

Monitor 44

Constitution Unit Newsletter

January 2010

Constitutional Issues in the Election

This is almost certainly the last Monitor before the 2010 general election. It is an occasion to sum up on Gordon Brown's constitutional reform agenda, and look ahead to the commitments of the other parties. Brown's legacy has been disappointing, but his agenda may yet be delivered by others. As the election draws nearer, there is a surprising convergence between the constitutional commitments of all the major parties.

Brown started strongly, with his Green Paper *The Governance of Britain* in July 2007. It contained a long list of proposals to make the executive more accountable and reinvigorate democracy. What happened since is a case study in the limited capacity of No 10 to deliver. The policy lead lay mainly with the Ministry of Justice and the Leader of the House. No 10 continually interfered and changed its mind, and two and a half years later the list of actual achievements is pretty thin.

Most disappointing have been the items where the lead lay primarily with Harriet Harman, who has had to tackle the MPs' expenses crisis and also wears several other 'hats'. There has been no progress on the proposals for the dissolution and recall of Parliament; no model resolution on the war making power; and little progress on e-petitions, or revitalising the House of Commons. No date has yet been set for debating the report of the Wright Committee on Reform of the House of Commons (see pages 1 & 2). Regional grand committees have not proved a success, and publication of the draft legislative programme has been used as a propaganda exercise rather than a consultative one.

From the Ministry of Justice policy papers have been published on an elected House of Lords and a British bill of rights. Implementation must await the next Parliament (such big reforms were never feasible in this one). Reviews have been completed of electoral systems, and the remaining prerogative powers.

Further reforms to the Lords, better parliamentary scrutiny of Treaties, and putting the civil service on a statutory footing are all in the current Constitutional Reform and Governance Bill. But the bill was introduced so late that it is bound to go into the wash up when Parliament is dissolved for the election, and the opposition parties will then determine what survives.

After the election the polls suggest a Conservative government, but it is not certain that this will happen, or indeed whether it will have a majority. The Conservatives have distinctive constitutional reforms of their own (see page 7), but they also share a number of important commitments with Labour and the Liberal Democrats. All three parties speak of the need to strengthen the House of Commons. All three parties are committed to a British bill of rights. All three parties will have manifesto commitments to an 80 or 100% elected House of Lords. All are committed to decentralisation and further devolution. And the Conservatives will seek entrenchment of certain reforms, as 'constitutional laws': not the same as the Liberal Democrats' and Brown's wish for a written constitution, but a step along the way.

In a hung Parliament the Liberal Democrats are the party most likely to hold the balance of power. It is tempting to suppose that all these reforms might then come to pass: plus electoral reform, the Lib Dems' key demand. But that is reformers' wishful thinking. If the Conservatives form a minority government they are likely to seek a further election within a year or so. The Lib Dems will not get electoral reform. But they may get to prioritise between the other reforms held in common with the Conservatives. If given that choice, they should hold out for further reform of the Commons, and other reforms which help to make a minority parliament work more effectively with a minority government. Minority government is a different political game, as a new report by the Unit shows (see page 7).

Parliament

'Wright committee' proposals on Commons reform

The House of Commons Reform Committee chaired by Tony Wright reported on 24 November. The committee was set up in the wake of the MPs' expenses crisis to review three elements of Commons' procedure: the selection of members and chairs of select committees, the scheduling of business in the chamber, and public initiation of parliamentary proceedings. The Unit's Dr Meg Russell was Specialist Adviser to the committee.

Despite being given a very short timetable and having a large membership (18 members) the committee agreed a largely unanimous report giving full consideration to all three areas. On select committees it proposed that chairs should in future be elected in a secret ballot by members of the House as a whole, while members should be elected (afterwards) by secret ballot in party groups (continued overleaf).

In this Issue:

Parliament	1-3
Executive	3
Parties and Elections	3
Devolution	3-5
Human Rights	5
Information Policy	5-6
International Focus	6
People On The Move	6
Unit News	7
Bulletin Board	8

The Constitution Unit
UCL Department of Political Science
Director: Professor Robert Hazell CBE
www.ucl.ac.uk/constitution-unit
Email: constitution@ucl.ac.uk
Phone: +44 (0) 20 7679 4977
Fax: +44 (0) 20 7679 4978

The committee therefore rejected a simple tidying up of the existing arrangements, but also rejected the 'maximalist' solution of the House electing both members and chairs: this was feared to be too ambitious, especially at the start of a new parliament. The proposal made would significantly enhance the status of committee chairs both inside and outside the House, and make it far harder for whips to block members from committees.

With respect to scheduling of business the Wright committee also proposed important changes, which avoid the predictable but fuzzy conclusion of the need for 'a business committee'. Following the logic first set out in the Unit report *The House Rules?* (2007) it called for a far clearer distinction between government and non-government business, with ministers removed from influence over the scheduling of the latter. Instead there should be a Backbench Business Committee, elected by the whole House, with responsibility for scheduling items such as select committee reports and general debates, which would be guaranteed an average of one day per week.

