Constitutional Futures

The Unit’s most ambitious project to date bore fruit on the 4th February with publication of *Constitutional Futures: A History of the Next Ten Years*. The book has already been reprinted within a month of publication, following a series of 8 articles in the *Financial Times*, and favourable mentions in *The Times* and *The Guardian*. The book has also been the subject of a one day conference sponsored by *The Times* and Clifford Chance (see report page 4), and of a debate on the subject *Devolution: Make Up or Break Up of the Union* sponsored by Dillons and OUP on March 9th.

Already a number of predictions in the book are coming into effect:

• the tensions created by devolution for the national political parties, played out in the leadership contest in Wales between Alun Michael and Rhodri Morgan.

• the boost given by devolution to nationalist and regional parties. The SNP in Scotland and Plaid Cymru in Wales are both scoring poll ratings twice as high as their share of the vote in the 1997 general election. Devolution is also likely to lead to differential patterns of voting between regional and national elections.

• the need for the second stage of Lords reform to address the role and functions of the second chamber, before deciding on its composition; and to think about the Lords against the background of the other constitutional changes now set in train. This is directly reflected in the terms of reference of the Royal Commission (see p4).

• the need for Westminster to address the consequences of devolution, and the future of the Scottish, Welsh and Northern Irish Committees. This is now being investigated by the House of Commons Procedure Committee.

• the need for Westminster to address the English Question, and to operate as a proxy English Parliament. The book suggested reviving the 1970s Standing Committee on Regional Affairs. This has now been proposed by Margaret Beckett to the Modernisation Committee.

*Constitutional Futures* is available at the special price of £13 (plus £2 p&p) to readers of the *Monitor*.  

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Constitutional Update

Legislation

In the second year the pace of constitutional legislation has hardly slackened, with six constitutional bills coming before Parliament

- The Greater London Authority Bill and the House of Lords Bill have both gone through the Commons and are now before the Lords.

In addition three draft bills have been promised before the summer:
- Draft Bill on Cabinet System/Elected Mayors for Local Government
- Draft Bill on Freedom of Information
- Draft Bill on Controls on Party Funding.

Devolution

- In Scotland the four main parties and the Greens agreed voluntarily to implement Lord Neill’s recommendations and limit their campaign spending for the Scottish Parliament elections to £1.5m. They will submit their accounts to independent inspection.
- The Consultative Steering Group (CSG) on the Scottish Parliament published its report in January 1999. The CSG included a range of politicians from all parties, academics, and representatives of civil society. Its remit was to: consider the operational needs of the Scottish Parliament, develop proposals for procedures, and prepare a report for use in drafting the parliament’s standing orders. The report (176 pages) is available from the Stationery Office for £9.50 and can also be found at http://www.scottish-devolution.org.
- The campaign for the post of prospective Labour Leader in the Welsh Assembly was narrowly won by Welsh Secretary Alun Michael MP. He was generally perceived as the Blairite candidate, and opposed by backbencher Rhodri Morgan MP. Rhodri Morgan won 64% of party members’ votes, but only 47% of the total vote, because Alun Michael won 64% of trade union votes and 58% of Welsh Labour MPs’ and Assembly candidates’ votes. Alun Michael announced that he would quit the Cabinet in May and stand down from Parliament at the next election in order to concentrate on Wales.
- Northern Ireland The Assembly has accepted plans for 10 departments and a number of North-South bodies, but the impasse over decommissioning remains. The Unionists refuse to admit Sinn Fein into the executive without the IRA commencing decommissioning.

Regional Development Agencies

The eight RDAs across England go live from April. Each has a chairman and a board of up to thirteen members. Sir Jeremy Beecham, Labour chairman of the Local Government Association, has written to Richard Caborn, Minister of the Regions, to complain of ‘problems of political balance’ in the board appointments. Of the 103 members appointed by the government, 35 are Labour councillors, union officials, and people who work for Labour-supporting organisations. Two others are Labour peers. This 37 contrasts with the seven Conservatives and eight Liberal Democrats appointed. The government said that all appointments had been made in accordance with guidelines from the Commissioner for Public Appointments (The Independent 20 February 1999).

