* assumes, adopts, or even proselytises, a particular agenda or point of view hosted by one, or several, interviewees - by listening carefully to each viewpoint but 'remained presumptuous enough to think that we see the larger picture'.[341]

Campbell and Wilson's study of Whitehall,[342] also conceived in the 1970s but published much later, in 1995, has echoes of Heclo and Wildavsky's earlier study of the community and the

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336. Heclo, H & Wildavsky, A(1981) *The Private Government of Public Money*. Lon: MacMillan, second edn, p.lxi.

337. Heclo, H & Wildavsky, A(1981) *The Private Government of Public Money*. Lon: MacMillan, second edn, p.lxvii.

338. for a recent study, see Woodhouse, D (1998) *In Pursuit of Good Administration: Ministers, Civil Servants and the Ombudsman*, Oxford University Press. For a review of aspects of Woodhouse including its methodological discussion, see, Loh, I (1998) 3 *Web Journal of Current Legal Issues* at http://webjcli.ncl.ac.uk/

339. Heclo, H & Wildavsky, A (1981) *The Private Government of Public Money*. Lon: MacMillan, second edn, p.lxviii.

340. Heclo, H & Wildavsky, A (1981) *The Private Government of Public Money*. Lon: MacMillan, second edn, p.lxviii.

341. Heclo, H & Wildavsky, A (1981) *The Private Government of Public Money*. Lon: MacMillan, second edn, p.lxxii.

342. Campbell, C & Wilson, G (1995) *The End of Whitehall*, Oxford: Blackwell Publishers.

policy of the public expenditure process. Their discussion on their research methodology does not come across as very methodical, inserted as it is, in just over a page of the preface. Between them, the authors estimate that they have conducted 287 interviews (Campbell did 212; Wilson 75) with both serving and former ministers and civil servants over a period of sixteen years (1978-1994). They do not appear to have adopted a common method, as Campbell used "an open-ended instrument"[343] while Wilson employed "a structured interview schedule"[344]. In Campbell's case, "all but a few interviews were taped and transcribed"[345], whereas for Wilson, "about half the sessions were taped"[346]. The only methodological problem they appear to have logged in their book is their difficulty in grappling with the sampling of interviewees in Britain because "unlike the United States, officials (in Whitehall) rarely give interviews without consulting with a central authority in their department"[347].

The lack of a methodological discussion is also evident in Greer's[348] research on the Next Steps initiative. There was a notable inconsistency between the principle of anonymity that she professed to protect in her preface, and the opportunity for 'jigsaw identification' which was evident in her attribution of comments. 'Jigsaw identification' refers to a situation in which quotes are attributed to a person which, even if un-named, can be easily identified with further information. Greer made use of such references in chapter 5 in particular, quoting amongst others, 'the Social Security chief Executive', 'the Child Support Agency chief Executive' and 'the Benefits Agency personnel director'. The other criticism that can perhaps be levelled at Greer's research methodology is the lack of a separation between the interview data from her other research sources. Interview comments are instead interwoven with analytical arguments in a way which may court criticisms relating to researcher bias. It is precisely for this reason that the interview data is presented in a separate chapter from a discussion of the data in this thesis, as will be evident later on.

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[343]. ibid, p.xiii.

[344]. ibid, p.xiv.

[345]. ibid, p.xiv.

[346]. ibid, p.xiv.

[347]. ibid, p.xiii.

[348]. Greer, P (1994) *Transforming Central Government: the Next Steps Initiative*, Buckingham: Open University Press.

In his comparative study of management reforms in Britain and Australia published in 1994, Spencer Zifcak[349] displayed a more systematic approach to the methodological issues encountered in his research by setting them out at some length, in an appendix, separate from the substantive arguments he was trying to pursue. Zifcak noted, among other things, that few academic researchers had been able to negotiate 'the requisite degree of access'[350] to key administrative officials in government. The advice that Zifcak offers to prospective researchers is basically to persist in seeking out the avenues of access into the social network of relevant officials, in his case, in both Britain and Australia. In Britain, Zifcak finally managed to establish research contact, and even secure a work shadowing venture, after several initiatives such as joining the Royal Institute for Public Administration (now abolished), and attending its conferences, attending relevant in-house seminars of his university, and becoming a member of the Chartered Institute of Public Finance and Accountancy (CIPFA) as well as getting involved in its seminars.

It was through a CIPFA conference that Zifcak fielded a question, and later introduced himself, to one of the speakers, Sir John Cassels, then head of the Management and Personnel Office (now abolished). Sir John referred Zifcak to another key official, Sandy Russell, who headed the Financial Management Unit, who was, in turn, able to meet Zifcak's request to shadow some key officials in the FMU for almost six months, having sought clearance from his superiors. Zifcak followed the same pattern of social networking in Australia, and was able to secure a shadowing role in the equivalent department of the FMU in Canberra. His experience was, partly perhaps because he was a native, that 'the Australian officials were generally more open than those in Whitehall'.[351] His primary sources of empirical information were interviews, internal documentation, conferences and meetings. Of these sources, the interviews which he conducted with sixty three officials were his most important avenue. The

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[349]. Zifcak, S (1994) *New Managerialism: Administrative Reform in Whitehall and Canberra*, Open University Press.

[350]. Zifcak, S (1994) *New Managerialism: Administrative Reform in Whitehall and Canberra*, Open University Press, p.197.

[351]. Zifcak, S (1994) *New Managerialism: Administrative Reform in Whitehall and Canberra*, Open University Press, p.199.

methodological principles which Zifcak adhered to were also applied in the fieldwork undertaken by this author with Prison Service officials, namely, that all interviews were audio-taped, and all interviewees were assured that the interviews were done on the basis of Chatham rules - that is to say, comments could be quoted but not attributed without prior consent.

One of Zifcak's research contact, Sir John Cassels, also contributed to another research published recently. As part of his research on the nature of senior civil service appointments during Thatcher's years, David Richards[352] interviewed, and attributed comments to, Sir John and eleven other key officials who served for some period during Thatcher's time in office from 1979-95. However, it is not clear from Richards' book what type of methodology he used when interviewing these officials. In Richards' case, interview comments were also interwoven with substantive arguments, rather than analysed independently, in order to preempt suspicions of researcher bias towards, or capture by, the research interviewees' environment.

Apart from considering works in which some qualitative research methodology was used, some attention could also have been paid to works where the qualitative model could have been used but was not. This was not done in this case as it would have been more of a study in conjecture rather than learning from hard lessons from past works.

Theoretical canons of qualitative case studies

(i) Understanding the case study model

The case study model was chosen due to its particular strengths. Firstly, it will facilitate a *contextual* study of events as they occur within a chosen field, according to certain theoretical propositions. Yin[353] for instance explains that case studies are employed "especially when the

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[352]. Richards, D (1997) *The Civil Service under the Conservatives, 1979-97: Whitehall's Political Poodles?*, Sussex Academic Press.

[353]. Yin, R.K (1994) *Case Study Research: Design and Methods*. Cal: Sage, 2nd edn., p.13.

boundaries between phenomenon and context are not clearly evident". They make appropriate research methodology when details of the case are important as are the interactivity of the details with the relevant operating context. Stake[354] amplifies this point nicely:

> "A case study is expected to catch the complexity of a single-case...We look for the detail of *interaction* with its contexts. Case study is study of the particularity and complexity of a single case, coming to understand its activity within important circumstances." (emphasis added).

There are precedents in current literature which show how case studies have been used by researchers in political science especially where there is a need to track developments within the target administrative area whilst simultaneously preserving the wider socio-legal context of its development.[355] These studies highlight the unique contribution of case study research methodology in academic research on administrative reform.

The second reason is that case studies impose manageable parameters for a single researcher such as in my case. As Stake[356] points out,

> "Case study research is not sampling research. We do not study a case to understand other cases. Our first obligation is to understand this one case."

(ii) Limitations of the case study

This orientation ties in with a central premise of my research which holds that there is a chasm between the policies underpinning recent civil service reforms on the one hand, and their

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354. Stake, R.E (1995) *The Art of Case Study Research.* Cal; Sage, p.xi.

355. See for instance: Kellner, P & Lord Crowther Hunt (1980) *The Civil Servants: An Inquiry into Britain's Ruling Class.* Lon: MacDonald; Heclo, H & Wildavsky, A (1981) *The Private Government of Public Money.* Lon: Macmillan.; Osborne, D & Gaebler, T (1992) *Reinventing Government.* Mass; Addison-Wesley; Greer, P (1994) *Transforming Central Government: The Next Steps Initiative.* Open University Press; Zifcak, S (1994) *New Managerialism.* Open University Press.

356. Stake, R.E (1995) *The Art of Case Study Research.* Cal; Sage, p.4.

implementation in specific areas of public administration on the other. There is nothing novel in this, and indeed, the architects of the civil service reforms do envisage the room for this type disparity. For example, in the first official report after the implementation of the "Next Steps" agency idea, Angus Fraser[357] emphasised:

> "...all Agencies and all Departments are different. Arrangements in each case should be tailored to the particular job to be done."

And so, my research aims to focus on how well these arrangements have worked out in the case of the Prison Service post-implementation.

The strengths of an elite case study can however sometimes pose as limitations as well. In their study of Scottish business elites' responses to the idea of Scottish devolution, Christopolous and Herbert[358] raised some of the more obvious limitations for example, (i) "validity" considerations arise over the personal interaction of the interviewer and the interviewee; (ii) the likelihood of "response bias" in securing interviews from certain elites only; and (iii) the possibility that positions expressed were representing the "official" line rather their "actual" views. These limitations are present in my own research as well. It is well-known that research ethics encourage open acknowledgement of the limitations of one's study and methodology. Nevertheless, it can be argued that the limitations inherent in my own research can, in some way, be guarded against.

The first limitation relates to a wider question concerning the representativeness of the findings of a single case study. The Prison Service is a unique case in many senses - due to its coercive role, the political sensitivity surrounding its governance and operation, its relationship with the State/ central government and its relationship with one of its key stakeholders, i.e. prisoners. Case studies are apt in this context because they help us: (a) study the problems and successes of "the particular"; and (b) see how "the particular" relates to "the general" if at all.

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[357]. Cabinet Office (1990) *Making the Most of Next Steps*. Lon: HMSO.

[358]. Christopoulos, D & Herbert, S (1997) Scottish Elite Responses to Devolution. In *Contemporary Political Studies 1997*, volume 2, p.796. Political Studies Assn.

As Stake[359] explains, the highly focused setting of a case study often raises and repeats many observations, analyses and interpretations in a way which connects the study to wider themes and principles of more general concern. And so, as will be evident in my case study of the Prison Service, qualitative case studies can often provide a subtle combination of particularity and generality which other research methods lack.

So even though the Prison Service is a unique case as compared to other areas of administration, the case study here will be used to show how it fits in with the developing body of theoretical and empirical literature on the impact of post-1979 civil service reforms. It will be evident that the case study of the Prison Service raises themes which touch upon wider questions of this thesis, namely: (i) what are the underlying purposes of the civil service? Are there now *competing* conceptions of the purpose of the modern civil service? (ii) What are the cumulative implications of recent managerial reforms for the position of the civil service in the British constitutional order?

The second limitation concerns the generalisability of the interview data, and within that, the representativeness of the interview sample. The critical question here is "How can the views of a handful of elite civil servants involved in the administration of prisons be considered as representative of the views of the others in the Prison Service?". Whilst the limitations posed by a small interview sample must be recognised, they must also be placed in the wider context of pragmatic concerns and reasonable attempts to minimise the more obvious problems.

On the first point, it is within the allowance of the relevant Code of Research Ethics[360] that the researcher can admit the limits of their professional competence (e.g. expertise) and practical resources (e.g. personnel, time and cost) as legitimate boundaries of their research. Nevertheless, the researcher should at the same time, take reasonable steps to ascertain the

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359. Stake, R.E (1995) *The Art of Case Study Research.* Cal: Sage.

360. Socio-Legal Studies Association (1993) *Statement on Ethical Practice.* Lon: Butterworths.

truth[361] value of their findings. This is where the practice of "triangulation" is important. As Marshall and Rossman[362] explain:

> "Triangulation is the act of bringing more than one source of data to bear on a single point...Data from different sources can be used to corroborate, elaborate or illuminate the research in question."

According to Denzin,[363] the rigour of a study can be improved via triangulation in terms of data source, investigator/ theoretical perspectives and methodological approach. Stake[364] argues that the modern understanding of triangulation is based on a need for additional *interpretations* rather than *confirmation* of a single meaning. The author's own research will study the impact of recent civil service reforms through multiple methods, principally, (i) interviews with a range of stakeholders concerned with the administration of prisons. My interview respondents include current and former civil service elites in the Prison Service, as well as official elites in prison-related non-governmental bodies; and (ii) a study of relevant primary and secondary documentation to which the researcher has legitimate access.

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361. There are different definitions of this concept. These will not be discussed in detail here but see for example: Lincoln and Guba (1985) propose a four-stage test: credibility, transferability, dependability and confirmability: see Lincoln, Y & Guba, E (1985) *Naturalistic Inquiry*. Cal: Sage, p.290 et seq. Marshall and Rossman (1995) propose a twenty-point checklist which will be discussed later but see Marshall, C & Rossman, G.B (1995) *Designing Qualitative Research*. Cal: Sage, chap.7.

362. Marshall, C & Rossman, G.B (1995) *Designing Qualitative Research*. Cal: Sage, p. 144. This concept originated in navigation science and has been applied in social scientific inquiries, see for example: Denzin, N (1984) *The Research Act: A Theoretical Introduction to Sociological Methods*. NJ: Prentice-Hall, 2nd edn.; Jick, T.D (1979) Mixing Qualitative and Quantitative Methods (1970) 24 *Administrative Science Quarterly*, pp.602-61; Rossman, G.B & Wilson, B.L(1985) Numbers and words: Combining quantitative and qualitative methods in a single large-scale evaluation study (1985) 9 *Evaluation Review* pp.627-43; Rossman, G.B. & Wilson, B.L (1994) Numbers and words revisited: Being shamelessly eclectic (1994) 28 *Quality and Quantity* pp.315-27.

363. Denzin, N (1984) *The Research Act: A Theoretical Introduction to Sociological Methods*. NJ: Prentice-Hall, 2nd edn.

364. Stake, R.E (1995) *The Art of Case Study Research*. Cal: Sage, pp.114-5.

The third limitation touches upon a theme particularly familiar within elite research.[365] According to Goffman,[366] there are critical differences between the frontstage and backstage settings for social behaviour. In the case of elite interviews, there is understandable concern as to whether participants tend to share the frontstage views (i.e. "official" view or the popularly accepted opinions) rather than the backstage views (i.e. their personal postures and internal feuds and factions). Hunter[367] refines this distinction by pointing out that "even backstages have backstages". For example, in a private council meeting to which Hunter had managed to negotiate access, he noticed that his presence "drew a veil over conversations that would only be dealt with backstage".[368]

The problems associated with hidden layers of backstage views are arguably more acute in cases where senior civil servants who are steeped in the traditional art of diplomacy and circumspection in their official duties, are being interviewed. So again, a certain margin of error has to be built into the analysis and interpretation of the relevant interview data. Arguably, there can only be reasonable attempts to counter the polluting effects of this problem within the author's research.

There are numerous circumstances in which the backstage views are perhaps more likely to surface and of these, three particular case-types are arguably present in this study:

(i) where interviewees have been referred by a gatekeeper who commands a high degree of respect within the Prison Service by virtue of his wide experience and length of service, the interviewees do not hear of this research "cold";

(ii) in a limited number of cases, interviewer and interviewee belong to the same University alumni, and this common point of departure may well elicit a more helpful response from the interviewee;

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[365]. See generally, Hertz, R & Imber, J.B (eds)(1995) *Studying Elites Using Qualitative Methods*. Cal: Sage.

[366]. Goffman, E (1959) *The Presentation of Self in Every-Day Life*. New York: Anchor.

[367]. Hunter, A (1995) Local Knowledge and Local Power. in Hertz, R & Imber, J.B (eds)(1995) *Studying Elites Using Qualitative Methods*. Cal: Sage, p.153.

[368]. Hunter, A (1995) Local Knowledge and Local Power. in Hertz, R & Imber, J.B (eds)(1995) *Studying Elites Using Qualitative Methods*. Cal: Sage, p.155.

(iii) in a number of other cases, the interviewees may have a personal interest in "telling the unfiltered truth". These are typically former employees who have left the Service without their own volition, and they are keen to express their views through legitimate avenues such as those presented by academic research.

Getting close to the backstage truth in elite interviews may present one set of problems. At the opposite end of the spectrum are problems associated with what is sometimes known as "researcher bias" in the selection and interpretation of the fieldwork data. Maintaining a fine line between access and impartiality is one of the bedrocks of academic research ethics. Stake[369] advises that one way of guarding this boundary lies in the presentation of the work, that is to say, by ensuring the separation of the theoretical arguments, the fieldwork data, and the interpretation of raw data. It is on this basis that the raw data (interview transcriptions) are summarised in chapter 7 and a thematic assessment of the interview is accommodated separately in chapter 8. Another safeguard, as already discussed earlier, would be to employ a multi-method triangulation[370] by comparing the author's analysis of the raw data with the accounts and findings from other known research and inquiries.

(iii) Assessing the validity of findings

It is clear from the foregoing that case studies have inherent strengths which can frequently pose as limitations at the same time. This recognition is important because ethical research practice involves open acknowledgement of not only the *value* but also the *limits* of the research contribution to knowledge generally. This idea is implicit in Marshall and Rossman's[371] sophisticated and detailed twenty-point checklist for evaluating the usefulness of a qualitative study. It is worthwhile cataloguing their guidelines as follows:

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369. Stake, R.E (1995) *The Art of Case Study Research*. Cal: Sage, chap.3

370. Denzin, N (1984) *The Research Act: A Theoretical Introduction to Sociological Methods*. NJ: Prentice-Hall, 2nd edn.

371. Marshall, C & Rossman, G.B (1995) *Designing Qualitative Research*. Cal: Sage, chap.7.

(1) detailed methodological discussion in terms of rationale, data collection and data analysis; (2) assumptions and biases are expressed; (3) safeguards against value judgments in data collection and analysis; (4) clear link between raw data and theoretical literature; (5) research questions are stated, the study attempts to answer those questions as well as asks further questions; (6) the research clarifies its relationship with previous studies and goes beyond old frameworks; (7) its presentation is accessible; (8) evidence that the researcher was tolerant of ambiguous and negative cases, and attempted to triangulate findings; (9) the researcher recognises the limitations in generalising findings whilst assisting readers in seeing the transferability of findings; (10) there is evidence of fieldwork actively informing the theory rather than finding data to fit the study; (11) observations are sampled over a range of activities; (12) data are preserved and available for re-analysis; (13) methods are devised to check the quality of data; (14) in-fieldwork analysis is documented; (15) meaning is elicited from cross-cultural perspectives; (16) the researcher is careful about the sensitivities of the researched; (17) people in the research setting benefit in some way; (18) data collection strategies are the most adequate and efficient available; (19) the study is tied into "the big picture" to understand linkages with other systems; (20) the researcher traces the historical context to understand how institution and roles evolved.

Animating the case study: approaching the interviews

Qualitative or semi-structured interviews are a common means of gathering empirical intelligence for case studies. Qualitative fieldwork presents many opportunities as well as challenges for developing the researcher's knowledge and conception of a phenomenon. Hertz and Imber refer to the "street sense that researchers call upon in order to collect the data they need to better inform the understanding of social life".[372] Kvale puts it thus: "The qualitative research interview is a construction site for knowledge. An interview is literally an inter view, an inter-change of views between two persons conversing about a theme of mutual interest".[373]

372. Hertz, R & Imber, J.B (eds.)(1995) *Studying Elites Using Qualitative Methods*. Cal: Sage, p.viii.

373. Kvale, S (1996) *InterViews: An Introduction to Qualitative Research Interviewing*. Cal: Sage, p.14.

It is this unique combination of street wisdom and interview interactivity which helps the researcher pierce the veil of mystique and positivism which often surrounds a phenomenon under study.

As Kvale[374] explains, qualitative interviews carry an arsenal of different questioning modes which can facilitate a more in-depth inquiry into a subject, namely:

- introducing questions (e.g. 'what were your first thoughts about this research?'),
- follow-up questions (e.g. 'and what did you say then?'),
- probing questions (e.g. 'can you please elaborate on that?'),
- specifying questions (e.g. 'what did you think at that point in time?'),
- direct questions (e.g. 'have you ever discussed the issue with X?'),
- indirect questions (e.g. 'what do you think others might feel about this issue?'),
- structuring questions (e.g. 'can we move onto another topic...?'),
- silence and interpreting questions (e.g. 'are you implying that....?').

This chapter is underpinned by a belief that the interview *process* is as central to the development of the research method as is the eventual *outcome* or the emerging data. It is only by peering into the deeply interactive nature of interviewing that we are reminded that emerging data (transcriptions) are inevitably cast in a value-laden context. As Kvale puts it: "An emphasis on the transcription may promote a reifying analysis that reduces the text to a mere collection of words or single meanings conceived as verbal data."[375] The discussion in the next few sub-sections on the backstage preparations leading up to, during and beyond the interviews are set within this wider context.

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374. Kvale, S (1996) *InterViews: An Introduction to Qualitative Research Interviewing.* Cal: Sage, pp.133-5.

375. Kvale, S (1996) *InterViews: An Introduction to Qualitative Research Interviewing.* Cal: Sage, p.182.

(i) Stage one: pre-interview issues of access and design

Interviewees were drawn from samples of civil servants at different echelons of the management hierarchy, covering the: senior (Executive board), middle (area managers) and operational (prison governors) levels. Due to difficulties of access, the author did not interview either past or present holders of relevant ministerial offices even though it was acknowledged that they were a desirable interview sample. The author did not however consider the absence of this particular interview sample to have had any significant impact on the line of triangulation as there were many sources in the public domain from which one could glean the views of ministers. The more obvious examples of these sources are select committee reports, House of Commons debates and written parliamentary questions and answers as well as ministerial biographies or autobiographies. Given the public availability of ministerial perspectives, it was judged that the priority in terms of obtaining a balanced view on the research issues should perhaps be accorded to relevant senior civil servants who, by nature of their positions, do not ventilate their opinions through public channels.

Some of the interviewees who participated in this research were referred by a Prison Service official, who will be referred to forthwith as a 'gatekeeper'. Seasoned qualitative researchers, such as Ostrander[376], who have worked with elite samples have emphasised the importance of working with the *right kind* of gatekeepers who 'were known and respected by others so that they could serve as an informant about entrée as well as a subject'. In my case, a decision was taken not to use the gatekeeper as an interview subject as he had already submitted detailed comments in response to my preliminary or pilot list of interview issues and questions. To a certain extent, he had acted a sounding board or perhaps, a pilot subject. He was also, to use Ostrander's criteria, the right sort of gatekeeper as he was *both known and respected* by all levels of the Prison Service management, as was evident in his credentials and the positive responses of those to whom I wrote requesting an interview. Prior to his current

[376]. Ostrander, S.A (1995) Surely You're Not in This Just to Be Helpful: Access, Rapport and Interviews in Three Studies of Elites in Hertz, R & Imber, J.B (eds)(1995) *Studying Elites Using Qualitative Methods*. Cal: Sage, p.135.

policy/administrative secondment to the Prison Service headquarters, he was a prison governor of many years standing. I initiated contact with the official in question by sending him a copy of my research outline after I came across an article by him in the Prison Service Journal, initially seeking his advice and comments. He was most forthcoming with not only analytical comments but also suggestions on the practicalities of empirical research.

Potential interview respondents recommended by the gatekeeper were sent a revised copy of my research outline along with a short letter of introduction, asking if they would like to participate in an interview. Other respondents were approached from the cold through a differently-worded formal letter of introduction about my research accompanied by a request for a short semi-structured interview. Both types of letters also provided the name and institutional contact address and number of my research supervisor in case my research contacts wanted to check the veracity of my research, or to request further details on the nature of my project. To the best my knowledge, none of my research contacts pursued, or tried to pursue, this line of enquiry with my supervisor.

Due to the limitations imposed by time, financial resources and the absence of research assistance, the interview sample has been kept to a manageable minima which tries to sample a range of prison officials' opinions on the themes of the research, and which facilitates a subsequent triangulation of these perspectives from other sources. Fifteen people were approached in total. Most of the respondents replied within 3 weeks, commonly by having their personal assistant telephone the home number which I provided to arrange a suitable appointment. Some respondents who have left the Prison Service replied by letter which specified the dates on which they could be available. I adopted a consistent practice of confirming the logistics of all appointments by letter.

(ii) Stage two: the interview process

Over a period of six weeks, ten people were interviewed in (i) their own work place, or (ii) private residence in one case, or (iii) the neutral grounds of a research institute in the case of a retired official. The atmosphere was predominantly formal, with both interviewee and

interviewer wearing suits. Yet within that sphere of formality, there were also different latitudes of informality being displayed by the respondents, partly due to a matter of individual style as well as differentiations in the affective element of the interviewer-interviewee relationship. The interview relations were partly a function of a mixture of variables namely gender, age and ethnic background.

In stark contrast to the interviewer, all the interviewees were men (as, at the time of interviewing, there was only one woman in the Executive board, none in middle management and one amongst the governor ranks), middle-aged and white. It is hard to ignore the observation that there are relatively few women at the higher echelons of any institutional hierarchy, and the senior civil service in Britain illustrates this point *par excellence.* Gurney's[377] sharp observations of the gender problems in fieldwork relations is equally applicable to other variables such as age and ethnicity:

> 'Although efforts to get in and establish rapport are crucial for all researchers, they may be especially tricky for researchers whose personal characteristics are in some way at odds with those of the group they are studying'.

As far as the interviewer could tell, all but one of those interviewed displayed a willingness to expend time to reflect on the questions being asked, to clarify the nature of those questions as well as to tap into the interviewer's research intelligence. The interviewee in question, whose response was an exception rather than the norm, seemed under pressure to complete the interview to make way for a meeting which had been pre-scheduled to follow soon after. However, the general mode of the other interviewees was one of co-operation, and this may have been a function of the short-term nature of field contact. As Gurney[378] explains: 'In short-term research, the researcher enters and exits the setting relatively quickly. The field-worker-

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377. Gurney, J.N (1991) Female Researchers in Male-Dominated Settings: Implications for Short-term versus Long-term Research in Shaffir, W.B & Stebbins, R.A (eds.)(1991) *Experiencing Fieldwork: An Insider View of Qualitative Research*, Cal: Sage, p.54.

378. Gurney, J.N (1991) Female Researchers in Male-Dominated Settings: Implications for Short-term versus Long-term Research in Shaffir, W.B & Stebbins, R.A (eds.)(1991) *Experiencing Fieldwork: An Insider View of Qualitative Research*, Cal: Sage, p.55.

host relationship tends to remain primarily at the formal or secondary level because the time spent together is focused almost exclusively on the business at hand'.

It is difficult to evaluate the impact of venue on the candour of the interviewees because the two interviews carried outside the workplace were with retired employees who most probably had the distance of space and time to reflect on the issues on which their views were being sought. Further light could have been cast on this issue if there had been interviews with current officials outside their workplace, as comparators.

In all cases, the interviewees' personal assistants offered refreshments as they were ushering me into the interviewees' offices. Though my interviewees often opted for coffee or tea, I almost invariably asked for plain water, explaining in part jest and part truth that caffeine has long had a curious sedative effect on me.

The interviews were conducted on the basis of Chatham House rules, that is to say, comments were only attributed with the interviewee's express consent. Of the ten people interviewed, one agreed to be interviewed under anonymity, two others were willing to have their comments attributed in vetted interview drafts, and seven others gave unconditional consent for attribution. In any event, in the interest of comparability of findings, it was decided that all transcripts of non-anonymised interviews would be sent for review by the respondents concerned.

All the interviewees gave consent for the sessions to be tape-recorded on the basis of an express undertaking that the recordings were going to be used only to aid written transcription for this thesis. The presence of the tape-recorder or indeed of non-anonymity (for those who were willing to be quoted) did not appear to have stifled frank discussion as the prior assurance that the interview was to be conducted on Chatham House rules provided the option of anonymity in the final written transcript.

Although the precise formulation of the questions differed according to the circumstances of the interviewees, all the respondents were informed that the overarching theme of the research was whether key managerial initiatives since 1979 such as the FMI, Next Steps, Citizen's

Charter, market-testing and the Private Finance Initiative had substantially redefined the principles underpinning the civil service *as they saw it.* All respondents were similarly asked at the end of the session for their own opinion of the constitutional and administrative significance of reforms in the civil service from their insider positions as Prison Service officials.

The nature of semi-structured interviews is such that there are bound to be variations in the interview settings as well as the general interview flow. These differences did not in the main, seem to be significant variables which affected the outcome of the interviews in any perceptible way. Perhaps most importantly, they have not, in the interviewer's estimation, appeared to have stifled discussion on the issues on which the interviewer sought information and elaboration.

(iii) Stage three: post-interview - transcribing and vetting

The pace of the research arguably accentuates when the interviews have been completed. The challenges of what can be called the post-interview stage come predominantly from two tasks: first, the process of transcribing elite social discourses; and second, the eventual use of transcripts which have been sent for vetting.

The term "transcribing" is used here to refer to the process of playing back the tape to extract a written record of the interviews. I approached the task as a two-stage process: firstly by taking a comprehensive record of every word, repetition, hesitation and pause which were evident when the tape was being played back. In what can be called the second phase, I began to string the comments together under tighter and more coherent themes, omitting some texts in the interest of brevity, and also injecting some words, phrases and sentences in the interest of clarity. The distinction between interviewees' comments and my own have been maintained by the use of quotation marks for the former.

The processes of transcribing the tapes as well as of editing the transcripts are undoubtedly cloaked in moral choices that plague the decisions concerning what to include and to leave out. Although there are potentially many criticisms that can be levelled at the final interview transcripts, there are safeguards, such as vetting, which was adopted to counter the more damaging suspicions of engineered interview data.

All the non-anonymised interview transcripts included in this study were sent to the interviewees for vetting. Transcripts were returned with comments and amendments within approximately 4 weeks. There were few substantive corrections of the original transcripts; most of the amendments centred on typographical errors, or smoothing out rough edges which were inevitable legacies of concentrated oral discussions.

Conclusions on elite qualitative interviewing

Buried in my fieldwork experiences outlined above, are critical lessons on methodological considerations that are likely to feature in the pursuit of elites (whether business, political or professional) for the purposes of research interviews.[379] In the context of this author's fieldwork, there were several problems with accessing the elites. Two interviewees (John May and David Ramsbotham) were left out due to inevitable diary engagements on their parts at the times volunteered for the research interviews. Both have nevertheless left open the option of being interviewed at a future date. One (Marriot) decided to opt out at the last minute for reasons not entirely clear to the interviewer. Another (Derek Lewis) expressed a preference for postal or telephonic interviews, and even then, only on the grounds of 'necessity', his rationale being that he had already made public his views on his time at the Prison Service through several fora, including voluminous evidence to Parliamentary select committees, public speeches, and his own book, *Hidden Agendas*.[380] The different shades of difficulties encountered here nevertheless underline the peculiar problems of pursuing an elite interview sample.

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379. See generally, Hertz, R & Imber, J.B (eds)(1995) *Studying Elites Using Qualitative Methods*. Cal: Sage.

380. Lewis, D (1997) *Hidden Agendas: The Politics of Law and Disorder*, Lon: Hamish Hamilton.

As against that, there are distinct advantages in interviewing elites. One of the points to have emerged from the interview process is that elite respondents can be legitimate sounding boards for the theories and inclinations of the research. It was not an uncommon experience throughout my interviews to find my respondents remarking about the timeliness of the research. These feedback help to legitimise the chosen focus of the research project, but there is also a sense in which elite interviewees leave an impression on the priorities and emphases of the semi-structured interviews. This process of active learning in the field thus lends some credence to the term "empirico-inductive" fieldwork.

Elite interview respondents are all too aware of the potential for a power imbalance if they were just *responding* to questions in interviews. It was apparent from my interviews that the *modus operandi* of most respondents was not about partaking as passive interviewees nor responding to questions asked by the interviewer but rather as active conversationalists and initiating questions usually in the initial stages of the interview, almost as if to redress the power and informational imbalances that usually attend interviews.

For instance, one interviewee enquired at some length into the nature of my interest in the Prison Service, as well as how I came to arrive at the research topic. Another took a slightly different approach by tapping into my career plans upon completion of this research project, as well as the intended outlets for the research findings. It is in practice difficult to isolate the precise motivations for these enquiries as they do serve many other social functions apart from addressing any putative imbalance in the interview dynamics, such as helping to establish a bond for the subsequent dialogue or to orientate themselves for the ensuing discussion, and perhaps also to capture an impression of the professional facade of the interviewer.

At the other end of the spectrum, there is a somewhat different variation of the power imbalance issue. There have been situations in which one interviewee tailed his response with questions such as "Is that were you looking for?", or "Is that right?", almost as if the interviewee was seeking confirmation or even approval of what was being said. It would be misleading and perhaps fatal to the interview relations if the interviewee misread these signs as invitations to get on a high horse and assert what limited knowledge they have of the ground

details. Curious as it may sound, the appropriate posture, as Gamson argues, is that of humility: "The obvious strategy would seem to be a return to a self-conscious emphasis on the role of academic researcher, the true outsider who has no stake in 'good' answers but only in honest ones".[381]

One interviewee raised a problem known only too well to academic researchers: that of charting an "accurate" picture of the empirical reality. The question here, as one respondent put it, is "how far at the end of the day (the researcher) has understood the ethos of the Service in the field, what it was like to be working inside, the restraints and constraints. One can have quite an intellectual discussion about it, but if one hasn't got a feel for what actually goes on in there, one can create resentment with the people in the field because they think their problems in their approach haven't really been appreciated". Within the field of social sciences, terms such as truth, validity and accuracy can be slippery concepts as perhaps evinced by various theoretical models. The methodological issue raised here is one of the need for triangulation.

Between these scenarios, my own sense of elite interviewing is that it is more than just a one-dimensional exercise in getting an account of empirical practice. The underpinning model of interaction revolves more around an interactive, multi-dimensional exchange of information and opinions rather than a bilateral flow of data from interviewee to interviewer. The general rule seemed to be that the more informed the interviewer in questioning and probing, the more rigorous the interviewee was in responding.

For instance, one interviewee seemed pleasantly surprised that I happened to know about the existence of an ongoing study of the internal management set-up of the Prison Service which although then unreported in the media, was mentioned by an earlier interviewee. It was perhaps not coincidental that despite apparent demands on his time as a senior official, he seemed more inclined to go over the issues raised during the interview and even volunteered to post copies of certain background documents in which I had expressed a passing interest.

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381. Gamson, J (1995) Stopping the Spin and Becoming a Prop: Fieldwork on Hollywood Elites in Hertz, R & Imber, J.B (eds.)(1995) *Studying Elites Using Qualitative Methods*. Cal: Sage, p.88.

One senior official asked whether I had through my research formed any views about possible ways of reforming the key performance indicators on which there is a policy of continuous review. Another peppered many of his responses with enquiries such as, "What have you been picking up from your own interviews about this?". My general strategy, informed by the principles of objectivity and the right to anonymity of fellow interviewees, has been to respond to such enquiries with reference to established findings or reports already in the public domain.

One of the main methodological lessons here is that the academic researcher must maintain a critical degree of interest, flexibility and vigilance for new developments in the field *as the research unfolds* rather than be corseted by the research outline. The interactive model of elite interviews is underlined by the fact that some interviewees tend to drop the occasional but noticeable question during the interviews about how *other interviewees* have responded to the same question, or how the interviewer herself perceived the issue under discussion.

Chapter 6

Part II of the case study of the implementation of managerial reforms in the HM Prison Service: the official picture

Introduction: rationale for the case study

"Is the constitution to do with Acts of Parliament, or the way government does its business?" (Peter Kitteridge, para 4.21), so asked a member of the Prisons Board in the course of an interview conducted by the author. This chapter, and indeed the thesis, subscribes to the view that the constitution is about *both* what Parliament does and how government conducts itself. As has been mentioned in chapter 1, this thesis is an exercise in *contextual* constitutional scholarship not only in terms of its analytical (socio-legal) orientation but also in its *empirical* approach. It will also be methodologically contextualised in a real-life case-study of civil servants involved in the administration of prisons in England. Earlier chapters of the thesis have sought to excavate apparent gaps in the constitutional context,[382] the doctrinal origins[383] and the policy context[384] of managerialism in the British civil service. Chapter 5 provided a buffer between theory and practice by setting out the methodology of the qualitative case study of the Prison Service through which some new empirical data, on which this chapter relies, has been generated.

This chapter goes beyond the broad propositions and arguments relating to the policy of managerialising the civil service set out in earlier chapters, and shines a searching torch on the *implementation* of the managerialist agenda using a case study of the Prison Service in its life

382. chapter 2.

383. chapter 3.

384. chapter 4.

as a Next Steps agency. There are bound to be constitutional problems with this 'one size fits all' approach: the administration of for example, driving standards, is poles apart from the administration of say, welfare benefits or penal institutions, both of which impinge upon aspects of individual liberties. Although the *generic* constitutional position is that civil servants are servants of the Crown, the dynamics of the relationship between ministers and their civil servants are likely to differ depending on the activities of the government department. The chapter analyses the implementation of the agencification of the Prison Service with a view to clarifying the underlying constitutional concepts and principles, or arguably, the lack of them, within the policy *formulation* as well as the policy *implementation* stages. There were, for instance, no pilot studies before Next Steps agencies, arguably "the twentieth century's equivalent of the Northcote-Trevelyan reforms in the nineteenth century",[385] were set up. According to the Ibbs report which founded the Next Steps agencies, 'the choice and definition of suitable agencies is primarily for Ministers and senior management in departments to decide'.[386] As we have seen in chapter 2, there are problems with entrusting the Executive with the regulation of the constitutional underpinnings of the civil service. This chapter builds on that theme by highlighting the pitfalls of concentrating the responsibility for reforming the management of the Prison Service in the exclusive hands of the Executive.