But the report also went much further, in two respects. First, there would also be a House Business Committee, comprising these same members plus frontbench representatives from the main three parties, with responsibility for agreeing the overall schedule of business for the week. This would protect ministers' current rights, to a large extent, because backbench members would not be permitted to veto their proposals. But there would also be a new requirement for the next week's business to be approved by the House (as is the case in Scotland), rather than presented to it only for information, as at present. The chamber would thereby regain ownership of its agenda, even if this was usually agreed on a whipped vote.

On public initiation the committee was perhaps more modest, but backed existing proposals to establish a Petitions Committee, proposing that this role be given on an experimental basis to the Procedure Committee in the current parliament. The remainder of the proposals would come into effect only in the new parliament, but should be agreed in this one: the committee asked for a debate and vote on its report by 24 January. This has, as yet, not been scheduled. Gordon Brown, who enthusiastically set up the committee, gave a slightly lukewarm response on the day after its report was published, suggesting that he expected 'a warm welcome for some of the proposals'. But this is a rare moment when serious and useful parliamentary reform may be possible, and MPs of all parties would be wise to embrace the recommendations in the report.

Lords reforms: large and small

As reported in Monitor 43, the Constitutional Reform and Governance Bill includes small but important proposals on Lords reform: to end hereditary by-elections, allow peers to retire, and allow expulsion and suspension from the chamber. The bill has made slow progress, having reached only the second day of its committee stage (on the floor) in the Commons. The clauses on the Lords have not yet been reached, but two major points of contention are likely. The first is the 'quarantine' clause to ensure that retiring peers cannot immediately stand for the Commons. The government have prevaricated on this point, but if necessary it is likely to be forced on them by opposition parties. Such a clause is highly desirable to ensure the Lords does not become a training ground for ambitious future ministers. The second big issue is the proposal of 'term peerages' (normally lasting three Commons terms) as an alternative to life peerages in future. This proposal was first made by Conservative MPs Andrew Tyrie and George Young in a Unit briefing in July. Young is now on the frontbench, but Tyrie and Labour MP Keith Vaz have proposed an amendment to introduce these into the bill. Jack Straw did not oppose the idea at second reading, and it would have interesting consequences. Like life peerages in 1958 'term peerages' could

gradually become the default way of entering the Lords. They would also help to keep the size of the chamber in check.

The future of the bill is uncertain, and it may well end up being negotiated as part of the 'wash up' just before the general election. At this point the opposition parties have significant power. David Cameron would be well advised to accept the Lords clauses, including the two amendments above, to make life easier for himself if he enters government. First, Lords reform will otherwise be irritating unfinished business and he may be forced to reintroduce some of these clauses himself. Second, he will want (and deserve) to appoint numerous Conservative peers to refresh his benches. The space created by allowing retirements, and over time freed up by the hereditaries, could prove very useful. Otherwise he will stand accused of creating a chamber that is much too large, while officially being signed up to creating a smaller one.

The government remains publicly committed to publishing draft clauses of a bill to create a largely elected second chamber. However these have been awaited for a long time. Jack Straw has now clarified his own position as being in favour of proportional representation for these elections: the Conservatives can be reliably predicted to disagree. In practice progress is unlikely, except perhaps in a hung parliament. An alternative proposal was made in an unusual intervention in October by the former Lord Chief Justice Lord Bingham, when he called in a speech for the Lords to be replaced by an appointed Council with the power to propose amendments but not actually amend legislation.

In the meantime there have been continued small movements in the direction of reform coming from the Lords itself. Along with the Law Lords, who departed the chamber for the new Supreme Court in October, most Northern Irish party peers have now left the Crossbenches (for the 'Other' group), leaving these almost entirely made up of independent peers. The Lords Procedure Committee has recommended a new 15 minute departmental question slot on Thursdays for Secretaries of State (currently Lords Mandelson and Adonis) to receive closer scrutiny. This follows suggestions that such peers should be subject to questioning in the Commons, which could yet happen. In Lords debate on the Queen's Speech on 18 November various other proposals for internal changes were made, including strengthening question time and the legislative process. There is also some pressure for the Lord Speaker to be given greater power. The Lord Speaker herself, in a speech on 9 December, indicated support for a number of reforms, including possibly establishment of a committee on procedural reform similar to the Wright committee in the Commons. In terms of slow membership changes, however, a small setback may have occurred. Retired Archbishop of Westminster Cardinal Murphy-O'Connor has told the Telegraph (6 Dec) that he was offered a peerage, but declined following consultation with the Vatican. This appears to have been part of a strategy of widening faith representation, following appointment of the Chief Rabbi, Lord Sacks, earlier this year. Rhodri Morgan, retiring Welsh First Minister, has also publicly rejected the idea of joining the Lords, while former Plaid Cymru president Dafydd Wigley has withdrawn his name as a nominee for the party, which has not yet been given any seats.

Law Commission Bill

On 12 November 2009 the Law Commission Bill received Royal Assent. The Bill was introduced as a Private Members Bill in the House of Lords in January 2009 by Lord Lloyd of Berwick, and then picked up by Emily Thornberry MP, who was its sponsor through the House of Commons. The provisions were originally part of the Draft Constitutional Renewal Bill, which may be taken as an indication of their significance. The Bill contains two Clauses: Clause 1 of the Bill imposes a statutory duty on the Lord Chancellor to report

annually to Parliament. In this annual report, the Lord Chancellor will have to describe the Law Commission proposals that have been implemented in the past year, and more importantly give account of those proposals that have not been implemented along with the reasons for non-implementation. Clause 2 provides a statutorily backed protocol governing the working relationship between the Law Commission and government departments. These provisions introduce parliamentary accountability for the Government's response to the Law Commission, a body which over the last forty years has performed the constitutionally imperative task of ensuring our laws are clear and up-to-date through its recommendations for reform.

