Tim Congdon

‘Gordon Brown needs to be warned that everyone, even Prime Ministers, must obey the law’

Britain has long been admired for its commitment to the rule of law. It does not have a written constitution, and until a decade ago (when Europe’s Human Rights Act was written into our own law) its citizens were not protected by an extensive and formal statement of their rights. Nevertheless, for centuries the British have been proud that their government cannot behave oppressively because, like everyone else, its ministers and civil servants are under the law. The law was supreme in the UK, not because it relied on a set of formal constitutional documents, but because judges were impartial and the judiciary could not be intimidated by the executive.

Surprisingly, little comment has so far been made about one aspect of Gordon Brown’s premiership: the large number and the seriousness of the government’s challenges to the rule of law that have occurred since he moved into Downing Street in June 2007. In particular, the financial crisis has given him and various state agencies the pretext to disregard basic principles. Whether the government has in fact broken the substance of the law will be determined by actions in the courts and judicial decisions over the next year or two. But, as the following three examples will show, a case can be made that Mr Brown has already overruled what might be termed “the spirit of the British constitution”.

First, an obvious inconsistency is to be found in the official treatment of monopoly questions in August and early September 2007, when the Northern Rock crisis broke, and more recently, in Lloyds TSB’s bid for HBOS.

According to Alex Brummer in his excellent book, The Crunch, Lloyds TSB was interested in buying Northern Rock in early September last year, but wanted a back-up loan facility at commercial rates from the Bank of England. The Bank refused to provide such a facility. Both its Governor, Mervyn King, and the Chancellor, Alistair Darling, worried about a possible breach of European competition law.

But in the past few weeks, the government has been actively promoting Lloyds TSB’s takeover of HBOS, even though the result will be to create a dominant supplier of important financial services — including mortgage-lending — in the UK. In some areas of retail banking, the Lloyds TSB-HBOS combination will have a market share of 30 per cent, with a high risk of semi-monopolistic, anti-competitive outcomes. Mr Brown has intervened personally in the matter, letting it be known that the takeover has official blessing.

Second, on 29 September 2008, the government used the Banking (Special Provisions) Act, which had been passed earlier in the year in order to take Northern Rock into public ownership, to nationalise Bradford & Bingley without its shareholders’ consent. When this was done, 97 per cent of Bradford & Bingley’s loan book was current (ie, not in arrears) and profitable, while its balance sheet had just benefited from £400m of rights-issue proceeds and its book capital amounted to about £1,500m. On all standard accounting criteria Bradford & Bingley was solvent and profitable, even if it faced difficulties funding its assets.

Nevertheless, immediately after the nationalisation, the government sold Bradford & Bingley’s branch network to a Spanish bank, Santander, for just over £600m, and shunted its loan portfolio and deposit liabilities into a separate vehicle which may (or may not) have positive value after some years of winding-down. To whom will the £600m and the value in the wind-down vehicle belong? In terms of natural justice, surely the answer is that they belong to the shareholders. But, under the terms of the 2008 Banking (Special Provisions) Act, shareholders could be compensated under a formula which leaves them with next to nothing.

Third, in early October, the British government used anti-terrorism laws passed in 2001 to seize the assets of Kaupthing Singer & Friedlander, which immediately precipitated the collapse of its parent, the Kaupthing Bank. No one is claiming that Iceland’s banks have been models of prudence in the last few years, but considerable shock has been expressed that laws supposedly directed against terrorists were in fact used against a friendly state. At one point Mr Brown said, “We are freezing the assets of Icelandic companies in the UK where we can.” He was incorrect, since such companies — which were quite separate entities — had had no legal obligation to cover the liabilities of Icelandic banks.

Mr Brown needs to be warned that everyone, even prime ministers, must obey the law. Governments must respect human rights, including rights to property. No doubt a high proportion of the British public despises bankers and Iceland, and couldn’t care a tuppence for the property rights of bank shareholders and Icelanders. But judicial decisions are determined by the law, not opinion polls. If Mr Brown and his associates remain unchecked, the rule of law is more greatly at risk in Britain today than at any time since the 17th century.