There are now a handful of areas in which the problems of wholesale transplantation of untested managerialist ideas and practices from the private sector into the civil service have been sorely exposed. These areas have been christened with different identities, or slotted into various categories: the Efficiency Unit once called them, 'agencies which are fundamental to mainstream policy and operations of their Departments',[387] while Derek Lewis simply labelled them as 'sensitive' agencies.[388] The Prison Service is, without doubt, one such area: other

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[385]. O'Toole, B & Jordan, G (eds)(1995) *Next Steps: Improving Management in Government?*, Aldershot: Dartmouth, p.3.

[386]. Efficiency Unit (1988) *Improving Management in Government: the Next Steps*, Lon: HMSO, para 19.

[387]. Efficiency Unit (1991) *Making the Most of Next Steps: The Management of Ministers' Departments and their Executive Agencies*, Lon: HMSO, Appendix A.

[388]. see e.g.. the written and oral evidence by Derek Lewis to the Public Services Committee (1995-96) HC 113-III, pp.91 et seq.

examples include the Child Support Agency, Benefits Agency,[389] and Employment Service Agency[390] but as the accompanying references attest, there is already a burgeoning literature on the managerial progress of these agencies. At the time this research began in October 1995, there was little sustained analysis of the *constitutional* dimension of managerialism in the Prison Service, and to a large extent, this gap remains extant now - several years down the line - as this research is being finalised. It is this gap in current knowledge about managerialism in the Prison Service which this case study aims to bridge. The litmus test of the suitability of managerial reforms in the civil service should be based on a systematic assessment of how it is implemented in sensitive and high-profile agencies such as the Prison Service, for it is on this basis that the outer and upper limits of the managerial programme, as both a theory and policy, are discovered. A study of these 'problem cases' reveals in poignant details the factors and conditions that contribute to the success or failure of a reform programme. It also sheds light on the limited extent to which the Executive branch of government has given a 'hard look' to its own reform agenda in repositioning the institutions central to the machinery of government such as the civil service.

This chapter has several goals in that it:

(i) sheds critical light on how the policy of managerialising the Prison Service post-1979, and in particular, the Next Steps initiative, has been implemented;

(ii) questions the way in which non-legislative measures have generally been preferred over legislative initiatives in implementing the reforms; and

(iii) evaluates how the implementation of that managerialist policy has affected the role of civil servants, in the context of prisons administration, as servants of the Crown.

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389. on the DSS agencies, see e.g. Greer, P (1994) *Transforming Central Government: the Next Steps Initiative*, Buckingham: Open University Press; O'Toole, Bellamy, C (1995) *Managing Strategic Resources in a Next Steps Department: Information Agendas and Information Systems in the DSS*, in O'Toole, B & Jordan, G (eds)(1995) *Next Steps: Improving Management in Government?*, Aldershot: Dartmouth; Greer, P (1995) *The Department of Social Security and its Agencies*, in Giddings, P (ed)(1995) *Parliamentary Accountability: A Study of Parliament and Executive Agencies*, Lon: MacMillan.

390. see e.g. Hunt, M (1995) The Employment Service as an Agency: the First Three Years, in O'Toole, B & Jordan, G (eds)(1995) *Next Steps: Improving Management in Government?*, Aldershot: Dartmouth; Lewis, N (1995) Accountability and the Employment Service Agency, in Giddings, P (ed)(1995) *Parliamentary Accountability: A Study of Parliament and Executive Agencies*, Lon: MacMillan.

While the Home Secretary is politically accountable for the Prison Service, the responsibility for administering the services of the prison estate rests with the officials within the Prison Service. Since 1979, the administrative practices and structures of the Prison Service have been subject to continuous review and change, culminating in the transformation of the Prison Service from a department of the Home Office to agency status. The chapter charts the managerial changes that have taken place in the Prison Service, and evaluates the agency status of the Prison Service in the light of official reports and in the next chapter, in the light of empirical data from the author's own qualitative interviews.

Charting managerialism in the Prison Service since 1979

(i) the historical context

The election of the Conservative government to office under Margaret Thatcher in 1979 did not have direct and immediate reverberations throughout the administration of prisons despite the Conservatives' dynamic free market rhetoric. Thatcher's first period in office did however usher in, in October 1979, the report of an inquiry chaired by Justice May. May's inquiry had been commissioned by the previous Labour government.[391] The organisation and management of the Prison Service has tended to be a millstone around the neck of governments. With the benefit of hindsight, it is perhaps ominous that the Conservatives entered office in 1979 with the baggage of an inquiry[392] examining this very issue. It will be recalled that their departure from office in 1997 was tainted by the events set in motion by even more critical inquiries[393]

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391. *Committee of Inquiry into the UK Prison Services* (1979) Cm 7673, vols I & II.

392. *Committee of Inquiry into the UK Prison Services* (1979) Cm 7673-I, p.iii.

393. Home Office (1994-95) *The Escape from Whitemoor Prison on Friday 9th September 1994: the Woodcock report,* Cm 2741; Home Office (1995-96) *Review of Prison*

into aspects of prison management and security. In order to understand the constitutional role of civil servants in prison administration, the managerial reforms introduced into the Prison Service have to be placed in the wider context of its historical evolution and legislative framework. The management of prisons has tended to appear like a millstone around the neck of government since the loose federation of locally and centrally-provided prisons was nationalised and put under the charge of the Prison Commission through the Prisons Act in 1877.[394] The origins of civil service involvement in prisons administration can traced to this important piece of legislation, for it was through this statute that the Home Secretary came to assume overall political control of, and responsibility for, the management of prisons. The Commission was a statutory corporation which was accountable to Parliament via the Home Secretary, and was administered by a board of prison commissioners whose members were drawn from the ranks of departmental civil servants in much the same way as some senior staff in the Prison Service agency currently are.

The constitutional powers and duties of the Home Secretary for prison governance are now confirmed in several key provisions of the Prisons Act which, though passed in 1952, remains the primary source of legislative authority concerning prisons despite numerous inquiries into the state of prisons. Section 1 vests all powers and jurisdiction in relation to prisons and prisoners in the Home Secretary; s4 confirms the authority of the Home Secretary 'who shall oversee the general superintendence of prisons'; s47(1) authorises the Home Secretary, *inter alia*, to make rules for the regulation and management of prisons; and s52 enables the Home Secretary to issue new rules in the areas listed in s47 by means of delegated legislation. Despite the complexity of prison management, the secondary sources of rules are surprisingly sparse, and can be found principally in the Prison Rules 1964.[395] So, the legislative framework of prison governance puts the Home Secretary at the apex, but more recently, it has become

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Service Security in England and Wales and the Escape from Parkhurst Prison on Tuesday 3rd January 1995: the report, Cm 3020.

394. on the historical background, see further: McConville, M (1981) *A History of English Penal Administration*, vol. 1, Lon: Routledge & Kegan Paul, esp chap.1; Blom-Cooper, L (ed)(1974) *Progress in Penal Reform*, Oxford Clarendon Press; *Committee of Inquiry into the UK Prison Services* (1979) Cm 7673-II, chap.2; Livingstone, S & Owen T (1993) *Prison Law: Text and Materials*, Oxford Clarendon Press, Oxford Clarendon Press, esp chapter 2.

395. S.I. 1964 No. 388 (as amended).

clear that the exercise of his powers in various manifestations vis-à-vis prisoners are subject to judicial oversight.[396]

There are also other institutions such as the HM Chief Inspector of Prisons and the Prisons Ombudsman, both of whom are appointed by the Home Secretary, which oversee aspects of prison governance, but these are not of immediate relevance to this case study. Suffice to say that issues arising out of the management of prisons can be sensitive, and this appeared to be a factor which featured in the abolition of the Prison Commission by the Prison Commissioners Dissolution Order[397] in 1963. Upon the abolition of the Prison Commission, the administration of prisons became the direct responsibility of the Home Office, through a newly created Prisons Department. This single move strengthened a traditional principle which has underpinned the constitutional relationship between the Home Secretary and civil servants in the administration of prisons insofar as it was accepted that the "Home Secretary has a direct ministerial responsibility for every aspect of the work of the service".[398] The managerially-oriented reforms in the Prison Service since 1979 cast doubts on the validity of this statement as an accurate reflection of current constitutional reality. While this proposition may not necessarily be generalisable to other areas of the civil service, it does raise questions as to whether and to what extent the Executive gave a 'hard look' to the suitability of managerial reforms in the sensitive context of the prisons administration.

From 1963-1979, a series of internal reviews were conducted to look at ways of improving the management of the Prison Service, but the perception of the service as being chronically riddled with crisis,[399] fuelled by the actions of different constituencies such as prisoners, prison

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396. see e.g. *R v Board of Visitors Hull Prison, ex p St Germain (No.1)* [1979] QB 425 ; *R v Board of Visitors Hull Prison, ex p St Germain (No.2)* [1979] 3 All ER 545; *Raymond v Honey* [1983] 1 AC 1; *R v Deputy Governor of Parkhurst, ex p Leech* [1988] 1 AC 533; *R v Deputy Governor of Parkhurst, ex p Hague* [1992] 1 AC 154; and more recently, *R v Secretary of State for the Home Department, ex p Pierson*, 24 July 1997, judgment to be found on the World Wide Web: (www.Parliament.the-stationery-office.co.uk/pa/ld199798/ldjudgmt/ jd970724/piers01.htm).

397. S.I. 1963 No.597.

398. Home Office (1977) *Prisons and Prisoners: the Work of the Prison Service in England and Wales*, Lon: HMSO, p.124.

399. see e.g. Ryan, M (1983) *The Politics of Penal Reform*, Lon: Longman; also, Birkinshaw, P (1981) The Closed Society-Complaints Mechanisms and Disciplinary Proceedings in Prisons, *Northern Ireland Legal Quarterly*, pp.117-57.

officers and prison management, persisted. Widespread industrial action by prison officers in the late 1970s culminated in the establishment of an inquiry chaired by Justice May with a far-reaching remit 'to inquire into the state of the Prison Services in the United Kingdom'.[400] The May Committee, which recommended 'accountable regimes' based upon the corporate idea of management by objectives, presaged the managerial agenda of the Thatcher administration. May's proposals for contracts between regional directors and prison governors, and for regime monitoring arrangements to assess output against pre-determined objectives, fitted in with the New Right managerialist template which Thatcher favoured. The central elements of their reform programme, as will be evident later in this chapter, involved: the injection of private sector practices and disciplines (e.g. the Financial Management Initiative), the introduction of new corporate-style structures (e.g. private prisons and Next Steps) and the abolition of inefficient traditional practices (e.g. outlawing industrial action).

A striking feature of this managerial reform programme is that legislation, and Parliamentary scrutiny as well as debate, has been largely absent. Statutes were used mainly to confer additional powers on the Home Secretary to privatise aspects of prison activities, and to abolish the privilege of industrial action by prison officers. The fact that other managerial reforms, in particular the transition to agency status, were not put on statutory footing reveals a cultural mindset on the part of government in which law seems to have little part to play in modern public administration and management. This is a persistent theme that permeates the discussion which follows in the next section. The central argument is that as a result of reform initiatives introduced by the Executive since 1979, the environment in which the civil servants in the Prison Service worked came to embrace a more managerial cloak.

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[400]. *Committee of Inquiry into the UK Prison Services* (1979) Cm 7673-I, p.iii.

(ii) charting the implementation of managerialism

Soft managerialism

The underlying template for the reform of the management of the Prison Service has tended to be a top-down model, with authority emanating from the centre. Between 1980-90, there was a series of reform initiatives which worked *within* the existing parameters, structures and boundaries which can be regarded as 'soft managerialism'. Having entered office in May 1979, the Conservative government wasted no time in reaffirming, in its earliest White Papers[401] on the civil service, "good management throughout the whole of the civil service as an aim to be pursued *as a matter of policy in its own right*".[402] In May 1982, Thatcher launched the FMI through an internal memo to all ministers in charge of departments, stressing the importance she attached to the arrangements for improving managerial responsibility, and in particular, the need for higher standards of financial management. At about the same time, the second Permanent Secretary of the Treasury notified other permanent secretaries and heads of departments of the need for proper co-ordination between the departments and the Treasury and the Cabinet Office in preparing FMI plans. The precise nature and contents of this policy were not announced until September 1982, when the government published a White Paper in response to criticisms by the TCSC[403] of the excessive emphasis on economy in the use of resources, at the expense of other priorities such as efficiency and effectiveness within the civil service.

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[401]. *Efficiency in the Civil Service* (1981-82) Cmnd 8293, Lon: HMSO; *Efficiency and Effectiveness in the Civil Service* (1981-82) Cmnd 8618, Lon: HMSO.

[402]. see, *Efficiency and Effectiveness in the Civil Service* (1981-82) Cmnd 8618, Lon: HMSO, para 5. Emphasis added.

[403]. TCSC (1981-82) *Efficiency and Effectiveness in the Civil Service*, HC 236, vols I-III, , Lon: HMSO

The White Paper allied itself with a rather impoverished concept of 'good management'[404] in which senior civil servants cast in a new management cloak, are expected to have clear objectives and be able to measure their output, have specific responsibilities for maintaining value for money, and the wherewithal (in terms of information, training and expert advice) to achieve value for money.[405] In essence, the FMI programme consisted of two pillars:[406] the first is a concern with economy through the establishment of a proper financial framework: the second is a concern to secure better value for money through the creation and maintenance of 'an environment conducive to good management'. The government published White Papers in September 1983 and July 1984 reviewing the progress made by departments in developing systems to meet the objectives of FMI. In its White Paper in 1984, the government realised that the implementation of the principles of FMI had yet to penetrate into the civil service mindset: "...for the initiative to succeed, attitudes need to change as well. The aim of better value for money requires a more managerial approach to government business".[407]

The response of the Prison Service towards the FMI was reviewed by the White Papers in 1983 and 1984, as well as by the National Audit Office in October 1986 - see also the PAC report (1986-87) HC 61. They reported on progress in developing the systems to meet the objectives of FMI, but in essence, the Prison Service, like many other departments, showed little signs of a fundamental 'managerial' rejuvenation. The White Paper of 1983[408] revealed that the Prison Service viewed the FMI not as an independent programme in its own right, but as an initiative with which to *repackage* their own reform initiatives earlier set in motion by an internal reorganisation in 1980. The 'progress' of the Prison Service towards FMI was classified broadly, and arguably vaguely, in the 1983 White Paper which included initiatives such as:

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404. c.f. e.g. Woodhouse, D (1997) *In Pursuit of Good Administration*, Oxford Clarendon Press, chapters 1 & 2.

405. *Efficiency and Effectiveness in the Civil Service* (1981-82) Cmnd 8618, Lon: HMSO, para 13.

406. *Efficiency and Effectiveness in the Civil Service* (1981-82) Cmnd 8618, Lon: HMSO, paras 5-7.

407. *Progress in the Financial Management of Government Departments* (1983-84) Cmnd 9297, p.2.

408. *Financial Management in Government Departments* (1983-84) Cmnd 9058.

- 'better financial management;
- 'improvements in monitoring and control systems';
- 'developments in accountable management at prison establishments'; and
- 'bringing to fruition the next stages of several major reviews (on resource control, manpower, and management structure of prison establishments)'.[409]

In the following year, the White Paper of 1984[410] reported few new initiatives in the Prison Service: lines of accountability were being 'clarified', and a special Efficiency Unit was set up to ensure that devolved responsibilities were being properly exercised. The NAO[411] found that the Prison Service encountered problems in its implementation of the principles of FMI: line management objectives were not properly implemented due to a shortage of resources. In addtion, management information systems and the budgetary control system were not properly monitored due to a lack of reliable data. The overarching theme of these reviews was that whilst there may have been more orientation towards efficiency and value for money as the FMI intended, there were attitudinal and structural barriers to the full implementation of the government's stated policy on promoting good management throughout the civil service.

The FMI tried to stimulate the atmosphere for reform by applying pressure for continuous improvement in the standards of financial management in the civil service. The Prison Service arguably tried to extend the idea of value for money behind FMI through the reviews promised in the White Paper of 1983 mentioned earlier. The outcome of the reviews was christened the 'Fresh Start' initiative, which was first announced by the Home Secretary to the annual conference of the Prison Officers Association in 1985 as a plan to study new ways of remunerating staff,[412] but was only belatedly launched in 1987. 'Fresh Start' had two basic goals, to abolish management dependence on overtime staff, and to replace local and inefficient arrangements for staff deployment and pay with a centralised package. In 1990, a

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409. *Financial Management in Government Departments* (1983-84) Cmnd 9058, p.70.

410. *Progress in the Financial Management of Government Departments* (1983-84) Cmnd 9297, p.69.

411. NAO (1985-86) *The Financial Management Initiative*, HC 588, see chapter 8 (on the Home Office).

412. see Vagg, J (1994) *Prison Systems: A Comparative Study of Accountability in England, France, Germany, and the Netherlands*, Oxford Clarendon Press, p.52.

further administrative re-structuring dispensed with the office of deputy chair of prisons board and introduced area managers, which like the regional managers of earlier years, liaised between the Prisons Board and the governors of individual prisons. The 'Fresh Start' initiative progressively fell by the wayside as the agreements between prison governors and headquarters (and the Treasury) often did not meet the objectives set by the latter.

It became clear through the government's own, as well as external, reviews that the FMI was an insufficient crutch for galvanising managerial thinking within the civil service. The key ideas of FMI were principally driven by *financial* imperatives emanating from the Treasury, which had rather lost their cogency by the time they had filtered through the bureaucratic maze into individual departments. The implementation success rate of the FMI has been indisputably patchy and low-profile, and the Prison Service typifies that. Even an internal report on the future direction of Prison Service in 1985 failed to mention the contribution of the FMI towards the management principles of the Prison Service.[413] An independent study of the overall management changes under the FMI initiative concluded that the programme had "failed to create more than small incremental improvements".[414] In time, it became clear that FMI alone was not a sufficient platform on which to promote the government's ambitious policy of managerialising the civil service. The cultivation of what was referred to as 'a more managerial approach to government business',[415] itself a radical re-statement of public administration, required a programme which was significantly different from FMI, one which moved from the realm of 'soft managerialism' into 'hard managerialism' in the early 1990s. The next section explores how this transition was implemented in the Prison Service in the context of the contracting out of prisons initiative, and more importantly for the purposes of this case study, the move to agency status.

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[413]. Dunbar, I (1985) *A Sense of Direction*, Lon: Home Office. Ian Dunbar was then the Regional Director for South-West England.

[414]. Richards, S (1987) The Financial Management Initiative, in Gretton, J & Harrison, A (eds)(1987) *Reshaping Central Government*, Oxford: Transaction Books, p.41.

[415]. *Progress in the Financial Management of Government Departments* (1983-84) Cmnd 9297, p.2.

Hard managerialism

Changes in the administrative structure of the Prison Service in the 1990s were foreshadowed in a White Paper entitled "Custody Care and Justice",[416] the government's response to the Woolf report[417] in 1991. The Woolf report was ordered by David Waddington, then Home Secretary, to inquire into the causes underlying the spate of prison riots and protests, arising first in the Strangeways Prison in Manchester, and then, in other prison establishments in England and Wales in April 1990, and also their wider implications for the Prison Service. LJ Woolf (now Lord Woolf), in echoing the findings in May Report of 1979, concluded that weaknesses in the management of the Prison Service contributed to the problems of the service:

> there was a 'profound desire for visible leadership in the Prison Service', and this leadership role should be filled by 'an operational head *who is, and is seen to be*, in day to day charge of the Service'.[418]

This emphasis on visible leadership, as we will see later in this case study, is problematic insofar as it requires a higher public profile of senior civil servants than they are normally accustomed to, and in a way which has an impact on the perception by the public as to who is actually in charge - either ministers or civil servants? Woolf's solution for the improvement of the management structures lay in greater devolution of powers at two levels: (i) from the ministerial level to the civil servants (from ministers to the Director General); and (ii) within the civil service echelons (from Prison Service headquarters to the prison governors). At level (i), Woolf recommended that there ought to be a renewed understanding between the Home Secretary and the Director General through a document or contract, which was to be written by the Prison Service, approved by the Home Secretary and laid before Parliament. The purpose

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416. Home Office (1991) *Custody, Care and Justice: the Way Ahead for the Prison Service in England and Wales*, Cm 1647, Lon: HMSO. (September 1991)

417. Report of an Inquiry by the Right Hon Lord Justice Woolf (Parts I & II) and His Hon Judge Stephen Tumim (Part II) (1990-91) *Prison Disturbances April 1990*, Cm 1456, Lon: HMSO. (February 1991)

418. Report of an Inquiry by the Right Hon Lord Justice Woolf (Parts I & II) and His Hon Judge Stephen Tumim (Part II) (1990-91) *Prison Disturbances April 1990*, Cm 1456, Lon: HMSO, see para 1.175, emphasis added.

of the framework document was to spell out the objectives of the Prison Service for each year, and the resources available for their implementation. At level (ii), governors should also have a similar contract with their area managers, linking objectives for the establishment, with the resources granted by senior management.

In its White Paper, the government did not address these specific proposals made by LJ Woolf but instead advocated subtle alterations to the constitutional relationship between Ministers and civil servants by promoting potentially conflicting roles for the Minister and his civil servants: on the one hand, it reaffirmed the principle that 'Ministers should continue to remain directly responsible to Parliament for the policies and objectives of the Service, and for the resources made available to it', but on the other, it advised that 'the Director General and other senior members of the Prison Service should take opportunities to explain in public the Prison Service's performance (either against published objectives or on daily operational developments)'.[419] The White Paper also fleshed out two particular aspects of 'hard managerialism' which, when implemented, were to promote greater accountability of civil servants over those of their ministers: (a) the first is a review of the scope for what was adeptly referred to as 'alternative' provision or ownership of new prisons and prison-related services such court escort services; (b) the second is a more fundamental review of the entire administrative structure of the Prison Service by Admiral Sir Raymond Lygo commissioned by the then Home Secretary, Kenneth Baker in August 1991. These reviews unleashed even more radical changes within Prison Service administration, i.e. contracting out and agency status, which will now be considered in turn.

Contracting out

The contracting out initiative is one of the few components of the government's policy of managerialising the Prison Service which has been implemented through statute. 'Contracting out', as advocated by a White Paper in 1991,[420] refers to the transfer of responsibilities for the

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[419]. Home Office (1991) *Custody, Care and Justice: the Way Ahead for the Prison Service in England and Wales*, Cm 1647, Lon: HMSO, para 3.6.

[420]. *Competing for Quality: Buying Better Public Services* (1991) Cm 1730, Lon: HMSO.

management of prison establishments and related services from the civil service to the corporate sector. The intellectual underpinnings of contracting out in the context prisons, as a Home Office study[421] concluded, are:

> firstly, 'a generic political commitment to increasing competition in the public sector as a means of increasing its economy, efficiency and effectiveness' and secondly, 'growing pressure on the prison system because of the increasing prison population'.

The idea of contracting out the management of prisons in Britain was first floated by the right-wing think-tank, the Adam Smith Institute, in 1984 but it was not until 1987 when the Home Affairs Committee[422] issued a favourable report following their exploratory visit to contracted-out facilities in the United States that the proposal entered mainstream debate on the provision of Prison Services in the United Kingdom.[423] The momentum for its adoption picked up after the 1987 general election when the then Home Office minister, Earl Caithness, and his officials visited private prisons in the United States, and were equally impressed. A Green Paper[424] was published in July 1988 which set the context for the need to review the potential for private sector involvement as a means of alleviating the problems of overcrowding in remand prisons. In February 1989, private consultants Deloitte, Haskins and Sells[425] published a feasibility study commissioned by the Home Office in August 1988 in which they concluded that private sector contractors would be able to offer cost-effectiveness. The report did not however consider the constitutional implications of implementing the idea. A special administrative unit called the Contracts and Competition Group was established in the Home Office to take forward its proposals. The White Paper "Crime, Justice and Protecting the Public",[426] whilst

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421. Bottomley, K et al (1997) *Monitoring and Evaluation of Wolds Remand Prison and Comparisons with public sector prisons, in particular HMP Woodhill*, Lon: Home Office, p.9.

422. Home Affairs Committee (1987-88) *Contract Provision of Prisons*, Lon: HMSO.

423. Adam Smith Institute (1984) *Justice Policy: The Omega Report*, Lon: Adam Smith Institute.

424. *Private Sector Involvement in the Remand System* (1988) Cm 434, Lon: HMSO.

425. *Report on the Practicality of Private Sector Involvement in the Remand System* (1988) Lon: Home Office.

426. Home Office (1990) *Crime, Justice and Protecting the Public*, Cm 965, Lon: HMSO.

cautious about the urgency of contracting out (due to mounting evidence that the population of remand prisoners had begun to fall, and also, further detailed studies by the Home Office suggested that the projected costs savings was not as substantial), nevertheless recommended that there be provisions in the forthcoming criminal justice legislation to enable an experiment of contracting out with a new remand prison to be opened in Humberside. Some prison governors[427] interviewed by the author suggested that the political sensitivity surrounding private prisons may have underpinned the decision to soften the contracting out venture by limiting it first to *new* rather than existing prisons, and to prisons for *remand* suspects rather than those for convicted prisoners. There was, it seemed, an attempt to experiment with contracting-out in such a way so as not to tread on the 'traditional' stronghold of the Prison Service i.e. keeping in custody those convicted by courts.

Against that background, the Criminal Justice Act 1991 (hereinafter CJA 1991) came into effect. Section 84 in its amended form[428] now enables the Home Secretary to contract out the management of *any* prison, regardless of whether the prison preceded or succeeded the time the Act came into effect, and regardless of whether it holds remand or convicted prisoners. by the simple issue of statutory instrument. The first invitations to tender were issued in May 1991 for the Wolds Remand Prison, which was to be the first privately-managed prison, and Group 4 (Remand Services) Ltd were offered the contract for Wolds which finally opened in April 1992. The management of Strangeways prison was market-tested in August 1992 against the background of one of the biggest riots by inmates in penal history according to the Woolf report (discussed earlier) but civil servants managed to mount a successful in-house bid to retain their management responsibilities.[429] The involvement of the private sector in prison provision has grown since 1991; out of 139 prison establishments, 5 were managed by the private sector (1 remand centre; 4 custody prisons) at the time this thesis was written. It is now apparent that a benign proposal for the contracting out of *remand* prisons has developed to such an extent that it applies to *any* type of prison by an adept manoeuvring of primary

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427. See e.g. interview with Mike Newell in the next chapter.

428. *Criminal Justice Act 1991 (Contracted Out Prisons) Order* 1992, SI No.1656; *Criminal Justice Act 1991 (Contracted Out Prisons) Order* No 2,1992.

429. for an insider account, see Halward, R (1994) Manchester Prison: Mounting A Successful In-house Bid, in Prison Reform Trust (1994) *Privatisation and Market-testing in the Prison Service*, Lon: Prison Reform Trust, pp.26-33.

legislation (CJA 1991[430]) which provided the Home Secretary the basic authority to contract out new remand prisons (s84(1)), with the opportunity to contract out any other type of new prisons by means of secondary legislation (s84(3)). The new sector of contracted out prisons raises many questions of cost-effectiveness and comparability with the public sector which cannot be adequately dealt with in this chapter.[431] For the purposes of this thesis however, the very existence of privately-managed prisons alongside public prisons run by civil servants introduces a new dimension to the implicit contract between ministers and civil servants insofar as the responsibilities of civil servants for penal administration can be handed over to the private sector by ministers purely on the basis of managerial considerations of cost and efficiency. Is the servant of the Crown also becoming a servant of the market?

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430. Section 84 of the Criminal Justice Act 1991 is reproduced as follows:

> **84.**—(1) The Secretary of State may enter into a contract with another person for the running by him of any prison which—
> (a) is established after the commencement of this section; and
> (b) is for the confinement of remand prisoners, that is to say, persons charged with offences who are remanded in or committed to custody pending their trial, or persons committed to custody on their conviction who have not been sentenced for their offences;
> and while such a contract is in force, the prison to which it relates shall be run subject to and in accordance with sections 85 and 86 below, the 1952 Act (as modified by section 87 below) and prison rules.
>
> (2) In this Part—
> "contracted out prison" means a prison as respects which such a contract is for the time being in force;
> "the contractor", in relation to such a prison, means the person who has contracted to run it.
>
> (3) The Secretary of State may by order made by statutory instrument provide that this section shall have effect as if there were omitted from subsection (1) above either—
> (a) paragraph (a) and the word "and" immediately following that paragraph; or
> (b) paragraph (b) and the said word "and" or
> (c) the words from "which", in the first place where it occurs, to the end of paragraph (b).
>
> (4) An order under subsection (3)(b) or (c) above shall provide that section 87 below shall have effect as if subsection (5) were omitted.
>
> (5) No order shall be made under subsection (3) above unless a draft of the order has been laid before and approved by resolution of each House of Parliament.

Note that section 84 of the Criminal Justice Act 1991 has been substituted by section 96 of the Criminal Justice and Public Order Act 1994 insofar as the management of prisons can also be subcontracted.

431. One of the questions that arises here is should private sector contractors who administer prisons be brought within the ambit of a reconstituted definition of 'servants of the crown'?

The policy on private prisons looks set to continue under the New Labour administration despite the diametrically opposite stance taken by Jack Straw, now Home Secretary, when he was shadowing the office. In his various public statements as Shadow Home Secretary, Straw declared the privatisation of the Prison Service as 'morally repugnant', and that 'at the expiration of their contracts, a Labour government will bring these prisons into the State sector'.[432] Straw expanded on the nature of this commitment in a speech delivered at the Prison Officers Association Annual Conference: 'we shall certainly let no new contracts for privatised prisons', and 'within existing budgets, we shall take back into the public service privatised prisons as soon as that becomes contractually possible'.[433] It is perhaps worth contrasting their rhetoric on this issue when they were in Opposition, and the reality when they are now in government. While the contracting out of prisons raises many complex issues that potentially relate to the question of constitutionalism, a detailed assessment of these issues is judged to be outside the immediate scope of this thesis.

Agency status

Towards agency status: the Ibbs and Lygo proposals

As mentioned earlier, agency status was the other main managerial initiative, apart from contracting out, envisaged in the White Paper on "Custody, Care and Justice" in 1991. Unlike most other agencies, the contracting out initiative preceded the transition to agency status in the Prison Service. The contracting out option was also implemented in a rather different way to the review of agency option for the Prison Service: there were contributions from Parliament as well as the government itself through its own White Paper, and there was at least a 'pilot study'[434] (in The Wolds). The transition to agency option on the other hand, apart from being foreshadowed in the Woolf Report and the government's White Paper, was being reviewed by

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432. Straw, J (1996) Prison 'free market', *Gatelodge*, January 1996, p6.

433. the text of this speech is published in *Gatelodge*, August 1996, pp9-13.

434. But see, Bottomley, K et al (1997) *Monitoring and Evaluation of Wolds Remand Prison and Comparisons with public sector prisons, in particular HMP Woodhill*, Lon: Home Office.

an external inquiry under Admiral Sir Raymond Lygo which was commissioned by the Home Office in August 1991, 'to review the managerial effectiveness of the Prison Service...with particular reference to its managerial structures and personnel policies and to make recommendations'.[435] In essence, Lygo was being appointed to make recommendations on how the Ibbs[436] model of Next Steps agency could be applied to the Prison Service.

Lygo seemed to appreciate the nature of the issues that enveloped the Prison Service: his statement that 'the Prison Service is the most complex organisation I have encountered and its problems some of the most intractable' (para 4 & para 67) is perhaps all the more significant in the light of his experience as the Chief Executive of British Aerospace during the controversial Westland episode which resulted in two ministerial resignations in 1987. Lygo found that there were four key elements lacking within the administration of the Prison Service: visible management leadership; sufficient managerial independence of political control; a sense of unity; and a sense of purpose (paras 9-12). Against this context, Lygo constructed a rather precarious reform agenda towards the Ibbs model by promoting two principles which have been in persistent tension in the history of Prison Service administration, namely 'clear political accountability for the major policy and resource issues' on the one hand, and 'a greater degree of managerial authority for day to day operations' on the other (para 16). Lygo proposed that these two conflicting principles, managerial independence and political control, should be balanced through an arrangement which 'in current civil service thinking, would equate to agency status' but at the same time, the unique nature of the Prison Service meant that 'rather different arrangements are needed for its top structure than has been the case in other agencies' (para 17).

The essence - essentially one of contradiction - of Lygo is captured in these two key paragraphs outlined above. On the one hand, Lygo peddled the rhetoric of managerial independence in several parts of the report. For example, Lygo tried to connect with a theme of previous

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[435]. Lygo, Admiral Sir Raymond (1991) *Management of the Prison Service*, December 1991. To be referred to as 'the Lygo report' from this point.

[436]. Efficiency Unit (1988) *Improving Management in Government: the Next Steps*, Lon: HMSO. To be referred to as 'the Ibbs report' from this point.

reviews[437] by identifying the restoration of managerial independence from political interference as 'the key question to be resolved' (para 14). Lygo's posture on this issue perhaps transgressed the normal boundaries of the neutral inquisitor when he asked bluntly: 'why has this [i.e. independence of daily ministerial control] not happened in the past despite the recommendations of successive reports? (para 14). He also observed that the implementation of the agency idea was subject to an important proviso which was to be central to the problems of the Prison Service as an agency in the next few years: 'the critical factor in the success or failure of any new arrangement will the ability of ministers to allow the Prison Service to operate in an almost autonomous mode while retaining their responsibility to Parliament for the overall policy and conduct' (para 19). Lygo seemed to be trying to clarify the constitutional principles for civil servants in the Prison Service in the discharge of their constitutional responsibilities to ministers as servants on the Crown within a more managerially-oriented context, by putting the onus on *ministers* to mend their interfering tendencies so that civil servants had the autonomy to deliver the full benefits of the managerial programme so extolled by the government. This basic idea is also evident in Lygo's letter which prefaced his report to the Home Secretary: 'unless there was a preparedness on the part of the Home Office to take its hands off the management of the Prison Service in its day to day business and allow itself to be constrained by matters of policy only, then it would not be possible to effect the (managerial) changes you deem desirable'.[438] Lygo emphasised that real managerial benefits would not be forthcoming without corresponding developments on the politico-constitutional front. In other words, without autonomy, there could be no efficiency.

On the other hand, Lygo's rhetoric of managerial independence was not substantiated in his vision of agency status for the Prison Service when he recommended (see paras 20-26) that, unlike all other agencies, there be a tripartite structure made up of ministers, as well as a two-tier management structure comprising a Supervisory Board (situated in the Home Office) and a strengthened Prisons Board (situated in the Prison Service agency), apparently unaware of the

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437. *Mountbatten Report of the Inquiry into Prison Escape and Security* (1966) Cm 3175; *(May) Committee of Inquiry into the UK Prison Services* (1979) Cm 7673, vols I & II; Report of an Inquiry by the Right Hon Lord Justice Woolf (Parts I & II) and His Hon Judge Stephen Tumim (Part II) (1990-91) *Prison Disturbances April 1990*, Cm 1456, Lon: HMSO.

438. letter from Admiral Sir Raymond Lygo to Kenneth Baker, 12 December 1991.

tension and disunity that such a structure would further engender. According to Lygo, the Supervisory Board would essentially become an advisory watchdog, to 'advise the Home Secretary on major policy and resource questions, on the process of establishing the agency's annual objectives and on the performance of Prison Service management in meeting those objectives' (para 21), while the Prisons Board would be the key management players 'with a collective responsibility to the Home Secretary for the delivery of the Service's objectives and for the proper conduct of its finances' (para 26). The key problem with this two-tier arrangement was that it had the potential to put a *symbolic* distance between ministers and the management of the Prison Service (the idea of managerial independence), but it did not introduce safeguards for situations where ministers bypassed the formal two-tier structure by taking a direct hand in operational management (the idea of political interference). In terms of the underlying constitutional equation, if the regular eclipse of managerial independence of civil servants by constant political interference in operational matters is unrecognised, and therefore unregulated, in the formal structures of accountability, then this would further obscure the constitutional umbilical cord that traditionally linked civil servants to ministers, and through ministers, to Parliament. Put another way, while *responsibility* lies with civil servants, real *power* is arguably vested in ministers.

What passages, if any, can be extracted from both the founding agency blueprint (the Ibbs report) and the document recommending the agencification of the Prison Service (the Lygo report) to shed some light on the scenario painted above? Both reports emphasised the importance of the presumption in favour of managerial independence over political interference in some form of formal document. Ibbs advised that 'the main strategic control must lie with the Minister and Permanent Secretary' but beyond that, 'the presumption must be that, provided management is operating within the strategic direction set by ministers, it must be left as free as possible to manage within that framework' (para 21). Ibbs, echoed later by Lygo, warned that 'a crucial element in the relationship would be a *formal* understanding with ministers about the handling of sensitive issues and the lines of accountability in a crisis' (para 21, emphasis added), hinting further that 'in some cases, legislation may be necessary to effect the change' (para 46). Lygo, however, did not pursue the option of legislative reform, and opted instead for a softer option of dubious legal value by speaking vaguely of the need 'to spell out clearly in the framework document the respective responsibilities of Ministers and

management' and further advocating an arrangement in which 'Ministers can delegate operational matters to agency management while continuing personally to answer for major issues of policy' (para 18). These few passages in the two reports commissioned by the Executive,[439] riddled with all their contradictions, thus set the breeding ground for the problematic distinction between 'policy' and 'operation'. The crucial question is: how much of the confusion in the Ibbs and Lygo reports found its way into the Prison Service framework document?