Executive

The Governance of Britain: Review of the Executive Prerogative Powers

Reform of executive prerogative powers has been a central theme of the government's reform agenda. The Governance of Britain Green Paper noted that prerogative powers could be exercised without parliamentary approval and that restrictions on Ministers' prerogative powers were limited. Released in 2007, this green paper required the government to conduct a review of UK prerogative powers and questioned whether they should, in the long term, be codified or put on a statutory basis. The recent report by the Ministry of Justice on the matter provides a cautious answer to that question.

Many of the most controversial prerogative powers - for example the power to deploy troops into armed conflict overseas, the power to make judicial appointments and the power of the Prime Minister to call for Parliament's dissolution - are already the subject of legislative review. Accordingly, the report acts as a sort of 'sweeping up' exercise in that it deals with the residual prerogative powers that have not been addressed in other proposed bills or legislation. These include commonly used powers, for example those relating to the power to organise and control the Armed Forces and the Secretary of State's power to call independent Public Inquiries, as well as those which are infrequently exercised such as powers relating to 'Mercy' and the granting of Royal Charters.

The report begins with the explicit acknowledgement that 'the purpose of any reform of a prerogative power is to increase scrutiny by Parliament'. It is perhaps surprising then that it proceeds to take an overtly conservative approach to the issue of prerogative reform. It points out that there are already some controls on the ability to exercise these powers. The Prime Minister must, for example, appear before the Liaison Committee twice annually.

Highlighting the difficulties in implementing any reform, the report argues that it can be difficult to accurately define the contours of these powers. This is because the powers can be difficult to disentangle from subsequent legislation which deals with the same or similar powers, and because in the absence of relevant judicial pronouncements, it cannot be accurately gauged whether the power has already been wholly replaced by statute.

However, there is also emphasis on the positive case for retaining the current set-up. The report argues that prerogative powers can provide flexibility in dealing with specific or exceptional circumstances that are not covered by statutory provisions. It further argues that legislation introduced to replace some of these powers could itself give rise to new risks; be they an inability of the State to respond to exceptional circumstances, or threats to civil liberties.

Interestingly, the initial driving force behind the government's 'wider

review' was a desire to impose democratic control over the exercise of these powers. In emphasising the view that 'change should not be proposed for change's sake', the report perhaps misses sight of this. Instead of focusing on the positive case for democratic scrutiny over the exercise of these powers, the Ministry of Justice's response is driven by concerns about the practical expediency and potential threats posed by reform.

However, the significance of the report should not be overstated; the most controversial and widely used of the prerogative powers were not its subject matter, and these powers remain the subject of review elsewhere.

The full report is available at: <http://www.justice.gov.uk/publications/docs/royal-prerogative.pdf>

Parties and Elections

Individual Voter registration

Individual voter registration (IVR) was introduced in the Political Parties and Elections Act of July 2009 after years of discussion. Long standing arguments in its favour have been based on criticisms of the paternalistic, old-fashioned nature of the current system of household voter registration, and on evidence that it may facilitate electoral fraud. Household voter registration allows the head of household to exclude some people from the electoral register, and to add others who may not exist.

The new system of individual voter registration would put the onus on the individual to register him or her self. The electoral register will remain within each local authority rather than being transferred into a national database: IVR is a way of changing how the voter gets onto the register rather than changing the register itself. In terms of access to the register, this too will remain unchanged (as far as the plans rest now), and subject to the same data protection principles. The cost of introducing IVR is estimated to be about £60m.

The inclusion of IVR in the Political Parties and Elections Act set in motion a long two stage process. From 2010 to 2015 individual information (National Insurance number, date of birth and signature) will be collected by Electoral Registration Officers on a voluntary basis. The Electoral Commission will monitor take-up, and recommend whether to make IVR compulsory.

The Conservatives and Liberal Democrats have both criticised the long time scale, and giving so much control to the Electoral Commission. They want to speed up the process. There are two obstacles to doing so. The first is cost: speeding it up will cost more. The second is putting at risk the accuracy and integrity of the electoral roll, and damaging public confidence in the new system. People may remember the damage caused when postal voting was speeded up in 2003, against the advice of the Electoral Commission, and electoral fraud increased as a result.

Devolution

Introduction

The autumn of 2009 has been a lively period for devolution across the UK. In Scotland there have been debates about financial and fiscal issues, and a possible referendum on independence, and in Wales, about a referendum on 'primary legislative powers'. The least

excitement has probably been in Northern Ireland, where there have been extended negotiations both within the Executive and Assembly, and with the UK Government, about the devolution of justice and policing functions. That has resulted in a stalemate. Despite a generous financial agreement with the UK, promising access to UK funds to cover a wide variety of contingencies, the parties and particularly the Democratic Unionist Party (DUP) and Sinn Fein have failed to agree on terms for devolution to take place. The result has been a threat to the survival of the coalition, and devolved government there more generally. Beyond that, much of the debate has focussed on financial issues as well as purely constitutional ones.