House of Commons

The Procedure Committee is conducting an inquiry into the Procedural Consequences of Devolution. Its first report (HC 148) published on 18 January contains the government’s memorandum of evidence: a two page document which takes a minimalist approach. The Committee is mainly hearing evidence from fellow MPs: but on 10 February it heard from the Study of Parliament Group (HC 185-ii), and on 2 March from the Leader of the Commons Margaret Beckett. Mrs. Beckett was pressed on whether Scottish MPs should continue to be able to vote on English matters while English MPs would have no say on matters devolved to Edinburgh, and replied that it was a choice of two evils, but she was opposed to creating different categories of Westminster MPs.
Freedom of Information

- The Home Office has established an Advisory Group on Implementation of Freedom of Information, chaired by Minister of State Lord Williams of Mostyn. The terms of reference are:
  ◊ to advise the Home Secretary on proposals for promoting cultural change in the public sector to foster a culture of openness
  ◊ to assist in the development of training and education programmes for public servants to promote the introduction of the Act and cultural change.

- The Whitehall members of the Group are Carolyn Sinclair, Lee Hughes and Rowena Collins-Rice from the Home Office, Andrew Adonis (No. 10 Policy Unit), Caroline Lee (Cabinet Office) and Andrew McDonald (Public Record Office). The outside members are Robert Hazell, Elizabeth France (Data Protection Registrar), Christine Gifford (formerly Metropolitan Police Civil Staff), Dilys Jones (NHS Executive), John Mills (Cornwall County Council) and Aviva Gershuny-Roth.

- The Group held its first meeting on 17 February, and is to meet at monthly intervals from April to November. The Home Office has changed its name to the Advisory Group on Openness in the Public Sector. The minutes of its meetings are to be published.

- The draft Freedom of Information Bill is now unlikely to be published until May. The Public Administration Committee is starting to consider how it should conduct its pre-legislative scrutiny of the draft bill.

Human Rights

- On 19 January 1999 Professor Brice Dickson, University of Ulster (UU) was appointed as Chief Commissioner of the Human Rights Commission for Northern Ireland, established pursuant to the Belfast Agreement. The nine other Human Rights Commissioners were appointed on 1 March 1999. They are Christine Bell, Queen’s University Belfast (QU), Professor Tom Hadden QU, Angela Hegarty, UU, Francis McGuinness, Trócaire, Inez McCormack, UNISON, Patricia Kelly, Children’s Law Centre, Margaret Ann Dinsmore, barrister, Rev Harold Good, Methodist Church and Tom Donnelly, former SDLP councillor.


- On 28 January and 9 March the Human Rights Task Force held its first two meetings. The members of the Task Force, chaired by Lord Williams of Mostyn, includes NGO representatives from Article 19, Human Rights Incorporation Project, IPPR, Justice, Liberty, 1990 Trust. The terms of reference of the Task Force are to help departments and other public authorities prepare for implementation of the Human Rights Act 1998, and by increasing general awareness of the rights and responsibilities flowing from the incorporation of the ECHR, to help build a human rights culture in the UK. It is to meet at monthly intervals through 1999.

- On 17 February, Lord Lester QC led a debate in the House of Lords calling attention to the arrangements for maintaining the separation of powers with respect to the office of the Law Lords, and in particular the Lord Chancellor. Lord Lester argued that it would not be compatible with the guarantee of the appearance of judicial independence for the Lord Chancellor to continue to sit judicially. He also suggested that if the Law Lords do remain as members of a reformed House of Lords they should not play an active role as legislators while holding judicial office [HL debate col. 710 ff.].

- On 1 March it was reported that the Lord Chancellor had stepped down from a case concerning police liability pending before the House of Lords in which he was due to sit. His decision was taken following the objections of Nicholas Blake QC who submitted that a government minister could not perform the role of an independent judge in such a case.

- On 18 February, in Matthews v UK the European Court of Human Rights [ECtHR] found the UK in violation of the Convention by failing to provide residents of Gibraltar with voting rights in the European Parliament elections. In the House of Lords on 25 February Baroness Symons stated that in order to comply with the judgement it would be necessary to amend the 1976 EC Act on direct elections and that the Government would be seeking an amendment in the course of negotiations in Brussels on European Parliament elections [Column 1240]. In Cable and others v UK and Hood v UK the ECtHR also held that the UK Court Martial system violated the requirements of judicial independence and
impartiality. These cases are part of a large number of cases raising the same complaint. Cases are available on www.dhcour.coe.fr.

The White Paper & the Royal Commission on Lords Reform

In December the Government introduced its bill to remove the hereditary peers from the House of Lords. It was accompanied by a White Paper on the further stages of Lords reform (Cm 4183), and the announcement of a Royal Commission to advise on the role, functions and composition of a fully reformed Second Chamber. The Royal Commission is to be chaired by Lord Wakeham, a former Conservative Leader of the House of Commons and of the House of Lords.