Agency status: the framework document

The contents of the Lygo report were not published on government paper nor were they debated in Parliament; instead, the publication of the report was given relatively little publicity in the form of Parliamentary written answers.[440] On 1 April 1993, the Prison Service quietly acquired a new managerial cloak of agency status. The main features of an Executive agency are that it is headed by a Chief Executive directly accountable to the Secretary of State (SoS); and the relationship between the SoS and the Director General would be governed by a framework document which set down the basic duties and responsibilities of each. But how much of the Ibbs model and of Lygo's ideas were incorporated into the framework document which established the Prison Service on agency footing? The framework document, as in the case of other agencies, has been drafted by the agency in close consultation with the civil servants in the parent department, in this case the Home Office, and is subject to the approval of the Home Secretary. It was not subject to Parliamentary debate; indeed, no new legislation was introduced, nor was there any alteration to the basic legal framework in the Prisons Act 1952 and Prison Rules 1964. For the first time in its history, the Prison Service opened up the competition for the position of the administrative head - the Director General - to those outside the civil service ranks. Through this process, Derek Lewis, was appointed[441] over the internal incumbent, Joe Pilling. The appointment of Derek Lewis, formerly chief Executive of Granada Television and UK Gold TV, with no experience of either prisons or public administration, was

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[439]. The Ibbs report was commissioned by Margaret Thatcher when she was Prime Minister, the Lygo report by Kenneth Baker qua Home Secretary.

[440]. HC Debs, col.13, 16 December 1991; HC Debs, col.563, 11 March 1992.

[441]. For an account of the contextual background to this appointment, see Lewis, D (1997) *Hidden Agendas: Law, Politics and Disorder*, Lon: Hamish Hamilton, chapter 1.

arguably, in itself, a symbolic recognition that public services were mere products which just needed to be 'managed' by the candidate deemed to have the best 'management' credentials. As an agency, the Prison Service continued to be confronted with the 'intractable' problems indicated in the Lygo report, culminating in one of the most acrimonious dispute between the agency management head (the Director General) and the political head (the Home Secretary) since the idea of Next Steps was introduced in 1988.

There are, in effect, two dimensions to the agency concept which are now inherent in the 'contract', or framework document, between ministers and civil servants qua managers: (i) the *politico-constitutional* aspect of that contract is about the *qualitative* boundaries between the minister and senior civil servants (or managers); and (ii) the *managerial* aspect of that contract relates to the *quantitative* measures of the agency's performance such as business plans, corporate plans, key performance indicators and other performance targets. The case study of the Prison Service suggests that the implementation of the agency idea is bound to be flawed if ministers want to reap the benefits of the *managerial* aspect of agency status without honouring the *politico-constitutional* dimension of it. These two aspects were not explicitly laid down as distinct components in any official document at the time agency status was being considered for the Prison Service but their existence appears to have been given tacit recognition in recent official reports.

The Home Affairs Committee,[442] for instance, willingly adopted Derek Lewis' view of agency as having two aspects: 'the introduction of good management techniques to any well run business or organisation' (the managerial element) and 'greater autonomy for the Service from the Home Office than it had hitherto held' (the politico-constitutional element). The next section assesses the implementation of the agency idea in the Prison Service: the theme which emerges from the assessment is that questions which plague the delivery of the quantitative-managerial targets in the Prison Service agency have been symbiotically bound up with the problems concerning the qualitative-political boundaries of minister-civil servant relations.

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[442]. Home Affairs Committee (1996-97) *The Management of the Prison Service (Public and Private)* HC 57-I, para 100.

The failure to drive a sufficient wedge between the two variables, is in effect, a flawed implementation of the Next Steps idea.

Assessing the implementation of agency status

In 1985, Douglas Wass characterised the relationship between ministers and civil servants as one based upon 'an implicit contract'.[443] If this ever held true, the managerial framework of the Next Steps agency poses a serious challenge to the traditional assumptions that underpinned such a contract as was argued earlier in this thesis.[444] It was also argued in chapter 2 that the nature of that contract is also changing "from protective-type to predatory-type relationship" in which civil servants are increasingly becoming "not only accountable to Ministers but also for Ministers". The purpose of this case study is to locate the transformation of that constitutional relationship in the context of the implementation of Next Steps in a sensitive or high profile agency such as the HM Prison Service. The other major plank of managerialism in the Prison Service which relates to contracting out and the establishment of private prisons throws up many complex issues which cannot be adequately nor coherently dealt with in this thesis. [445]

This case study evaluates the impact of the implementation of agency status on the role of civil servants as 'servants of the Crown' in the light of the evidence given in official reports as well as interview data obtained from the author's own qualitative interviews with a sample number of civil servants at the senior, middle and operational levels of Prison Service management.[446] As we will see, the seeds of the recent tensions between Howard/ Lewis lie in this sensitive

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[443]. Wass, D (1985) The Civil Service At Cross-roads, *Political Quarterly*, at p.228.

[444]. See chapter 2.

[445]. but see, Prison Reform Trust (1994) *Wolds Remand Prison - Contracting Out: A First Year Report*, Lon: Prison Reform Trust; van de Graaf, A (1994) Privately managed prisons: Ensuring better standards or reducing government control, in Prison Reform Trust (1994) *Privatisation and Market Testing in the Prison Service*, Lon: Prison Reform Trust; for a recent 'impact study', see also, Bottomley, K et al (1997) *Monitoring and Evaluation of Wolds Remand Prison*, Lon: Home Office.

[446]. See chapter 5 for a discussion of the empirical methodology and chapter 7 for a discussion of the fieldwork findings.

zone where questions of managerial efficiency and operational autonomy straddle dangerously on the hazy borders of penal policy and operation, yet these scenarios go unrecognised and unregulated in the framework document which forms the new constitution of the Prison Service as an agency. There appears to be no mechanism, apart from ministerial control, for deciding which of the two goals - efficiency and autonomy - has a higher priority, but the set-up in itself seems to put a higher premium on efficiency, arguably at the expense of autonomy. The critical public law issue here is whether the traditionally restrictive constitutional straitjacket of ministerial responsibility for the civil service is either adequate or appropriate for the development of management reforms within high-profile policy areas such as that of prison. We will consider this question in further detail below.

(i) strengthening managerial responsibility for agency: towards greater efficiency?

The Ibbs report spoke of a need 'to focus on results rather than the process' (para 13). This was motivated by a pursuit of 'efficiency' which underpinned the political appetite for reform. Yet, for the idea to be successfully implemented in the Prison Service, the politico-constitutional element has also to be addressed: as Lygo emphasised, without autonomy, there could be no efficiency.

There are two separate issues which arise from the pursuit of efficiency? Firstly, despite this new management orientation, it not necessarily clear whether the Prison Service has become more 'efficient'; secondly, has it crowded out the constitutional considerations? The first question has been clouded with contrasting evidence. Talbot argues that the current measurements of efficiency do not yield sufficiently meaningful data on which to make judgments on the question. According to available official data, the key performance indicators (KPIs) are changing from year to year.[447]

The other key question used in the qualitative interviews, and also implicit in the official inquiries is: has the agencification of the Prison Service pushed managerial efficiency as a higher order goal, over that of greater autonomy from political control? The managerial dimension of agency status has focused on *quantifying* relationships either within the Prison Service, as well as between the Home Office and the Prison Service. The mechanism for achieving this is a series of targets enabling the measurement of *outcomes*, whether by senior and middle management of individual prisons, or by the Home Secretary of the Director

[447]. see HM Prison Service (1993-94) *Prison Service Annual Report and Accounts*, HC 185; HM Prison Service (1994-95) *Prison Service Annual Report and Accounts*, HC 447; HM Prison Service (1995-96) *Prison Service Annual Report and Accounts*, HC 247; HM Prison Service (1996-97) *Prison Service Annual Report and Accounts*, HC 274; HM Prison Service (1997-98) *Prison Service Annual Report and Accounts*, HC 998; HM Prison Service (1998-99) *Prison Service Annual Report and Accounts*, HC 748; HM Prison Service (1999-00) *Prison Service Annual Report and Accounts*, HC 622.

General. The manifestations of managerialism include, the framework document, a three-year corporate plan revised annually, a year-to-year business plan issued annually, key performance indicators, new employment practices (e.g. new grading structures and work contracts), and a new approach towards disclosure of information about managerial performance in the annual reports.

In their recent report, the Public Service Committee[448] welcomed 'the increase in the amount of published information about agencies and their performance as an increase in accountability', subject to a few provisos: firstly, that there should continue to be a presumption in favour of making agency performance more transparent; secondly, there should be more comparative analyses of agency performance; thirdly, the government should issue, and publish guidance to agencies on standards of reporting, so that comparisons between agencies can be more meaningful. Despite some reservations about the quality of existing measurements of managerial efficiency, the experience of the Prison Service suggests that there are significant strides towards the first pillar of agencification, that is, the strengthening of managerial responsibilities of civil servants involved in operational management. As we will see in the next section, the implementation of the second pillar - that of strengthening political responsibility for agency - has been more problematic.

(ii) strengthening political responsibility for agency: accounting to, or for, Ministers?

The second manifest principle which underpinned the agency model is the strengthening of civil service responsibility for *operational* as opposed to *policy* management. This was achieved by maintaining the conventional relationship between senior civil servants in operational (as opposed to policy) management, and ministers in the parent department. But can innovations in management practice be achieved by maintaining the constitutional status

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[448]. Public Service Committee (1995-96) HC 313-I, part V.

quo in having civil servants account to ministers on operational issues, or has the consolidation of managerial responsibilities now surpassed that of political responsibility such that civil servants are having to account for ministers? There are disturbing tensions between these two aspects - management (operation) and politics (policy) - in sensitive agencies such as the Prison Service because the developments on the *management* front do have fundamental implications for the dynamics which influence how civil servants relate and account to ministers on issues of prison *policy*, yet these phenomena appear to be neither countenanced nor reflected in the framework document.

To understand how the tensions have arisen, we need to delve into the origins of the distinction between policy and operation. The Ibbs report talked of the need for a radical policy to ensure that civil servants have 'the freedom to manage' (para 13). The device chosen to harness greater managerial freedom was by delineating the respective responsibilities of ministers for policy matters, and of civil servants for operational matters. The Ibbs report, which presented the blueprint for the agency idea, made it clear that 'placing responsibility for performance squarely on the shoulders of the manager of an agency' meant that it was 'possible for Parliament, through Ministers, to regard managers as directly responsible for operational matters' even though it was still the case that 'Ministers have to be wholly responsible for policy' (para 23). The Lygo report, which recommended the agencification of the Prison Service, also adopted Ibbs views by suggesting that Parliament would accept that ministers can properly delegate operational matters to agency management while continuing personally to answer for major issues of policy' (para 18).

The rationale for separating the responsibilities for policy and operation, according to Ibbs, was that: firstly, agencies are unlikely to have real freedom to manage 'if a minister remains immediately answerable for every operational detail that may be questioned'; and secondly, it would be unrealistic to expect individual civil servants to be responsible for performance if 'repeated ministerial intervention is there as a ready-made excuse' (para 2, Annexe A). Ibbs proposed that intervention in operational matters should only occur in exceptional cases (para 49); and that perhaps statute may be necessary to bring about reform (para 6, Annexe A). Ibbs favoured a presumption in which 'provided that management is operating within the strategic direction set by ministers, it must be left as free as possible to manage within that framework'

(para 21). The government, in its evidence to the Public Service Committee inquiry, qualified that presumption which favours managerial independence by insisting that the notion is a *rebuttable* one: 'Because ministers must account to Parliament, they must retain the right to look into, question and even intervene in the operation of their agencies'.[449]

This is indeed the *motif* that underpins the formula in the Prison Service framework document insofar as the Home Secretary 'will expect to be consulted by the Director General on the handling of operational matters which could give rise to grave public or Parliamentary concern' (para 3.1). The Public Service Committee, however, captured the essence of the tension which this formula presents: 'Because ministers retain this right (of intervention), there remains a question about the extent to which chief Executives have genuine administrative freedom; and as long as their freedom can be questioned, responsibility can be blurred'.[450] Rather than providing the constitutional safeguards for the grey areas between these two concepts, the framework document peddles a rather sanitised, if not naive, version of the constitutional hierarchy between minister and civil servant: 'The Home Secretary is accountable to Parliament for the Prison Service' (para 3.1), while 'the Director-General is directly accountable to the Home Secretary for the Prison Service's performance and operations' (para 3.5).[451]

There are also other problems with the framework document: firstly, it echoes the problematic distinction between *accountability*, which lies with the Home Secretary, and *responsibility*, which lies with the Director-General. Whilst para 3.5 sets out the various scenarios in which Director General is responsible for the daily management, performance, and operation of the Prison Service, the framework document is notably silent on the circumstances under which the

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[449]. Minutes of evidence by the OPSS, see (1995-96) HC 313-III, p187.

[450]. see (1995-96) HC 313-I, para 95.

[451]. The nature of the Director-General's responsibility, and in particular the benchmark for assessing the DG's responsibility, has been clarified in the Prison Service framework document as revised by the New Labour administration in April 1999. Para 1 of the revised framework document states that 'the Home Secretary is accountable to Parliament for the Prison Service in England and Wales' while para 5 states that 'the Director General is responsible to the Home Secretary for the Prison Service and in particular for its performance against the corporate plans and targets'. This thesis does not however undertake a detailed assessment of the changes under the New Labour administration.

Home Secretary can be held accountable. Furthermore, the framework document curiously ignores the constitutional position of the management stakeholders beneath the senior echelons of management such as area managers (middle managers) and prison governors (operational managers) even though, as the first annual report of the agency made clear, the transition to agency status has left these players with 'greater responsibility and accountability'.[452] This omission to look beyond the top management at headquarters, as we will see later on this chapter, has also been identified by a recent review[453] of Prison Service management.

The *implementation* of the constitutional status quo has been problematic to the extent that there has been a lack of clarity over who is responsible - either ministers or civil servants - for the Prison Service since it became an agency. There were concerns that agency status was being used as 'a shield to protect Ministers'.[454] The clearest indications of tensions in the relationship between ministers and senior civil servants came early on within the first two years of the service becoming an agency, first in the Woodcock report,[455] and then, echoed in the Learmont report.[456] Woodcock found that there was 'at all levels within the Prison Service, some confusion as to the respective roles of Ministers, the Agency Headquarters and individual prison governors' (para 9.28). The government responded to the report by bolstering the symbolic importance of ministerial responsibility for the agency. It established the Prison Service Monitoring Unit, which being situated in the Home Office, was to be a new unit 'outside the Prison Service to strengthen Ministers' ability to supervise the performance of the Prison Service'.[457]

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452. HM Prison Service (1993-94) *Prison Service Annual Report and Accounts*, HC 185. see the foreword by Derek Lewis.

453. HM Prison Service (1997) *Prison Service Review*. The review team consisted of Arthur di Frisching, Christopher Blairs, Don Strong and Angela Gimblett.

454. Speech by Jack Straw MP qua Shadow Home Secretary, to the Bourne Trust AGM, Westminster, 7 March 1995; the same speech was also published in the bulletin for prison officers: see, *Gatelodge*, February 1996, pp6-7.

455. *The Escape from Whitemoor Prison on Friday 9th September 1994* (1994-95) Cm 2741.

456. *Review of Prison Service Security in England and Wales and the Escape from Parkhurst Prison on Tuesday 3rd January 1995* (1995-96) Cm 3020 (the Learmont report).

457. HC Debs 19 December 1994, col 1400. The monitoring unit was subsequently disbanded – see discussion in the next section 'Beyond Learmont – rediscovering the constitution'.

Further concerns were raised in a letter dated 27 September 1995, from General Sir John Learmont to the Home Secretary, which prefaced the findings of Learmont's nine-month inquiry into general issues of prison security as well as the circumstances of prisoners' escape from Parkhurst prison in January 1995. Learmont wrote that there was 'a need for further study to be carried out to improve the liaison between the Prison Service and the Home Office' and 'to re-examine ways of devolving greater operational independence to the Service', although these issues were adeptly avoided in his own report whose terms of reference he had notably been encouraged by the Home Secretary to 'interpret widely' (p.i). It was an opportunity missed in a report that was commissioned to inquire into one of the issues fundamental to, as well as cutting across, prison policy and operation - that of prison security. But Learmont's criticism, if it can indeed be called that, was coded, and his response evasive, on this crucial point. Instead he recommended in the report 'that someone with wide experience of the workings of agencies should be identified to undertake an in-depth study of this relationship with a view to giving the Prison Service the greater operational independence that agency status was meant to confer' (para 3.78). It is argued that this case study of the Prison Service in its first five years as a Next Steps agency highlights the potential of agency status to be a Trojan horse enabling greater political *interference* rather than improving its operational *independence.*

The sustained array of management reforms has created a *symbolic* distance between ministers and operational management, and in constitutional terms, has obscured as much as dislocated *power over policy formulation* (which lies with ministers) and *responsibility for policy implementation* (which rests with civil servants). It was pointed out earlier that both the Ibbs and Lygo reports were essentially stealthy and incremental attempts to carve out a problematic distinction between 'policy' and 'operation' supposedly to clarify the nature of civil servants' responsibilities to ministers. The full significance of the problems raised by this distinction is perhaps best illustrated in the full context of the story of the Prison Service which centres around conflicts between the political figurehead (the Home Secretary) and the management figurehead of civil service rank (the Chief Executive) in the first few years of the service as an agency. When the Prison Service became an agency on 1 April in 1993, it acquired a new corporate identity through a non-statutory framework document. The agency was given

management objectives framed as KPIs which were to be subject to the overall oversight of the chief Executive, who was in turn accountable to Home Secretary. A series of high-profile prison escapes and disturbances in 1994-95 ignited a debate over where responsibility for the agency ultimately lay - was it with the Home Secretary or the chief Executive?

In management terms, the Prison Service seemed to be delivering the services to the standards and targets required of them as set out in various documents such as the framework document, business plan and corporate plan, but Michael Howard, then Home Secretary, evaded calls for his own resignation and instead terminated the employment of Derek Lewis, then the chief Executive on the grounds of operational rather than policy failures, amidst deep concerns about the legitimacy of this termination. To what extent does the conflict boil down to personality differences on the one hand, and to the limits of the constitution on the other? Even allowing for affective elements in the relationship between the political head and the management head, what sort of picture do we construct of a constitution that enables a minister to act out personal differences of opinion with an agency management head who is a civil servant, to the detriment of the latter? What problems do these episodes reveal about the constitutional position of civil servants as 'servants of the Crown'?

(iii) the critical interplay of the managerial and the constitutional issues

Woodcock and Learmont reports

To understand the nature of these constitutional concerns, we have to turn to the relevant inquiries that have examined the problems of the Prison Service post-agencification. In the aftermath of the attempted escapes of high security prisoners from Whitemoor prison on 9 September 1994, the Home Secretary appointed Sir John Woodcock to conduct an inquiry into the background issues of security which facilitated the escapes. Woodcock's report three months later revealed what the Home Secretary described in the House of Commons as a

'dreadful state of affairs'[458] at Whitemoor prison, and to which the government responded by appointing General Sir John Learmont to 'conduct a comprehensive, independent and authoritative review of security throughout the Prison Service'.[459]

Against a background of intense media interest in the Prison Service, with the suicide of Frederick West at Winston Green Prison on 1 January 1995, disturbances at Everthorpe on 2 January, and the escape of three prisoners from Parkhurst prison on 3 January, the Home Secretary later broadened the terms of the Learmont inquiry to include the specific circumstances at Parkhurst prison through a Commons statement on 10 January.[460] Both the Woodcock and Learmont reports did not address directly what seemed to many to be the key issue, i.e. the relationship between the political branch and the management branch, but only hinted at the growing tensions between ministers and civil servants involved in the management of the agency by recommending further study on the matter.

Learmont questioned the apparent mismatch between management targets (KPIs) and the statement of purpose of the Prison Service enshrined, not in statute, but in the framework document, and in particular the bias of KPIs towards care rather than security issues, but failed to put these problems in the context of the *political* origins of the KPIs and the framework document. These documents are drafted by civil servants within the main Home Office in consultation with the Director-General, but they are subject to the revision and approval of the Home Secretary. Learmont was nonetheless careful not to criticise the idea of KPIs which he claimed to support 'wholeheartedly' (para 3.55); instead, he argued that the formulations of KPIs then were not necessarily measuring the right aspects of prison performance, nor were they helping to 'identify improvements and problem areas' (para 3.51).

In effect, Learmont was only touching upon the *symptoms* rather than tackling the *causes* when he evaded the difficult but critical issues such as where real power and responsibility for the

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[458]. see HC Debs, 19 December 1994, col 1397.

[459]. see HC Debs, 19 December 1994, col 1399.

[460]. see HC Debs 10 January 1995, col 33.

Prison Service lay. As Rod Morgan[461] argued, the Learmont report was essentially barking up the wrong tree: 'the confusion in the Prison Service stems not from the inclusion of different elements in the Service's Statement of Purpose, but from the policy U-turns and constant meddling by Ministers in what ought to be regarded as operational questions'.

Ironically, Learmont's report provided a catalogue of examples of the Home Office's 'close involvement' in the management of the Prison Service (para 3.77) which has generated a discernible level of reactive, upward-focused activity in keeping Ministers informed at the expense of proper downward-supervision and control of the organisation (para 3.83). Learmont cited the inquiry's personal experience of the notable demands made by the Home Secretary on the Director General's time when 'a full day's interview with the Inquiry was disturbed on a number of occasions because Ministers required his advice' (para 3.84).

The claims of excessive political interference in the management of Prison Service were belatedly given credence, after the Conservatives were defeated at the general election of May 1997, by Ann Widdecombe who served as Howard's prisons minister. In her statement to the Commons,[462] Widdecombe alleged that Howard had knowingly misled the Commons to hide the real nature of his intervention in decisions over the appropriate action in respect of John Marriott, then governor of Parkhurst prison, essentially an operational matter, in the aftermath of the attempted escapes from Parkhurst prison. Despite the weight of evidence detailing significant if not excessive political interference in operational management in his own report, Learmont pinned the blame and responsibility for the lapses in prison security on the management rather than the political branch of the agency, that is to say, on civil servants, rather than on ministers: 'in the final analysis, the top management of any organisation must be responsible for its performance' (para 3.2).

However, Learmont, perhaps because of his allegiance to the Home Secretary who appointed him, shied away from the uncomfortable conclusion that the *de facto* 'top management' were

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[461]. Morgan, R (1996) Why the Essence of Learmont Should Be Firmly Rejected, *Gatelodge*, June 1996, p21. Morgan was one of the three Assessors to Lord Justice Woolf's Inquiry into the Prison Service in 1991.

[462]. HC Debs 19 May 1997, cols 403-4.

Ministers, by virtue of their constant hand in operational matters, even though he had earlier found evidence that members of the *de jure* top management had developed a reactive culture of 'communicating upwards' to the ministerial circle, rather than serving the operational prison units (paras 3.84-3.86) as they ought to have done.

The undisguised bias towards a critical view of the management of the Prison Service outlined in Learmont's report provided the background context in which Michael Howard dismissed Derek Lewis despite calls from the Opposition for his own resignation. When justifying the dismissal before the House of Commons,[463] the Home Secretary sought to rely on several constitutional ground-rules carved out in the Ibbs report (paras 20-23), the Lygo report (para 18) and also the framework document (paras 3.1 & 3.5). According to the terms of these documents, the Secretary of State is responsible only for policy matters, and the chief Executive for operational matters. Howard insisted that the problems outlined by Learmont were matters of operation rather than policy.

A further sub-text of Howard's evasion of political responsibility for the problems of the Prison Service as portrayed by Learmont was that the constitutional duty of the Home Secretary in cases like these was *fully* discharged by the minister giving an explanatory account to Parliament about what actions were to be taken to remedy the faults: in other words, he was constitutionally accountable but not personally responsible.

The intense dispute between Howard and Lewis concerning the extent of political involvement in operational matters has generated an active interest within the Prison Service as well as among Parliamentary select committees in clarifying the constitutional ground-rules for civil servants vis-à-vis their ministers:

(i) the Commons Home Affairs Committee[464] examined the question of agency status (as well as of private prisons) in July 1995 and reported in March 1997;

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[463]. HC Debs 16 October 1995, col 31 et seq.

[464]. (1996-97) HC 57.

(ii) the Commons Public Service Committee[465] launched 'an inquiry into Next Steps agencies with reference to issues relating to ministerial and Parliamentary accountability'[466] in January 1996 and reported in July 1996;

(iii) the Lords Public Service Committee[467] which reported its conclusions in February in 1998, was appointed by John Major in April 1996 to consider, among other things, the effectiveness and impact of managerial changes on standards of conduct in the public interest';

(iv) the Prison Service[468] itself conducted an internal review of senior management in the spring of 1997 and reported in October 1997.

These reports are in effect commentaries on the events triggered by the Learmont report, and to a certain extent, are also attempts to clarify the confusion in constitutional ground-rules about the relative positions of ministers and senior civil service managers in an agency setting in the aftermath of Learmont. The proposals in these reports are discussed in the next section.

Beyond Learmont: rediscovering the constitution?

Much of the confusion about where managerial responsibility ended and where political responsibility began had arisen because there was a lack of 'a formal understanding with Ministers about the handling of sensitive issues and the lines of accountability in a crisis' described as a 'crucial element' by the Ibbs report (para 21). Both the Ibbs and the Lygo reports emphasised the importance of setting out clearly the roles of the Minister and the chief Executive in the framework document, yet this prescription was ignored when the Prison Service framework document was drafted. Post-implementation of the agency idea, the Prison Service framework document has itself been subject to critical review.

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465. (1995-96) HC 313.

466. see (1995-96) HC 313-I, para 5.

467. (1997-98) HL 55.

468. HM Prison Service (1997) *Prison Service Review.*

One of the problems with the framework document lay in the fact that there was little opportunity for systematic external input and comment, outside the immediate circles of the policy advisers surrounding the Home Secretary, prior to its publication; as a consequence neither the actors most affected such as prison governors, nor the relevant Parliamentary select committees, were able to comment on the terms of the framework document before they were put into effect. It was this defect at which the Commons Public Service Committee was hinting when they recommended that the government invited select committees to comment on framework documents and agency corporate plans *before* there were published and when they were reviewed.[469] The former suggestion - of prior comment by select committees - was rejected by the government in their response to the report on the rather weak grounds that it was inappropriate 'to consult on documents concerning departmental management in advance of publication'.[470]

In a separate review conducted internally by civil servants in the Prison Service recently, it was recommended that 'the text of the framework document be revised to ensure that the language used is not at odds with the Ministers' wish to take responsibility for the Prison Service'.[471] This prescription is perhaps a lightly-veiled critique of the apparent opportunities for the terms of the framework document to be interpreted in a predatory manner as they had been by the Home Secretary under the previous Conservative administration.

In his discussions with Learmont in 1995, Ibbs clarified that the 'formal understanding' between the political head (ministers) and the management head (chief Executive) did not only encompass managerial issues such as monitoring the framework document, setting the policy and resources framework, setting objectives and targets as well as approving corporate and business plans; they also included political issues such as 'acting as a champion for the agency' and 'helping, advising and supporting the chief Executive'.[472]

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[469]. (1995-96) HC 313-I, para 123.

[470]. (1996-97) HC 67, paras 23-24.

[471]. HM Prison Service (1997) *Prison Service Review*, para 5.6.

[472]. (1995-96) Cm 3020, para 3.80.

The political dimension of that relationship, Ibbs thought, suffered from two setbacks: firstly, the Prison Service lacked an identifiable owner as adviser and champion for the agency: and secondly, there was a need for 'a Home Office corporate plan, setting out strategy and relating objectives to the resources allocated' to redress the imbalance in clarity between managerial responsibility and political responsibility.[473] Subsequent inquiries have suggested different ways of improving the understanding between ministers and civil servants: the Public Service Committee recommended that 'framework documents should specify more precisely the respective roles of ministers and chief Executives'.[474] The Committee also went further by recommending that 'at each stage of agency review, the government should consider whether the agency in question should be converted into a statutory body'.[475] It went on to say that 'other [sic select] committees, when they consider the framework document of agencies falling within their remit, should also consider whether a contractual or legislative framework would better serve the public interest than the agency's present status'.[476] This proposal arguably betrays one of the underlying themes contended by this thesis which is, that 'content' or 'substance' is far more important than 'form' itself.

Indeed, the Home Affairs Committee thought it was not 'possible to lay down a rigid dividing line between the roles of Ministers and of the Director-General of the agency' and that the agency arrangements would only work well if there was 'a good relationship between the Home Secretary and the Director General'.[477] The notion of 'good relationship' of which the Home Affairs Committee spoke was endorsed by the Prison Service in its internal review.[478] The latter took the view that 'mutual trust and confidence' rather than formal structures were the more important foundations of a 'good working relationship' (para 5.8). It found that a central factor which had destabilised the working relationship was a 'widespread

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473. (1995-96) Cm 3020, para 3.81.

474. (1995-96) HC 313-I, para 122.

475. (1995-96) HC 313-I, para 122.

476. (1995-96) HC 313-I, para 122.

477. (1996-97) HC 57-I, para 111.

478. HM Prison Service (1997) *Prison Service Review*, chapter 5.

misconception' among managers in the prison that agency status was about giving the service independence from the main Home Office and its Ministers (para 5.10).

Implicit in this suggestion is the idea that such a 'misconception' within the Prison Service may have created a cultural mindset which was hostile to much of the involvement of the Home Secretary in Prison Service affairs to the point where they were perceived as having overstepped the appropriate boundaries between policy and operation. In its own report. the Prison Service's own prescription to cure that 'misconception' also lay in that old, problematic balance between *political oversight* on the one hand, and *operational autonomy* on the other: while the Prison Service 'must recognise' that the Home Secretary has a legitimate interest in its operational matters which 'could give rise to grave public or Parliamentary concern', 'the Home Secretary needs to grant the Prison Service the room for manoeuvre for carrying out its day-to-day operations within the agreed policy framework' (para 5.12).

However, it is also clear from the report that of the two variables - political oversight and operational autonomy - the former prevails on the basis of the 'the need for the Home Secretary to have confidence in the advice given by the Prison Service, and for the Prison Service to be realistic about and responsive to the demands of ministerial accountability to Parliament' (para 5.12). The report noted that recent mechanisms were put in place to strengthen political oversight of the Prison Service, for example, the Prison Service Monitoring Unit[479] established by Michael Howard in response to the Woodcock report in December 1994 'to support Ministers and the Permanent Secretary in carrying out their responsibilities under the Prison Service framework document'; and the decision by Jack Straw, the current Labour Home Secretary, to have his ministers rather than civil servants answer Parliamentary written questions since May 1997.

However, the report earmarked certain sensitive areas which had to be tread with caution if there was to be a good balance in the working relationship between ministers and the civil servants in the Prison Service: *firstly*, the report argued that the idea of a Prisons Advisory

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479. The Unit has recently been disbanded and its functions are now carried out by the Planning and Finance Directorate of the main Home Office.

Board, first advocated by Michael Howard on 1 April 1996, did not bode well for the high-profile work of the Prison Service agency because 'it would add to existing layers of the management machinery and would fit oddly with the close day-to-day links between ministers and the Prison Service' (para 5.25). It advocated instead that there be a system of quarterly meetings between ministers and members of the Prisons Board to review performance and strategy. In addtion, there was to be regular meetings between area managers and the Operational Directors to keep the former in touch with ministers' 'concerns and priorities' (para 5.26).

Secondly, it warned that the idea of visible leadership of the Prison Service touted by previous reviews of the Service was transgressing the normal boundaries of senior civil servants' role and going 'beyond the public profile which senior civil servants are normally expected to adopt and has been a higher profile than most other agency chief Executives' (para 5.27); and *thirdly*, in an apparent critique of the sweeping nature of recommendations of post-mortem inquiries by outsiders to Prison Service affairs such as the Learmont report, it argued that 'the Director of Security should develop a protocol, agreed with Ministers, to determine the form of inquiry to follow major incidents' (para 5.29).

Despite its detailed observations on operational matters, the Prison Service review, perhaps predictably, as it was authored by civil servants qua actors rather than observers, missed what this case study suggests to be the most sensitive underlying issue. A recurring problem which is encountered in this case study of the Prison Service relates to the apparent monopoly of the Executive over the regulation of its working relationship with senior civil servants. The question to which the situation now leads is: is it not better if Parliament, rather than the Executive *per se*, were to perform that regulatory function? In practice however, as Lord Hailsham[480] pointed out long ago, the Executive can and do usurp the powers of Parliament and so, the more urgent task is arguably the protection of the core underlying constitutional norms relating to the civil service.

[480]. Lord Hailsham (1976) *Elective Dictatorship*, Lon: Collins.

What constitutional ground-rules are appropriate for dealing with the tension between agency civil servants and ministers in future, in the light of the episodes involving the Prison Service, and are these rules clear enough? To what extent is it feasible to maintain water-tight distinctions, so fundamental to Ibbs' idea of agency, between *accountability for policy* by ministers, and *responsibility for operations* by civil servants? What light do post-mortem inquiries shed on these problematic distinctions, firstly between 'policy' and 'operation', and secondly, between 'responsibility' and 'accountability'? The balance of evidence suggests that the distinction between policy and operation, though problematic, may still be valid. The problems of trying to separate it are however well-known.

As the Lords Select Committee[481] heard, it can often be used to the advantage of ministers because even if 'an operation may fail because the policy behind it was bad, as Professor Bogdanor said, 'it can never be policy that something goes wrong'. So, 'operational matters enter the political domain when they go wrong' (para 346). The Committee also found that it was difficult if not impossible to formalise the distinction between policy and operation (para 347), and concluded that it was neither possible nor desirable to separate the two concepts (para 348). Derek Lewis however put the problem into context when he explained that the distinction was only problematic in 'the larger, more sensitive and complex agencies'.[482] Indeed, underlying the problematic distinctions between the managerial and the political is also the question of whether it was right to implement the agency model within a sensitive or high-profile agency such as the Prison Service in the first place. It is in this light that we realise the potential dangers of concentrating the responsibility for civil service reform in the hands of the Executive, without any effective checks or counterbalance prior to implementation.

Lord Armstrong, in his evidence to the Lords Public Service Committee[483] reiterated his reservations, first given to Commons Public Service Committee,[484] about the suitability of the Prison Service as an agency: the Prison Service 'perhaps was an area in which it might have

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481. (1997-98) HL 55.

482. (1995-96) HC 313-III, p91.

483. (1997-98) HL 55, see para 341.

484. (1995-96) HC 313-III, QQ109-18.

been better not to move to an Executive agency because it seems to me that in that service some of the operational issues or some of the day-to-day issues that arise are highly political and raise highly political issues such that the Home Secretary and his Ministerial colleagues simply cannot detach themselves from it in terms of answerability' (para 341). Similarly, Sir Christopher Foster suggested that 'if a body is like the Prison Service where it is impossible for Ministers to let well alone, then an Executive agency or quango is not a sensible way of proceeding' (para 341).

The sub-argument of Michael Howard's acrimonious dispute with Derek Lewis, as was pointed out earlier, centred around the distinction between the nature of 'managerial responsibility' and 'political accountability'. One of the practices that blurred this distinction during Howard's tenure was the practice of having the Director-General answer written Parliamentary questions directed to the Home Secretary. This practice has since been discontinued by Jack Straw, New Labour's Home Secretary, soon after they entered office.[485] Howard's dismissal of Derek Lewis gave rise to a minimalist notion of ministerial responsibility insofar as it suggested that ministers only owed a duty to explain and account for the actions of the civil servants. This bold attempt was categorically rejected by the Commons Public Service Committee; their interpretation of the constitutional convention of ministerial responsibility was that ministers have an obligation not only to explain the actions of government but also to 'respond to criticism in Parliament in a way that seems likely to satisfy it - which may include, if necessary, resignation'.[486]

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[485]. this was first announced in a letter dated 7 May 1997 from Jack Straw to David Clark, the Public Service Minister; and later confirmed in the government's response to the Home Affairs Committee report, *The Management of the Prison Service*, in (1996-97) Cm 3810, paras 33 & 34.

[486]. (1995-96) HC 313-I, para 21. The Committee also recommended the adoption of a 'Resolution on Accountability' which incorporates the following:

'Ministers must take special care to provide information that is full and accurate to Parliament and must in their dealings with Parliament, conduct themselves frankly and with candour. The House believes that Ministers may need, upon occasions, to withhold information but believe that they should do so only exceptionally. They must not knowingly mislead Parliament and they should correct any inadvertent errors at the earliest opportunity. *The House will expect Ministers who knowingly mislead it to resign.*' (para 60). Emphases added.

A minimalist concept of ministerial responsibility has implications for the constitutional burdens to be shouldered by civil servants as ministers' alter-egos, and in particular, for the relationship between the civil service and Parliament. In their response to the Public Service Committee's report, the previous Conservative government pronounced their commitment to guarding against an 'apportioning between the Minister and his civil servants part or parallel shares in a single line of accountability to Parliament'.[487]

Despite this assurance, the issue seemed far from closed: more recently, the Lords Select Committee on the Public Service[488] has consolidated the inquiries of its counterpart in the House of Commons by examining the doctrinal complications of a minimalist view of ministerial responsibility for the way in which senior civil servants relate to Parliament. Barry O'Toole warned that the progress in managerial accountability should not cloud the issue proper ministerial accountability to Parliament:

> 'The claim of Ministers is that the increasing transparency of decision making which is implicit in the devolution of administrative powers to the agencies has meant that public officials are more accountable now than ever before. In particular, minister often point to the Citizen's Charter, the proliferation and publication of performance criteria, and the decreasing anonymity of Civil Servants as evidence for this. Indeed these are all facts. However, these developments do not necessarily add up to an improvement in responsibility and accountability. The reason is simple: it is Ministers and Ministers alone who answer to Parliament for the whole range of Government activity; and it is Parliament, through elections to the House of Commons, which answers to the public. Agency chief Executives and other officials may well appear before select committees or in the media; but they are not directly answerable to the electorate through Parliament' (para 351).

Despite the problems encountered by the Prison Service in its earlier years, Sir Richard Wilson, successor to Robin Butler as Head of the Home Civil Service and Cabinet Secretary, (Q 947)

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487. (1996-97) HC 67, para 3.

488. (1997-98) HL 55.

insisted that 'delegation of authority within a department internally is a *management* matter, it is not a *constitutional* matter, it is a matter of management and it happens at all levels, and it does not conflict in any way with the accountability of Ministers to Parliament as a constitutional doctrine' (para 354).