Scotland: It's mostly about money

Despite the best efforts of Labour, in particular, constitutional issues have dominated events of the autumn in Scotland. Although there have been ongoing rumblings following the release of the Libyan prisoner Abdelbaset Ali Al-Megrahi in August, and the SNP's policy actions have exposed it to criticism, constitutional questions have been at the fore following the publication of the Calman Commission's final report in June and with the ending of the Scottish Government's 'National Conversation'. Inevitably, these debates have heavily emphasised financial issues and tax powers as well as conventionally constitutional ones.

The first question has been what would happen to the Calman Commission's report. Its recommendations were substantially but not entirely accepted by the UK Government in a white paper published on 26 November, *Scotland's Place in the United Kingdom*. The UK Government said that the recommendations would be treated as a package, with no steps being taken to devolve new tax or other powers to Holyrood before a UK general election. Perhaps more important is the Conservatives' position; they endorsed the principle of devolving both 'fiscal accountability' and borrowing powers, but said they would need to issue their own white paper if they came to power. While there is agreement on the broad outlines of the substantive changes, progress on delivering them will continue to be slow, and it remains unclear whether the promise of that limited package at some uncertain future date will be sufficient to convince the Scottish public that London will in fact strengthen the powers of the Parliament.

The second issue has been the SNP Government's plans for a referendum. Contrary to most expectations, the white paper *Your Scotland, Your Voice* which it published on 30 November (St Andrew's Day) did not set out a referendum question, or even the issues that a referendum would need to address. Presumably that will become clear by the time the referendum bill is introduced into the Scottish Parliament on 25 January. The biggest immediate question is how many questions the referendum offers – a straight choice between the status quo and 'independence', or with intermediate choices such as the Calman recommendations or 'devolution max' as further options. Of course, anything other than a referendum offering a choice between two clear options would fail to satisfy the criterion of a clear referendum question. The whole issue is somewhat abstract, as opposition from all three unionist parties (restated following an internal policy review, in the case of the Lib Dems) is clear.

What the Scottish Government offered in its white paper was, instead, a comparative analysis of the merits of four constitutional options for Scotland. Unsurprisingly, it argued that independence was the best way of strengthening Scottish self-government, and found extensive shortcomings in both the status quo and the Calman recommendations. However, it found substantial benefits from what it called 'full devolution' (devolution of everything except defence, foreign relations and macro-economic policy). The SNP has also indicated that it will seek any opportunity to extend the range of devolved powers. The implication of these two positions, taken together, is that the key

debating ground is likely to be how much the UK Government is willing to concede in that direction.

Wales: a new leader, and another referendum

In Wales, the political agenda has been dominated by two issues: the nature of the Assembly's legislative powers, and the choice of a new Labour leader and First Minister to succeed Rhodri Morgan. There were three candidates to succeed Morgan: Carwyn Jones, the Counsel-General and Leader of the House, Edwina Hart, Health Minister, and Huw Lewis from the back benches. The campaign was a protracted but largely good-tempered, and the election result announced on 2 December was a clear victory in the first round for Carwyn Jones. He received over 50 per cent of the votes in each of the three constituencies (elected legislators, grass-roots members and trades unions). Jones first made his name as an effective rural affairs minister during the 2001 Foot and Mouth Disease outbreak, but his present role has reduced his visibility since 2007. His compelling mandate gives him wide scope to reshape the government as he wishes, though the changes he made when he appointed his cabinet were modest and there were only two departures. Rhodri Morgan has gone to the back benches trailing well-earned expressions of admiration and affection from all parties in the Assembly, and many outside it.

The first big policy challenge on Jones's desk is what to do about a referendum on primary legislative powers under the Government of Wales Act 2006. He inherits a commitment in the 'One Wales' coalition agreement with Plaid Cymru to hold that referendum by the time of the May 2011 elections, and an increasing tide of opinion within the Assembly that autumn 2010 is the best time for that. That's a short period of time, especially as decisions need making very soon if that were to happen. In its favour are three factors. First, David Cameron declared in what has become known as the 'Broughton declaration' that a Conservative UK Government would not block a request from the Assembly to hold a referendum. Second, in response to that Peter Hain said he would also not obstruct a referendum – though he also stuck to his long-standing position that a referendum should not be called unless it was clear that it would be won.

Third, there was the report of the All Wales Convention, chaired by former diplomat Sir Emyr Jones Parry and published on 18 November. The Convention brought together all four political parties in the National Assembly and a swathe of civil society in Wales, and has been at work since July 2008. It has subjected the working of devolution in Wales to detailed scrutiny and (like the Richard Commission before it) found that the present arrangements are woefully inadequate and complex, resulting in poorer governance, serious problems of public understanding and significant undermining of the principles of the rule of law. Looking at public opinion, the Convention found that although the public had serious problems in understanding the present arrangements, but that there was broad support for moving to the primary legislative powers set out in Part 4. That has given supporters of an early referendum (particularly in Plaid Cymru) a fillip. Even though there is unease within Labour about even voting on a referendum before a UK general election, it means that Carwyn Jones will expend a significant amount of political goodwill and capital if he tries to postpone the likely date for a referendum.