The other members are Lord Hurd of Westwell, Lord Butler of Brockwell, Bill Morris, Baroness Dean of Thornton-le-Fylde, the Rt. Rev. Richard Harries, Sir Michael Wheeler-Booth, Sir Kenneth Munro, Professor Anthony King, Ann Beynon, Professor Dawn Oliver and Gerald Kaufman MP. The secretary is David Hill, former Head of the Political and Constitutional Division of the Northern Ireland Office.

The Commission is required to have regard to four factors:

- the need to maintain the pre-eminence of the House of Commons
- the new devolved institutions
- the impact of the Human Rights Act
- developing relations with the EU.

It is pretty clear from the White Paper that the Commission is expected to recommend a chamber of mixed composition: part nominated, to preserve the cross benchers and party appointees; and part elected. The elected element may also serve the function of linking the second chamber with the devolved institutions. The main issue the Commission will have to address is whether that function is best achieved through representatives who are directly elected or indirectly elected; or appointed by the devolved governments or assemblies.

The Commission has to report by 31 December 1999. It will not have much time to consult with the devolved governments or assemblies themselves, which will not be elected until the summer. To consider this issue properly the Commission may need to seek an extension of its timetable. Thereafter the proposals are to be considered by a Joint Committee of both Houses, as promised in the Manifesto. It is highly unlikely that the second stage reforms will be implemented this side of the next election. More likely is that the political parties will go into the election armed with their proposals for further reform.

Human Rights in Parliament

On 24 November 1998, Home Secretary Jack Straw brought into force s. 19 of the Human Rights Act 1998. This requires all Ministers in charge of Bills in either House to make a ‘statement of compatibility’, indicating that in their view the Bill is compatible with rights under the European Convention on Human Rights (ECHR). If unable to do so Ministers must make a statement that they wish the House to proceed with the Bill notwithstanding any incompatibility. At the moment the practice is that a note on the face of each Government Bill appears stating that “in my view the provisions of the Bill are compatible with the Convention rights”. There is no indication of the grounds on which that view is reached.

To date 23 government Bills have been presented to parliament, bearing such statements of compatibility. No Bill has been introduced with a statement that it be proceeded with notwithstanding an incompatibility. However, several of the Bills raise potential human rights issues, for example the Youth Justice and Criminal Evidence Bill introduced into the House of Lords on 3 December 1998. Lord Cope noted that “There is a cursory statement from the Minister at the front of the Bill, pointing out that the whole Bill complies with the convention [ECHR]. But that does not conclude the argument and I forecast that during later stages there will be a certain amount of discussion on it” (Hansard, 15.12.98 column 1301).

The second step to institutionalising the human rights culture in parliament is the Joint Committee on Human Rights which is due to establish before the end of this session. One of the Committee’s tasks will be to scrutinise legislation for human rights compatibility. This is particularly important as secondary legislation is not required to bear a statement of compatibility.

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Conference & Seminar reports

**Lord Irvine’s Constitution Unit Lecture**

‘No other government this century has embarked upon so significant or wide-ranging a programme of constitutional reform as the Labour Government’ - the Lord Chancellor’s opening words at the Annual Lecture. The Lord Chancellor set out to answer two criticisms of the government’s programme: first that it does not go far enough, and second, that it goes too far. Critics in the first category argue that the programme is a disjointed series of measures and not planned as a coherent whole. Critics of the second kind fear that the reforms will lead to the dissolution of the United Kingdom as currently known. In response to these ‘indictments’ (as the Lord Chancellor characterised them), he identified the government’s approach as ‘pragmatism based on principle’, in keeping with the ‘empirical genius of our nation: to go, pragmatically, step by step, for change through continuing consent’. The lecture was sponsored year by the firm, **Lovell White Durrant**. **Text** available from the Constitution Unit for £5.

**Constitutional Futures: Where is the Government’s Constitutional Reform Programme taking us?**

120 people came to this highly successful conference to launch the Unit’s new book **Constitutional Futures: A History of the Next Ten Years**. Speakers were asked to present their responses to the themes in the book, focusing on four areas: devolution, Parliament, the courts, and Europe.

Debate on the devolution topic criticised the book for being overly optimistic about the continuance of the Union of England, Scotland, Wales and Northern Ireland. Peter Jones (*The Economist*) noted the fluid nature of the Union and, with the erosion of British identity, a need for deeper thought now about the rationale for the Union. Devolution, he maintained, was simply the start of a process of reformulating the United Kingdom.

Peter Riddell (*The Times*), speaking on Parliament focused on Westminster’s lack of assertiveness in dealing with constitutional reform, developing themes from his own recent book, *Parliament Under Pressure* (1998). He and Professor Philip Norton both noted the Prime Minster’s silence on constitutional reform, but agreed that as the various measures took hold he would be forced to acknowledge publicly the far reaching nature of the reform agenda. Tony Wright MP, reminded the conference of the government’s undeniably significant progress on constitutional reform.