The experience of the Prison Service, however, has illustrated vividly that questions of management, politics and the constitution are intertwined, and it is this interconnection which partly explains the difficulties in formalising the distinction between policy and operation - yet, there is still a sustained attempt to isolate the managerial changes from the sphere of the politico-constitutional. It is perhaps due to the failure to see the interconnections between the two that the vulnerability of agency civil servants in the management-focused environment to political interference goes unrecognised by the constitution.

In his report to the Lords Public Service Committee, Derek Lewis argued that: 'The chief Executive and board of an agency must be free to make public their views on the operational implications of the policies that they are required to implement. If this is not permitted the principle of Ministerial responsibility is seriously distorted. Ministers would be free to impose half-baked impractical policies or to set wholly unrealistic performance targets, and then simply load the blame onto those running the agency for any failure to implement or achieve, as a mere operational matter. The public needs to know the views of the professionals in charge of its major public services on significant policy issues. If the public knows only the views of politicians, it cannot form balanced judgments about the policy decisions being taken by its elected representatives' (para 363).

Pending the publication of an imminent White Paper on 'Better Government', it is unclear how these problems are to be approached by ministers in the New Labour government. When asked by the Lords Public Service Committee for his view as to how accountability might work in the case where one person is responsible for policy and another for operations, David Clark, then Public Service Minister said (Q 1848), 'I do not think I have a definitive answer to that' (para 364). The Committee itself was concerned with the constitutional legitimacy of any attempts to divorce 'policy' from 'operation':

> 'the question arises whether any attempt by Ministers to distinguish between responsibility for policy and responsibility for operations is consistent either with the Armstrong Code or with the Carltona doctrine. If that doctrine holds good, then whatever might be said in an Executive agency's framework document, its chief Executive is in all things acting as his Minister's alter ego. In terms of the Armstrong Code, the chief Executive has no constitutional personality or responsibility separate from that of the government. If it is claimed that in operational matters a chief Executive (but not the Minister) is personally responsible because the Minister has delegated that responsibility to him, then the chief Executive's position is radically different from that of the Permanent Secretary, except perhaps, when the latter acts as an accounting officer. Such an interpretation would have far-reaching implications for the current status of both Civil Servants and Ministers as servants of the Crown-and, indeed, for Crown immunity' (para 366).

The Committee also exorcised a familiar debate about the merits of clarifying the constitutional ground rules about the position of the civil service through statute:

> 'the precise relationship between Ministers and Civil Servants is now subject to a variety of interpretations, and there is now a need for this relationship to be clearly defined, taking into account the Carltona doctrine, the Armstrong Code, the Civil Service Code and the new position of Chief Executives. It is a matter for reflection as to whether the Carltona doctrine is really relevant, or indeed in operation, in the changed circumstances of today, or whether the civil service should not be regarded as in some respects a separate organ of the constitution distinct from the Ministers of the Government. A Civil Service Act might be the means by which to clarify this' (para 366).

It recommended that 'in clarifying the relationship between civil servants and ministers, the government should affirm that:

(i) the position of agency chief Executives is no different from the position of any other civil servant;

(ii) when chief Executives provide the substance of written answers to Parliamentary questions or appear before select committees, they do so on behalf of the Minister; and

(iii) Ministers are accountable for whatever goes on in their agencies just as they are accountable for whatever goes on in the rest of their departments, and that 'such an affirmation would prevent it being thought that Ministers could pass responsibility for operational matters to chief Executives' (para 367).

The committee issued its strongest reservations yet about the implications of agency management reforms for the constitutional boundaries between ministers and civil servants: 'the creation of Executive agencies has not, in a constitutional sense, recast the architecture of the state so long *but only so long as* accountability of Ministers to Parliament for the work of Executive agencies remains the same as their accountability for any other aspect of their departments' work' (para 192, emphasis added).

Conclusion: servants of whom?

It is now several years since the Prison Service became an agency but the problematic episodes considered above manifest the turbulent problems of a political and constitutional nature particularly in its first three years. It is tempting to represent the conflicts between the Minister and senior civil servants in the Prison Service agency as a simple but unfortunate tale of differences between personalities. However, the fact that such tensions have been openly played out on the constitutional platform to the detriment of senior civil servants is an issue ripe for a public lawyer's consideration, for they corrode the underlying constitutional contract between ministers and bureaucrats. These episodes suggest that in some sensitive agencies such as the Prison Service, civil servants, as servants of Crown, are "not only accountable to Ministers but also, for Ministers", or put another way, the relationship between civil servants and their immediate political masters in this new managerial environment is transforming "from a protective-type to predatory-type relationship".

The original reports advocating the implementation of the agency idea (such as Ibbs and Lygo) do not articulate the underlying assumptions nor baseline criteria which guide judgments of

either 'efficiency' (the first manifest aim) or of 'operational independence' (the second manifest aim). In place of detail are a series of vague key performance indicators which are supposed to quantify the efficiency of the Prison Service in the discharge of its statutory duties as a penal institution, and broad statements of constitutional doctrines as the foundations of minister-civil servant relations which were supposed to pave way for greater operational independence. These reports have tended to confound and obscure, rather than disentangle and illuminate, the problems of achieving both efficiency and operational independence simultaneously in the Prison Service.

Both the Ibbs and Lygo reports set the constitutional ground-rules which were later to be incorporated into the framework document for the implementation of the agency idea. However, it does not escape a public lawyer's attention that these documents are essentially agents and instruments of the Executive. The concerns expressed by the Lords Public Service Committee represent the strongest, if not the most recent, manifestations of a distinct *absence* of constitutionality of the managerial initiatives, and in particular, the Next Steps idea.

The case study does not claim to generate findings which can be indiscriminately generalised to other agencies, nor does it purport to cover all the issues related to the implementation of managerialism. Rather, its primary aim, as mentioned in the introduction, has been to examine the underlying constitutional concepts and principles, or perhaps the lack of them, in the implementation of the agency idea within the Prison Service. The guiding theme of its enquiry is 'how have managerial reforms in the civil service affected the relationship of civil servants to the Crown (or its Ministers)?'. As was argued earlier, the mechanisms preferred for the implementation of the managerial initiatives within the civil service have largely been administrative or Executive rather than legislative in nature. There is therefore no systematic means for Parliament to influence, by way of discussion and scrutiny, the government's stated policy of improving management in the civil service. Unlike other areas of public policy such as health, education and welfare, many managerial reforms in the civil service have, excepting rare cases, been introduced by extra-statutory means. The contribution of Parliament is limited to after the event, as demonstrated by a succession of select committee inquiries into aspects of the Prison Service management since it acquired agency status in April 1993. The virtual absence of a 'hard look' by Parliament into the managerial reform programme in the civil

service perhaps helps to explain why the implementation of that programme in certain sensitive agencies such as the Prison Service has been problematic. While there is scope to include Parliamentary influence in the reform of civil service management, it is also critical to improve the quality of Parliament's contribution: the provisions of the Criminal Justice Act 1991 which conferred new powers on the Home Secretary to contract out the management of prisons bear testimony to the dangers of the Executive capturing the legislative output of Parliament in order to implement their reform programme.

The dynamics of the relationship between ministers and civil servants are clearly different across departments and agencies. This case study investigates and highlights the points of tension in that relationship within the context of a high profile agency whose work is fundamental to the primary policies of its parent department. It is clear that the episodes discussed earlier not only fit in with the contemporary concerns of public lawyers about the constitutional status of civil servants; they also pose a serious challenge to the traditional conventions peddled by the government (see chapter 4 on this). It would seem therefore that in the pursuit of 'good management' within the civil service, successive governments under Thatcher and Major have consistently shied away from ensuring a healthy balance between politics and the constitution. In other words, the managerial focus so clearly emphasised by the Executive has not provided any means for a consideration of the constitutional issues such as the status of civil servants within a reformed management structure. As a result, there was little sustained consideration of how the relationship between ministers and civil servants within the new managerial setting can be strengthened and legitimised *within* the constitution, rather than outside it as is arguably the position now. This theme is developed further in the following chapter when qualitative data from the author's interviews with several senior civil servants within the Prison Service will be considered.

Chapter 7

Part III of the case study of the implementation of managerial reforms in the HM Prison Service: the qualitative discourse

Introduction: the ins and outs

The implementation of the Prison Service framework document, which can perhaps be characterised as the *living managerialism*, has arguably not been systematically conceptualised in existing academic literature. Semi-structured interviews were conducted by the author in this study to encapsulate a flavour of the descriptive discourse employed by the civil servants at different echelons of prisons administration as well as to capture a qualitative insight into the different facades of the living managerialism. The focus on qualitative data has been born, not out of a lack of faith in quantitative measures, but rather of an intention to enrich existing quantitative data via alternative sources. A familiar theme emerging from the qualitative interview data suggests that the latent elements (or policy outcomes) of managerialism has tended to diverge from the manifest ones (or policy intentions). The suggestion in the qualitative data of an implementation gap between the manifest and latent aspects of managerialism connects also with a wider body of literature on the factors influencing the implementation of administrative reforms.[489]

As mentioned in chapter 5, ten interviews were conducted in total. A decision was taken, due to the circumstances, character and tone of the interviews, to use materials from three interviews (O'Friel; Nathan; and Scott) as deep background information rather than to reconstruct them as solid interview data below. The term deep background is used here to

[489]. see e.g. Caiden, G.E (1976) Implementation-The Achilles Heel of Administrative Reform in Leemans, A.F (ed.)(1976) *The Management of Change in Government*, Martinus Nijhoff, pp.142-64; Sabatier, P (1986) Top-down and bottom-up approaches to implementation research (1986) *Journal of Public Policy* 21-48; Marsh, D & Rhodes, R (eds.)(1992) *Implementing Thatcherite Policies: Audit of An Era*, Buckingham: Open University Press.

mean that some of the analytical, methodological and empirical insights gained from the discussions were used to inform relevant aspects of the research. The interview with Brendan O'Friel, former Chair of the Prison Governors' Association, provided many good historical points as well as suggestions on further contacts in the field but the transcription of the interview has not been included here. In line with the respondent's wishes, the interview was not tape-recorded and the discussion raised many issues which were not directly central to the primary research themes. The interview with Stephen Nathan, freelance consultant to the Prison Reform Trust, was also treated on the same basis. The interviewee was generous in sharing analytical insights on the role of the private sector in administering prisons and the bulk of the discussion tended to centre around what appeared to be his current research interest. The interview with Colin Scott, current Chair of the Prison Governors' Association, was conducted in rather rushed circumstances, some two hours after the scheduled time as the respondent was caught up previously in a school governors' meeting. During this waiting time, the interviewer was cordially provided a welcome talk by another governor who was deputising on that day. When Scott arrived back from his meeting, he made a commendable effort to be very co-operative and forthcoming with his views qua PGA chair on the issues put to him but the interview has not been included here as it was felt that the interview, conducted under the circumstances explained, did not address the key issues which were more fully explored in other interviews.

Transcriptions of interviews conducted by the author are provided in the following section. A more thematic assessment of the interview data transcribed above will be made in the following chapter. The rationale for this, as outlined in chapter 5, is that a separation of transcribed interview data from the interviewer's own analysis minimises the risks of 'researcher bias' by which the interview data may be contaminated by, or interpreted in the light of, the researcher's own preconceptions. Separation between raw data and analysis allows objective readers to reconcile any differences in emphasis and content presented by both sets of information.

Qualitative interview data

No 1: Rannoch Daly, Prison Governor (27 March 1997): vetted

1.1 Mr Daly is the governing Governor of Leeds Prison.

1.2 "The major advantage of agency is that it has enabled different parts of the Prison Service to manage their internal affairs much more closely. This has enabled staff and management to develop and become more efficient. Within the Prison Service as an agency, the debate has not really been about constitutional accountability, not like in say privatisation, constitutional accountability has changed completely. In the case of agencies, the constitutional divide between government and agency has been less clear".[490]

1.3 Mr Daly further explained that it was not clear to him whether "agency has contributed to greater Parliamentary interest in the Prison Service, or made it more interesting, or whether it was the Home Secretary (then) who was taking more interest in reports about the Prison Service". He went on: "A lot of people have been surprised by the latter because there was an expectation that there would be less political interference but there was (then) in fact more".

1.4 Asked whether by implication, he felt that there was an initial consensus that the conversion of the Prison Service into Agency was a good idea, Mr Daly replied that: "Yes because it was thought that there would be less political interference. There was a support for more managerial freedom in the Prison Service on the one hand, and for less bureaucratic

[490] The example raised here related to the arrangements, now abolished by a new Home Secretary, for the Director-General of the Prison Service to respond to Parliamentary written questions. The practice of allowing the Director-General to answer Parliamentary questions in this manner was described as "a bit convoluted and niggling for MPs who would have preferred one of their own members rather than a civil servant to answer the queries".

interference by the central civil service on promotion, grading, pay rates, pensions and so forth on the other".

1.5 The role of the Chief Executive, the management figurehead of the Prison Service seems to be a new one. There was also a new set of avenues of accountability put in place. Mr Daly was asked how as a governor, he saw the relationship between the new managerial accountability and the traditional legal and political avenues. Rather poignantly, the Director-General of the Prison Service was sacked over high profile prisoner escapes even though he had met all the KPIs for that year. Mr Daly explained:

"Better written KPIs could be an answer. KPIs are drafted by the Prison Service initially, agreed and signed up to by the Home Secretary who is advised by the Prison Service Monitoring Unit (within the Home Office) which comprise non-political advisers i.e. civil servants. There is no further formal consultation outside this Home Office group, and so they are matters entirely between the Home Secretary and the Director-General. However, they are published and reported on each year and interested parties for instance penal reform groups are beginning to lobby about their content".

1.6 Mr Daly emphasised that the constitutional implications of the policy/operations debate need to be clarified. "Policy and operation permeate each other. This issue of policy/operation has always been an issue. The main question seems to be, 'Can you adequately divide policy from operation?.' At present, some policy documents are written within the Prison Service. The consensus view seems to be that you cannot divorce policy from operation. Policy needs to be informed by those in the field. A dividing line is not practical, or if done is likely to render the policy document vague or impractical and the operational side unable to put policy into practice."

1.7 Asked about the role of prison governors within this debate, Mr Daly explained that there have been positive developments: "Post-agency, there have been changes in finance and personnel management. The financial accounts of the Prison Service have been sub-divided per subject. Responsibilities for managing budgets have been devolved to establishments. Given a fixed budget, which is noticeable in the public sector, decisions closer to ground level

would be better. So now, prison governors have more management flexibility, in budgets and personnel recruitment. Consequently, they are better able to bring value for money."

1.8 On the other hand, there have also been some rather unwelcome side-effects: "Prison governors are now more complained about as their authority to take decisions increase. So while governors welcome new developments, some are not so (welcome). With better and more management at ground level, there will tend to be more grounds for complaint. Those aggrieved will seek means for redress, and this is partly due to devolution in decision-making post-Agency."

1.9 "However, the notion of a constitutional crisis in the Prison Service as some might have suggested is a mirage, rather like shadow-boxing. Any political controversy about agency status was not about the management of prisons by governors, but instead hinted at the relationship between the (then) Director-General and the (then) Home Secretary. But even here, it was a mirage. Agency status, although it looks as if it changed things, in fact has not. The Home Secretary is still accountable to Parliament. Agency status has not changed that. On Parliamentary questions,[491] the signature on the response was different, but answers were given to PQs just as quickly."

1.10 Asked whether the present framework for accountability of Prison Service officials is too centralised in that the key offices of the Prisons Minister, the Director General, the Chief Inspector of Prisons, the Prisons Ombudsman and members of the Boards of Visitors are appointed by the Home Secretary, Mr Daly replied: "The Home Secretary should dilute this centralising tendency because people are likely to blame him (sic. when things go wrong). It would be to his advantage if he has other bodies who are not accountable to him."

1.11 "Perhaps these could be other elected bodies say at local level. Or courts could also dilute some of that centralising tendency. Other ways could be area-based Prison Service board of commissioners accountable to the Home Secretary, which allow the Director-General,

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[491]. At the time of the interview, the arrangement for answering PQs was that written answers would be dealt with by the Director-General. However, this changed when Labour Home Secretary came into office in May 1997, reverting the responsibility of providing Parliamentary written answers back to the Home Secretary.

the police chief constables and courts a say on policies covering budget, overcrowding and such like. One problem might be where the money for this initiative is going to come from - will the money be from local or central taxation?"

1.12 On whether the concept of managerialism has much more to offer than the concept of constitutionalism, Mr Daly applied a reverse logic: "If the agency status is removed due to political or constitutional problems, there is a concern that managerial improvements could be jeopardised. Part of the general civil service way of doing things is not the right way of running the Prison Service. And this point applies to many other parts of the public sector. The civil service is becoming more divergent in its managerial practice in its different parts."

"However, some constitutional dilution would benefit the Prison Service by putting vitality from other sources into the Prison Service as well as help protect the Home Secretary from other criticisms. There is perhaps a case for diluting his control. The Home Secretary does not run the police force or probation service or courts in the criminal justice system. Why not run the Prison Service on an analogous devolved model?".

No 2: John Alldridge, YOI Governor (10 May 1997): vetted

2.1 Mr Alldridge is Governor Grade 2 of Stoke Heath Youth Offender Institution.

2.2 Mr Alldridge prefaced the interview by a general statement: "Next Steps have exposed the Director-General who, until Derek Lewis was recruited, used to be traditional civil service mandarins. There has not, to my knowledge, been any academic research into the living aspects of Next Steps perhaps due to difficulties of access to the people in the field. But there seems to be an elaborate trend to expose the civil service since the early 1980s while the elite group of permanent secretaries have not changed at all".

2.3 On the day of the interview with Mr Alldridge, the Home Secretary announced that he was resuming ministerial responsibilities for answering written questions in Parliament. Mr Allridge welcomed the move: "When in opposition, Labour saw the agency as a handy political football which was often kicked into the government's net. Now, in government, they are putting a defender in place which is a significant change".

2.4 Asked about the impact of managerial reforms on his work as a governor, Mr Alldridge replied: "There has been no clear strategy to reforms which have instead been borne of dogma and personal belief. Now although we may still have a public service, their deed would not be delivered by central government but by its agency counterpart or through contracted out agents. Similarly the Citizen's Charter has changed the concept of the consumer. Behind this is an idea that you did not have to govern the business and you can give bits of it away".

2.5 "The Prison Service has always been a controversial area of administration...Kenneth Baker nearly lost his job as Home Secretary over the Brixton escape. But he was lucky to hang on. That incident may have reminded Ministers that being able to hand over the operational business to someone else in the Prison Service was a very attractive proposition which could be nicely tucked into the Next Steps initiative".

2.6 "An interesting contrast can be made with the police. When the police violates someone's civil liberties, nobody calls for the Home Secretary's resignation because he is always able to say that operational autonomy is, at law, in the hands of the chief constable concerned. It might have seemed an attractive proposition to Ministers to create the same situation of operational autonomy for the Prison Service by some other, non-statutory, arrangement".

2.7 "The vast majority of operational grade has been subject to continuous interference by Ministers, and further, any Member of Parliament via Parliamentary questions can, in fact, inflict wounds on the Prison Service operational capacity. As an extreme example, I was once part of a team dealing with very serious insurrection. The silver commander at the prison was being pestered by the headquarters because the Prisons Minister had to answer a question on prisoners' personal items."

2.8 Mr Alldridge then offered some perspectives on the characters of some key actors in the agency: "Michael Howard was a very energetic Home Secretary with a different vision. There was a paradigm shift when he came into power. But there was never any clear announcements of a change of policy. Within weeks of his arrival, he made his own agenda and it became implicitly clear over time. Derek Lewis with his background from private business, had a template of the chief Executive of the Prison Service as someone having authority. He soon realised that the permanent secretary had important powers whereas the chief Executive had no power to vary anything important. He did not for example have the jurisdiction over the employment of members of the Prison Service Executive committee".

2.9 Mr Alldridge also disclosed widespread news within the Prison Service that "the previous Director-General, Joe Pilling (who was the other candidate apart from Derek Lewis) had been offered the job but he refused unless the new post of Director General/Chief Executive was created as a Permanent Secretary post, separated from the Home Office. Pilling was a mandarin and understood the power play positions perfectly. He realised that if he were to take the Prison Service forward, it would have to be in the capacity of de jure accounting officer for the service, i.e. on a permanent secretary basis".

2.10 "The Government Finance Act (sic Exchequer and Audit Act) of 1866 sets out who can spend public money. The Accounting Officer has to be the permanent secretary. The framework document provides for an additional accounting officer (the Director-General) subordinate to the Permanent Secretary on the traditional civil service grade. This Act also provides for budget holders (Assistant Under-Secretaries of State) as well as sub-accounting officers (all governing governors). In law, there is a strict hierarchy between the actors and everything else is invisible. Derek Lewis did not seem to know this and he thought he could vary the employment terms and conditions of staff and reduce HQ size."

2.11 Allridge felt that the official version of events to the effect that Derek Lewis (as represented in his own book[492]) was originally the preferred candidate over Joe Pilling was "a

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[492]. Lewis, D (1997) *Hidden Agendas: Politics, Law and Disorder*, pp.5-14.

terminological inexactitude". "Derek Lewis worked very hard when he was the Prison Service director-general but he lacked knowledge and understanding of the legal position, as well as of the conventional practice of lateral brokerage. Senior civil servants often broker laterally at their own level with people from other ministries. Partly because he did not have a hand in this practice, Lewis found that he could not control the agenda of his Executive committee. For example, Rosemary Wool, the Prison Service Director of Healthcare, was able to enlist the support of an assistant under-secretary at the Department of Health on an issue to do with the control of drugs over which there had been some disagreement with Derek Lewis. Due to the conditions of the senior civil service, Derek Lewis was not able to sack or stop practices like this. There were significant players in the ranks who were not sympathetic to his arrival. From their perspective, if he had been successful, it would have been an assault on the Whitehall village."

2.12 "Senior civil servants can even rein in Ministers - they work collaboratively. Derek Lewis was an outsider; they did not help him at all. They just let him get on. He was not part of them nor did he have any connections. Derek Lewis was immensely dedicated but Joe Pilling could have managed better. He knew the rules; he had the connections and he was part of the club. Pilling was an unusual mandarin who had a vision for the Prison Service and realised that it needed refocusing. He was playing a game he understood but I don't think Lewis did."

2.13 Mr Alldridge clarified that he was not criticising open competition which enabled non-civil servants to enter the recruitment race as it did at least promise that "the best candidate gets the job". "But there is a yawning chasm between a situation where no matter how chaotic the rules, they were at least understood by the player, and another where the rules were not understood by the player. So a person that takes a step across from the private sector into the public sector can suddenly find himself hamstrung by all sorts of things that he did not know were there, as was arguably the case with Brian Landers (recruited from Habitat as the Prison Service Director Finance for a short period between 1993 to 1996). Brian Landers himself exposed this position in a series of newspaper articles after leaving the Prison Service".

2.14 "Unless Ministers are upfront about Next Steps, and legitimise the position of the agency chief Executive by changing civil service rules, and unless they are prepared to give substance

to the notion of operational independence, then there will always be an element of Next Steps that could not work. The exceptions to this point are perhaps low profile or non-controversial agencies which are not the subject of attention in the media or public arena."

2.15 There are key omissions in the framework document over administrative relations between headquarters and establishments, as well as finance arrangements. "The framework document takes a superficial view of the Prison Service as an agency. The impression it gives is that what you need to do is to restructure the relations between Home Office and the agency and you needn't do anything else. There are also strange anomalies in the operational line. Area managers are created by HQ but it is not a position grounded in law, not even in the Finance Act. So area managers are neither budget holders nor sub-accounting officers. The potential weakness of area managers in this matter arises if governors (who are sub-budget holders) disagree with area managers about the nature of their contributions to the Prison Service Mutual Aid Fund. Governors are by nature of their legal position accountable for the budget of their establishments. If an area manager persuades a governor to divert some contributions to the Fund, he may be able to do this on the basis of delegated authority of the Operational Director (who are budget holders), but may then encounter difficulties if the Operational Director does not back him in the event of a dispute."

2.16 Asked what he thought the implications of agency status have been for the Prison Service, Mr Alldridge replied: "We have never really been allowed to pull away from the Home Office. Derek Lewis did not manage to reduce the number of initiatives stemming from the Home Office nor did he manage to reduce the size of HQ as he had intended. From an external point of view, the whole structure has become more transparent, and so have unfortunately been the problems. But what advantage does this confer on the public or indeed the prisoners? From an insider point of view, there have been very few advantages. We may now be more transparent but this has had to be absorbed by management resources. We have to ask ourselves whether that has been a worthy experiment".

2.17 The managerial focus in the Prison Service has brought with it the emphasis on visible leadership. The administrative head of the Prison Service (director-general) and the heads of prison establishments (governors) have among others been the focus of that emphasis. This

creates a potential tension with the traditional requirement that civil servants provide administrative service and objective advice to ministers under the cloak of anonymity. Mr Alldridge added: "This tension has not been resolved but arguably accentuated. Administrative independence has to be backed by statute. A new Home Secretary should keep this option open."

No 3: Mike Newell, Prison Governor (9 May 1997).

3.1 Mr Newell joined the Prison Service in 1974, and has served as an Assistant Governor at HMP Leeds, HMYOI Aylesbury, HMP Featherstone and HMP Dover; Deputy Governor at HMP Hull (1989-92) and HMP Holme House (1992-94); on secondment at the Headquarters; and since March 1996, as Governor of HMP Hull. Mr Newell has also been elected as Vice-Chair of the Prison Governors' Association since 1995.

3.2 Mr Newell's opening comments went straight to the heart of this research: "I think this is an important study. One of the issues, through my period of service in headquarters as well as establishments, is that the civil service including the Prison Service has become highly politicised in its approach. Many of the things I was originally taught as a junior civil servant do not seem to apply anymore. For example, it has always been the duty of the civil servant to give 'best advice' to Ministers irrespective of the colour of that advice. It does seem that in recent years, people have given that advice to match the political colour. So they have excluded a whole series of things which they should have put as best advice, and ended up saying to themselves, dismissing those issues on the basis that the Home Secretary would not accept that. This is of course not the duty of the civil servant which is to be non-political and serve the public and the government by giving advice."

3.3 "There have also been a number of changes. The Prison Service is a classic example of the Next Steps agency where it had all gone wrong and was undoubtedly misused by Ministers

as a way of distancing themselves from what was a very dodgy agency - for example, you don't get any (electoral) votes in prisons and there are always banana skins in relation to prisons."

"It does seem that the Next Steps agency delivered certain *political* objectives but actually the *operational* objectives for managing the Prison Service in a more effective way didn't really deliver anything. For example, for those of us working in the Service, we had hoped that there would be variation in relation to personnel and financial issues. But instead, we are still governed by the same Treasury rules as we were prior to agency as well as the same personnel rules from Cabinet Office."

3.4 "So if you take for example something like movements in local government over the years - where there is opportunity to raise additional funds, raise capital freedoms where departments can make up to 6% additional revenue from spare capacity, that you can have year-on-year roll-over on budgets - none of these came our way. Nor on the personnel issues - the hiring, firing, selection of grades, pay rates and promotion structures - they were all controlled in the same way. So from an agency point of view, the Prison Service does not appear to have gained anything. It is Ministers who appear to have gained in the past However, it is significant that Jack Straw as his very action as Home Secretary is to say that he will hold himself accountable and answer all questions raised in Parliament on behalf of the Prison Service."

3.5 "The Next Steps have not been very successful from my point of view. The Prison Service has not delivered anything since acquiring agency status which it could not have delivered under the old structure. There have not been any new-found freedoms under agency status. It has not been much of a success for us in the Prison Service."

3.6 "Over the years, there has been a move in the Prison Service and in general, the civil service, to the belief that there is a business culture out there which is transportable to the public service. It has actually been a great mistake which has led us into a number of directions which have not been very helpful to the delivery of public services."

3.7 "If you take for example the red-tape and bureaucracy which people wish to cut out, there are two primary reasons why they are there: (i) decisions about public funds must be open to every form of scrutiny and money must be accounted for in a way that the public has a right to expect. When you remove some of these red-tape, you also open up some of the things from the business culture which have not been helpful such as corruption and fraud. I don't think it is because we have recruited people who are more inclined to engage themselves in that. (Rather) the previous culture held those natural tendency that many people had in check and in control; (ii) in relation to business culture, a very large number of decisions that we make are about <u>social</u> benefit, not about <u>cost</u> benefit. (Now) I am governed by the bottom line rather than standards, then I tend to cut out expensive services that may have a high social benefit. If you introduce a culture where you purely decide options on the basis of <u>cost</u>, then you make some very bad <u>social</u> decisions.

3.8 "Additionally, if you don't support by standards - and I suspect this applies not just in the Prison Service but in many other agencies - then standards get moved without any degree of central control, and people tend to turn a blind eye to this. I have a whole series of standards about regime that I am meant to deliver here but in many cases, I don't deliver because I don't have the resources to deliver in trying to match my budget. When my area manager looks at what I am doing, they are not really concerned about any of this i.e. standards that I have moved so long as I have not exceeded the bottom line, in terms of the budget I am operating to."

3.9 "(A proper approach to) the provision of public services is to provide the standards first, and then match, in the most cost-effective way, the delivery of those standards. We don't do that - we put the money first and then decide what we can have. And if that means that we can't keep standards, then it seems to be all right if we don't keep them. For example, politically, one of the reasons why Home Secretaries have refused to sign up to the European Prison Rules and our minimum standards is that they would be expected to deliver those standards and they cost money. What we do (now) is that we publish non-enforceable standards for which nobody would be penalised if we didn't deliver. It becomes a bit of a wish-list, usually with the rider 'where possible'."

3.10 "Prison rules are a form of secondary legislation but they are very general. If you look at legislation say in the Prison Rules 1952, there are only about thirty pages but compare say the Orange Book in Germany which has several hundred pages on very detailed matters. Let me give you two examples: (i) on closeness to home, there is no specific rule in Britain but the German Penal Code affords prisoners a right to be close to home; (ii) English Prison Rules say that prisoners "shall work" but they are silent about the quality of work, the rate of remuneration or even any requirement of establishment to provide work."

3.11 Asked about the situation before 1963 (i.e. before the Prison Commission became a department of the Home Office), Mr Newell explained that as he understood it, "even then, there was a policy/operation distinction entrenched in the civil service. Civil service as opposed to Prison Service grades are seen as meddling people in that they often take very senior positions in the Prison Service for short periods of time. That is seen as 'meddling' or 'not being very committed' to the development of the Service. They are also seen to have very separate agendas. For example, one recent review of senior management by John McNaughton who was then private secretary to the Home Secretary, castigated the Prison Service Headquarters for failing in its 'primary task'. But its primary task as defined by the Home Office was to serve the Ministers, but from my perspective, the primary task is to service the operational business. Since 1963 (when the Prison Commission became the Prison Department), there has been a major problem: a "them and us" culture and a culture that says everything should be constructed to deliver the effective service at ground level whereas at headquarters, it is seen as dealing with Ministers as a prime objective."

3.12 Has this tension been more marked since the Prison Service became an agency? "We really don't know because almost immediately after we went on agency status, we got the most difficult and interventionist Home Secretary in the history of the Service. Instead of less political interference, we got more and more. If you describe policy as saying what you want achieved but not saying how you wish to achieve it, and operational as how you deliver the policy, as living piece of work, then Michael Howard set the policy and as people began to deliver, also set 'operational policy' because he did not like a whole series of things which the Prison Service was doing."

3.13 "But whether this was about character or structure, it is difficult to split out. And because now we have a change of government which has put Michael Howard out of office. we will never know (whether things might have been different). It was Kenneth Clarke who as Home Secretary saw the Prison Service acquire agency status and who appointed Derek Lewis as the Director-General. Quite how things would have gone had Clarke stayed on, we will never know."

3.14 Were some of the seeds of the structural problems rooted in the constitution of the Prison Service i.e. the framework document? Mr Newell pointed out that there are some classic examples in the framework document which support this suggestion. (i) The Permanent Secretary remains the Accounting Officer for the Prison Service;[493] (ii) the Home Secretary 'will expect to be consulted by the Director General on the handling of any operational matters which could give rise to grave public or Parliamentary concern'.[494] He further added: "And so basically, there was written in the formulation of the reporting terms between the Director General and the Home Secretary, and any interventionist Home Secretary has a clear right under those terms to be involved in anything as they wish."

3.15 "As Vice-Chair of the Prison Governors' Association, I have had many meetings with Michael Howard, and it always took the same form. Whatever anyone was asking, whatever dangers everyone was pointing out, he always used to say, 'Yes I understand that and I hear what you say, however the British public tell me something very different'. That was always his way of carrying out <u>his</u> requirement under the framework document. That 'there was public concern about this', that was why he had to intervene - that was how he used to use that relationship."

3.16 Perhaps there is a serious tension between the legal framework, and the managerial framework which appears to enable or empower civil servants to take responsibilities through visible leadership?

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493. HM Prison Service Framework Document April 1993, para 3.7.

494. ibid., para 3.1.

"I think there is always a serious tension whenever you wish to hold me accountable for something but you don't necessarily allow me to do the job. Derek Lewis was under the impression when he was signed on by Kenneth Clarke (then Home Secretary) that he was taken on as Chief Executive of the Prison Service. Derek Lewis' understanding of the term was that he had the power of delivery. What he didn't realise was that he had the responsibility but did not have available to him the full range over delivery because for a whole series of reasons, he could not. For example, he did not have the authority to remove people on Senior Service Grade from the Prisons Board. That clearly created a tension. But this is not peculiar to the Prison Service. Chief constables of police are answerable to police committees for instance. Chief constables have a statutory position, a better position at law but not in day to day administration. Difficult police committees are like difficult Ministers."

3.17 "Many of the devolution that we have had has been a devolution of the responsibility without the power. We have very little control. As governor, I am responsible for delivering services within the budget but with limited flexibility, for instance, I cannot carry over from year to year or do anything about in-year movements. Any surplus I have is taken away. The split between capital and current cost is decided centrally, so I cannot make savings on current and save it on capital. Everyone is covered by a whole series of rules which emanate from Treasury, Cabinet Office and the Permanent Secretary in the central civil service. I don't know how it works in other agencies but I do know that as far as prisons go, this is an agency in name only. There are no discernible differences in delivering the services. There is more work down the establishment level but no corresponding power down the establishment level."

3.19 What impact has the Citizen's Charter had on the operational ranks of prison administration? "The Citizen's Charter initiative seems to have excited little interest among prison governors and officers. There was, for example, the ill-fated namebadges where staff dealing with the public were required to wear namebadges. The Prison Officers' Association refused to cooperate with that. We thus have a position which is still extant of an Order being published by the Service that you will wear namebadges, prison officers refusing to wear it, and it is being quietly forgotten about."

3.20 Mr Newell then went on to clarify the PGA agenda: "There are a number of things on which we would like to see progress but there are some which considered more important. They are about minimum standards, and how we certify prisons. Lord Woolf recommended a legally enforceable capacity for each prison. Any increase over that required an application to Parliament and would only be a temporary increase. What Woolf was saying was that the danger with overcrowding is that you can never afford to put in extra resources and so with increasing population but the same amount of resources, there should be an additional safeguard to the judgements of the Home Secretary and the prison officials. The PGA's proposal is to go further: there should be a certificate, to be issued by an agreed authority, for each establishment to say that the facilities matched the population."

3.21 Another aspect to the debate on agency status is the involvement of the private sector in administering prisons. "First of all, I don't believe that the Prison Service should be an agency. I think one of the mistakes about the public sector is that we do not get right what the public sector management ethos is and what the main responsibilities are. We have had eighteen years of government with a particular view about the public sector, which is generally built around the idea that the public sector is a millstone around the taxpayer's neck, that it is inefficient in everything it delivers and if only the people from the business world could get their hands on it, it could be better."

3.22 "There is no reason why you can't have efficient public services once you have defined what public sector management ethos is. So the mechanics that we use to deliver effective services have nothing to do with whether you define them as agency, commission, department and so forth. They are actually about delivering a structure which allows efficiency to flow through the organisation, and yet keeps where necessary, the appropriate controls for propriety in terms of public funds and proper controls in the way that we deal with people."

3.23 "Civil servants as Crown servants are by definition expected to follow all its legislation and needs things in place to make sure that it does. In outside industry, it may appear that companies sometimes break rules in pursuit of efficiency. The public sector do break rules but we do not do it by design. We do seem however to have been confused by the distancing between the <u>political</u> and the <u>efficiency</u> pursuits. They are not in any way connected in my

view. Under the right ministerial accountability, we can still have public sector efficiency once we have defined what it is. Public sector efficiency can never be just about 'balance sheet mentality'. Public sector provision is based on a strong, clear social need."

3.24 Does private sector involvement in prisons administration square with your conception of the public sector? "You cannot have private sector operating in a public sector, operating outside the line and not governed by the same standards. Private prisons are not accountable to the Prison Service for many of their functions. As Learmont pointed out, when there is a major incident, the control structure is not the same as in public prisons where the Governor is responsible to the Commander at Headquarters. In the case of private prisons, the Commander at Headquarters can only advise but cannot overrule the Director as he can a Governor."

3.25 Mr Newell applied an interesting logic to the question: "If you look at what has been achieved, then I don't think you require market testing to achieve that. If the intention has been to break down the structure of accountability, or break the morale of the Service, then the initiative has been 'a success'. But if the intention has been to introduce better practice and innovation or to reduce costs on a similar framework or budget, then the evidence is more questionable."

3.26 "Private sector involvement has clearly been conceived within an ideological framework. The original proponents of this idea from the Adam Smith Institute admitted that their arguments were not intended to be taken seriously. Douglas Hurd, when speaking as Home Secretary in 1988, said that it was inconceivable that Parliament would allow the privatisation of prisons."