A new blog on devolution

Alan Trench, honorary senior research fellow at the Constitution Unit and also a researcher at the University of Edinburgh, has recently started a blog called 'Devolution Matters' providing up-to-date commentary and analysis on constitutional and technical aspects of devolution, including links to relevant documents and sources.

It discusses all these issues in more detail, at: <http://devolutionmatters.wordpress.com/>

Human Rights

Control orders and secret evidence

In *Secretary of State for the Home Department v AF [2009] UKHL 28*, the Law Lords ruled that the use of secret evidence against three men subject to control orders denied their right to a fair trial (see Monitor 43). The orders were imposed to protect the public from the possibility of a terrorist threat. Home Secretary Alan Johnson described the judgment as 'extremely disappointing' but vowed to fight to uphold the control orders in the courts (Guardian, 12 July).

The Home Secretary sought to maintain the control order against AN, one of the parties in AF; however the High Court rejected the bid citing the Lords' ruling in AF. The Court held that the use of secret evidence in that case went so far as to deny AN knowledge of the essence of the case against him. A similar ruling in the case of AF prompted the Home Secretary to revoke his control order. The Government has since dropped control orders on some suspects rather than publicly disclose the evidence against them.

The recent High Court decision in *U & XC [2009] EWHC 3052* is a further blow to the use of secret evidence. In that case, Lord Justice Laws along with Mr Justice Owen held that a person could not be denied bail solely on the basis of secret evidence. Relying on the Lords' ruling in AF, the two judges held that a suspect must be given sufficient material to enable them to answer effectively the case against them.

These rulings add to the pressure on the government to devise a new policy for dealing with terror suspects which respects the right to a fair trial under Article 6 of the ECHR. Overturning the ban on the use of intercept evidence is one way this could be achieved. A Home Office advisory group led by Sir John Chilcot has been conducting a series of mock trials to test the feasibility of storing and disclosing intercept evidence. But in December the Home Office announced this did not seem 'legally viable'; a conclusion endorsed by Lord Carlile, the independent reviewer of anti-terrorism legislation. Sir Ken Macdonald, the former Director of Public Prosecutions, has suggested that judicial oversight of the process of disclosure might be the key to resolving the issue.

Information Policy

IPSA, Legg and the Kelly Report – order from chaos?

After the MPs' expenses scandal in May 2009, politicians from all parties declared the system had to change. The Committee on Standards in Public Life (CSPL) and the new Independent Parliamentary Standards Authority are creating a new system of expenses and allowances. Meanwhile, Sir Thomas Legg has audited expenses claimed under the old system going back to 2005.

Legg was criticised by some MPs for unfairness and inconsistencies, but the *Telegraph* reported that over £600,00 had been paid back. 80 MPs are said to have appealed against Legg's repayment rulings to Sir Paul Kennedy, a retired judge appointed to hear their complaints.

In November the Committee on Standards in Public Life reported in its

proposed reforms to the expenses system. First, restrictions on what can be claimed as expenses - an end to claims for mortgage interest, gardening, cleaning, and second homes for Greater London MPs. Second, ending 'double-jobbing' (sitting in multiple legislatures) by Northern Irish and Scottish MPs. Third, the employment of spouses, the ability to claim expenses without receipts, and the £10,000 communications allowance - should cease.

The CSPL report also recommended significant changes to the functions of IPSA, which had been created in great haste under the Parliamentary Standards Act 2009. It recommended one important additional power, giving IPSA responsibility for determining the level of MPs' pay and pension arrangements as well as their expenses. And it recommended removing IPSA's responsibility for registering MPs' financial interests, and against creating a Commissioner for Parliamentary Investigations, whose remit could overlap with the existing Parliamentary Commissioner for Standards.

On 9 December, the Government announced amendments to the Constitutional Reform and Governance Bill to give effect to these recommendations. The amendments include giving IPSA statutory power to impose penalties on MPs, including levying fines and compelling MPs to return money; and allowing IPSA to employ a 'compliance officer' to investigate and initiate complaints about expenses abuse.

IPSA is not without its critics. Heather Brooke, the FOI campaigner who started investigating MPs' expenses back in 2005, argues that 'Kelly's well-researched, considered and comprehensive report' has been 'circumvented' by the hasty creation of another new quango. Questions also remain about the accountability of IPSA, its cost, and how well MPs will respond to its investigations and penalties.

Professor Sir Ian Kennedy is to head IPSA. The Speaker of the Commons has nominated four people for the board: former MP and CEO of the Royal National Institute for Deaf People, Jackie Ballard; Rt Hon Lord Justice Scott Baker; businessman Ken Olisa; and Professor Isobel Sharp, a partner at Deloitte LLP. Sir Ian Kennedy outlined his plans for IPSA in a speech on 6 January, and IPSA issued a consultation paper on a new expenses scheme on 8 January. Kennedy says the new regime 'must be fair and effective, and also respond to the public's concerns.'

See <http://www.parliamentarystandards.org.uk/news.html>

Sir Christopher Kelly, chair of CSPL, is giving a seminar on MPs' expenses and allowances at the Constitution Unit on Wednesday 20 January at 6pm.