In the afternoon speakers addressed the position of the courts in the reform programme, and the impact of European developments. Professor Dawn Oliver noted that a side effect of the transfer of power from Westminster to the nations (through devolution), and to citizens (through the Human Rights Act 1998) was the need for the courts to act as referees when disputes arise in those two areas.

The conference ended with a panel discussion, with two major themes emerging: first, the increasingly formal, written nature of the UK constitution, and the key role the judiciary will play in supervising the new arrangements; and second, the evolving nature of the UK constitution, and the need to address the political consequences of constitutional reform on the Union as a whole, as well as its constituent parts.
The Conference was sponsored by the law firm Clifford Chance, and The Times.

Constitution Unit Reports

A Vocational Upper House? Lessons from Ireland

The government has stated its commitment to retaining an independent element within the reformed House of Lords. The means of achieving this will be a difficult issue for the Royal Commission on Lords reform to resolve. One method which has occasionally been suggested is the formal representation of different professions or other interest groups such as trade unions or charities in the upper house.

The Irish second chamber, the Seanad (Senate), provides the only remaining example of such a system of parliamentary representation in the world. In the second of its series of briefings looking at second chambers overseas, the Unit looks at what lessons we can learn from the Irish Senate for the UK.

The Irish Seanad, established in 1937, comprises 60 members, 43 of whom are elected to represent vocational groups. These candidates are organised in five panels, representing, for example, agriculture, culture and education, industry and commerce. Of the remaining places, six are elected by university graduates and 11 are appointed by the Taoiseach (Prime Minister). But, since its early days, the Seanad has been dominated by the parties and independents are never elected to the ‘vocational’ seats.

The main reason is that the electorate for the panel seats are councillors and members of parliament, who are closely aligned to parties. Hence independent vocational bodies’ involvement is limited to nomination of candidates, and they mostly nominate those who are party aligned and likely to get elected. Despite numerous reviews of the Seanad, there has never been an attempt to increase the role of outside bodies, partly for fear of ‘ politicising’ them further.

As commentators in Ireland have noted, it would be controversial to establish a system today which balances one vocational group against another, and decides which independent groups should be involved in selection of candidates. However, the experience of the university senators in Ireland - who tend to be the only independent members of the chamber - shows that independent members can make a real contribution and be widely respected. It is perhaps because there are only six university seats that their election has never been monopolised by the parties.

Contact: Meg Russell

The Impact of the Human Rights Act: Lessons from Canada and New Zealand

As the implementation of the Human Rights Act 1998 gets under way, lessons can be learned from the experience of New Zealand and Canada, which have both had their own human rights legislation for a number of years. Changes attributable to the Act are already beginning to be felt. For example, every Minister sponsoring a Bill is required to make a statement on the front of the Bill that in their view the provisions of the Bill are compatible with the Convention rights. This is the first visible sign of what promises to be a much more fundamental shift in the conduct of business in Whitehall.

The experience from New Zealand and Canada is that a human rights based constitution alters the policy and law making processes, promoting the rule of law and requiring from the outset strict justification for policy choices which threaten to limit individual liberties. There will be a need for new procedures or bureaucratic structures designed explicitly to ensure that Convention implications are taken into account at the earliest stages of the policy process. With this comes an enhancement of the role of government lawyers and of the Attorney General, and a need to build intellectual sympathy among lawyers and policy-makers.

The impact on courts, in particular the House of Lords, to whom the lower courts and the government will be looking for guidance, will of course be profound. The impact in workload will be felt most directly in the field of criminal law, but all courts will find that they ask different questions when engaging in legislative interpretation and reviewing the conduct of public officials. This reflects the wider rebalancing in the relationship between the courts, the legislature and the executive. While the long term effects of the Human Rights Act will inevitably be determined by its own distinctive features, the preparation process can undoubtedly be sharpened by learning from the experience of our Commonwealth partners.

Contact: Aisling Reidy

The UK’s Highest Courts and Constitutional Reform

Three themes in the constitutional reform agenda will highlight the role of the higher courts generally, and the courts (the Judicial Committee of the Privy
Council and the Appellate committee of the House of Lords) at the apex of the legal system in particular.

First, devolution. Power is being devolved from Westminster to assemblies in Wales and Northern Ireland, a Parliament in Scotland, and possibly in the future, regional assemblies in England. The powers of the devolved assemblies and executives are described in their constitutions: the Scotland Act, Government of Wales Act and the Northern Ireland Act, 1998. These constitutions are to be interpreted by the Judicial Committee of the Privy Council which is charged with determining devolution issues.