3.27 "Then we went through an extremely peculiar phase which is the only degree of rationale that you can put on private prisons which made some degree of sense. This was a response to Woolf and the conditions of remand prisons, legitimised by the fact that people are innocent until proven guilty, therefore remand prisoners are different to convicted prisoners. And we had the so-called experiment with the Wolds Remand Centre, where the enabling statutes which were passed stated that the only people who could be detained in private prisons were people on remand. Where this almost acceptable ideology fell down is when we decided to go

for wholesale privatisation before we even considered the success or failure of the 'experiment'. By 1993, we were actually opening further prisons under the private sector even though there was considerable resistance on the other way."

3.28 Mr Newell then spoke of the qualitative impact of the private sector in administering prisons: "What those prisons have done is that they have created a climate in the Service where the 40,000 public sector employees feel undervalued by their lords and masters. The morale suffered extremely badly and confidence was lost in the senior echelons of the Service because here was a unique structure. Unlike contracting out, market-testing had a positive impact on the whole, on those who remained in the Service. At least under market-testing, the competition was perceived as out there, it wasn't on the inside."

3.29 "(In the case of the Prison Service) we have a Director-General who is meant to be the head of the public and private sector. The damage is that because there is natural animosity between the two, everytime the Director-General praises the private prison, he is actually saying something negative by inference about the public prison. There has been an incredible loss of confidence which came to an absolute head in the Service over the Buckley Hall contract where the Prison Service submitted the lowest bid but was rejected in favour of a Group 4 bid. The assessment panel gave us their reason that they did not feel that the former had the full backing of the Prisons Board to deliver that bid."

3.30 "There seems to be several complaints about the private management of prisons: whether they are value for money, how they contribute to best practice and their institutional fit in the public management of prisons. As for value for money, we know from the Public Accounts Committee report[495] on the Wolds contract that in actual fact, the Wolds turned out to be more expensive. The latest of course is the Private Finance Initiative. These are usually Design, Build, Finance and Manage projects contracted out to the private sector, usually over a twenty

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[495]. See the study by Bottomley, K et al (1997) *Monitoring and Evaluation of Wolds Remand Prison and Comparisons with public sector prisons, in particular HMP Woodhill*, Lon: Home Office.

year period. The National Audit Office[496] is currently preparing its report on the PFI contracts for Bridgend and Liverpool and may have very stern things to say that these are not very good for the taxpayer. PFI contracts are like hire purchase arrangements in which you are likely to spend more than you can really afford by spending capital out of current account. The consequence of that in the Prison Service is that a larger proportion of current expenditure available to the Prison Service is ring-fenced to pay for private contracts and it is nonetheless including a capital element which is taken out of current budget. So for the public sector prison, there is less to go round, and there is also less flexibility in the way that you can play with that account."

3.31 As for contribution to best practice and institutional fit, "it is very interesting that the only countries with private prisons - Australia, UK and the USA - since the establishment of private prisons have witnessed an explosion in their prison population. One of the reasons is that private prisons have a natural lobby - it has to have a 'natural lobby'. If you are in a market where all new prisons are going to come to the private sector to give you a larger share of the market and getting the prison population down by its nature means there aren't going to be new prisons. Then you are not going to lobby about the proper use of imprisonment; you're actually going to lobby for more prisons, so there is, it seems, a huge conflict of interest. Now, I can't get any private prison to join me in a lobby to the Home Secretary to say 'we have to stop putting too many people in prison'. So if you create a situation in which the professionals cannot speak to each other in the same language, then you have created a very dangerous position".

3.32 Asked for his closing thoughts, Mr Newell said: "as I pointed out earlier, the Service has become more politicised and it needs to stand away from politics. The civil service needs to define for itself what a cost-efficient public sector service is, what the barriers to that delivery are, without compromising what is essential to the public sector and the delivery of that. We don't want the world of back-handers, corporate bribes and loss leaders. All the shenanigans that go on in the world of business are not appropriate to the way we handle public money. It

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[496]. see National Audit Office (1997-98) *The PFI Contracts for Bridgend and Fazakerley Prisons*, HC 253. Also see, Public Accounts Committee (1997-98)) *The PFI Contracts for Bridgend and Fazakerley Prisons*, HC 499-I.

has to be 'follow the book'. Nonetheless, there are some barriers to the way we produce an effective public service. There are things that we can do that would make us considerably more efficient. I think the public sector needs to do that root and branch analysis in spending departments that actually deliver a service at the end, to see how it can be better delivered within the public sector framework. These are not incompatible aims - you can have effective, cost-efficient public sector services".

No 4: Peter Kitteridge, Area Manager (19 May 1997): vetted

4.1 Mr Kitteridge joined the Prison Service in 1963 as an open entrant. He has served in several capacities in different prisons as well as headquarters before becoming area manager in 1990 for the South Coast area, and for London South since 1991.

4.2 "Looking back, before 1990s, there were policies being discussed within the Home Office, and between the Home Office and the Prison Service HQ, and I was unclear as to the links between local objectives to run the prison and the timescale for emerging new policies. I was sensitive to the fact that I could be setting up in the establishment, corporate objectives, very much locally-based and then during the course of the year, it would feel as if a changing policy was being imposed into a plan, and that the establishment plan was having to be put to one side because of central initiatives. It was difficult as a governor to appreciate the timescales and the priorities for changes. That is something that created a tension in general terms."

4.3 "When I became area manager, I had a wonderful opportunity of gaining an insight into the way in which government policy was affecting a variety of government ministers, and it felt when I became area manager that it was all part and parcel of the civil service having to become more efficient. Although at the time, the Director-General had explained that he had felt the time was right for the Prison Service management between headquarters and establishments to be re-organised. He felt that having set up a statement of purpose in a

document called Circular 55/84 that this had gone as far as it could go within the line management structure."

4.4 "It was explained that with regional directors looking after as many as forty establishments and not being able to 'line manage' directly for very senior governors under their command, there were some inefficiencies and gaps in the management structure that could lead to manipulation and lack of understanding of priorities. The area manager system came about because there was a strong belief in the civil service, and certainly coming into Prison Service headquarters that governors needed to be closely line-managed.

4.5 "I got a closer feeling for central government initiatives about management efficiencies when I became an area manager in 1990. I had to get my thinking clear about the purpose of the Prison Service for which we had a statement, and how that would be translated into the allocation of resources, delegation of responsibilities and setting of targets at local level to fit into with centrally-driven targets as well where Ministers or the Prisons Board decided that something was so crucial that they needed to be checked. It was as area manager that I realised that there was a significant gap between the Prisons Board and governors and that the regional structure was no longer appropriate to get a grip on line management issues."

4.6 Did your job description as area manager fit in with the statement of purpose of the Prison Service? "Yes - my job description is reviewed on an annual basis with my line manager who is the operational director. It has been reviewed annually since 1990, and is now called the personal responsibility plan. It was reviewed as a very important issue at the last review of area managers. I was one of the area managers who had to put in job descriptions, personal responsibility plans and describe the kind of judgments and decisions I had to make, and what kind of influence I could have. That all led to what was called the Job Evaluation of Senior Positions (JESP) scores, a weighting system in all senior governor grades".

4.7 Mr Kitteridge explained that the personal responsibility plan of area managers: "(i) to manage governors at London South establishments by providing direction and support as well as monitoring their performance. I also manage my area support team; (ii) to set establishment cash allocation for a year and their performance layout and to monitor the standard of the

performance that they undertake in the course of that year. All of that includes checking against mandatory instructions and prison rules and the Prison Service Operating Standards; (iii) to ensure the delivery of Prison Service six strategies set out in the establishment contracts and business plans. The key deliverables of the year must link in with one of the Prison Service six strategies in the central corporate plan. If governors wanted central funding, they must link them with key objectives of the Prison Service strategies; (iv) I also contribute to organisational developments of the Prison Service and changing policies."

4.8 The managerial dialogue between governor and area manager is part of a highly intricate web of negotiations and decisions within the Prison Service[497]: "area managers tell their governors what they can be offered for the coming year and the area manager asks them to prepare an establishment Business Plan between June and August every year. Area managers then have "budget challenge" meetings with governors in September and October in which governors negotiate their plans with area managers. Area managers then discuss these draft business plans with the Operational Director in November, who is then "budget challenged" by the Finance Director early in December. This is followed by discussions at the Executive Committee level and area managers should receive statements of cash allocations in early January. The governors then have to revise their localised business plans in accordance with this plan".

4.9 "The establishment business plan also includes a management document called an establishment contract. Establishment contracts will include in-year targets where there is usually a difference between the level of service provided and the operational standards which the Prison Service has drawn up. Governors then have to look for ways to drive up their performance to the standards the Prison Service is aspiring to. Between April and May, every member of staff should also have personal objectives drawn up, linked with in-year targets so that they can see how they fit into the direction in which the organisation is going."

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[497]. The role of the central government machinery such as the Treasury and the Home Office though critical to this process of allocating funds, was not discussed in this context.

4.10 "This detailed regime has been developing as management practice since the mid-1980s. It can probably can be traced to the time Circular 55/84 was issued, because that described the task of establishments and it required governors to set targets. We have since refined that process. In about 1993, we required governors to set up a strategic plan for establishments, and that their annual business plans should also be taken from the strategic plans which cover the 3-year period of the PES cycle."

4.11 Area managers also contribute to the organisational development of the Prison Service: "Area managers are members of the monthly Senior Management Forum (SMF) in the headquarters which is also attended by all Heads of Divisions, the Director-General and members of the Prisons Executive Committee as well as a consultant. The SMF is different from the Prison Executive Committee[498] and the Prisons Board,[499] which are mainly about picking up new business and monitoring performance. The Executive Committee wanted an intermediate culture which was consultative and which helped clarify their thinking about how the Prison Service would move forward, what issues, and in what timescale. They felt they needed a mechanism of collaboration which was different from the straight line management, engaging people who were willing to think wider than their own divisional responsibilities, and think as service managers with experience within the Prison Service".

4.12 "The main purpose of the SMF is to analyse changes in the management and organisation of the Prison Service. We have for example, just set up 'Programme Management' in the Prison Service because it was decided that the way we operated through divisions could also work to flag up issues which transcended individual directorates, and try to have a 'programme manager' for each of those. Another example is that we have also started a programme to clarify the Prison Service operational standards. At present, these are set out in prison rules, standing orders, Prison Service instructions, Prison Service orders and so forth. We need to make sense of these important sources as well as their relative weights. Governors are saying

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498. Comprising the Director-General, Directors of Finance, Services, Personnel, Healthcare Services, Security and Operations, as well as three Operational Directors (North/ South/ Dispersal).

499. Comprising members of the Executive Committee and two non-Executive committee members.

that they feel overloaded by what they see as 'emerging from the centre' which is really about 'emerging government practice'."

4.13 Mr Kitteridge was asked whether area managers were sufficiently empowered to carry out their functions. For example, in setting establishment cash allocations, governors are considered 'sub-accounting officers' under the Government Finance Act (sic Exchequer and Audit Act) 1866 whereas area managers are, by virtue of that Act, non-persons. Mr Kitteridge was asked whether this was an anomaly?

"The Prison Rules (also) only talk about the Home Secretary and governors but makes no mention of area managers. I think this is an issue that can be handled because governors do appreciate that they do need direction, support and advice on matters". As an area manager, if a governor operates outside the prison rules, I would require him to stop it. If he was doing something which was against the Prison Service goals and values, I would engage him in discussion as to why he was doing it, and I might strongly urge and advise him to reconsider his position. I have to make a judgment as to whether I actually intervene to the point of giving either direction or advice to him."

"When it comes to cash, the Prison Service has identified the Director-General (D-G) as the additional accounting officer while the Permanent Secretary is the Accounting Officer. The D-G delegates this role to his Operational Directors who are 'budget holders'. According to the Prison Service Manual (and now the Prison Service Finance Order), area managers are 'sub-budget holders'. So, Operational Directors work carefully through area managers. Governors recognise that area managers are very important links in this management chain. Area managers have influence in negotiating with governors and the Operational Directors for more or less cash. Area managers have leverage not just to withdraw funding but also to contribute to spending via the Mutual Aid Fund which is considered three or four times a year."

4.14 However, the management of the Mutual Aid Fund may not be as straightforward in certain cases, for instance the governor who is persuaded to release funds for mutual aid subsequently encounters a problem caused by insufficient resources. The balance of accountability in this situation, as Mr Kitteridge explained, is bound to be delicate: "The

governor would be accountable because he had offered up his underspend. The area manager might get caught up in that too because he had judged in that discussion with the governor that the contribution was an appropriate for re-distribution. So, the area manager would probably be responsible at the end of the day for an in-year change. Over the years, because the Fund has been successful so far as a mechanism, I think there is faith in it as a very helpful way of freeing up what could otherwise be a very rigid system of allocation".

4.15 Mr Kitteridge was then asked whether the criticisms raised by Derek Lewis[500] of his line management of Parkhurst Prison were fair. "I think it was because I was brought up in a Prison Service where governors and their seniors actually used language such as 'I am advising you to get it done' when what was actually known and understood was that it was tantamount to 'an order'. Derek Lewis felt my language was less strong than it should have been. I explained to Learmont,[501] and I think he understood, that the traditions of the Prison Service were not about the governors being given orders but being given direction, support and clear advice. I think Derek Lewis missed the point of the nuances of the language used".

4.16 The Learmont report[502] was in fact highly critical of what was perceived as a serious mismatch between the administrative and operational grades of the Prison Service. He recommended that the middle management (area managers) be strengthened in their bridging capacity, through to the Operational Directors in the senior management.

Mr Kitteridge explained: "Part of the role of area managers is to represent HQ and not to deny their part in HQ; they are part of HQ and they are bridge-building between governors and the Executive Committee. So for example, I have a meeting with my governors every six weeks. I start by telling them about what are sensitive issues for the Prisons Board and the Executive Committee. I consult governors about relevant issues in relation to emerging policies. Quite often, I write to them and invite them to brief me as to what they think is important. So, I am

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500. Lewis, D (1997) *Hidden Agendas: Politics, Law and Disorder*. Lon: Hamish Hamilton, pp. 78, 171.

501. Learmont also endorsed the role of area managers by recommending a stronger input for them into the deliberations of the Prisons Board via the Operational Directors – refer to chapter 6.

502. refer to chapter 6.

trying to lock them into the central decision-making chain and help them identify with the Prisons Board. I help them ventilate their stresses and then look to problem-solving, and persuade them to get back into the mainstream. One of the problems of straying too far from the mainstream is that you can become isolated".

4.17 Asked whether this might have been the problem underpinning management difficulties at Parkhurst Prison from which three prisoners attempted escape[503], Mr Kitteridge replied: "I think it felt harsh because Learmont knew that the Governor of Parkhurst had been running a prison in the middle of a building site for five years. At the time the prisoners escaped, we were entering the final stages of the building programme that were always going to be difficult, and to open up those two new wings, we needed sufficient work and education for the prisoners to be actively occupied. As the builders were working hard to finish the wings, there were other builders working hard to finish the support buildings. All the buildings required last minute changes, which created crises for the governor. So the route for the prisoners became like paths through the jungle from June 1994 to January 1995 when the escape happened.".

4.18 "The governor was having to cope with hundreds of builders as well as with the most difficult prisoners in the British penal system. We actually foiled a few escape plots between the time of the Whitemoor escape and the Parkhurst escape but the difficulties at Parkhurst for the governor were exceptionally difficult. We don't often ask a governor to continue to run a jail with so many builders, certainly not in a maximum security jail and certainly not without good TV cameras, geophones and alarm fences. For years, the governor had been asking for geophones and alarm fences and these were weaknesses that were known about, and the governor was still trying to keep the prison running. The governor was determined that he was going to bring the building programme to fruition and did not want to close down the jail, and so he was prepared to run it against very many difficulties. So knowing these as I did, I felt very sad when he was retired early".

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503. on this, see further, Home Office (1995-96) *Review of Prison Service Security in England and Wales and the Escape from Parkhurst Prison on Tuesday 3rd January 1995: the Inquiry*, Cm 3020.

4.19 Asked whether the governor was blameworthy for not recommending the relocation of the more difficult prisoners, Mr Kitteridge explained: "The governor could have made recommendations for closing the prison down and I could as well, which I did in relation to Category A prisoners when I realised that things were going to get difficult in September 1994. But I think once, you're running a prison, you have got a commitment, and it was perhaps difficult (for the Governor to scale down his responsibilities), which was why he tried to mitigate the situation by trying to ensure that prisoners were kept in purposeful activity in difficult circumstances".

4.20 One of the issues to have come out of the Parkhurst incident was the emphasis placed by Michael Howard on the distinction between policy and operation. Asked for his view on this emphasis, Mr Kitteridge replied: "The Home Secretary has to answer to Parliament and the prisons are run by public finance. At the end of the day, the Home Secretary is my boss. I know that in an agency, the Director-General is my boss but I see him working very closely with the Home Secretary and the Permanent Secretary. There is also in the Prison Service at present a need to work more closely with Ministers. And that (closer working relationship) is all about acknowledging that penal policy and practice are very close. And if it isn't, there will be those who will try to divide us".

4.21 Asked for an assessment of the constitutional as opposed to administrative significance of recent managerial reforms in the Prison Service, Mr Kitteridge first responded: "Is the constitution to do with Acts of Parliament or the way central government does its business?". He was invited to articulate his subjective judgements of propriety. He then went on to summarise the position thus: "There has been the theme of accountability which has been very strong since the mid to late 1980s. Public servants should be describing what they are doing and accounting for their mistakes and difficulties. The Prison Service has responded to this in a number of ways. For example, we had to hold a lot of review boards to show that we were treating prisoners fairly; we had to write monthly reports on youth offenders to chart whether there has been any progress; we had to write a report for the parole board to say whether the prisoner warrants an early release; we were subjected to financial audits to whether that public money was being spent in the way that it had been provided, and so for many years, I felt the

Prison Service had been very accountable. However, I think there were perhaps difficulties in the 1970s and 1980s, when there was a lot of money spent on overtime in the Prison Service caused by union practices which worried the Prison Service. A number of governors felt they were in a difficult position because these practices were not efficient but yet they had been borne of industrial negotiations. So that was a difficulty with accountability".

4.22 "The other thing that emerged was the emphasis on restructuring government to get efficiency and clear lines of delegation. As far as I am aware, the Prison Service worked at that with the 'Fresh Start' drive in 1987 which was a clear example of the service trying to clear out Spanish customs that had developed and practices that had come about by negotiations with the unions. The Prison Service went upfront and actually bought out overtime and brought in new practices which gave managers a lot of confidence."

4.23 "Then we also had a reorganisation in the HQ with the Area Manager Review in 1990. Area managers were encouraged to negotiate out inefficient practices in the early 1990s, and we came to a point where the Prison Officers' Association threatened to put in a three day programme of industrial action which would have crippled the Prison Service. Michael Howard (then Home Secretary) realised that this was operational nonsense and pointed out that since the Prisons Act of 1952, prison officers had the statutory powers of constables and therefore could not constitutionally participate in industrial action. Successive Ministers have chosen not to push this point because they preferred more democratic processes of negotiations to go forward and hoped that governors would be able to manage industrial action. (This apparent legal loophole has now been closed by the passing of a relevant provision in the Criminal Justice and Public Order Act 1994.)."

4.24 "The other bit to the reforms, and I am not sure whether you would consider it administrative or constitutional, is that the efficiency drive in government has affected the Prison Service. Management has been about maintaining standards of operating practice with less money; at times, it has felt like drastic cuts in cash but it has been both."

4.25 Mr Kitteridge concluded: "Right from the word go, the crucial question for the Prison Service agency was, 'Who was the Accounting Officer for the Prison Service?'. Was it the

Permanent Secretary or was it the Director-General? And there is a lot in that question. If the Permanent Secretary is our Accounting Officer (as is the case pre and post agency), it defines what the Prison Service agency is about. One can think of certain situations where that is quite crucial, for example if we overspend, we get the benefit of the Home Office trying to bail us out, and vice versa. In some government agencies, there is a direct relationship between the Director-General and Ministers, but this is not the case in the Prison Service. So when we don't have such clear and direct lines of relationship, then there are rules to the game which people have to appreciate, and we have to understand why those rules are more complicated than the straight simple lines. They are not there for nothing".

No 5: Terence Weiler, former Grade 3 Home Office (21 May 1997): vetted

5.1 Mr Weiler entered the Civil Service in 1947 when candidates for the administrative grade of the civil service were admitted through extended interview procedures rather than via the pre-war requirements of academic excellence. In accordance with the civil service policy on cultivating generalist administrators, Mr Weiler spent his early years in different areas of Home Office administration. As a Grade 5 (assistant secretary), he was seconded to the Prison Commission in 1962, a year before it became the Prison Department of the Home Office where he served as head of personnel (and therefore a member of the Prisons Board) until 1966. On his promotion to Grade 3 (under-secretary), he was based at the Home Office, working on probation, after care service, the establishment of the parole system and race relations. He returned to the Prisons Board as a Controller on personnel and services matters in 1970 before retiring in March 1980.

5.2 Asked about the status of civil servants in prisons administration (as against operational control for which see 5.8), Mr Weiler explained that "prison officers in the days of the Prison Commission (1878-1963) were also civil servants, but they like certain other groups (e.g. chaplains) were departmental grades, that is to say, they were directly recruited and their pay

and condition of service were negotiated within the Prison Commission". However, "Executive or clerical staff in headquarters and in the Prison Service establishments were members of the general civil service grades and had general conditions of service. When the need for administrative grades at the Prison Commission arose after World War II, officers in Grades 5 and 7 were seconded from the Home Office".

5.3 The administration of prisons gradually became "big administrative business. From the early 1920s, the Chair of the Prisons Board was always seconded from the Home Office at Grade 3 level and included for future Permanent Secretaries. The small, neat, compact Commission headquarters - dealing with a falling prison population which enabled 14 prisons to be closed - was staffed by clerical and administrative grades. There was then a long middle management promotion structure. The constant growth in prison population after World War II brought the first building programme for virtually a hundred years and the expansion of prison establishments from 40 to 70 in ten years. This also resulted in a restructuring of administrative grade at headquarters, and grades 5 and 7 began to be seconded from the Home Office (grade 5s joining the Prisons Board).

5.4 Mr Weiler was invited to explore the impact of managerial developments in the Prison Service between 1979-1997 on the constitutional core from his perspective as a long-standing and now retired civil servant in the Prison Service. The ensuing interview focused on certain key themes in the historical development of prisons administration since its administrative significance was graced by a Prisons Department within the Home Office in 1963, namely how the Prison Service has coped with the perennial conflict engulfing: (i) a "them and us" culture; (ii) the emphasis on managerial leadership and the need for objective advice to the Executive; (iii) competing demands being made on limited resources.

5.5 He explained that as he retired not long after the Conservatives came into office in 1979, his contribution to my project would have to be qualified by the fact that he was participating as an observer of events on the sidelines, offering comments from his understanding of its history and also from his occasional contact with current Prison Service officials. He focused his answer on the first aspect, that relating to the "them and us" culture by emphasising that "the tension has always been there especially for a Service that is under pressure". He had

found the same feelings during his war service. He pointed out that as long ago as the late 1960s, the Prison Service tried to ease this problem by creating more posts for governors in the HQ "to give governors a better understanding of the problems with which HQ had to cope and also to identify future administrators from the field". He also hinted that some of the impression of tension has been more rhetoric than real, "with the media writing up stories about the people in the field not being adequately defended by the Prisons Board".

5.6 Asked whether the tension between the operational and policy ranks constitutes a weak link in the chain which has perhaps contributed to the phenomenon of scapegoating civil servants by their political masters, Mr Weiler advised that "this is a very difficult area indeed. Ministers cannot take responsibility for everything in their department. But when you move to the area of financial resources, the Minister might be more responsible. This is where the move from Prison Commission to Prison Department benefited the Prison Service because instead of the Director-General of the Prison Service (who ranked as Assistant Under Secretary) fighting for resources, you had the whole weight of the Home Office behind whatever demands were made. The Home Secretary is a fairly powerful Minister as well, able to put pressure on Cabinet colleagues".

5.7 Mr Weiler added that one feature of the gradual exposure of this tension "has been the number of inquiries since the Mountbatten Inquiry (in 1966) as a result of various crises, and it seems to me that virtually of them, except perhaps the Woolf Report, have focused a lot of attention on reorganising the HQ. They hadn't started where half of the troubles of the service were by getting down to the field, seeing how you were going to get over problems there. It is easy to reorganise the HQ in the sense that they will still cope with the administrative work there but the question is has it been better for the people in the field?".

5.8 Asked whether the introduction of middle-management posts of Area Managers were a step in the right direction, Mr Weiler replied that the idea of operational middle management has not been a new one. When he joined the Prisons Board in 1962, there were, under the Chair, two other grade 5s and three Directors who had all come up from the field (comprising a Chief Director, a Director for Adult Offender Establishments and a Director for Youth Offender Institutions). The latter two were each helped by two or more Assistant Directors

(also ex-governors) who were responsible for supervising and supporting a group of establishments. This kind of operational set-up had existed from the earliest days of the Commission, and was replaced in 1970 by a system of regional directors after a management review the previous year. This was eventually supplanted by the current arrangement of area managers.

5.9 Mr Weiler said the litmus test for area managers seemed to him to be whether "their administrative set-up has made any impact in the field". He explained why it was important that those on the operational side had a channel of communication to the policy/administrative civil servants: "People in the field were not trained to think of themselves as civil servants or to realise that the Minister was responsible for them and that what they did might cause political embarrassment for the Minister".

5.10 Mr Weiler explained that the notion that Prison Service had greater independence during the days of Prison Commission is a misnomer: "It is an article of faith in the Prison Service but in fact, it wasn't so. The policy then (as now) lay in the Home Office and you will find there were matters that were settled in the Prisons Board had to be referred to the Home Office for endorsement and criticism. So the Home Secretary was just as able to intervene then. This reality was however obscured because there were so few controversial matters and relatively little public or Parliamentary interest in the Prison Service in that period. It is also that period has never really been written up properly".

5.11 It would appear that the general debate about agencies has moved on considerably. and in the context of the Prison Service, the idea of agency has been endorsed by two recent official reports by General Sir John Learmont[504] as well as the Home Affairs Committee[505]. It seems equally clear that the focus of the debate is no longer about whether the agency model is appropriate to prisons administration "now that there is in place a professional Director-General. They've got to live with him whereas it was different with Derek Lewis. It would be interesting to see what the Home Secretary would have done if the Director-General had been a

504 . *Review of Prison Security in England and Wales and the Escape from Parkhurst Escape on 3rd Jan 1995.* (1995-96) Cm 3020.

505 . *The Management of the Prison Service.* (1996-97) HC 57 vols. I & II.

serving civil servant because there wouldn't have been a contract to terminate. You can't quite just dispose of him though you can take disciplinary action or move him to some other parts of the civil service".

5.12 Asked about his perception of the impact of the Citizen's Charter, Mr Weiler replied that it was never quite clear to him whether the charter could usefully service the prisoners or the staff, further adding: "I tend to regard them as rather idealistic". He then talked about "the rather legalistic framework" comprising the municipal, European and international laws which regulate administrative and operational practice in prisons. These are rather legalistic definitions of what prisoners are entitled to whereas recent managerial reforms have sharpened focus on managerial forms of assessments of the performance of staff (like KPIs) and an assessment of how well staff relate to prisoners (like the Citizen's Charter).

5.13 On the subject of contracting out, Mr Weiler said that his first instincts were that he was "uneasy about the treatment of prisoners by people making it a business rather than a profession, but he understood that the Prison Service has built controls into the system to obviate the risks entailed. Though he has little current intelligence on this issue, he thought that the contracting out of establishments had proved acceptable. It had always seemed "a waste of prison officers' time given their training for more demanding work". Another interesting but more controversial area might be the ordinary run of remand prisoners for whom the service could do very little positive but he had no idea whether this was a live issue.

5.14 Mr Weiler concluded the cumulative constitutional as opposed to administrative impact of recent managerial reforms in the civil service should be seen from the experience of "those people on the ground". He added, "one of the things I have worried about HQ is the growth of people who produce ideas which are interesting but have virtually no chance of introduction or proving acceptable to the field. One might have Ministers who might take a view one wouldn't oneself have taken on but the civil servant's job then, having uttered any reservations one thought was necessary, was to get on with the job in the most effective way". His response is one ultimately based on short-term pragmatism of the task: The job is about "needing clear

instructions and being given opportunity to draw attention to possible problems and then getting on with the job".

No 6: Syd Norris, Finance Director (3 June 1997): vetted

6.1 Mr Norris entered the Civil Service in 1963 on an assistant Principal Officer level, working in the Criminal and then the Police Department of the Home Office. In a career spanning more than thirty years, he has been promoted through the ranks in different departments including police, prisons, Treasury and Northern Ireland. He has developed a specialism in finance and in November 1996, was appointed the Director of Finance of the Prison Service following the departure of Brian Landers.

6.2 Mr Norris initially explained his finance role in broad terms: "we have to assist the Home Secretary in understanding the financial needs of the Home Office, and indeed of the Prison Service. The Permanent Secretary is the person who puts forward the requirements of the Prison Service alongside the rest of the Home Office".

6.3 The specific functions of the Finance Directorate include *inter alia*, responsibility for (i) the control of public expenditure on an annual cycle; (ii) monitoring the financial and accounting systems of the Prison Service; (iii) advising on the planning process, with a particular emphasis on financial planning and by encouraging focus on output measures; (iv) monitoring the key performance indicators for the Prison Service (through the Planning Group); (v) putting forward the draft three-yearly Corporate and Business Plans; (vi) evaluating the best use of the estate (through the Strategic Planning Group); (vii) assessing the accommodation potential and capacity of the Prison Service (through the Construction Unit); (viii) assessing in conjunction with the Contracts and Competition Group, what initiatives may be done through private finance initiative; (ix) examining the adequacy and propriety of the financial systems in operation at unit level (through the Internal Audit Unit).

6.4 It was explained that the intricate and complex web of functions of the finance role is underpinned by the fact that the chief Executive of the Prison Service and the Permanent Secretary qua Additional Accounting Officer and Departmental Accounting Officer respectively, are *personally* responsible for financial management in the areas of business and the Permanent Secretary is responsible for the quality of that management throughout the Home Office including the Prison Service.

6.5 Mr Norris explained during the interview that his responsibilities are set out in a number of documents, namely in a memo from the Director-General which lists his responsibilities in key areas, and in a year-on-year Personal Responsibility Plan. On request, both copies of these documents were kindly provided by post after the interview.[506] Mr Norris explained that the memo setting out the responsibilities of the Finance Director is currently under revision though it has been left unchanged since the departure of his predecessor, Brian Landers. who like Derek Lewis, was recruited from the private sector.

6.6 Mr Norris was asked for his views on a comment made by Brian Landers in an interview with the Prison Service Journal,[507] to the effect that his tenure as Finance Director in the Prison Service has not really been a success because of opposition from a select elite in the main Home Office either to the idea of agency independence, or to the principle of outside recruitment to a key position on the prisons board.

6.7 Mr Norris offered an alternative view to Lander's analysis: "The position is rather difficult because everyone has a different idea as to what an agency is. Landers had acquired a notion from somewhere that an agency was to be as independent as possible of the department, and Derek Lewis' way of doing things tended to move in the same direction. Lewis seemed to want to move things through him to the main Home Office, and the degree of lateral connections with the main department reduced".

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506 . Correspondence from Mr Norris dated 10 June 1997.

507 . *Prison Service Journal*, Issue 109, January 1997.

6.8 He pointed out that this conception did not however correspond to the policy intentions of the Next Steps model as confirmed later by Roger Freeman, then Public Services Minister, in a lecture to the Civil Service College in July 1997, further adding: "That is how we (sic Home Office colleagues whom Brian was presumably criticising) have always viewed it. Brian Landers viewed it rather differently. It became common to refer to the Home Office as if it were somewhat separate. I think some of the difficulties that arose, arose from the notion that they were not part of the Home Office. There were some problems we had as a consequence, for example our planning cycle in the Prison Service was not in tune with the public expenditure cycle and we are trying to get back into that cycle. This was peculiar to the Prison Service ".

6.9 Mr Norris then explained the conventional perceptions of the idea of agency as he understood it: "The official conception of agency has changed over time. (i) As I recollect reading the original Rayner report, there was considerable emphasis separating Executive operations and avoiding Ministers interfering in Executive operations, which is an absolutely ideal model for say the Passport Agency where unless you have a question of lifetime passports or the extension of passports into identity cards, there isn't much by way of policy considerations. Plus perhaps under a government that was concerned with managerial matters, might want to consider the sort of managerial arrangements for the future.[508] But the bulk of the work of Passport Agency goes on without any need for Ministers to take an interest at all. (ii) What I got as an impression from the original Rayner report was that there were some areas of business where Ministers wanted to interfere and get involved in detail in a way that wasn't productive. (iii) And gradually, the concept of agency got pushed further particularly under Peter Kemp until the OPCS got to the point where they had the former Prime Minister's agreement to the view that the onus should be on explaining why the Civil Service should **not** be organised as agency rather than the other way round".

6.10 Mr Norris explained that the Prison Service fell into the second interpretation of Rayner's idea (see above): "As you move into the more difficult territory where there is more policy involved, then you cannot draw an easy line dividing issues into what is Ministerial business

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[508]. This line of thought reveals that managerialising the civil service has conflicting outcomes: political steering on the one hand, and administrative rowing on the other.

and what is not. If there is any criticism of the way the Home Office approached agencies, it is probably that we sought to make them too self-sufficient. And over time, it became necessary, not just in relation to the Prison Service but more in relation to other agencies, to draw them back in again because it was found that there was too great a degree of independence to fit the responsibilities that remained at the Home Office ".

6.11 It was pointed out that the theory of the relationship is firmly established in the framework document, albeit to be applied by the relevant actors: "If you look at our framework document, you will find that it is written in a way which allows people to develop certain sensible working practices. When we drew up the framework document, we considered whether we could draw up a list of the things which we needed to consider, and those we needed to consult. We decided that was not practicable. What was needed was a working relationship which would develop over time, and that is what you have at the moment".

6.12 It was emphasised that the *affective element* or the *working relationship* was a crucial determinant of how well the theory worked: "I don't know the intricacies of the way it operated under Derek Lewis, and if I did, I couldn't tell you. What one can see as a newspaper reader, was that somehow, something went wrong with the working relationship. There is nothing that says that the Home Secretary may not make decisions on operational matters. It has always been the case when I was working in the Prison Service that there are various matters that are decided in the Prison Service or at the appropriate level and there are matters which went to Ministers. And usually, it depended on what hung on a decision".

6.13 Asked whether the phrase in the Prison Service Framework Document which provides that the SoS can ask the Director-General "to report on any matters which attract public or Parliamentary concern" might provide room for an interventionist Home Secretary to do more than perhaps appropriate as the daily activities of the Prison Service are prone to fit this description, Mr Norris replied that the current set-up has struck an appropriate balance: "Yes - but there is a framework of independence, a framework of accountability and there is Ministerial accountability as well. I don't see how the Prison Service can operate as an agency without being prepared to report to Ministers on matters that are likely to be of public concern.

The same is true of the other Home Office agencies: the Forensic Science Service, the Fire Service College and the UK Passport Agency. It is just that there are rather fewer of those things for those agencies".

6.14 It was emphasised that the arrangements in place now are neither novel nor radical: "Agency was not an enormous change - the Prison Service, with the largest block of staff in the Home Office, had already had its own finance line, its personnel line, and an awful lot of stuff had already been delegated to Prison Service staff before agency status. It was then already a distinct operation and the relationship between Chris Train (then Director-General) and the Permanent Secretary (though he remained the Accounting Officer) then was not all that different".

6.15 However, agencification did introduce some key changes: "It introduced the framework document and key performance indicators which have been valuable. It sharpened up some of the accountabilities and made the Director-General Accounting Officer responsible for the vote (expenditure) instead of being responsible simply for managing the vote as he was when there was a separate prisons vote but he wasn't the Accounting Officer. In the other Home Office agencies, the chief Executive has the role of accounting officer for the agency's business but the Permanent Secretary is responsible for the vote as a whole. On Prison Service business, the Director-General is personally responsible for the use of all funds on the Prison Service vote and has to appear as a witness before the Public Accounts Committee when required on any matter of Prison Service expenditure.

They may also call the Permanent Secretary as a witness if they want, on Prison Service matters. The degree to which the Permanent Secretary is responsible for Prison Service matters is partly dated in the framework document and in part would be a matter of custom and practice. The framework document provides that he is responsible for financial management and practice throughout the Home Office, which is a restatement of government accounting. In my experience, provided the permanent secretary has a clearly delineated understanding about what matters he is prepared to interfere with and those he will leave to the other accounting officer, that will on the whole be respected by the PAC and indeed the C&AG and the NAO".

6.16 The interview then moved on to suggestions at Ministerial level earlier on, for the reform of the framework document. Michael Howard, then Home Secretary, said in November 1996 that the document would benefit from further clarification. This was also echoed by Learmont in the letter to the Home Secretary prefacing his report on the Parkhurst escape and general prisons security. In fact, Learmont specified that there are issues to do with the relationship between the Home Office and the Prison Service which need to be considered in greater depth.

Mr Norris explained that there are now fresh considerations on this front: (i) a new government which has "expressed a wish to satisfy themselves about certain aspects of the relationship between Ministers and agency"; (ii) Richard Tilt qua Director-General has "something in hand by way of a study[509] by Arthur de Frisching, looking at how the agency is organised"; (iii) the Office of Public Service has also changed the rule from three years to five years with respect to a review of agency status and operation, which now extends the original review date of 31 December 1997 in the case of the Prison Service.

6.17 Mr Norris was then asked about the progress of the undertakings given by Jack Straw to the Prison Officers' Association annual conference in 1996, to review private sector involvement in prisons administration. He advised that these issues need to be seen in the light of the New Labour government's commitment to the expenditure levels of the previous government for this as well as the next financial year.

6.18 He further added that private sector prisons now pose a persistent challenge for those prisons run by civil servants: "The cost comparisons between public and private sector prisons have been fairly important - the fact that it proved possible to run private sector prisons at lower cost per place, and to do so with relative success on the KPIs, is very important. It has forced us into a much deeper analysis of cost and capacity to improve efficiency in public prisons than otherwise might have been the case".