MPs Expenses around the world

The release of MPs' expenses details by FOI is neither new nor isolated to the UK. As our synopsis shows, many countries have suffered similar controversies when their Freedom of Information Acts have been used to reveal details of how public money is spent.

Scotland

The Scottish Parliament, which is covered by a separate Scottish FOI Act, experienced an expenses controversy in 2006 soon after the law was enacted. Following a request and ruling by the Scottish Information Commissioner, the details of Scottish Conservative leader David McLetchie's expenses were released, which ultimately led to his resignation. MSPs then agreed to regularly publish expenses on a search database and though there have been small expenses controversies since then, there has been nothing like what has occurred at Westminster.

Canada

The Canadian Access to Information Act has been in place since 1983. Both the Trudeau and Mulroney governments suffered

from the disclosure of expenses details in the early 1980s. In the former case, the revelations led to a ministerial resignation. Prime Minister Trudeau was himself damaged by revelations relating to foreign travel expenses. The expenses revelations contributed to the growing unpopularity of the Conservative Government in the 1980s, as well as to an increasing resistance to the Act by politicians. Trudeau subsequently described the Act as a 'tough fact of life for a government – witness the repetitious play on the spending on every trip I take'.

New Zealand

In New Zealand, 'ministerial' spending (accommodation, travel) is covered by the Official Information Act, like all other government spending. But spending by MPs is administered by the Parliamentary Service, an entity not covered by the OIA.

Motivated by the continuing fallout from MPs' expenses in Britain, in June Prime Minister John Key and Speaker Lockwood Smith made a decision to proactively and routinely publish MPs travel and accommodation expenses. Smith and Key said the disclosure was 'a commitment by members of Parliament to be open and accountable to the people of New Zealand'. However, there are no plans to make the disclosures compulsory in law, nor to bring Parliament under the Official Information Act.

Ireland

Although Ireland has had an FOI Act since 1997, the Irish expenses 'scandal' evolved more slowly through a series of FOI requests and parliamentary questions. Various Irish newspapers submitted requests for travel and accommodation bills, and were able to secure a steady supply of spending stories from May to November.

This has led to release of expenses on all TDs, as well as ministerial expenses that have caused controversy. For a number of cabinet ministers including the deputy prime minister, health minister and ministers for the arts. The Minister for Arts, Sport and Tourism, John O'Donoghue, was forced to resign following the disclosure of €100,000 in travel expenses revealed by FOI.

In November, the government was reported to be 'fast-tracking' reforms to the expenses rules for Irish MPs, but this came two months after the resignation of the equivalent of the chairman of the Audit committee of the House of Commons Commission. Indeed, in November Taoiseach Brian Cowan publicly expressed scepticism about how FOI is working. He spoke of how FOI 'is an expensive and time-consuming aspect of Government work,' and, while supporting individuals' use of it, felt that people 'trawling' for information constituted an 'abuse of the process'.

Expenses elsewhere in the UK

The expenses issue is now firmly on the political agenda in Britain. Revelations have now stretched across a range of public bodies. FOI is being used by the national and local press as well as by various campaigners and NGOs. The allowances of local councillors and salaries of local government officers have been opened up over the past few years, in part due to FOI, with the Taxpayers' Alliance putting together a 'rich list' of local authority chief executives. Media attention has also turned to the metropolitan police, the BBC and the judiciary who have all had their expenses revealed.

International Focus

The end of Guantanamo Bay...almost?

In November the Obama Administration announced that certain detainees currently held at Guantanamo Bay will be tried in federal court on terrorism related charges. It reverses the policy of the Bush

Administration which used military commissions rather than the normal civilian courts to charge so called 'enemy combatants'. However, President Obama now admits that he will not be able to meet his self-imposed 22 January deadline to close the facility at Guantanamo Bay. Moreover, some of the 205 detainees believed to be held at the facility will still face trial by military commissions, such as those allegedly responsible for bombing the USS Cole.

Khalid Sheikh Mohammed, the alleged mastermind of the September 11 terrorist attacks, along with four other detainees, will be tried in federal court in New York City just a short distance from the former site of the World Trade Centre. If convicted, they could all face the death penalty. The change of policy has been both praised and criticised. Supporters claim that the move demonstrates to the world that the US has faith in its civilian legal institutions and is committed to the rule of law. Those opposed, including many family members of 9/11 victims and former NYC Mayor Rudy Giuliani, argue that a public trial gives the terrorists a forum to disseminate their ideology and may risk turning them into martyrs.

The fundamental difference between the military and civilian legal systems is that the civilian rules of evidence favour defendants. That has led some to suggest that the federal courts will be used when convictions are almost certain whereas military commissions will be used in cases where the evidence is weaker or constitutionally suspect. The military commissions are by no means a rubber stamp. Some have completely dismissed charges for lack of evidence and others have imposed relatively lenient sentences. Although most commentators are confident that the trials will result in convictions, there is no guarantee that 12 jurors will agree to impose the death penalty. For example, Zacarias Moussaoui, the so called 20th hijacker, was sentenced to life in 2006 because one juror refused to impose the death penalty.

Whatever the outcomes, the trials will certainly raise a number of significant and novel questions of constitutional law such as whether evidence was obtained by torture (it should be noted that the President has said that he regards waterboarding as torture), how evidence was collected and the admissibility of statements made to authorities under coercion or without a lawyer present. It is likely that these will be the central issues raised both at trial and, should there be convictions, at the appeal stage.