The second theme is incorporation of the European Convention on Human Rights (‘ECHR’) in UK law. Under the Human Rights Act 1998 the courts may strike down any act of the executive, or subordinate legislation, which is incompatible with the ECHR. They may also issue a declaration of incompatibility in relation to primary legislation passed by Westminster; and strike down any legislation passed by the devolved assemblies for incompatibility with the ECHR. In addition in Northern Ireland there will be a new Bill of Rights drafted specifically for Northern Ireland.

Finally there is reform of the House of Lords. In the second stage of Lords reform questions will be raised as to whether the Appellate Committee of the House of Lords ought to remain a part of the second chamber, or whether there should be an independent supreme court on the Canadian, Australian or United States model.

This research project will examine these issues, assess the suitability of the current structures of the Judicial and Appellate Committees, and consider calls for a new stand alone supreme court in the UK along the lines of the US, Canadian or Australian models. The first briefing will be published in March 1999, with a further briefing and large report to follow.

Contact: Richard Cornes

Breaking the Westminster Mould? The New Assemblies in Scotland, Wales and Northern Ireland

By the close of 1999 there will be three new representative bodies in the UK: the Scottish Parliament, the National Assembly for Wales, and the Northern Ireland Assembly. The reasons for the creation of each vary widely, as do the paths to their first sittings. All three legislatures embody, in different measures, a desire to break from the ‘Westminster mould’, to create more open and inclusive democratic institutions. This research project will assess the extent to which the UK’s new assemblies establish themselves as distinct from the model set by their creator, Westminster.

The desire to break from the Westminster mould has been followed by a desire to establish parliamentary procedures which produce assemblies with a real role in the formation and development of policy, which are not mere ciphers of the new executives, and play a leading role in the governance of Scotland, Wales and Northern Ireland. In Scotland for example the Parliament is to be ‘accessible, open and responsive’, and ‘to adopt modern methods of working’ including encouraging the ‘participation by organisations and individuals in decision making…’.

The project will include interviews of participants in the new institutions, seminars in each capital, and a conference of the devolved assemblies in 2000. An initial briefing setting out the audit method to be employed in assessing the structure and operation of the new assemblies will be published in March.

Contact: Richard Cornes

Planning for referendums on electoral change and reform of the Lords

This briefing examines the logistical issues involved in the next stages of reform of the voting system and the Lords. The analysis shows that the government has been boxed into a tight corner by the EMU referendum, which will make it difficult to hold the PR referendum in the next parliament. Another constraint is the need to legislate for the Neill Committee’s recommendations, which included recommendations on the conduct of referendums. If the government accepts the need to put in place more effective supervisory machinery, it is unlikely that a referendum held during this parliament could take place before autumn/winter 2000.

Contact: Ben Seyd

New electoral systems: What voters need to know

This briefing explores how far voters understand the new electoral systems for Scotland, Wales, London and the European Parliament. Voters will need more than a mechanical knowledge of voting under the new systems; in particular, they will need information on the operation of the new systems and the way they work (e.g. how are votes translated into seats). There will also need to be ‘contextual’ information on issues such as the role and powers of the devolved institutions, the size of the new constituencies, and the difference between constituency members and additional members drawn from regional lists.

Contact: Ben Seyd
New publications by the Unit


A Vocational Upper House? Lessons from Ireland, by Meg Russell (March 1999), £5 briefing

Planning for Referendums on electoral change and Lords reform by Ben Seyd (March 1999) £5 briefing

New Electoral Systems: What Voters Need to Know Published with SCPR. (March 1999) £10 report, £5 briefing


Publications received


‘Remaking the Union: Devolution and British Politics in the 1990s’ Regional and Federal Studies, Vol. 8, Spring 1998, No. 1

Scotland and Nationalism: Scottish Society and Politics 1707 to the Present by Christopher Harvie

Multi-Level Democracy (Scottish Affairs Select Committee Report, November 1998)

The British Union State: Imperial Hangover or Flexible Citizen’s Home? by Simon Partridge (Catalyst Pamphlet 4) ISBN 0 9533224 3 2 £5.


The House of Lords Bill: ‘Stage One’ Issues, (HC Research Paper 99/5) by Barry K. Winetrobe

The House of Lords Bill: Lords reform and wider constitutional reform (HC Research Paper 99/7) by Barry K. Winetrobe


Forthcoming Events

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If you would like us to mention a publication, website or forthcoming event in the next issue of the Monitor (June), send details by the end of May to Sara Northey Fax: 0171 504 4978, Email: s.northey@ucl.ac.uk.

Constitution Unit Website

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