6.19 Despite the wave of reforms in the management of the service, Mr Norris was wary of the academic suggestion that these reforms amount to a constitutional revolution. He likened them

509. HM Prison Service (1997) *Prison Service Review*, published in December 1997.

more to a somewhat natural evolution: "I think I see things as a matter of the civil service managing, developing and improving in the same way that managers everywhere develop and improve. Various things influence this, including ideas that Ministers may have. Ever since the Public Expenditure Survey began in the 1960s, there has been more concentration which has increased year on year, on the public sector as a demand on resources from the economy and more of a concern to improve the management of money".

6.20 His perception of the impact of reforms on the constitutional underpinnings of the civil service is similarly guarded: "Whether they amount to a real change in the constitutional position of the civil service is a matter of judgment. I find this very difficult as we don't have a written constitution, but I don't think the constitutional position has changed if you go back to the statement by Robert Armstrong, then Head of the Home Civil Service, and this was written into the doctrine which was adopted by the Treasury and Civil Service Select Committee in 1994, and more latterly revised by the previous government in the Civil Service Code in 1996".

6.21 The recent Civil Service Code was perceived to have made some modifications: "That made it clear for all practical purposes that we worked for the Minister of the day. I think that did produce a slant on what it meant to be a civil servant working for the Crown, and the Crown actually works for the public, which may have crystallised a *particular* concept of responsibility to Ministers. Looking back in history, there are situations where it may be thought in retrospect that it was probably a good thing that some people like Churchill (sic. when out of government) were fed information which they shouldn't have been fed. But now, we would all take note of the recent Code and would accept that as civil servants, it is not our business to decide precisely how much is to be said to Parliament - that is a Ministerial responsibility. Though if a Minister was clearly misleading Parliament, we would have to point it out to them and if they continued to do, we would have to think what we do next according to the Code".

6.22 Asked whether this professional conflict of interest questions the doctrine of civil service accountability to Ministers, Mr Norris replied: "I think it is in that sort of area that the weaknesses of the doctrine lie. There are various questions it doesn't answer. But if you look

at the statement in the Code, you do have a lot of scope for whistle-blowing before you resign. The question is whether the whistle-blowing would be effective. If it is and people changed their behaviour, then the way we have got it is about right. If in the course of time this turns out not to be the case, then it isn't right". And so, although the Code has been helpful in clarifying what people's roles are, there are still some persistent grey areas.

6.23 Mr Norris then raised another issue: "I have become more attuned during my time in the civil service, to the importance of changes before 1979, giving Ministers a real hand on what is going on, making government less of a juggernaut......making it something which actually provides an efficient and effective service, consistent with democratic principles. Partly as a result of that, another change that has taken place is that the power of Ministers vis-à-vis the civil service, as caricatured in "Yes Minister", has increased. The institution of special advisers which came in with the Labour government in the late 1960s is probably an example of this. Though it never developed into a full cabinet system, it has provided Ministers with a source of advice more attuned to politics and a means to a network which the civil service don't have because we are cut off from political contacts". He then pointed out that this pragmatic initiative has aroused constitutional interest. In 1994, a government White Paper "Continuity and Change" raised an important counter wedge by setting out a commitment to maintaining a civil service which would be politically neutral and more in keeping with the traditions of the civil service.

6.24 Asked for his perception on the evolution of civil service accountability, Mr Norris explained (and further emphasised in a letter[510] after the interview) thus: "Civil servants appearing before select committees are acting on behalf of their Ministers and at their Minister's discretion (except that the Public Accounts Committee can insist on the Accounting Officer attending). So although the term "accountable" is sometimes used of civil servants, it is the Minister who is accountable to Parliament and the civil servants are responsible to him or her. Nonetheless, this distinction may seem a little muddied by the way in which accountability has recently been used to distinguish 'giving an account of the department's actions' from 'being open to credit or blame for individual decisions'.

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[510]. Dated 10th June 1997.

6.25 Finally, he summarised the principles which underpin his constitutional existence as a civil servant thus: "I am a servant of the Crown, and therefore a servant of the public, and for practical purposes, that means serving the Minister. If one comes across difficult situations, for example where it appears that a Minister is wanting to do things not blessed by his cabinet colleagues, or is not taking into account things that he ought to, well one seeks to have a dialogue with him". However there are no hard and fast rules in these difficult cases where "one has to decide what one is going to do about it". "There will be those difficult cases but they are very atypical, and there are now conventions about them which to some extent Parliament accepted".

No 7: Area Manager (Anonymous)[511] *(10 June 1997)*

7.1 In response to my first question about the role of area managers, AM1 explained that the primary functions of his office are two-fold: firstly, he acts as a manager of the governors of nine establishments. One of these is a contracted out prison which means the relationship is slightly different, in the sense that "it is much more a matter of managing the contract, rather than managing the governor as line manager". In relation to the other prisons, he sees the relationship as one of line management by which he means playing a significant role "in the distribution of resources and in the setting of the direction for those governors". He sees the second role of Area Managers as contributors to the process of policy formation in the Prison Service headquarters on the basis of their knowledge of establishments in their area.

7.2 When asked about the relationship between the functions of area managers and the organisational aims of the Prison Service which have been redefined in recent times, he explained that the primary mechanism for linking the two are contractual documents called "personal responsibility plans" which incorporate the annual planning priorities in the Prison

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[511]. To be referred hereinafter as AM1.

Service's contracts and decisions. The other mechanism which enfranchise area managers in the organisational juggernaut is their finer role in setting objectives for individual prison establishments under their supervision in the light of the wider principles in their own personal responsibility plan.

7.3 AM1 takes the view that area managers are sufficiently empowered to carry out their official functions. In this context, he was asked about a potential problem spot raised by prison governors in earlier interviews, which relates to the issue of authority to spend money. The law, as set out in the Government Finance Act (sic. Exchequer and Audit Act) of 1866, recognises the authority of governors to spend allocated budgets, but does not allocate a formal spending role to middle management offices such as that occupied by area managers. Prison governors are not aware of any modern legislative amendments to the legal position established in the Act of 1866.

7.4 Though sensitive to the problems of an absence of legal authority, AM1 responded by emphasising the significance of the *politics* of the decision-making process which legitimises the position of area managers: "...I have a say in the overall budget that they don't overspend or underspend and also, how they spend within that budget". So although area managers are not armed with statutory powers, and are in fact administrative positions created by headquarters, AM1 is of the view that their legitimate authority comes from the fact that they act on behalf of the Secretary of State.

7.5 When asked whether the criticisms of the line management control raised by Derek Lewis in his book, Hidden Agendas, were typical or fair, AM1 reasoned that Lewis was actually critical of certain individual style rather than the collective authority of area managers. "I think the role is a new one, and people bring to it different styles...In terms of style, I would use words like coaching or being alongside the governor".

7.6 AM1 was nevertheless cautious of the suggestion that the relationship between area managers and prison governors is based on collaboration, trust and goodwill: "No - it is based on the fact that I represent the Secretary of State, and the governor being the governor, and

therefore having to follow what the SoS says. However, it is a two-way process in that the SoS needs to be informed of what is practical, and that is where the governor has a word to say".

7.7 The next question raised concerned a theme recurrent in the Learmont Report into the Parkhurst escape and the general security of prisons in England and Wales, that there was a serious mismatch between the views of the prisons headquarters and its establishment. Asked whether this was an implicit criticism of the middle management as represented by area managers, AM1 offered a pragmatic response saying that this was inevitable "because HQ will want an overview of strategies and directions whilst individual establishments will want to move in a quicker or perhaps slower pace".

7.7.1 AM1's failure however to address the question of how area managers can act as a better bridge between HQ and establishments is perhaps indicative of the poverty of independent reflection about the potential role of area managers in the administrative hierarchy. The counter viewpoint as he pointed out however, is that the mismatch may be interpreted as providing a healthy tension between a range of viewpoints which can enrich the quality of decision-making.

7.7.2 But again, it was also rather revealing that he omitted to point out that Learmont did recommend that middle management can be strengthened by giving area managers a more active input into the deliberations of the Prisons Board through the Operational Manager. He later went on to say that: "I think Learmont didn't understand the Prison Service very well as he came from a sector (sic. the military) that was quite different".

7.8 The discussion then moved onto his responsibilities over the one contracted-out prison under his supervision. AM1 was positive about the different, more simplified management structure in place here. He explained that "the Director (Governor) of the prison has a major advantage in that there is only one person to whom the Director has to speak to get a decision; whereas in the public sector, there are so many people with a range of interests in number of issues such that it becomes a complex business getting a decision on anything of significance. Decisions are much quicker in the private sector".

7.9 It was explained that the primary reasons for this greater freedom in a private prison is that it is "not tied by civil service rules in the management of staff, and this makes a big difference because they don't have to be bound by traditional civil service rules about promotion and pay. Neither do they have unions of the power of the Prison Officers' Association. So they have greater flexibility in the remuneration and deployment of staff, which is how they run their prisons at less cost than the State sector".

7.10 However, there are safeguards that accompany this simplified hierarchy and greater managerial freedom. There is a much more detailed and intrusive role played by HQ through a Prison Service-appointed Monitor based at the prison who can give "detailed attention and instructions to a situation which some other colleagues at HQ may not be able to recognise".

7.11 AM1 revealed that although he was initially opposed to the idea of private prisons (for reasons hinted in 7.12), he is now reconciled with the positive implications for prisons administration arising from its establishment. He explained that "due to the need to draw up contracts, people at the very highest level, including Ministers, have had to sit down to think about they want prisons to do". Further, there is a hint that developments in the private prisons are now leading rather than mirroring initiatives in the public prisons.

7.12 AM1 perceived the public sector culture as a restrictive environment, with hidden levers and hurdles, whereas the private sector ethos is applauded for the flexibility, freedom and facilitative approach it harbours. Mobilising the public sector leviathan is seen as a difficult challenge: "My own reservation is that I don't think we would have had the courage to face up to the trades union who would have resisted that very much". Despite statutory incursions on the right of prison officers to strike, via the Criminal Justice and Public Order Act 1994, the realities of management have known a different law: "Legislation is no good unless there is power to back it and there isn't any in this case. So, the unions still do strike but nothing happens".

7.13 Asked for a general assessment of the managerial reforms in the administration of prisons, AM1 believed the service now to be a more managerial organisation: "In recent years, there has been a move away from notions of administration to management. The difference

between the two concepts is that administration is very much a legalistic approach which places a lot of emphasis on rules and regulations but they are not obeyed when there are no sanctions. So you need to move to a much more managerial approach, measuring outputs, identifying staff needs, paying more attention to the management of resources, rather simply writing a rule, putting it out on a memo, dispatching it out and expecting it to be obeyed everywhere - it isn't".

7.14 AM1 seems however to underplay the impact of managerial ideas embodied in key policy initiatives such as the Citizen's Charter: "I don't think that it is anywhere near as influential as say, the Woolf Report. The Woolf Report has been a major influence, and that is about notions of justice in prisons. I think that went along with managerial ideas about who is the customer".

7.15 AM1 also hinted at the constitutional problems that has arisen in recent times when asked about whether the Prison Service framework document has introduced a viable distinction between policy and operation which was the subject of bitter dispute between Derek Lewis and Michael Howard. "The distinction is an artificial one - policies are only significant insofar as they are influenced by operations".

7.16 It was also explained that while agency status, as introduced by the framework document, has not made any difference at all ("the difference was almost imperceptible"), it has created a somewhat ironic position where, contrary to original policy intentions underpinning Next Steps, "the Home Secretary now takes a closer interest in what happens in the Prison Service than perhaps before agency status".

7.17 Finally, AM1 was asked about his perception of the constitutional as opposed to the administrative consequences of managerial reforms since 1979: "I think the significant factor since then has been a greater concern for the use of resources which has gone along with notions of governors being managers rather than administrators. There have also developed notions of justice which came not only from the Woolf Report, but also the greater interventionist approach of courts".

Conclusion

The overriding relevance of the interview data to this thesis is that they catalogue as well as expose the merits and limitations, *from the point of view of key internal participants*, of the generic policy of managerialising the civil service in a particularly high-profile area such as the Prison Service. The diversity of views expressed by this small cross-section of key players within prison administration could be interpreted as a healthy indicator of freedom of thought and speech among senior civil servants in the Prison Service. But to stop at that simplistic conclusion would be to betray the complexity of the agency arrangements in the Prison Service which my interviewees have been careful to emphasise. Within this complexity lurks a potential confusion in the understanding of that slippery continuum which is ubiquitous in British governance, one which attempts to accommodate political (or ministers') responsibilities and managerial (or civil servants') responsibilities. A fuller analysis of the interview transcripts above follows in the next chapter.

Chapter 8

Part IV of the case study of the implementation of managerial reforms in the HM Prison Service: an analysis of the qualitative discourse

Introduction

It has been commonly known that the Prison Service went through a comparatively turbulent period in its first 3 years as a Next Steps agency.[512] A significant part of this turbulence revolved around the conflict between Derek Lewis, a media businessman recruited into civil service ranks as the Prison Service agency's first chief Executive, and Michael Howard, then Secretary of State for Home Affairs. The background to this conflict between Lewis and Howard, as well as the events beyond, have even formed the subject of an 'insider account' by Lewis himself.[513]

Academic commentary on the Lewis-Howard affair has hitherto tended to focus on one main factor underlying the problematic relationship. Howard was seen as a highly interventionist Minister who would as readily accept credit as he would evade blame as far as the Prison Service was concerned. This view was also given credence by Ann Widdecombe, Howard's junior minister at the Home Office, who chose to ventilate her discontent with Howard's handling of Derek Lewis when Howard was contemplating the candidacy for the leadership of the Conservative Party.[514] The Prison Service's turbulent start as an agency bears all the

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[512]. See e.g. Talbot, C (1996) Ministers and Agencies: Control, Performance and Accountability, Lon: CIPFA; Talbot, C (1995) The Prison Service: a framework of irresponsibility?, *Public Money and Management*, vol 16, 1.

[513]. Lewis, D (1997) *Hidden Agendas: Law, Politics and Disorder*, Lon: Hamish Hamilton.

[514]. See e.g. The Times 20 May 1997.

hallmarks of the 'flawed implementation' of a concept that had been considered so successful it had already been launched in more than a hundred agencies well before April 1993 when the idea was introduced to the Prison Service.

Empirical data gathered in the author's own qualitative interviews suggest that there were other factors apart from Howard's personal style of leadership which underpinned the flawed implementation of the agency concept in the first few years of agency status for the Prison Service. The conflict between Michael Howard and Derek Lewis was the culmination of more deep-seated problems within the structure of the agency model and these problems manifested themselves in the context of the Prison Service.

Caiden[515] has provided a useful framework within which to assess the relative importance of different factors underlying the flawed implementation of the agency concept in the Prison Service. As illustrated in the table below, Caiden postulates that there are several factors which can frustrate the implementation of a policy idea.

[515]. Caiden, G.E (1976) Implementation - The Achilles Heel of Administrative Reform in Leemans, A.F (ed.)(1976) *The Management of Change in Government*, Martinus Nijhoff, pp.145-64; also see, Sabatier, P (1986) Top-down and bottom-up approaches to implementation research, *Journal of Public Policy* 21-48; Marsh, D & Rhodes, R (eds)(1992) *Implementing Thatcherite Policies: Audit of An Era*. Buckingham: Open University Press.

Category	Possible factors	Suggested examples in the context of the Prison Service
Pre-implementation flaws	• bad beginnings • the "imitation not innovation" syndrome • incorrect diagnosis • hidden intentions • indecisive approach • faulty planning	• a high-profile department such as the Prison Service was not suitable or not ready for agency status • the preference for an outsider with no apparent relevant experience over the internal incumbent as chief Executive • the 'Next Steps' idea was applied to the Prison Service without tailoring it to local circumstances • the Prison Service framework document contains significant scope for the Home Secretary to intervene 'operational matters which could give rise to grave public or parliamentary concern'.
Implementation flaws	• unduly restrictive techniques • inability to command resources • absence of feedback and monitoring	• Home Secretary perceived as too interventionist in the operational matters of the Prison Service
Post-implementation flaws	• failure of evaluation • confusion or displacement of pertinent goals	• Derek Lewis was judged to have met all the key performance indicators of the Prison Service but was subsequently dismissed from his post as chief Executive.

Fig 8.1 Summary of Caiden's template of factors underlying flawed policy implementation

Set in the context of Caiden's framework, it would appear that the causes underlying the turbulent start of the Prison Service as an agency were largely due to 'pre-implementation' factors such as those outlined in Fig. 8.1 above. For example, 'the imitation not innovation'

and 'incorrect diagnosis' arguments underpinned the view held by some interviewees that the Next Steps agency model was perhaps not suited to the circumstances of a high-profile area such as the administration of prisons.

Some of the interviewees also felt that the way in which an outsider like Derek Lewis was recruited to the post of agency chief Executive at the expense of Joe Pilling, the internal incumbent, set the tone for a 'bad beginning'. The formulation of the Prison Service's first framework document[516] also gave rise to a suspicion among some interviewees that there were 'hidden intentions' behind the move to agency status which did not exactly square with official claims of wanting to improve managerial independence, efficiency and performance in the Prison Service. It could also be argued that the Lygo report,[517] commissioned by the Home Office in August 1991 to 'review the managerial effectiveness of the Prison Service', sowed the seeds of 'faulty planning' by recommending that the Next Steps model be applied to the Prison Service without substantial modifications. In particular, Lygo omitted to put forward any specific proposals by way of much-needed safeguards against excessive ministerial interference in the operational activities of the Prison Service despite identifying managerial independence of political control as 'the key question to be resolved'.[518]

These 'pre-implementation' factors outlined above are arguably symptoms of a more fundamental problem embedded within a largely unwritten British constitution. More specifically, those 'pre-implementation' factors are inextricably intertwined with the ability of the Executive to rely on their monopoly of the Crown prerogative in the regulation and management of the civil service. While it is true that problems with policy implementation such as those outlined could easily have featured in any constitutional environment, the absence of entrenched 'first principles' in the British constitution arguably gives the Executive more room for manoeuvre in its reorganisation of the machinery of government including the

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516. At the 1999 Prison Service Annual Conference, Jack Straw, Home Secretary announced that the Prison Service Framework Document would be revised. For a summary of Jack Straw's speech to the conference, see *Prison Service News*, March 1999. The revised version of the Prison Service framework document came into effect in April 1999.

517. Lygo, Admiral Sir Raymond (1991) Management of the Prison Service, December 1991. The Lygo Report is discussed in further detail in chapter 6.

518. See chapter 6 for a more detailed discussion of the Lygo Report.

civil service. This underlying theme has been discussed at length in chapter 2, and will be revisited in the concluding chapter (chapter 9).

The purpose of this chapter is to attempt to flesh out those 'pre-implementation' factors from the viewpoint of the elite interviewees who have participated in this case study. One of the recurrent themes that permeate the interview data is that there are variations in the understanding of civil service managers in the Prison Service of their constitutional position as 'servants of the Crown'. The closer the civil servant, in terms of the institutional hierarchy, to the Ministerial apex, the stronger his or her apparent identification with the management reform agenda and rationale of the ministers' decisions and actions. This broad trend is manifest in the views expressed by the civil servants the author interviewed. Broadly, they were at three different levels of the hierarchy:

- senior management (Norris: then Director of Finance, now retired),
- middle management (Kitteridge and anonymous interviewee: both were Area Managers) and
- operational management (Newell, Allridge and Daly: all were Prison Governors).

The following sections elaborate some of the 'pre-implementation' factors by dissecting the interviewees' perceptions of:

(i) the rationale and suitability of management reforms?;

(ii) changes in their own roles post implementation of agency status;

(iii) the policy/ operation debate; and

(iv) the constitutional as opposed to the administrative impact of management reforms in the Prison Service.

These will now be dealt with in turn.

Qualitative views on the factors underpinning the flawed implementation of the Next Steps agency concept in the initial few years of the Prison Service as an agency

(i) interviewees' perceptions of the rationale and suitability of agency management reforms

Prison Governor, Rannoch Daly, explained that the initial consensus in support of the implementation of the Next Steps agency idea within the Prison Service was premised upon a *specific* understanding of the concept of agency:

> 'it was thought that there would be less political interference. There was a support for more managerial freedom in the Prison Service on the one hand, and for less bureaucratic interference by the central civil service on promotion, grading, pay rates, pensions and so forth on the other' (para 1.4).

This understanding amongst the field participants was, however, later revealed to be flawed. As Governor Daly explained, it was not clear to him whether 'agency has contributed to greater Parliamentary interest in the Prison Service, or made it more interesting, or whether it was the Home Secretary (then) who was taking more interest in reports about the Prison Service. A lot of people have been surprised by the latter because there was an expectation that there would be less political interference but there was (then) in fact more' (para 1.3).

This view is supported by another Prison Governor, John Allridge, who took the view that during the Conservative administration, the Prison Service agency was seen as 'a football which was often kicked into the government's net' (para 2.3). To illustrate his argument, Governor Allridge implied that it was short-termist *political* convictions rather than the longer-term *constitutional* considerations which prevailed in the selection of the chief Executive of the Prison Service for its first term of agency status. It was suggested that the incumbent, Joe Pilling, had been offered the post but had turned it down:

> 'Pilling was a mandarin and understood the power play positions perfectly. He realised that if he were to take the Prison Service forward, it would have to be in the capacity of *de jure* accounting officer for the service, i.e. on a permanent secretary basis' (para 2.9).

The account given by Derek Lewis, who became the first chief Executive of the Prison Service agency, would appear to corroborate this suspicion. Lewis himself revealed in his book that the competition for this civil service post 'was not the usual selection process'.[519] The protocol was that the selection board recommended a preferred candidate whom the Secretary of State would be asked to endorse, 'but on this occasion - never repeated - the Civil Service Commissioner agreed that the board should offer the Home Secretary a choice of candidates, from whom he would make a final selection'.[520] There would thus have been the opportunity for Kenneth Clarke, then Home Secretary, and Pilling to negotiate, albeit to no apparent avail, the terms and conditions before, or even while, negotiating with Lewis.

One of the interviewees believed that ministers may have their own hidden agendas in the introduction of agency status: 'Kenneth Baker nearly lost his job as Home Secretary over the Brixton escape. But he was lucky to hang on. That incident may have reminded Ministers that being able to hand over the operational business to someone else in the Prison Service was a very attractive proposition which could be nicely tucked into the Next Steps initiative' (para 2.5). Governor Allridge further advised:

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519. Lewis, D (1997) *Hidden Agendas: Law, Politics and Disorder*, Lon: Hamish Hamilton, p.10.

520. Lewis, D (1997) *Hidden Agendas: Law, Politics and Disorder*, Lon: Hamish Hamilton, p.10.

'Unless Ministers are upfront about Next Steps, and legitimise the position of the agency chief Executive by changing civil service rules, and unless they are prepared to give substance to the notion of operational independence, then there will always be an element of Next Steps that could not work. The exceptions to this point are perhaps low profile or non-controversial agencies which are not the subject of attention in the media or public arena' (para 2.14).

The vice-chair of the Prison Governors' Association, Mike Newell, takes this argument further:

'The Prison Service is a classic example of the Next Steps agency where it had all gone wrong and was undoubtedly *misused* by Ministers as a way of distancing themselves from what was a very dodgy agency - for example, you don't get any (electoral) votes in prisons and there are always banana skins in relation to prisons' (para 3.3, emphasis added).

Governor Newell believed, for two reasons, that the *motif* for implementing the agency idea was essentially political:

firstly, 'it does seem that the Next Steps agency delivered certain *political* objectives but actually the *operational* objectives for managing the Prison Service in a more effective way didn't really deliver anything. For example, for those of us working in the Service, we had hoped that there would be variation in relation to personnel and financial issues. But instead, we are still governed by the same Treasury rules as we were prior to agency as well as the same personnel rules from Cabinet Office' (para 3.3); secondly, 'the Prison Service has not delivered anything since acquiring agency status which it could not have delivered under the old structure. There have not been any new-found freedoms under agency status. *It has not been much of a success for us in the Prison Service*' (para 3.5, emphasis added).

The views of the Governors Daly, Allridge and Newell are triangulated by an Area Manager who preferred to be anonymous, referred to as AM1 in the interview transcripts. AM1 thought

the differences in management terms post-agency were 'almost imperceptible', and that agency has further created an ironic situation in which 'the Home Secretary now takes a closer interest in what happens in the Prison Service than perhaps before agency status' (para 7.16).

The perspective taken by another area manager was rather different. Peter Kitteridge was more sympathetic: 'the efficiency drive in government has affected the Prison Service. Management has been about maintaining standards of operating practice with less money; at times, it has felt like drastic cuts in cash but it has been both' (para 4.24). Mr Kitteridge suggested that the idea of agency in the context of the Prison Service may have been misunderstood by critics of its implementation, and that, this misconception may have led to essentially flawed expectations being dashed:

> 'Right from the word go, the crucial question for the Prison Service agency was, "Who was the Accounting Officer for the Prison Service?". Was it the Permanent Secretary or was it the Director-General? And there is a lot in that question. If the Permanent Secretary is our Accounting Officer (as is the case pre and post agency), it defines what the Prison Service agency is about. One can think of certain situations where that is quite crucial, for example if we overspend, we get the benefit of the Home Office trying to bail us out, and vice versa. In some government agencies, there is a direct relationship between the Director-General and Ministers, but this is not the case in the Prison Service. So when we don't have such clear and direct lines of relationship, then there are rules to the game which people have to appreciate, and we have to understand why those rules are more complicated than the straight simple lines. They are not there for nothing' (para 4.25).

Kitteridge's perspective is triangulated by an interviewee at senior management level. The Director of Finance at the time of the interview, Syd Norris, explained that some of the criticisms of agency status in the Prison Service had been premised on a particular *misconception* of agency. Mr Norris suggested that this may have helped explain the problems encountered by Derek Lewis and Brian Landers who were chief Executive and Director of Finance of the Prison Service agency respectively. Both were recruited from the private sector.

Mr Norris suggested that their prior experience in the private sector may have crystallised their own ideas of agency:

> 'The position is rather difficult because everyone has a different idea as to what an agency is. Landers had acquired a notion from somewhere that an agency was to be as independent as possible of the department, and Lewis' way of doing things tended to move in the same direction. Lewis seemed to want to move things through him to the main Home Office, and the degree of lateral connections with the main department reduced' (para 6.7).

Their attitude towards the idea of agency affected the way in which they performed their functions as civil servants in the Prison Service agency:

> 'It became common to refer to the Home Office as if it were somewhat separate. I think some of the difficulties that arose, arose from the notion that they were not part of the Home Office. There were some problems we had as a consequence, for example our planning cycle in the Prison Service was not in tune with the public expenditure cycle and we are trying to get back into that cycle. This was peculiar to the Prison Service' (para 6.8).

Mr Norris believed that the widespread misconception clashed with the *conventional* perceptions of the idea of agency according to which there were two species, rather than a homogenous one, of agency:

> 'The official conception of agency has changed over time. (i) As I recollect reading the original Rayner report, there was considerable emphasis separating Executive operations and avoiding Ministers interfering in Executive operations, which is an absolutely ideal model for say the Passport Agency where unless you have a question of lifetime passports or the extension of passports into identity cards, there isn't much by way of policy considerations. (ii) What I got as an impression from the original Rayner report was that there were some areas of business where Ministers wanted to interfere and get involved in detail in a way that wasn't productive. (iii) And gradually, the

concept of agency got pushed further particularly under Peter Kemp until the OPCS got to the point where they had the former Prime Minister's agreement to the view that the onus should be on explaining why the Civil Service should **not** be organised as agency rather than the other way round' (para 6.9).

The disparity in conceptions outlined by Norris is significant insofar as it influenced the *attitudes of key participants* towards the implementation of the agency concept. It follows that the attitudinal aspects of the policy process was an important determinant of policy outcomes. The idea that the policy process has an affective (or informal) element and a policy (or formal) therefore tends to strengthen the argument for qualitative interviews such as those pursued by this case study.

As Mr Norris saw it, the Prison Service fell into the second interpretation of Rayner's idea:

> 'As you move into the more difficult territory where there is more policy involved, then you cannot draw an easy line dividing issues into what is Ministerial business and what is not. If there is any criticism of the way the Home Office approached agencies, it is probably that we sought to make them too self-sufficient. And over time, it became necessary, not just in relation to the Prison Service but more in relation to other agencies, to draw them back in again because it was found that there was too great a degree of independence to fit the responsibilities that remained at the Home Office' (para 6.10).

Mr Norris explained that part of the other problem could also be that perhaps too much pragmatism could have been built into the framework document of the Prison Service:

> 'If you look at our framework document, you will find that it is written in a way which allows people to develop certain sensible working practices. When we drew up the framework document, we considered whether we could draw up a list of the things which we needed to consider, and those we needed to consult. We decided that was not practicable. What was needed was a working relationship which would develop over time, and that is what you have at the moment' (para 6.11).

The element of pragmatism is perhaps illustrated by the fact that the *affective element* or the *working relationship* was a crucial determinant of how well the theory worked particularly during the Howard-Lewis era:

> 'I don't know the intricacies of the way it operated under Derek Lewis, and if I did, I couldn't tell you. What one can see as a newspaper reader, was that somehow, something went wrong with the working relationship. There is nothing that says that the Home Secretary may not make decisions on operational matters. It has always been the case when I was working in the Prison Service that there are various matters that are decided in the Prison Service or at the appropriate level and there are matters which went to Ministers. And usually, it depended on what hung on a decision' (para 6.12).

Mr Norris reconciled some of the problems in the aftermath of agency status by playing down the effects of agencification:

> 'Agency was not an enormous change - the Prison Service, with the largest block of staff in the Home Office, had already had its own finance line, its personnel line, and an awful lot of stuff had already been delegated to Prison Service staff before agency status. It was then already a distinct operation and the relationship between Chris Train (then Director-General) and the Permanent Secretary (though he remained the Accounting Officer) then was not all that different' (para 6.14).

Mr Norris did however acknowledge that agencification brought some key changes:

> 'It introduced the framework document and key performance indicators which have been valuable. It sharpened up some of the accountabilities and made the Director-General Accounting Officer responsible for the vote (expenditure) instead of being responsible simply for managing the vote as he was when there was a separate prisons vote but he wasn't the Accounting Officer. In the other Home Office agencies, the chief Executive has the role of accounting officer for the agency's business but the Permanent Secretary is responsible for the vote as a whole. On Prison Service business, the

Director-General is personally responsible for the use of all funds on the Prison Service vote and has to appear as a witness before the Public Accounts Committee when required on any matter of Prison Service expenditure' (para 6.15).

Even with the formalisation of managerial and administrative practices, the arrangements for accountability still incorporate a certain degree of pragmatism and flexibility:

> 'They may also call the Permanent Secretary as a witness if they want, on Prison Service matters. The degree to which the Permanent Secretary is responsible for Prison Service matters is partly dated in the framework document and in part would be a matter of custom and practice. The framework document provides that he is responsible for financial management and practice throughout the Home Office, which is a restatement of government accounting. In my experience, provided the permanent secretary has a clearly delineated understanding about what matters he is prepared to interfere with and those he will leave to the other accounting officer, that will on the whole be respected by the PAC and indeed the C&AG and the NAO' (para 6.15).

A retired member of the Prisons Board, Terence Weiler, put the arguments in context. He could see familiar themes which seemed to surround the agency debate further back in the historical origins of the Prison Service as a department of the Home Office since 1963, namely: the perennial conflict engulfing: (i) a "them and us" culture; (ii) the emphasis on managerial leadership and the need for objective advice to the Executive; and (iii) competing demands being made on limited resources (para 5.4). Mr Weiler suggested that the general debate about agencies has moved on considerably, and in the context of the Prison Service, the idea of agency has been endorsed by two recent official reports by General Sir John Learmont[521] as well as the Home Affairs Committee[522].

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521. Home Office (1995-96) *Review of Prison Security in England and Wales and the Escape from Parkhurst Escape on 3rd Jan 1995: the Learmont Report*, Cm 3020.

522. Home Affairs Committee (1996-97) *The Management of the Prison Service*, HC 57 vols. I & II.

It seemed equally clear that the focus of the debate is no longer about whether the agency model is appropriate to prisons administration 'now that there is in place a professional Director-General. They've got to live with him whereas it was different with Derek Lewis. It would be interesting to see what the Home Secretary would have done if the Director-General had been a serving civil servant because there wouldn't have been a contract to terminate. You can't quite just dispose of him though you can take disciplinary action or move him to some other parts of the civil service' (para 5.11).

More recently, Jack Straw, the Home Secretary under the New Labour administration, confirmed that the Prison Service would continue as an agency.[523] Straw reaffirmed that the underlying philosophy of agency status would continue to be that 'the Director General will retain day to day responsibility for the Service within a clear framework set by Ministers. The Director General will continue to be my principal adviser on prison activities and he will continue to enjoy the operational freedoms and delegations needed to lead the Prison Service. But Ministers will not shirk from exercising proper Parliamentary responsibility for the Service'.[524] Straw also announced three key changes to the current structure of the Prison Service agency which would be reflected in a revised framework document:

- integrating the aims and objectives of the Prison Service within new planning arrangements for the wider criminal justice system;
- creating a new Prisons Strategy Board to be chaired by the Prisons and Probation Minister; and
- restructuring the current Prisons Management Board which will continue to be chaired by the Director General.

It is not clear at this stage how the proposed Prisons Strategy Board will fit into the current bi-partite structure of the Supervisory Board and the Management Board first advocated by the Lygo report.[525] A full assessment of the new structure proposed by the New Labour

[523]. In his speech to the 1999 Prison Service Annual Conference. For a summary of this speech, see *Prison Service News*, March 1999.

[524]. Extract of Jack Straw's speech from the *Prison Service News*, March 1999.

[525]. See chapter 6 for a discussion of the Lygo report.

administration will not be undertaken in this thesis. It may be conjectured though that these proposals are unlikely to resolve the underlying constitutional conundrum outlined earlier in chapter 2.

(ii) interviewees' perceptions of changes in their own roles post-implementation of agency status

Governor Daly explained that agency status did confer some advantages for prison governors:

> 'Post-agency, there have been changes in finance and personnel management. The financial accounts of the Prison Service have been sub-divided per subject. Responsibilities for managing budgets have been devolved to establishments. Given a fixed budget, which is noticeable in the public sector, decisions closer to ground level would be better. So now, prison governors have more management flexibility, in budgets and personnel recruitment. Consequently, they are better able to bring value for money' (para 1.7).

Agency status, Mr Daly implied, also helped to improve the accountability of prison governors:

> 'Prison governors are now more complained about as their authority to take decisions increase. So while governors welcome new developments, some are not so (welcome). With better and more management at ground level, there will tend to be more grounds for complaint. Those aggrieved will seek means for redress, and this is partly due to devolution in decision-making post-Agency' (para 1.8).

Governor Daly was of the view that if there was a perception of problems of a constitutional nature, it was more to do with a relationship higher up the institutional hierarchy, that between the Home Secretary and the Director-General:

'Any political controversy about agency status was not about the management of prisons by governors, but instead hinted at the relationship between the (then) Director-General and the (then) Home Secretary. But even here, it was a mirage. Agency status, although it looks as if it changed things, in fact has not. The Home Secretary is still accountable to Parliament. Agency status has not changed that. On Parliamentary questions,[526] the signature on the response was different, but answers were given to PQs just as quickly' (para 1.9).

The injection of new managerial practices through agency status without corresponding modifications to the constitutional relationships has attracted criticisms from some quarters. Governor Allridge for instance expressed concerns about the coherence of the policy of managerialising the civil service:

'There has been no clear strategy to reforms which have instead been borne of dogma and personal belief. Now although we may still have a public service, their deed would not be delivered by central government but by its agency counterpart or through contracted out agents. Similarly the Citizen's Charter has changed the concept of the consumer. Behind this is an idea that you did not have to govern the business and you can give bits of it away' (para 2.4).

Governor Newell also expressed his concerns with the managerial assumptions that have underpinned the agency reform:

'firstly, decisions about public funds must be open to every form of scrutiny and money must be accounted for in a way that the public has a right to expect. When you remove some of these red-tape, you also open up some of the things from the business culture which have not been helpful such as corruption and fraud. I don't think it is because we have recruited people who are more inclined to engage themselves in that. The previous culture held those natural tendency that many people had in check and in control;

[526]. At the time of the interview, the arrangement for answering PQs was that written answers would be dealt with by the Director-General. However, this changed when New Labour Home Secretary came into office in May 1997, reverting the responsibility of providing Parliamentary written answers back to the Home Secretary.

secondly, in relation to business culture, a very large number of decisions that we make are about social benefit, not about cost benefit. I am now governed by the bottom line rather than standards, then I tend to cut out expensive services that may have a high social benefit. If you introduce a culture where you purely decide options on the basis of cost, then you make some very bad social decisions' (para 3.7).

Some of the concerns expressed by Mr Newell are perhaps reflected in Kitteridge's exposition of the way governors relate to their area managers. Mr Kitteridge, explained that the role of area managers vis-à-vis governors under their supervision has, in more recent times, been geared towards cost and efficiency issues, in line with the statement of purpose of the Prison Service:

'area managers tell their governors what they can be offered for the coming year and the area manager asks them to prepare an establishment Business Plan between June and August every year. Area managers then have "budget challenge" meetings with governors in September/ October in which governors negotiate their plans with area managers. Area managers then discuss these draft business plans with the Operational Director in November, who is then "budget challenged" by the Finance Director early in December. This is followed by discussions at the Executive Committee level and area managers should receive statements of cash allocations in early January. The governors then have to revise their localised business plans in accordance with this plan' (para 4.8).