People on the Move

Sir James Munby is the new chairman of the Law Commission. Andrew McDonald is the interim chief executive of the Parliamentary Standards Authority. Elizabeth France is chair of the Office of Legal Complaints. Walter Merricks has stepped down from the Financial Ombudsman Service to be chair of the Office of the Health Professions Adjudicator. Maggie Atkinson is the new Children's Commissioner for England and Wales. Chris Bryant replaces Glenys Kinnock as Europe Minister. Matthew Hamlyn has stepped down as Head of the Committee Office Scrutiny Unit in the House of Commons. Chris Shaw is his successor. Baroness Barbara Young has announced that she will step down as Chair of the Care Quality Commission. Lord Lang of Monkton has been appointed Chair of the Advisory Committee on Business Appointments. Poul Christensen has been appointed Chair of Natural England.

Interns

As always, the Constitution Unit is grateful for the hard work and diligence of its interns: Martin Adams, Jack Simson Caird, Olivia Dunn, Richard Earley, Tamsyn Houlden, Robert Krause, and Zoe Laverly.

Constitution Unit News

Making Minority Government Work

This new report by the Constitution Unit and the Institute for Government considers the implications of a hung Parliament after the next election. It concludes that that minority government is more likely than coalition, but that Westminster traditionally perceives minority government as weak, unstable and short.

The report shows how minority government can work effectively in the interests of good government and a stronger Parliament. Robert Hazell led the study, with Mark Chalmers studying the lessons from Canada, Ben Yong New Zealand, Akash Paun the SNP government in Scotland, and Catherine Haddon the previous experience in the UK.

The main lessons from the report include:

- After the election, all concerned must be prepared for a longer than usual period of government formation while the parties negotiate.
- The civil service must be prepared to facilitate the negotiations on behalf of all parties involved, not just the outgoing government.
- Clearer rules are needed to explain that it is not the Queen's role to form a government, or to facilitate negotiations. The decisions to form a government must be arrived at by politicians.
- Support parties (such as the Liberal Democrats) should consider supply and confidence agreements, instead of coalition, to help them preserve their distinct identity.
- Minority government has some advantages over coalition: single party control, greater policy coherence, quicker decision making within the executive.
- But a minority government cannot govern in a majoritarian way. It must accept the likelihood of frequent parliamentary defeats, and prepare the media and the public for them.
- Parliament can become stronger under minority government, but cannot make policy. The volume of legislation is unlikely to diminish, but Parliament may take longer to pass bills, and amend them more heavily.
- Parliamentary reform will not happen, even in a hung Parliament, without a clear agenda and champion who can make it happen.
- The media play a key role in explaining the British parliamentary system and how governments are formed and dissolved. They shape public perceptions about minority government, and may distort them.
- For the public, minority government is more transparent and accountable than coalition government.

For a copy of the report see: <http://www.ucl.ac.uk/constitution-unit/research/in-the-round/minority-government.htm>

Conservative Agenda for Constitutional Reform

Robert Hazell is writing a Briefing on the Conservative plans for constitutional reform, to be published in February. Their agenda is greater than is generally supposed. The main items are their plans to repeal the Human Rights Act, and replace it with a British bill of rights; to reduce the size of the House of Commons by 10 per cent; and

to legislate to require a national referendum for future EU Treaties, and to back that up with a Sovereignty Bill to ensure that ultimate authority stays at Westminster. They will also inherit substantial items of unfinished business from Labour's reform programme, in strengthening Parliament; further reform of the House of Lords; and devolution, where all three assemblies are demanding further powers.

Robert Hazell will be speaking on the Conservatives' constitutional reform agenda at the Unit seminar on Wednesday 17 February at 6pm

Parliamentary Scrutiny of Senior Public Appointments

In September 2009 the Constitution Unit was commissioned by the Cabinet Office and Parliament to evaluate the use of pre-appointment scrutiny hearings by select committees for senior public appointments. In its March 2008 white paper 'Governance of Britain', the Government announced that it would proceed with plans for Parliament to hold these hearings 'on a pilot basis'. 60 senior public appointments were identified for pre-appointment scrutiny by the Cabinet Office and Commons Liaison Committee. To date, there have been 18 pre-appointment scrutiny hearings for 19 public appointments.

Under the current system Parliament does not have a veto over appointments; the final decision remains in the hands of the relevant Secretary of State. The Government and Liaison Committee agreed that the hearings should focus on the candidates' professional competence and personal independence rather than their private lives. Interestingly, reappointments are not subject to any type of formal scrutiny hearing.

The aim of the research is to establish what value is added by pre-appointment scrutiny hearings. The study relies on three main research methods: (1) examination of official literature related to the appointments; (2) interviews with executive search consultants, departmental officials, the select committee clerks and chairmen; and the successful candidates; (3) media monitoring to see how much publicity the hearings receive and whether the coverage is positive or negative.