It is within this process of 'budget challenge' that prison governors like Mr Newell have found that some priorities, though important in themselves, have had to be shelved to meet the budget allocations for their establishments. As Mr Kitteridge explained, this preoccupation with cost issues preceded the implementation of agency status:

'This detailed regime has been developing as management practice since the mid-1980s. It can probably can be traced to the time Circular 55/84 was issued, because that described the task of establishments and it required governors to set targets. We have

since refined that process. In about 1993, we required governors to set up a strategic plan for establishments, and that their annual business plans should also be taken from the strategic plans which cover the 3-year period of the PES cycle' (para 4.10).

Area managers act as an important bridge between the Executive management and the operational management of the Prison Service, yet they are not members of the Prisons Board. However, as Mr Kitteridge explained, they have access to the decision-making circle and contribute to the organisational development of the Prison Service through a newly-created forum for senior management:

'Area managers are members of the monthly Senior Management Forum (SMF) in the headquarters which is also attended by all Heads of Divisions, the Director-General and members of the Prisons Executive Committee as well as a consultant. The SMF is different from the Prison Executive Committee[527] and the Prisons Board,[528] which are mainly about picking up new business and monitoring performance. The Executive Committee wanted an intermediate culture which was consultative and which helped clarify their thinking about how the Prison Service would move forward, what issues, and in what timescale. They felt they needed a mechanism of collaboration which was different from the straight line management, engaging people who were willing to think wider than their own divisional responsibilities, and think as service managers with experience within the Prison Service' (para 4.11).

'The main purpose of the SMF is to analyse changes in the management and organisation of the Prison Service. We have for example, just set up 'Programme Management' in the Prison Service because it was decided that the way we operated through divisions could also work to flag up issues which transcended individual directorates, and try to have a 'programme manager' for each of those. Another example is that we have also started a programme to clarify the Prison Service

[527]. Comprising the Director-General, Directors of Finance, Services, Personnel, Healthcare Services, Security and Operations, as well as three Operational Directors (North/ South/ Dispersal).

[528]. Comprising members of the Executive Committee and two non-Executive committee members.

> operational standards. At present, these are set out in prison rules, standing orders, Prison Service instructions, Prison Service orders and so forth. We need to make sense of these important sources as well as their relative weights. Governors are saying that they feel overloaded by what they see as 'emerging from the centre' which is really about 'emerging government practice' (para 4.12).

These initiatives are important indicators of a managerial culture that is now more accentuated post-agency implementation. Another area manager, anonymously referred to as AM1, was asked how area managers related to prison governors. He was cautious of the suggestion that the relationship between area managers and prison governors is based on collaboration, trust and goodwill:

> 'No - it is based on the fact that I represent the Secretary of State, and the governor being the governor, and therefore having to follow what the SoS says. However, it is a two-way process in that the SoS needs to be informed of what is practical, and that is where the governor has a word to say' (para 7.6).

When asked whether the criticisms of the line management control raised by Derek Lewis in his book, Hidden Agendas, were typical or fair, AM1 reasoned that Lewis was actually critical of certain individual style rather than the collective authority of area managers. 'I think the role is a new one, and people bring to it different styles...In terms of style, I would use words like coaching or being alongside the governor' (para 7.5).

AM1 was also asked how he would respond to the point made by Learmont concerning a serious mismatch between the views of the prisons headquarters and its establishment. Asked whether this was an implicit criticism of the middle management as represented by area managers, AM1 offered a pragmatic response saying that this was inevitable 'because HQ will want an overview of strategies and directions whilst individual establishments will want to move in a quicker or perhaps slower pace' (para 7.7). The counter viewpoint as he pointed out however, is that the mismatch may be interpreted as providing a healthy tension between a range of viewpoints which can enrich the quality of decision-making (para 7.7.1).

It was, however, rather revealing that he omitted to point out that Learmont did recommend that middle management can be strengthened by giving area managers a more active input into the deliberations of the Prisons Board through the Operational Manager. He later went on to say that: 'I think Learmont didn't understand the Prison Service very well as he came from a sector (i.e. the military) that was quite different' (para 7.7.2). Some of the problems in the line communication between senior and operational levels of management within the Prison Service are, however, possible indicators of the confusion in the roles of senior civil service managers that still exists even after the implementation agency status.

At the senior management level, Mr Norris felt that his role as Finance Director for the Prison Service was well-defined in a number of sources, namely a memo from the Director-General and an annual personal responsibility plan (see para 6.5): 'we have to assist the Home Secretary in understanding the financial needs of the Home Office, and indeed of the Prison Service. The Permanent Secretary is the person who puts forward the requirements of the Prison Service in place alongside the rest of the Home Office' (para 6.2).

According to Mr Norris, the specific functions of the Finance Directorate include *inter alia*, responsibility for:

(i) the control of public expenditure on an annual cycle;

(ii) monitoring the financial and accounting systems of the Prison Service;

(iii) advising on the planning process, with a particular emphasis on financial planning and by encouraging focus on output measures;

(iv) monitoring the key performance indicators for the Prison Service (through the Planning Group);

(v) putting forward the draft three-yearly Corporate and Business Plans;

(vi) evaluating the best use of the estate (through the Strategic Planning Group);

(vii) assessing the accommodation potential and capacity of the Prison Service (through the Construction Unit);

(viii) assessing in conjunction with the Contracts and Competition Group, what initiatives may be done through private finance initiative;

(ix) examining the adequacy and propriety of the financial systems in operation at unit level (through the Internal Audit Unit) - (para 6.3).

Mr Norris explained that the intricate and complex web of functions of the finance role is underpinned by the fact that the chief Executive of the Prison Service and the Permanent Secretary qua Additional Accounting Officer and Departmental Accounting Officer respectively, are *personally* responsible for financial management in the areas of business and the Permanent Secretary is responsible for the quality of that management throughout the Home Office including the Prison Service (para 6.4).

(iii) interviewees' perceptions of the policy/operation debate

One of the aspects of the contemporary agency debate on which civil service managers in the Prison Service agency have a common understanding is the nature of the relationship between policy and operation apparently carved out by Sir Robin Ibbs' model of agency. Governor Daly took the view that these concepts would benefit from clarification, and further argued that any distinction between them would be futile:

> 'Policy and operation permeate each other. This issue of policy/operation has always been an issue. The main question seems to be, 'Can you adequately divide policy from operation?.' At present, some policy documents are written within the Prison Service. The consensus view seems to be that you cannot divorce policy from operation. Policy needs to be informed by those in the field. A dividing line is not practical, or if done is likely to render the policy document vague or impractical and the operational side unable to put policy into practice' (para 1.6).

Governor Allridge hinted that the distinction between policy and operation was just a smoke-screen for ministerial evasion of responsibilities; the suggestion being that because policies were laced with hidden agendas, the operational side has little chance of success (para 2.14).

The Vice-Chair of the PGA, Governor Newell located the distinction between policy and operation in a historical context:

> [sic] even before the Prison Commission became a department of the Home Office, 'there was already a policy/operation distinction entrenched in the civil service. Civil service as opposed to Prison Service grades are seen as meddling people in that they often take very senior positions in the Prison Service for short periods of time. That is seen as 'meddling' or 'not being very committed' to the development of the Service. They are also seen to have very separate agendas'. For example, one recent review of senior management by John McNaughton who was then private secretary to the Home Secretary, castigated the Prison Service Headquarters for failing in its 'primary task'. But its primary task as defined by the Home Office was to serve the Ministers, but from my perspective, the primary task is to service the operational business. Since 1963 (when the Prison Commission became the Prison Department), there has been a major problem: a "them and us" culture and a culture that says everything should be constructed to deliver the effective service at ground level whereas at headquarters, it is seen as dealing with Ministers as a prime objective' (para 3.11).

Governor Newell could not be sure whether the distinction has been made more problematic by the transition to agency status:

> 'We really don't know because almost immediately after we went on agency status, we got the most difficult and interventionist Home Secretary in the history of the Service. Instead of less political interference, we got more and more. If you describe *policy* as saying what you want achieved but not saying how you wish to achieve it, and *operational* as how you deliver the policy, as living piece of work, then Michael Howard set the policy and as people began to deliver, also set '*operational policy*'

because he did not like a whole series of things which the Prison Service was doing' (para 3.12, emphasis added).

Governor Newell added:

> 'but whether this was about character or structure, it is difficult to split out. And because now we have a change of government which has put Michael Howard out of office, we will never know [sic] whether things might have been different. It was Kenneth Clarke who as Home Secretary saw the Prison Service acquire agency status and who appointed Derek Lewis as the Director-General. Quite how things would have gone had Clarke stayed on, we will never know' (para 3.13).

Governor Newell suggested that the problems of distinguishing policy and operation existed at two levels: firstly, at the *formal* level, some of the seeds of the structural problems were rooted in the constitution of the Prison Service i.e. the framework document. Mr Newell pointed out that there are some classic examples in the framework document which support this suggestion. (i) The Permanent Secretary remains the Accounting Officer for the Prison Service;[529] (ii) the Home Secretary 'will expect to be consulted by the Director General on the handling of any operational matters which could give rise to grave public or Parliamentary concern'.[530] He further added: 'And so basically, there was written in the formulation of the reporting terms between the Director General and the Home Secretary, and any interventionist Home Secretary has a clear right under those terms to be involved in anything as they wish' (para 3.14). Secondly, it was also suggested that there were tensions at the *affective* level of relationships between the key actors in the agency: 'As Vice-Chair of the Prison Governors' Association, I have had many meetings with Michael Howard, and it always took the same form. Whatever anyone was asking, whatever dangers everyone was pointing out, he always used to say, 'Yes I understand that and I hear what you say, however the British public tell me something very different'. That was always his way of carrying out *his* requirement under the framework

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529. HM Prison Service Framework Document April 1993, para 3.7.

530. ibid., para 3.1.

document. That 'there was public concern about this', that was why he had to intervene - that was how he used to use that relationship' (para 3.15).

Governor Newell thought that there could be a tension between the constitutional position of civil servants as 'servants of the Crown' and the managerial framework promoted by the idea of agency:

> 'I think there is always a serious tension whenever you wish to hold me accountable for something but you don't necessarily allow me to do the job. Derek Lewis was under the impression when he was signed on by Kenneth Clarke (then Home Secretary) that he was taken on as Chief Executive of the Prison Service. Derek Lewis' understanding of the term was that he had the power of delivery. What he didn't realise was that he had the responsibility but did not have available to him the full range over delivery because for a whole series of reasons, he could not. For example, he did not have the authority to remove people on Senior Service Grade from the Prisons Board. That clearly created a tension. But this is not peculiar to the Prison Service. Chief constables of police are answerable to police committees for instance. Chief constables have a statutory position, a better position at law but not in day to day administration. Difficult police committees are like difficult Ministers' (para 3.16).

Governor Newell emphasised a theme which he thought captured the mood of civil servants within the operational management of the Prison Service:

> 'Much of the devolution that we have had has been a devolution of the *responsibility* without the *power*. We have very little control. As governor, I am responsible for delivering services within the budget but with limited flexibility, for instance, I cannot carry over from year to year or do anything about in-year movements. Any surplus I have is taken away. The split between capital and current cost is decided centrally, so I cannot make savings on current and save it on capital. Everyone is covered by a whole series of rules which emanate from Treasury, Cabinet Office and the Permanent Secretary in the central civil service. I don't know how it works in other agencies but I do know that as far as prisons go, this is an *agency in name* only. There are no

discernible differences in delivering the services. There is more work down the establishment level but no corresponding power down the establishment level' (para 3.17).

The perspective of middle management on the distinction between policy and operation tended to echo the scepticism voiced by civil servants within operational management, though not using identical language. For example, Area Manager, Mr Kitteridge responded that:

> 'The Home Secretary has to answer to Parliament and the prisons are run by public finance. At the end of the day, the Home Secretary is my boss. I know that in an agency, the Director-General is my boss but I see him working very closely with the Home Secretary and the Permanent Secretary. There is also in the Prison Service at present a need to work more closely with Ministers. And that (closer working relationship) is all about acknowledging that penal policy and practice are very close. And if it isn't, there will be those who will try to divide us' (para 4.20).

Similarly, another area manager, AM1, perhaps because he was protected by his self-chosen cloak of anonymity, criticised the attempts to separate the concepts in stronger language:

> 'The distinction (between policy and operation) is an artificial one - policies are only significant insofar as they are influenced by operations' (para 7.15).

By contrast, any views on this distinction tended to become more subtle when questions were put to senior civil service managers. The Finance Director, Mr Norris tended to put these issues into the context of developments which were ongoing. It was explained that there were now fresh considerations on this front: (i) a new government which has 'expressed a wish to satisfy themselves about certain aspects of the relationship between Ministers and agency'; (ii) Richard Tilt qua Director-General has 'something in hand by way of a study[531] by Arthur de Frisching, looking at how the agency is organised'; (iii) the Office of Public Service has also changed the rule from three years to five years with respect to a review of agency status and

[531]. HM Prison Service (1997) *Prison Service Review*, published in December 1997.

operation, which now extends the original review date of 31 December 1997 in the case of the Prison Service (para 6.16).

The recommendations of the study Mr Norris referred to have, since the interview, been published.[532] The authors of the report, all civil servants within the Prison Service, apparently sympathised with the views of the interviewees as discussed above. On the one hand, they agreed with the Home Affairs Committee that there was 'little point in trying to draw hard and fast boundaries between policy and operations'[533]; but on the other hand, they left the door open for such a distinction to be drawn, 'based on the need for the Home Secretary to have confidence in the advice given by the Prison Service and to trust in the operational fulfilment of the policy, and for the Prison Service to be realistic about and responsive to the demands of Ministerial accountability to Parliament'.[534]

A former member of the Prisons Board, Mr Weiler, put this distinction in a historical context; it was explained that the notion that Prison Service had greater independence during the days of Prison Commission is a misnomer: 'It is an article of faith in the Prison Service but in fact, it wasn't so. The policy then (as now) lay in the Home Office and you will find there were matters that were settled in the Prisons Board had to be referred to the Home Office for endorsement and criticism. So the Home Secretary was just as able to intervene then. This reality was however obscured because there were so few controversial matters and relatively little public or Parliamentary interest in the Prison Service in that period. It is also because that period has never really been written up properly' (para 5.10).

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532. HM Prison Service (1997) *Prison Service Review*, published in December 1997.

533. op cit, para 5.12.

534. op cit, para 5.12.

(iv) interviewees' perceptions of the constitutional as opposed to the administrative impact of management reforms

Civil servants at the operational level expressed doubts as to whether agency management reforms had been a worthwhile venture for the Prison Service in both constitutional and administrative terms. Governor Daly advised however that there could be an *image* problem if the agency initiative was reversed: 'If the agency status is removed due to political or constitutional problems, there is a concern that managerial improvements could be jeopardised' (para 1.12). However, he acknowledged that 'part of the general civil service way of doing things is not the right way of running the Prison Service. And this point applies to many other parts of the public sector. The civil service is becoming more divergent in its managerial practice in its different parts' (para 1.12).

Governor Allridge took the view that political considerations and personalities often stood in the way of management decisions in the early years of the Prison Service as an agency to such a degree which might have encouraged scepticism about the value of agency status:

> 'We have never really been allowed to pull away from the Home Office. Derek Lewis did not manage to reduce the number of initiatives stemming from the Home Office nor did he manage to reduce the size of HQ as he had intended. From an external point of view, the whole structure has become more transparent, and so have unfortunately been the problems. But what advantage does this confer on the public or indeed the prisoners? From an insider point of view, there have been very few advantages. We may now be more transparent but this has had to be absorbed by management resources. We have to ask ourselves whether that has been a worthy experiment' (para 2.16).

Agency status, as Governor Allridge saw it, also required a higher public profile of a senior civil servant qua chief Executive of the agency than might otherwise be expected of their

counterparts in parent departments. Mr Alldridge added: 'This tension has not been resolved but arguably accentuated. Administrative independence has to be backed by statute. A new Home Secretary should keep this option open' (para 2.17).

Governor Newell expressed concern over the basic assumption that seemed to have legitimised the implementation of the managerial reforms in the civil service: 'Over the years, there has been a move in the Prison Service and in general, the civil service, to the belief that there is a business culture out there which is transportable to the public service. It has actually been a great mistake which has led us into a number of directions which have not been very helpful to the delivery of public services' (para 3.6).

It was suggested that the pursuit of agency management objectives might have corroded some of the principles which have underpinned the work of civil servants in the Prison Service:

> 'One of the issues, through my period of service in headquarters as well as establishments, is that the civil service, including the Prison Service, has become highly politicised in its approach. Many of the things I was originally taught as a junior civil servant do not seem to apply anymore. For example, it has always been the duty of the civil servant to give 'best advice' to Ministers irrespective of the colour of that advice. It does seem that in recent years, people have given that advice to match the political colour. So they have excluded a whole series of things which they should have put as best advice, and ended up saying to themselves, dismissing those issues on the basis that the Home Secretary would not accept that. This is of course not the duty of the civil servant which is to be non-political and serve the public and the government by giving advice' (para 3.2).

Governor Newell's comments corroborate academic arguments that under the disguise of managerial reforms, the civil service is increasingly having to serve their Ministers in such a way as to obscure wider considerations of the public interest. Governor Newell's central argument seems to be that the management reforms lack a coherent agenda in terms of understanding the background political and efficiency arguments:

'Civil servants as Crown servants are, by definition, expected to follow all its legislation but we need things in place to make sure that it does. In outside industry, it may appear that companies sometimes break rules in pursuit of efficiency. The public sector do break rules but we do not do it by design. We do seem however to have been confused by the distancing between the *political* and the *efficiency* pursuits. They are not in any way connected in my view. Under the right ministerial accountability, we can still have public sector efficiency once we have defined what it is. Public sector efficiency can never be just about 'balance sheet mentality'. Public sector provision is based on a strong, clear social need' (para 3.23).

'In other words, management reforms have tended to dilute the traditional buffer between politicians and civil servants so that the two branches can come together in the pursuit of managerial objectives. As Governor Newell put it: 'the Service has become more politicised and it needs to stand away from politics. The civil service needs to define for itself what a cost-efficient public sector service is, what the barriers to that delivery are, without compromising what is essential to the public sector and the delivery of that' (para 3.32).

The perspectives of middle management were, on the whole, more positive. Asked for an assessment of the constitutional as opposed to administrative significance of recent managerial reforms in the Prison Service, Area Manager, Mr Kitteridge first responded: "Is the constitution to do with Acts of Parliament or the way central government does its business?" He subsequently summarised the main changes in terms of improvements in accountable practices (para 4.21), an emphasis on restructuring in pursuit of efficiency (paras 4.22 and 4.23), and an emphasis in financial prudence (para 4.24). Mr Kitteridge acknowledged the perception amongst governor grades within operational management that 'management has been about maintaining standards of operating practice with less money; at times, it has felt like drastic cuts in cash but it has been both' (para 4.24). This admission was also implicitly triangulated by the anonymous area manager: 'I think the significant factor since then (1979) has been a greater concern for the use of resources which has gone along with notions of governors being managers rather than administrators.'(para 7.17).

Mr Norris summarised the views of senior management on the managerial reforms in the Prison Service since 1979. As he saw it, the process was more of an *evolution* rather than *revolution*:

> 'I think I see things as a matter of the civil service managing, developing and improving in the same way that managers everywhere develop and improve. Various things influence this, including ideas that Ministers may have. Ever since the Public Expenditure Survey began in the 1960s, there has been more concentration which has increased year on year, on the public sector as a demand on resources from the economy and more of a concern to improve the management of money' (para 6.19).

Mr Norris pointed that it was not easy to assess the impact of the management reforms on the constitutional position of civil servants as the underlying principles were matters of unwritten convention rather than the subject of an entrenched Code:

> 'Whether they amount to a real change in the constitutional position of the civil service is a matter of judgment. I find this very difficult as we don't have a written constitution, but I don't think the constitutional position has changed if you go back to the statement by Robert Armstrong, then Head of the Home Civil Service, and this was written into the doctrine which was adopted by the Treasury and Civil Service Select Committee in 1994, and more latterly revised by the previous government in the Civil Service Code in 1996' (para 6.20).

However, Mr Norris pointed out that the significance of the Civil Service Code was that it strengthened a particular concept of civil servants first clarified by the Armstrong memorandum i.e. that civil servants as servants of the Crown were essentially servants of the government of the day (para 6.21). Mr Norris accepted the proposition that the interests of the government of the day may not be coterminous with the wider public interest, by acknowledging that 'it is in that sort of area that the weaknesses of the doctrine lie. There are various questions it doesn't answer. But if you look at the statement in the Code, you do have a lot of scope for whistle-blowing before you resign. The question is whether the whistle-blowing would be effective. If it is and people changed their behaviour, then the way we have

got it is about right. If in the course of time this turns out not to be the case, then it isn't right'. And so, although the Code has been helpful in clarifying what people's roles are, there are still some persistent grey areas (para 6.22).

Another grey area which Mr Norris flagged up was the way in which the previous Conservative government was keen to emphasise the difference between ministerial accountability and ministerial responsibility. He explained this issue further in a letter[535] after the interview thus:

> 'Civil servants appearing before select committees are acting on behalf of their Ministers and at their Minister's discretion (except that the Public Accounts Committee can insist on the Accounting Officer attending). So although the term "accountable" is sometimes used of civil servants, it is the Minister who is accountable to Parliament and the civil servants are responsible to him or her. (Nonetheless) this distinction may seem a little muddied by the way in which accountability has recently been used to distinguish giving an account of the department's actions as distinct from being open to credit or blame for the individual decisions' (para 6.24).

Mr Norris summarised the principles which underpin his constitutional existence as a civil servant thus:

> 'I am a servant of the Crown, and therefore a servant of the public, and for practical purposes, that means serving the Minister. If one comes across difficult situations, for example where it appears that a Minister is wanting to do things not blessed by his cabinet colleagues, or is not taking into account things that he ought to, well one seeks to have a dialogue with him'. However there are no hard and fast rules in these difficult cases where 'one has to decide what one is going to do about it'. 'There will be those difficult cases but they are very atypical, and there are now conventions about them which to some extent Parliament accepted' (para 6.25).

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535. Dated 10th June 1997.

It must however be questioned whether it would not be more desirable for the grey areas to be *clarified*, and for the constitutional position of civil servants to be *strengthened*, through a statutory code. It follows therefore that legislation *per se* would not address the situation. Neither would the act of merely putting the status quo on a statutory basis. As will be evident in the concluding chapter, the potential for statutory reform may well be limited because the fundamental issue is ultimately a high-level question: where should power for the management and regulation of the British civil service reside?

Conclusion

There are a few key themes which have emerged from the interview data. Firstly, it is evident that there were several 'pre-implementation' factors – apart from the interventionist style of Michael Howard, then Home Secretary – which contributed to the problematic start of the Prison Service as an agency. Recent studies[536] have also argued that some 'post-implementation'[537] factors such as the displacement of pertinent goals belied the difficult working relationship between the minister and the chief Executive. Talbot[538] argued that the key objectives of many Next Steps agencies, including the Prison Service, as set out in their framework documents bore a weak relationship with the key performance indicators (KPIs) which agency chief Executives were being asked to manage. KPIs also formed the basis upon which the performance of the chief Executive was judged for remuneration purposes. In the case of the Prison Service, Derek Lewis was judged to have met all but one of the KPIs in his first performance-related pay review, yet he was ultimately discharged from his post following prisoner escapes from two high security prisons. This situation arguably underlines the significance of the 'pre-implementation' flaws flagged up in the qualitative interview data.

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536. See e.g.. Talbot, C (1996) *Ministers and Agencies: Control, Performance and Accountability*, Lon: Public Finance Foundation.

537. Caiden, G.E (1976) Implementation - The Achilles Heel of Administrative Reform in Leemans, A.F (ed.)(1976) *The Management of Change in Government*, Martinus Nijhoff, pp.145-64.

538. Talbot, C (1996) *Ministers and Agencies: Control, Performance and Accountability*, Lon: Public Finance Foundation, piv.

The other theme which has emerged from the interview analysis is that the vigour with which some views have been put across also suggests that there is a lack of a developed sense, amongst not only the architects of managerialism but also some of the senior civil servants, of what is entailed by their constitutional role as 'servants of the Crown'. The lack of a systematic reflection on the part of civil servants of their constitutional role in a high-profile agency such as the Prison Service arguably reduces the potency of one of the potential bulwarks of a constitutional bureaucracy against an indisputably reformist-minded government.

It must also be questioned whether there is the *opportunity* within the current set-up of the British constitution for such reflection or indeed, for true recognition of the constitutional identity of civil servants. So far as the Armstrong Memorandum and more recently, the Civil Service Code are concerned, civil servants do not have an independent existence but are essentially shadows, or alter-egos, of their ministers. The empirical context in which these documents, earlier discussed in Chapter 2, are now put provides yet further argument for the *clarification* of the constitutional position of civil servants beyond the fragile framework of the Civil Service Code through a firmer legislative measure. However, legislation *per se* is not necessarily the panacea insofar as it may leave unaddressed the underlying problems that have been highlighted by the case study. We revisit the underlying constitutional issues in the following concluding chapter.

Chapter 9

Reconstitutionalising Managerialism in the British Civil Service

Introduction

The foregoing chapters sought to advance the thesis that managerialism in the British civil service since 1979, and in particular the Next Steps initiative, have failed to adhere to any meaningful constitutional norm governing the position of civil servants as 'servants of the Crown'.[539] The concept of 'servant of the Crown' has arguably never been well-defined and the issues such as those outlined in the context of the Prison Service have highlighted the problems of lack of clarity over its definition. That in and of itself does not warrant a public lawyer's attention. Rather what does is that the concept of 'servant of the Crown', in its current chimerical and indefinite form, has apparently legitimated much of the regulation of the civil service by the Executive. This would appear counter-intuitive if we recall what Thomas Paine[540] wrote:

> 'A constitution is not the act of government, but of a people constituting government, and a government without a constitution is power without right....A constitution is a thing antecedent to a government; and a government is only the creature of a constitution'.

It is argued that the focus of this thesis on managerialism in the civil service is unique insofar as its focus is on:

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539. See especially chapter 2.

540. Paine, T (1926) *Rights of Man*, Lon: Watts, cited in McIlwain, C.H (1958) *Constitutionalism: Ancient and Modern*, New York: Great Seal, p.2.

- the way the doctrine of separation between policy and implementation has been animated in the civil service, and
- the problems of implementing this doctrine of separation between policy and implementation in sensitive areas such as the HM Prison Service.

Empirical data from the author's own qualitative interviews with key actors in the Prison Service echelons suggest that apart from the interventionist style of their most senior Minister, there were also other 'pre-implementation' factors which had sowed the seeds of discomfort for the Prison Service in its first three years as an agency. These pre-implementation factors were described in the preceding chapter as 'incorrect diagnosis', 'bad beginnings', 'hidden intentions', 'imitation not innovation' syndrome and 'faulty planning'. Examples of these 'pre-implementation' issues were drawn from the illustrations drawn from the qualitative interview data of this case study.

It was also argued in chapter 8 that these 'pre-implementation' flaws are symptoms of a much more deep-seated problem within the British constitution. This thesis contends that the underlying constitutional issue raised here relates to the peculiar way in which the Executive has been able to invoke Crown prerogative in the regulation, management and reorganisation of the civil service without much effective *a priori* accountability to Parliament or other branches of the constitution. It is this central underlying theme which will now be revisited in the concluding chapter of this thesis.

On the one hand, it might be argued that the process of reforming the civil service in pursuit of managerial objectives might be seen as a political programme best left to the prerogative of the Executive. On the other hand, this important task of regulating the civil service can also be differentiated from other mundane internal administrative matters insofar as it is entangled with broader issues such as ministerial accountability and the status of civil servants within the British constitution as 'servants of the Crown'. Both academic and empirical discourses so far have arguably tended to focus more on the former, and less on the latter.

There are currently several obstacles in the development of a meaningful, principled and coherent idea of 'servant of the Crown' as a constitutional norm namely:

- confusion over its meaning (chapter 2),
- the doctrinal underpinnings of sustained managerialism (chapter 3),
- policy intentions of reformers (chapter 4) and
- the implementation of managerialism in sensitive areas of government activity (chapters 6-7).

Collectively, these *enforcement* problems bring into question the *status* of the norm, raising in particular, the question of whether the norm should be enacted in a legislative form. One of the key obstacles to an impartial enforcement of the norm is that it depends on political enforcement: in other words, the civil service is regulated by the very institution which it is supposed to serve - the Executive - rather than by an independent third institution such as Parliament. Lord Hailsham's cautionary note[541] of the Executive usurping the powers of a Parliament by virtue of its Parliamentary majority adds urgency to the task of ensuring a system which checks against abuse of the civil service by their ministers. At the time of writing, reform of the voting system remains on the political agenda although the political weight attached to it seems unclear.

The primary critique of the incrementalist changes to the notion of civil servants as 'servants of the Crown' centres around two key themes. Firstly, neo-managerial changes to the civil service have gone some way towards displacing the traditional Weberian[542] administrative structure through both the cost-cutting as well as the creative strands of managerialism. Secondly, the underlying constitutional model of regulating the civil service that is currently reflected in existing documents such as the Civil Service Code as well as the Ministerial Code has become somewhat outmoded insofar as it still adheres to a Weberian ideal of the civil service that is unified and impartial. The resulting dislocation between empirical management practice and the underpinning constitutional convention provides for a potential abuse of

541. Lord Hailsham (1976) *Elective Dictatorship*, Lon: Collins.

542. On the influence of Weber on British public administration, see e.g. Dowding, K (1995) *The Civil Service*, Lon: Routledge; Beetham, D (1996) *Bureaucracy*, Buckingham: Open University Press.

Executive power vis-à-vis their civil servants which can be difficult to check or hold to account.

This chapter will consider three issues in particular:

- the scope of the current constitutional framework in which the British civil service operates,
- any barriers to, and the prospects for, legislating a constitutional norm relating to a constitutional position of the civil service which mirrors the complexity of their modern management tasks, and
- some suggested models and possible directions for reform.

Executive self-regulation: the current constitutional framework

Even in this modern day, an enormously important institution such as the British civil service, which ensures the continuity of government business from day to day and from one government to the next, does not have a statutory existence. This means that the civil service as the administrative branch is legally indivisible from the Executive branch of government it is intended to serve. There is an obvious exception to this rule, as in the case of civil servants who act as accounting officers for the department or agency under relevant statutes. Notwithstanding this, a significant part of the relationship between the Executive and the civil service is conducted on an extra-legal basis, that is to say, principally:

- outside the domain of statutes,
- by means of Crown prerogative,
- using the instrument of Orders in Council,
- without the prior authority of Parliament.

In short, the entire existence and much of the management of the British civil service, in common with some parts of central government today, still rest largely upon an apparently

obscure and ancient instrument of the Crown prerogative. The Crown has prerogative powers to do many things including the power to regulate but only insofar there is no prior legislation. The Executive's regulation of the civil service is an obvious example in this area. Where Crown purports to regulate on the basis of its prerogative, it can do so through what is known as an 'Order in Council'. The key concern from the point of view public accountability is that prerogative Orders in Council have the same status as primary legislation even though they are not subject to the same degree of Parliamentary scrutiny.[543]

So what does 'prerogative' mean? Bradley and Ewing[544] define prerogative as 'those legal attributes of the Crown which the common law recognises as differing significantly from those of private persons'. Dicey[545] explains it thus:

> 'The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. ... Every act, which the Executive government can lawfully do without the authority of the Act of Parliament, is done in virtue of this prerogative'.

Dicey's definition brings home the potential breadth and omnipresence of royal prerogatives. Prior to 1689, the King commanded and exercised wide-ranging powers as both feudal lord and head of kingdom. Some of these powers were exceptional powers above those of other lords such as the residuary power of executing justice through his Council where common law courts had no jurisdiction. Discontent arising from the exercise of the latter during the rule of the Stuart kings paved the way for the Bill of Rights, which to this day, probably remains Britain's closest equivalent of a written constitution. Since the 1689 settlement, the Crown's prerogative power could only be discharged by the Crown on the advice of its ministers to Parliament.

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[543]. For a detailed explanation, see Turpin, C (1995) *British Government and the Constitution*, Lon: Butterworths, p.328 et seq.

[544]. Bradley, A.W & Ewing, K.D (1997) *Constitutional and Administrative Law*, Longman, p.273.

[545]. Dicey, A.V (1959) *An Introduction to the Study of the Law of the Constitution*, Lon: Macmillan, pp.424-5.

Just as the use (or potential abuse) of prerogative power by the King inspired the revolution in the seventeenth century, the ability of ministers to rely on prerogative power in modern times has given rise to a new hybrid of concerns about effective accountability of its exercise. There are two principal reasons for this: firstly, the exercise of some prerogative powers of a non-regulatory nature requires no prior Parliamentary approval although ministers have some form of *ex post facto* accountability to Parliament for its exercise through written Parliamentary questions and oral question time. Secondly, and perhaps more importantly, courts have determined that the exercise of prerogative power in some areas such as the making of treaties, the disposition of armed forces, the granting of honours and the dissolution of Parliament are not susceptible to judicial review.[546] Earlier authorities[547] before the *CCSU* case suggest that courts are willing to apply principles of administrative law to the cases which involve the use of prerogative power. In the *CCSU* case, the House of Lords set out the conditions under which courts were likely to review the exercise of prerogative power. More recently, in *R v Home Secretary, ex p Fire Brigades Union,*[548] the House of Lords held that the minister could not lawfully use his prerogative power to establish a compensation scheme offering substantially less compensation to victims of criminal injury than was available under a statutory scheme which was yet to come into force. However, the extent and preparedness of the judiciary to review the exercise of prerogative power is by no means a clear-cut nor settled area of law insofar as the boundaries of judicial oversight in this area are constantly shifting.

The concerns over effective accountability of the Executive in exercising the Crown's prerogative powers are magnified by the sheer scope of the Crown prerogative extant today. It is evidently wide in scope and manifests itself in different forms, for example:[549]

- the pardoning of convicted offenders or remitting of criminal sentences,
- the making of treaties, declarations of war or the making of peace,

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546. *CCSU v Minister of State for the Civil Service* [1985] AC 374.

547. *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864; *Laker Airways Ltd v Department of Trade and Industry* [1977] QB 643.

548. [1995] 2 AC 513.

549. For a more detailed exposition of the extent of royal prerogative, see e.g. Bradley, A.W & Ewing, K.D (1997) *Constitutional and Administrative Law*, Longman, pp.274-80.

- the control and organisation of the armed forces in Britain,
- the establishment and composition of Royal Commissions,
- the conferral of honours including the creation of life and hereditary peers and
- the regulation and management of the civil service.

It is this last area with which this thesis is most concerned. One of the common threads, which perhaps underlie the manifestations of prerogative power listed above, is that they relate to the internal functioning of effective and efficient government. However, this is by no means a generally accepted idea, and indeed, as is evident from earlier chapters, what constitutes action necessary for the rather arbitrary notion of 'internal functioning of effective government' can be a grey area, open to potentially generous interpretations by the government. Alan Page[550] perceptively highlights the choice by the Conservative administration of prerogative Order in Council, as opposed to statute, as the vehicle for introducing the Citizen's Charter as an example of an area which is difficult to classify as 'matters of its own house-keeping'.

Similarly, the recent history of managerial reforms within the British civil service is punctuated by initiatives that have more often been grounded in prerogative Orders in Council rather than statute. It might seem odd to some observers that the British civil service, commonly hailed as a Rolls-Royce institution envied by the rest of the world, should still be largely managed and regulated as if it was purely a domestic Executive concern or a matter for Executive 'house-keeping'. However, some leading commentators take the view that government by prerogative amounts to a form of legal phenomenon: Page[551] cites 'the law governing relations between the Crown and its servants' as an example of the internal law of the Executive. Similarly, William Robson[552] describes 'the law of the civil service' as a subset of 'customary administrative law'

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550. Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, p.78.

551. Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, p.67.

552. Robson, W (1950) Administrative Law in England 1919-1948 in Campion et at (ed)(1950) *British Government since 1918*, p.97 cited in Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, p.67.

by which he means 'a pattern of conduct regulating the relations between the Crown and its servants, involving obligations which are clearly formulated and regularly followed by all concerned. Such a pattern of conduct can give rise to rights and duties which are effectively recognised and observed by the administrative authorities concerned *even though they are not enforceable in the courts of law*' (emphasis added).

There are two principal problems with the "prerogative as law" argument propounded by Page and Robson. Firstly, as this chapter indicated earlier, courts have been willing to review the exercise of prerogative powers but the uncertainties over the judicial enforceability of prerogative-based powers may mean that Executive self-regulation is strictly more akin to 'soft law' in comparison with traditional legislative forms of regulation. Questions over its legal enforceability, as was argued earlier, underlie some doubts as to whether ministers in the modern day are effectively accountable in purporting to exercise the Crown's prerogative powers. Secondly, not all forms of what might be termed 'Executive self-regulation' fall neatly into Robson's definition of 'a pattern of conduct' giving rise to rights and duties accepted by all concerned. The government's own financial accounting rules and rules of employment might be so classified but what about framework documents, performance indicators and other managerial efficiency criteria? This very question has been raised by Alan Page who acknowledges that 'certain possible forms of Executive self-regulation such as financial accounting rules or employment rules may appear much closer to the idea of legal ordering than do others such as managerial efficiency criteria'.[553] Uncertainty over the status of the latter is borne out by the case study of the Prison Service in this thesis where it would appear that the framework document, for instance, has offered many duties but few rights to senior civil servants.

The general tendency of the Executive to rely on prerogative powers in regulating the civil service in spite of uncertainties over issues outlined above is arguably underpinned by several themes. The first can be classified as a concern with the preservation of *Executive autonomy.*

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[553]. Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, p.67.

Page[554] describes this as the Executive's 'maintenance of a self-contained normative order insulated from extraneous control'. The source of government's authority to regulate its own affairs is an area that seems to have attracted little discussion in classical public law textbooks, and its existence is apparently accepted as an 'unspoken assumption'.[555] Holdsworth[556] explains that the autonomy of units of central government dating from the 17th century meant that the rules relating to the conduct of government business were 'not treated as part of formal law' and as a consequence, not written about. The second is an essential *anti-legalistic* attitude on the part of the Executive, which sees traditional hard law, that is to say legislation, as 'ill-suited to the task of regulating relations between the Crown and its servants'.[557] The third is the assertion of *central control* over sub-departments or units of central governments through the Treasury and the Office of Public Service and Science (now the Office of Public Service).

The first two themes – of Executive autonomy and anti-legalism - manifest themselves in different ways and in differing degrees now as earlier chapters of this thesis argued. It may however be instructive to reiterate some of the more significant examples here. Firstly, changes to the structure of relationship between ministers and Crown servants through the medium of Next Steps agencies were brought about without legislation but were grounded in the prerogative powers of the Prime Minister qua Minister for the Civil Service. Secondly, the primary instruments for regulating the civil service such as the Civil Service Management Code (CSMC)[558] and the Civil Service Code (the Code) have been produced under the aegis of

554. Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, p.68.

555. *R v Home Secretary, ex p Nothumbria Police Authority* [1988] 2 WLR 590, per LJ Nourse.

556. Holdsworth, W, *A History of English Law*, Vol X, p515 cited in Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, p.61.

557. Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, p.68.

558. See chapter 2 for a detailed discussion of the CSMC and the Code.

prerogative Order In Council[559] prevalent at the time rather than put on statutory footing. The New Labour government elected in May 1997 seems to display a similar proclivity towards non-statutory, prerogative-based guidance and codes in regulating the relationship between ministers and their civil servants and specials advisers as will be evident later in this chapter.

The themes of anti-legalism and central control have, at the same time, been slowly diluted at least in theory. Traditionally, central control over the civil service was vested, by prerogative Order in Council, in the Treasury and the Office of Public Service and Science (now the Office of Public Service). Central control was notionally diluted or reallocated in 1992 when the Treasury later delegated some of their responsibilities for pay, grading and other employment conditions to individual departmental ministers responsible for the departments and related agencies. This was partly facilitated by the Civil Service (Management Functions) Act 1992. Some of the Treasury's responsibilities for the civil service were also transferred to the Prime Minister qua Minister for the Civil Service in 1995. The transfer of functions was achieved by secondary legislation.[560]

The reasons for the use of legislation in these areas are probably to do with history rather than necessarily due to the subject matters in question. This though is an arguably haphazard way in which to approach the reorganisation of Executive business and would appear to strengthen the argument for streamlining approaches to the reorganisation of the Executive by legislative means (on this, see next section). Although the organisation and reorganisation of the machinery of government has historically been a matter for the Executive alone by virtue of Crown prerogative, there is legally nothing barring the Executive from enacting laws as an enabling framework. Indeed, such legislation would not detract from or restrict the Executive's autonomous powers.[561] Hence the Ministers of the Crown Act 1975, which

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559. The Crown exercises its prerogative powers through Orders in Council: in the case of the civil service, the relevant order is the Civil Service Order In Council, of which the latest version at the time of writing is the Civil Service (Amendment) Order 1999.

560. SI 1995 No.269.

561. Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, p.73.

consolidates the Ministers of the Crown (Transfer of Functions) Act 1946, was enacted to enable, among other things:

- a transfer of functions between Ministers of departments by statutory instrument subject to negative resolution procedure in Parliament, and
- the dissolution of ministerial positions and government departments by a similar procedure

The legislative framework provided by the Ministers of the Crown Act 1975 does not appear to cover the transfer of functions *within* departments, say from ministers to Crown servants. This position has now been revised by subsequent statutes namely the Civil Service (Management Functions) Act 1992 and the Deregulation and Contracting out Act 1994 (both of which are discussed later in this section). As we have seen in the case study on the Prison Service, certain conflicts *within* departments, for example between parent departments and their agencies, may be neither effectively recognised nor regulated by the Civil Service Code and the Ministerial Code. It may well be that it would not be in the interests of effective government for the torch of the law to shine on the crevices of government, or for courts to second-guess the complex decisions of ministers. On the other hand, the interests of effective government must be balanced with the need for checks and balances, in other words, with the principal requirements of the rule of law. The British constitution provides some guidance on the constitutional relationship between civil servants in parent departments and ministers. The *Carltona*[562] case established the principle that where the functions entrusted to departmental ministers are exercised by civil servants in those departments, there is in law no delegation because the two are constitutionally indistinguishable. In other words, the official's act or decision is considered to be that of the minister's.

The *Carltona* doctrine has now been extended by legislation. Doubts about the legality of transferring functions to individuals who are either not ministers or Crown servants led to the Civil Service (Management Functions) Act 1992 and Deregulation and Contracting Out Act 1994. The primary rationale for the use of legislation in these cases is that under the Ministers of the Crown Act 1975, the Executive could only transfer functions between ministers of the

562. *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.

Crown, and not to those who did not hold ministerial positions such as civil servants and private contractors.

Under the 1992 Act, ministers can transfer their powers over pay and terms of conditions to 'Crown servants'. This term is not defined anywhere in the statute but is clearly intended to include agency chief Executives. Crucially however – 'the Act is silent on the method of delegation and does not provide for Parliamentary scrutiny of delegation instruments'.[563] The Act also envisages that delegates may be required to exercise their delegated powers personally (see sections 1(3) and 1(4)). These apparently benign provisions may, some would argue, bring into question the anonymity of civil servants. Furthermore – it is questionable whether these provisions do full justice to the original *Carltona* judgment which recognised that constitutionally,

(1) ministers and civil servants are indivisible (save in the case of accounting officers); and
(2) ministers are responsible to Parliament: 'the whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them'.[564]

The other piece of legislation – the Deregulation and Contracting Out Act 1994 – provides for the transfer of functions from ministers to private contractors. The Act provides some form of a constitutional safeguard against over-zealous parcelling out of Executive powers. Section 77(2) states that before a function can be contracted out, it must have been specified as eligible for contracting out by a ministerial order. These orders are subject to an affirmative resolution procedure in Parliament which means that they must first be approved by a resolution of both Houses of Parliament. On the other hand, the Act also incorporates what is commonly known as a 'Henry VIII clause'[565] which allows ministers, by means of secondary legislation, to repeal

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563. Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, pp.76-7.

564. *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, per Lord Greene.

565. For a more detailed exposition, see e.g. Bradley, A & Ewing, K (1997) *Constitutional and Administrative Law*, Lon: Longman, p.721.

or amend parts of the Act itself that may be considered to impose unnecessary burdens on business.

Against the background set out above, it is apparent that the regulation of the civil service continues to be predominantly grounded in the Crown prerogative insofar as it can be achieved without statutes. This apparent trend generates a number of potentially disturbing observations that might be worth reiterating here even though they have been raised earlier. Firstly - prerogative Order in Council has the same force of law as primary legislation passed by Parliament even though it is not subject to the same degree of Parliamentary debate and scrutiny as an ordinary statute.

Secondly – it will be recalled that Next Steps agencies have been established using the Crown's prerogative power rather than legislation. However, the transfer of functions from ministers to Crown servants and private contractors was effected through statutes due to historical reasons. The apparent ease with which the Executive has been able to reorganise the relationship between its ministers and the civil service through the creation of non-statutory agencies has also been marked by an alarming *absence* of a discernibly coherent policy.[566]

Thirdly – there seems to be a lack of a principled approach as to whether the Executive conducts important business, such as the regulation of the civil service, on the basis of legislation or Crown prerogative. As Rosamund Thomas, a consultant on the public sector, told the House of Lords Select Committee on the Public Service recently,

> 'the extent of change carried out in respect of the Civil Service and the machinery of government was proceeding without adequate public awareness, union consultation or Parliamentary findings. In the past, such changes would have been the subject of a Royal Commission or an independent enquiry or legislation'.[567]

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566. See Public Service Committee (1997-98) HL 55-I, para X.

567. See Public Service Committee (1997-98) HL 55-I, para 142.

In short, the concerns outlined above go to the heart of whether the British constitution is maintaining an effective system of checks and balances over the power of the Executive in transferring the functions of the Crown from ministers to civil servants and other players such as private contractors. It is through this constitutional lens that we see that the extensive programme of managerial change in the civil service has exposed the limitations of the traditional system of checks and balances. The essence of the problem is poignantly captured in the observations of the House of Lords Public Service Committee:[568]

> '*Justifications* for changes in the civil service were often couched in the language of efficiency, effectiveness, service and value for money. The *concerns* expressed about them tended to focus on responsibility and accountability. We therefore recommend that any significant change in the way in which public services are delivered should be subject to open debate, and that Government should seek Parliament's **views** on prospective changes, even those changes which can be implemented using the Royal Prerogative and without legislation'.

This quotation provides a convenient foundation for a discussion of the possible ways to improve the accountability of the Executive in the exercise of Crown prerogative in regulating the civil service. At the heart of this discussion will be two key questions. Firstly, to what extent should Parliament be involved in overseeing the Executive in this area: should the Executive be obliged to seek Parliament's *views*, as the House of Lords Public Service Committee suggested, or should they be required to go further by seeking Parliament's *approval*? Secondly, to what extent should civil servants have a broader public interest duty to the constitution beyond the loyalty to serve the government of the day as is currently the case? These issues will now be considered in the following section.

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568. See Public Service Committee (1997-98) HL 55-I, para 156. Italicised emphases are original emphases. Emboldened emphasis is my own.

Parliamentary oversight: the barriers to reform

It has been reported that while ministers and senior officials admit there has been a radical change in the civil service, 'what they also say is that the constitution has not changed and does not need to change'.[569] There is much support for this observation in the public statements by ministers and their senior officials in government publications or in their evidence to select committees. These statements appear to focus on several key arguments for maintaining the *status quo*. These arguments can also be considered as constituting the barriers to or stumbling blocks against any radical reform. So what are they?

The first is what we may call the 'necessity' argument. Sir Richard Wilson[570] – formerly permanent secretary at the Home Office when Michael Howard was Home Secretary, now head of the home civil service under the Blair government – suggests that the issue of delegation of authority within the department is an internal matter, 'not a constitutional matter'. Elsewhere, Sir Richard maintains that the Next Steps reform 'is a management reform, not a constitutional innovation'.[571] As such – the argument runs – it is necessary for the Executive to have the ability to deal with internal management matters under their prerogative powers.

The second can be labelled the 'flexibility' argument. Sir Robin Butler[572] told the Lords Public Service Committee that 'you do not want to pass an Act of Parliament every time there is some new development (such as the Nolan recommendations)'. The Major government also made

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569. Per evidence by Dr Martin Smith to the Public Service Committee (1997-98) HL 55-I, para 146.

570. Public Service Committee (1997-98) HL 55-I, para 354.

571. *The Civil Service in the New Millennium*, public speech by Sir Richard Wilson available on the Cabinet Office website at www.cabinet-office.gov.uk.

572. Public Service Committee (1997-98) HL 55-I, para 409.

clear in their White Paper on "Taking Forward Continuity and Change"[573] that they were inclined to oppose legislating the Civil Service Code on several grounds such as protecting the 'effective and efficient management of the civil service'.

The third can be described as the inconvenience posed by the 'costs' of accountability. Robin Butler[574] alluded to this when talking about the growth of quangos and privatisation in a public lecture:

> 'Sometimes a motive for taking a function out of Government may precisely be to free it from layers of accountability, oversight and appeal'.

Similarly, it could also be conjectured that the apparent preference of prerogative over statute in reforming the civil service conveniently keeps at bay the complications that have surfaced in cases where statutes co-exist with prerogative in respect of the same subject matter.

In *AG v De Keyser,*[575] the House of Lords held that the Crown could not rely on prerogative powers to seize a private property when there was a statute which authorised it to act and which prescribed conditions under which this could be done. In other words, where statute and prerogative cover the same subject matter, the Crown cannot lawfully rely on the latter to the detriment of an individual's liberty or property.

In a similar vein, the Court of Appeal decided in *ex p Northumbria Police Authority*[576] that the Home Secretary had sufficient authority under the Police Act to issue a circular authorising the issue of plastic baton rounds and CS gas even if the police authority withheld their consent. The Court seemed inclined to ground the minister's action in statute rather than the Crown prerogative (of maintaining the peace) which co-existed with statute (the Police Act).

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[573]. *The Civil Service: Taking Forward Continuity and Change* (1994-95) Cm 2748, para 2.17.

[574]. Cited in Public Service Committee, HL 55-I (1997-98), para 303.

[575]. *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

[576]. *R v Home Secretary, ex p Nothumbria Police Authority* [1989] QB 26.

The judgment in *Laker Airways v DTI*[577] appears to support this observation. There, the Court of Appeal took the view that the minister was wrong to invoke prerogative powers in purporting to withdraw Laker Airways' licence when he could have used the Civil Aviation Act 1971.

It would thus appear from these cases that statutes have the capacity to 'crowd out' the scope for the exercise of prerogative power. Put another way, the Executive may be more likely to enjoy more autonomy if their prerogative powers did not have to 'share' the same territory or coverage as statutes. It is difficult to gauge, without access to confidential briefings, whether and to what extent, this argument featured in the decision to create Next Steps agencies without the need for legislation.

Whatever the underlying motive may have been, the use of prerogative rather than statute in establishing agencies vis-à-vis their parent departments has several implications for the agency, some of which, as was argued earlier in the case study on the Prison Service, can be problematic. The main implications can be summarised as follows:

- Agencies are legally part of their parent departments.
- Agencies possess fewer guarantees of autonomy than statutorily backed departments or non-departmental public bodies.
- Despite being part of their parent departments, there is every scope for conflict between agencies and their parent departments that may not be effectively regulated by the constitution and may, as was apparent in the case of Derek Lewis, work to the detriment of Crown servants.

Underlying the *status quo* outlined above is a deep-seated concern of the Executive to hold an exclusive stake in the management and regulation of the civil service, possibly denying any legitimate interest of even Parliament in the issue. The Major government's position on this claim is clearly set out in their last White Paper on the Civil Service before they were left office in May 1997:

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[577]. *Laker Airways Ltd v DTI* [1977] QB 643.

'The management of the Civil Service is one of the aspects of the Prerogative which is exercised by Ministers on behalf of the Crown. It follows that *it is for Ministers alone to issue instructions concerning the management of the Civil Service, and they do not require Parliamentary authority to do so*'.[578]

Parliamentary oversight: the case for legislation

The essence of the arguments for changing the *status quo* revolves around at least two fundamental questions. Firstly – to what extent does the Executive have a legitimate monopoly over the tasks of managing and regulating the civil service? Does the British constitution allow other organs of the state such as Parliament or the courts a legitimate role in these tasks? Secondly – do civil servants have a broader public interest duty to the constitution over and above their duties to the government of the day? The precise focus of civil service loyalty is arguably not sufficiently clear under the current arrangements. Let us deal with these questions in turn.

(i) Does the British constitution confer upon the Executive a monopoly over the management and regulation of the civil service?

The British constitution has historically been founded on the twin principles of Parliamentary sovereignty and the rule of law. The United Kingdom's membership of the European Union aside, several leading commentators take the view that Parliament's absolute sovereignty implies that the Executive cannot legitimately claim a monopoly over the management of its

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578. *The Civil Service: Taking Forward Continuity and Change* (1994-95) Cm 2748, para 2.15. Emphases added.

internal affairs. In theory, as Alan Page[579] points out, 'it would follow from Parliament's unlimited legislative competence that it could intervene in the Executive's conduct of affairs if it was so minded'. Similarly – Daintith[580] suggests that 'Parliamentary supremacy clearly has at the centre the idea that there is no area of Executive competence and power into which Parliament cannot enter'. At the same time, it is also recognised that there are practical restraints on the ability of Parliament to exercise their 'constitutional' powers. One is what some might call the 'tradition and strength of the Cabinet in office'.[581]

Put another way, the Executive is able to maintain a tremendous amount of autonomy from Parliament through their possession of a Parliamentary majority. The curious irony, however, is that while Parliament has in theory virtually unlimited legal or constitutional ability to regulate the business of the Executive, 'the whole untrammelled legal power of Parliament is available for use by an Executive which can control Parliament by means of its majority in the House of Commons'.[582] However, practical politics should not be allowed to obscure the constitutional convention that Parliament has, *de jure*, the legal competence to regulate the Executive. As the civil service is at present legally indivisible from the Executive, there is no constitutional reason why it could not come within the ambit of Parliamentary regulation.

So it seems that the Executive cannot claim an exclusive power over questions relating to its internal organisation. Parliament has a potential role in it as well on the basis of its legislative supremacy. The other foundation of the British constitution – the rule of law – also implies that courts may have a legitimate part in overseeing the Executive's exercise of its prerogative powers in organising its own affairs including in the conduct of its relationship with the civil

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579. Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, p.63.

580. Daintith, T (1994) The Techniques of Government in Jowell, J & Oliver, D (eds)(1994) *The Changing Constitution*, Oxford Clarendon Press, p.210.

581. Cited in Page, A (1996) Executive Self-regulation in the United Kingdom in Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers, p.63.

582. Turpin, C (1995) *British Government and the Constitution*, Lon: Butterworths, p.24.

service. The extent to which courts have been willing to review the exercise of prerogative powers has already been discussed earlier in this chapter.

(ii) Do civil servants have a broader public interest duty to the constitution over and above their duties to the government of the day?

The precise constitutional identity of civil servants has in recent times been subject to intensive debate, both in government circles and in academic publications.[583] The traditional position was more of an unspoken assumption until it was expressly set out in 1985 by Sir Robert Armstrong (now Lord Armstrong) qua head of the home civil service in Thatcher's administration. The Ponting case, which exposed an apparent lack of clarity over the lines of accountability of civil servants in relation to the ministers for whom they work, provided a catalyst for this development.[584] In the wake of the Ponting affair, Lord Armstrong drafted a 'Note on the Duties and Responsibilities of Civil Servants in relation to their Ministers' – now more commonly known as the 'Armstrong Memorandum'[585] – after consulting all permanent secretaries. The memorandum appeared to suggest that civil servants owed an unqualified duty of loyalty to the government of the day: 'The civil service has no constitutional personality or responsibility separate from the duly constituted government of the day'. The Note was issued under the Crown's prerogative powers and has never been put on statutory footing.

[583]. For an extensive discussion of this issue, refer to chapter 2 of this thesis.

[584]. It will be recalled that Clive Ponting, a senior civil servant in the Ministry of Defence, leaked a confidential document to an MP relating to the conduct of the Defence Secretary, suggesting that the Minister was attempting to mislead the House of Commons intentionally. Ponting was prosecuted under the Official Secrets Act 1911 but was acquitted by the jury.

[585]. A copy of the Note can be found in HC Deb, vol.74, cols.128-30 (WA), 26 February 1985 and revised in HC Deb, vol.123, cols,572-75 (WA), 2 December 1987.

Armstrong's formulation has been criticised for effectively locking the civil service into an unconditional duty of obedience to ministers at the potential expense of their wider duties.[586] In 1995, the Treasury and Civil Service Committee (as was) recommended a Civil Service Code to clarify that civil servants do have wider duties to the law beyond their obligations to serve the government of the day. Its recommendations were largely accepted by the Major administration and as a result, the Civil Service Code was introduced under prerogative Order in Council on 1 January 1996. The revised version of the Civil Service Code, dated April 1996, states in paragraph 2 that:

> 'civil servants are servants of the Crown. Constitutionally the Crown acts on the advice of Ministers and subject to the provisions of this Code, civil servants owe their loyalty to the duly constituted Government'.[587]

This formulation has also been incorporated into another non-statutory document, the Civil Service Management Code (the CSMC),[588] which was introduced under the authority of Prerogative Order in Council in 1995.

The precise relationship between the Armstrong memorandum and the Civil Service Code – both non-statutory documents – is not necessarily clear-cut. It seemed at first that the Code was intended to replace[589] the Armstrong memorandum but the latter is still very much alive as it has been revised[590] as recently as February 1997. The revised Memorandum takes account of the new provisions in the Civil Service Code and the Ministerial Code (previously known as 'Questions of Procedure for Ministers'). Para 3 of the revised Memorandum states that

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586. Refer to chapter 2 of this thesis.

587. The Code was revised again on 13 May 1999 'to take account of devolution to Scotland and Wales'. The new para 2 states: 'civil servants are servants of the Crown. Constitutionally all Administrations form part of the Crown, and subject to the provisions of this Code, civil servants owe their loyalty to the Administrations in which they serve'.

588. See section 4.1 of the CSMC. A copy of the CSMC is available on the Cabinet Office website at www.cabinet-office.gov.uk.

589. See HC Deb, col 10 (WA), 30 October 1995. Also see Bradley, A & Ewing, K (1997) *Constitutional and Administrative Law*, Longman, p.310.

590. A copy of the revised Armstrong Memorandum is available on the Cabinet Office website at www.cabinet-office.gov.uk.

'subject to the Civil Service Code', the civil service is there to assist the government of the day in a number of ways such as:

- providing advice on the formulation of policies
- assisting in carrying out the decisions of government
- managing and delivering services for which the government is responsible
- being involved, 'as a proper part of their duties', in the presentation of government policies and decisions.

Many of the points above have already been raised in chapter 2 of this thesis. But here, we consider the broader questions relating to whether the small but significant progress from the original Armstrong formula to the current formula in the Civil Service Code reflects the full complexity of the management responsibilities of civil servants independent of their ministers. Do civil servants have a duty to protect the unwritten constitution under the Civil Service Code, the CSMC, Armstrong memo and Ministerial Code?[591]

The House of Lords Public Service Committee[592] considers the formulation in the revised Civil Service Code as 'much more satisfactory' than the original Armstrong draft. While they acknowledge that the civil service has no specific legal status, they also emphasise that the civil service 'play a significant part in (British) constitutional arrangements'.[593] Those giving evidence to the Committee explained this special role in different ways, all with which the Committee agreed. David Faulkner,[594] for example, considers the special function of the civil service as 'identifying and explaining the public interest'. The Committee also reports Vernon Bogdanor as suggesting that the civil service have a 'duty to the constitution and a unique role in maintaining the unwritten constitution'.[595]

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591. This question has also been raised and discussed in chapter 2.

592. Public Service Committee (1997-98) HL55-I, para 406.

593. Public Service Committee (1997-98) HL55-I, para 406.

594. Public Service Committee (1997-98) HL55-I, para 407.

595. Public Service Committee (1997-98) HL55-I, para 361.

To what extent does the Civil Service Code accommodate this 'special role' outlined above? Does the Code go far enough? Peter Hennessy argues that in terms of its *content*, the Code is 'as good as you could have made it'.[596] However, in terms of its *form*, there is compelling argument that the Code should be put on statutory footing. The primary problem seems to be that despite its unique constitutional role in 'identifying and explaining the public interest', the civil service does not legally exist. In other words, the British civil service is legally invisible within the British constitution insofar as it is subsumed under the broad umbrella of the Executive. Without a separate constitutional identity, the civil service is arguably much more vulnerable in several ways.

It is arguably still unclear to whom civil servants ultimately owe their loyalty if they are privy to the knowledge that their ministers are contriving to mislead Parliament as was apparently the case in Ponting. Also, notwithstanding the Ministerial Code, the Executive commands much autonomy and discretion in the conduct of their relationship with civil servants. The contrived distinction between policy and operations, which can work to the detriment of civil servants as was arguably demonstrated by the case of Derek Lewis, is a potent reminder of the Executive's autonomy. The risk here is that the civil service can become 'a private service for Ministers'.[597] The House of Lords Public Service Committee summarises these problems succinctly:

> 'within the current constitutional framework, the position of Ministers, Parliament and courts is acknowledged, assured and understood; but the same cannot be said of the Civil Service. If ministers were to decide that civil servants had no role in identifying and explaining the public interest, that would be that. Neither the civil service, Parliament nor courts would be in a position to do anything about it'.[598]

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596. Public Service Committee (1997-98) HL55-I, para 411.

597. Public Service Committee (1997-98) HL55-I, para 407.

598. Public Service Committee (1997-98) HL55-I, para 407.

Parliamentary oversight: suggested models for change

How can the current model of Executive regulation of the civil service be strengthened to reflect the 'public interest' function of the civil service? What scope is there for Parliament to be involved? An obvious way of involving Parliament in the regulation of the civil service would be for Parliament to exercise the legislative competence it clearly possesses as was argued earlier. However – the legislative agenda of Parliament is controlled by the Executive and successive administrations have so far not taken the bold step towards legislation in this area beyond a vague expression of their interest, intention or commitment. The Major administration retained 'an open mind' on legislation in their White Paper.[599] The Labour Party, while in Opposition, expressed a commitment to legislation of the Civil Service Code 'to underline the political neutrality of the Civil Service'.[600] More recently, the New Labour government has signalled an intention – in their evidence to the House of Lords Public Service Committee – to put the Civil Service Code on a statutory basis.[601]

In government, New Labour has not hitherto expanded on the nature of their political commitment to legislative reform for regulating the civil service. In 'Modernising Government',[602] their most recent White Paper on the public services, the government speaks of their broad commitment to 'modernise the civil service' but does not mention whether 'modernisation' would come about by statute. Government observers have however been keen to fill an apparent vacuum on the specifics of statutory reform. Chapter 2 of this thesis has outlined the main suggestions published while the Conservative government was in office. Since New Labour came into office in May 1997, there have been renewed recommendations.

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599. *Taking Forward Continuity and Change* (1994-95) Cm 2748, para 2.16.

600. Labour Party (1997) *Report of the Joint Consultative Committee on Constitutional Reform*, paras 83-84 cited in Lewis, N (1998) A Civil Service Act for the United Kingdom, *Public Law* at p.465.

601. Public Service Committee (1997-98) HL55-I, para 412.

602. Cabinet Office (1999) *Modernising Government*, Cm 4310.

For example, the House of Lords Public Service Committee[603] recommends that Parliament should exercise its legislative authority to put in place a Civil Service Act which will, among other things:

- 'define the Civil Service' (para 415)
- 'give statutory backing to the Civil Service Code of the kind promulgated in 1996' (para 416)
- clarify the constitutional relationship between ministers and civil servants: do civil servants owe a wider duty to the constitution? Should the civil service be constitutionally separated from the Executive? In particular, is the position of chief Executives any different from that of permanent secretaries (excepting their respective roles as accounting officers)? (para 416)
- 'specify a mechanism by which civil servants could in the public interest[604] report breaches of the provisions of the Act, which they otherwise might be prevented from doing by their obligations of obedience and confidentiality' (para 418). The phrase 'public interest' potentially goes much further than the present Code, para 11 of which allows civil servants to suspend obligations of obedience and confidentiality on certain specified grounds[605] so that they report them.
- 'replace the Civil Service Management Functions Act 1992' with 'uniform and clear guidance on the recruitment and management of civil servants as Crown servants' (para 417).
- 'replace the Deregulation and Contracting Out Act 1994' to ensure that changes to the ambit of the civil service 'could only be effected by primary legislation' (para 417). This

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603. Public Service Committee (1997-98) HL55-I. Relevant paragraphs are indicated in the main text.

604. While acknowledging the potential contribution of the concept of 'public interest' as one of the guiding principles in a debate on constitutional reform, this thesis does not attempt to define 'public interest'.

605. Para 11 of the Civil Service Code says that civil servants can report breaches of the Code if they are required to act in a way which:

'is illegal, improper or unethical;
is in breach of constitutional convention or a professional code;
may involve possible maladministration; or
is otherwise inconsistent with this Code.'

proposal goes much further than the 1994 Act by which functions of the civil service can be contracted out by means of ministerial orders. These orders are a form of secondary legislation and are subject to an affirmative resolution procedure.

- incorporate the Ministerial Code so that ministers' obligations and expectations in relation to the civil service ethos would be clarified within a coherent statutory framework (paras 298, 415).
- specify a requirement for the government to report annually to Parliament on recent and proposed changes, and a select committee be established to consider proposals for structural changes (para 226).

The Committee's main recommendations set out above underline its commitment to promote the 'public interest' theme at the heart of the relationship between the Executive and the civil service. Under the present system, the civil service does not have a statutory existence and is regulated by the Executive as if it were a subset of the Executive by virtue of the Crown prerogative and occasionally by means of legislation. With the exception of the personal responsibility of civil servants qua Accounting Officers, 'civil servants do not serve Parliament; they assist Ministers to do so'.[606] The capacity of the civil service in 'identifying and explaining the public interest' within the current framework therefore depends on the parameters set by the Executive.

The problem arises when friction arises between civil servants and ministers as to what constitutes 'public interest', as we have seen in say the rather different cases of Ponting (see chapter 2) and Derek Lewis (see chapters 5-8). Is it desirable that the Executive is itself able to arbitrate on these differing interpretations of 'public interest' which do not necessarily involve breaches of the law, as is currently the case? Would it not be better to reassert one of the foundational principles of the British constitution by carving out a role for Parliament as the independent third party arbiter on the basis of its legislative sovereignty?

The House of Commons Treasury and Civil Service Committee clearly had this in mind when they argued that 'the preservation of the principles and values of the civil service is too

[606]. Clucas, K (1982) Parliament and the Civil Service in RIPA (1982) *Parliament and the Executive*, p.28.

important to be left to ministers and civil servants alone'.[607] The TCSC's successor, the House of Commons Public Service Committee, reiterated the importance of restoring the role of Parliament: 'Parliament needs to retain and protect its role and to do so, it has to be more effective in fulfilling it'.[608]

Reports of the experiences of other countries with some form of Parliamentary regulation of the civil service appear to suggest that legislation does help.[609] As mentioned in chapter 1, this thesis does not engage in an in-depth enquiry of comparative experiences of the civil service systems in other countries due to personnel and time constraints. Indeed the feasibility of cross-fertilisation between the experiences of different countries is a legitimate subject which merits a thesis in itself. It is however instructive to note that Parliaments in other European Union countries such as Germany, France, the Netherlands, Denmark, Italy, Sweden and the Republic of Ireland have asserted their legislative authority over the Executive in the form of some legislation relating to aspects of the management and regulation of the civil service, or more loosely, the public service.

It is open to question how far lessons from the experiences of these countries are transferable to the British context insofar as Britain does not have the same constitutional model as its Continental partners. Unlike these countries, Britain does not have a strongly developed concept of the State nor does it have quite the same understanding of separation of powers, whereby the Executive and the civil service are distinct organs of the State.[610] It remains to be seen whether aspects of the regulation of the civil service, excepting laws relating to equal

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607. TCSC (1993-94) HC 27-I, para 102.

608. Public Service Committee (1995-96) HC 313-I, para 174.

609. See e.g. Daintith, T (ed)(1996) *Constitutional Implications of Executive Self-regulation: Comparative Experience*, IALS Research Working Papers; Bekke, H.A.G.M et al (eds.)(1996) *Civil Service Systems in Comparative Perspective*, Indiana University Press; Lewis, N (1998) A Civil Service Act for the United Kingdom, *Public Law* pp.463-88. For a broadbrush account of global trends in public service reform by 'non-lawyers', see e.g. Barker, L.K et al (1998) *Transforming Government Services: A Global Perspective*, Pricewaterhouse- Coopers.

610. These points have been raised in chapter 2 of this thesis. Also see generally Harlow, C & Rawlings, R (1997) *Law and Administration*, Lon: Butterworths, chapter 1.

treatment and the four freedoms, will at some point in the future be the focus of harmonisation initiatives across the European Union as well.

The experience of some Commonwealth countries[611] with a public service statute or legislation in progress is also potentially instructive, perhaps more so due to their Westminster model of government. Canada[612] has in place what Lewis calls a rather 'outdated' legislation, with its Privy Council Office (equivalent to the Cabinet Office in Britain) having an obligation to publish an annual report. New Zealand[613] has the State Sector Act 1988 which replaces their State Services Act 1962. At the time of writing, Australia[614] has in progress a Public Service Bill. Elsewhere, in South Africa[615] there is a newly written constitution that provides a codified framework for public administration with a specific section on 'the basic principles and values governing public administration' (section 195). There is much in New Zealand's State Sector Act that meets the recommendations of the House of Lord Public Service Committee outlined earlier in this chapter. It is interesting to note for example that the Act puts the office of agency chief Executives and their contractual terms and conditions on legislative footing.

The legislative experience of Westminster-type governments in this area is instructive in terms of not only the *content* of their legislation, but also the *manner* in which their legislation has been brought about. Britain would do well to avoid the experience of New Zealand if it were to ensure 'adequate consultation' and 'cross-party support' for legislative reform advocated by the House of Lord Public Service Committee. The Executive in New Zealand has been criticised for the way in which they rushed the introduction of State Sector Act by dispensing with 'the normal procedures of a Green or White Paper to introduce the issues or to canvass

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611. For a concise overview of the political system in Canada, Australia and New Zealand generally, see Campbell, C & Wilson, G.K (1995) *The End of Whitehall: Death of A Paradigm*, Oxford: Blackwell, especially chapter 5.

612. Lewis, N (1998) A Civil Service Act for the United Kingdom, *Public Law* at p.476.

613. See e.g. Boston, J et al (eds)(1991) *Reshaping the State: New Zealand's Bureaucratic Revolution*, Auckland: Oxford University Press, see especially chap 2; Lewis, N (1998) A Civil Service Act for the United Kingdom, *Public Law* at p.475-82.

614. For a summary, see e.g. Lewis, N (1998) A Civil Service Act for the United Kingdom, *Public Law* at p.475 & p483.

615. Lewis, N (1998) A Civil Service Act for the United Kingdom, *Public Law* at p.476.

discussion'.[616] Pat Walsh argues that 'this no doubt reflected the government's perception of the Act as a management exercise rather than a constitutional measure'. In many ways, this observation sums up the views of many critics of civil service reforms in Britain.

Conclusion: towards a meaningful role for law

It has been argued in chapter 8 of this thesis that the complex chain of events that underpinned the problematic start of the Prison Service agency are intertwined with a more fundamental flaw in the British constitution itself. In the absence of statutory backing, the civil service does not legally exist but is instead subsumed under the administrative arm of the Executive. Largely as a result of historical legacy, the Executive has in turn been able to regulate, manage and reorganise the civil service on the basis of an ancient tool of Crown prerogative.

While this prerogative may have been exercised well in many cases in the past, it has also been used to the apparent detriment or discomfort of certain areas of the civil service. The case study of the Prison Service agency in its initial few years illustrates the circumstances under which the Crown's prerogative over the management of the civil service had arguably not been exercised well. The underlying problem, it is argued, is not one that calls for either minor tinkering with the administrative structure of specific areas of the civil service or even just putting the *status quo* on a statutory basis. Putting the civil service as it currently operates on a legislative footing would not address the underlying problem but would merely perpetuate or even accentuate it.

What is called for is an acknowledgement of the need for what Neville Johnson calls 'political reconstruction'.[617] Johnson argues that one of the preconditions of this reconstruction is a recognition that the legal and political concept of the Crown needs to be reformed:

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[616]. Walsh, P (1991) The State Sector Act 1988 in Boston, J et al (eds)(1991) *Reshaping the State: New Zealand's Bureaucratic Revolution*, Auckland: Oxford University Press, chap 2.

[617]. Johnson, N (1978) *In Search of the Constitution*, Oxford: Pergamon Press, chapter 12.

'what is necessary in Britain is to get rid of the aura of majesty which still surrounds the Crown as the ground of Executive authority, whilst retaining something like the Crown concept in its purely political and legal sense as a construct defining the corporate entity in which powers of certain kinds are vested, and that corporate entity being in turn visible'.[618]

Implicit in Johnson's suggestion is the idea that civil service be legally divisible from the Executive branch of government, and the Executive in turn being seen as having a separate identity from the Crown:

'The government or ministers might have to be treated as exercising the central or Executive powers in the State rather than acting as agents of the Crown, whilst other institutions would similarly exercise such powers as are vested in them'.[619]

In the absence of a written constitution in Britain, the Crown can do anything that is not expressly prohibited by statutes or common law. However, the notion of "legality" measured by the standards of hard law (that is to say, statutes and common law) provides limited room for a meaningful critique of managerial reforms of the civil service initiated by the Executive. A recurrent theme in contemporary critical public law scholarship is, as Johnson argues, that 'the significance of law is seriously underestimated and misunderstood in Britain'.[620] Law has been seen as 'little more than a bundle of powers, incoherent and expedient, the multifarious expressions of the transient will of legislators'.[621] As a result, there has been a 'decay of an understanding of constitutional norms as the very preconditions of political freedom'.[622] Johnson perceptively argues that 'the prospect of beginning to reverse this particular state of affairs depends extensively on whether the need for a far-reaching new constitutional

618. Johnson, N (1978) *In Search of the Constitution*, Oxford: Pergamon Press, p211.

619. Johnson, N (1978) *In Search of the Constitution*, Oxford: Pergamon Press, p211.

620. Johnson, N (1978) *In Search of the Constitution*, Oxford: Pergamon Press, p219.

621. Johnson, N (1978) *In Search of the Constitution*, Oxford: Pergamon Press, p219.

622. Johnson, N (1978) *In Search of the Constitution*, Oxford: Pergamon Press, p219.

settlement is recognised'.[623] The passages extracted from Johnson's book capture the essence of a relatively old challenge that still confronts the British constitution into the new millennium. The restoration of constitutional norms in Britain can only come about when the true potential of the rule of law for the complex tasks of government, including the management of the civil service, is recognised.

This thesis has argued that the underlying problem which permeates the managerial reforms of the civil service is fundamentally a *constitutional* one insofar as the Executive is able, through its reliance on Crown prerogative, to manage, regulate and re-organise the civil service which is in theory supposed to be impartial of its political masters. This central issue has been considered by Parliamentary select committees in both Houses of Parliament recently but their reports have failed to galvanise any discernible political momentum for reform. It may be that there are vested political interests behind the inertia for the *status quo*. The thesis also recognises that the potential for statutory reform may well be limited because the fundamental issue is ultimately a high-level question: where should power for the management and regulation of the British civil service reside? This thesis does not advocate that hard law is necessarily the solution to that question because form is not so important as the protection of substantive constitutional norms. If the underlying constitutional norms are subject to constantly shifting interpretations, as this thesis argues they are, then the task of protecting them becomes even more urgent.

623. Johnson, N (1978) *In Search of the Constitution*, Oxford: Pergamon Press, p221.

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