The preliminary findings suggest that there is some uncertainty about the purpose of pre-appointment scrutiny hearings. Many feel that, given the absence of a parliamentary veto, the hearings are nothing more than a rubber stamping exercise. This view has been reinforced by the recent appointment of Maggie Atkinson as Children's Commissioner. In that case, the Secretary of State decided to appoint her despite the select committee having unanimously recommended against. However, others believe that pre-appointment scrutiny hearings are healthy for democracy and should be continued.

Appointment holders tend to have a more favourable view of the process. Many have said that they feel an enhanced sense of legitimacy after receiving the endorsement of a select committee composed of MPs from all the major parties. The hearings are also an opportunity for MPs to begin a dialogue with the appointee regarding their priorities for the new post.

The project is being carried out by Peter Waller, an honorary senior research associate, supported by Mark Chalmers, a new researcher with the Unit. The research should be completed by late January 2010.

More information about the research is available at: <http://www.ucl.ac.uk/constitution-unit/research/parliament/pre-appointment-scrutiny.htm>

Bulletin Board

Constitution Unit Newsletter

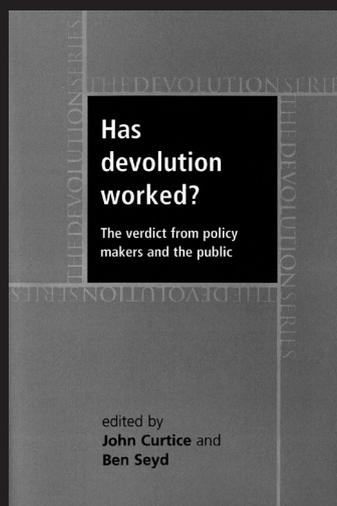
January 2010

Featured Publication

Has Devolution Worked? The Verdict from Policy Makers and the Public

The third, and final, book from the Unit's research programme on 'Nations and Regions', funded by the Leverhulme Foundation, has now been published. The book - *Has Devolution Worked? The Verdict from Policy Makers and the Public* - explores how devolution to Scotland and Wales has been received by citizens, politicians and interest groups. Drawing on dedicated surveys of citizens and politicians, along with a wide set of interviews among representatives of civil society, the book shows that devolution has been widely accepted, but that doubts exist over how far the new institutions have delivered improvements in policy and democratic performance. The book represents the most systematic attempt to date to gauge the reception that devolution has enjoyed.

Has Devolution Worked? The Verdict from Policy Makers and the Public Edited by John Curtice and Ben Seyd Manchester University Press, November 2009



Further details on Constitution Unit publications can be found at:
<http://www.ucl.ac.uk/constitution-unit/publications>

Forthcoming Events

- Christopher Graham (Information Commissioner), Tuesday 12 January, The Information Commissioner's Office. Government Information Policy Seminar Series (subscription only).
- Sir Christopher Kelly (Chair, Committee on Standards in Public Life), Wednesday 20 January, 6pm, MPs' Expense and Allowances.
- Professor Robert Hazell (Director, the Constitution Unit), Wednesday 17 February, 6pm, The Conservative Agenda for Constitutional Reform.
- Peter Riddell (Senior Fellow, Institute for Government & Editor, The Times), Thursday 4 March, 1pm, How to Ensure More Effective Transitions of Government.
- Peter Waller (Honorary Senior Research Associate, The Constitution Unit) & Mark Chalmers (Research Assistant, The Constitution Unit), Wednesday 14 April, 6pm, Pre-Appointment Scrutiny Hearings in the UK.

Full information on events is available at:
<http://www.ucl.ac.uk/constitution-unit/events/index.html>

FOI Live 2010, Tuesday 6 July 2010

FOI Live is one of the most important events in the FOI calendar. This year the conference will be a special afternoon combining top level guest speakers and an FOI question and answer session at a reduced rate. FOI Live is a unique opportunity to meet, share ideas, and network with specialists and practitioners.

More details about speakers and how to book will be available in the New Year. Places will be limited so make sure to book early!

More information about FOI Live 2010 will be available at: <http://www.ucl.ac.uk/constitution-unit/research/foi/index.htm>

CU in the News

- Robert Hazell's views of the workload of judges cited in the Financial Times and The Tribune (24.09.09)
- Straw supports 15-year limit on peers Meg Russell cited on politics.co.uk (24.09.09)
- Robert Hazell's appearance on BBC News talking about the new Supreme Court (01.10.09)
- In praise of... University College London *Guardian* Editorial (10.10.09)
- Two polls needed on Scottish Independence *The Times* (18.10.09)
- Robert Hazell on Radio 4's Law in Action (20.10.09)
- Citation in Michael White's political briefing in the *Guardian* Constitutional reform: a mouse that may roar (22.10.09)
- Robert Hazell in the *Times* comment piece How to Stop the Queen Picking the next PM (25.11.09)
- Martin Kettle in the *Guardian* Hung parliaments are only good for whips and scribblers (27.11.09)
- Meg Russell on Westminster Hour at 28 min (29.11.09)
- Robert Hazell on minority and coalition governments, writing in *Guardian Public*. What do we do now? (03.12.09)
- Robert Hazell on Radio 4's Today programme at 47min 03 sec (03.12.09)
- Robert Hazell wins PSA Communication Award and Meg Russell research commended in newsletter (04.12.09)

Links to the above news stories are available at: <http://www.ucl.ac.uk/constitution-unit/newsarchive.htm>



The Constitution Unit