

M O N I T O R

Issue 15

The Constitution Unit Bulletin

June 2001

Do Britain's political parties understand devolution?

The UK General Election has revealed that the UK's main political parties do not really understand what devolution has meant for the constitution.

A detailed analysis by the Constitution Unit of the UK election manifestos (available on the Unit's website) shows considerable confusion about what is devolved to Scotland, Wales or Northern Ireland.

Both Tory and Labour manifestos contain extensive UK-wide commitments in areas such as health and education - although these are now devolved. The Conservatives also make UK-wide commitments on crime and criminal justice, although these are devolved subjects in Scotland.

The Constitution Unit has scored all the main parties for the 'devolution literacy' of their manifestos, analysing the devolution awareness of their pledges in seven policy areas. The Conservatives come bottom (mean score 4 out of 10), and the

Liberal Democrats come top (with a score of 7). In between lie Plaid Cymru (6), Labour (5) and the SNP (5).

The SNP's policy commitments make no distinction between areas devolved to Scotland and remaining UK functions. Plaid Cymru are somewhat better. There is a tactical point in this - both want to show the scale of their visions for their respective countries. But readers of their manifestos would not understand what they are really voting for, and would derive little political education in terms of understanding which level of government does what.

The Liberal Democrats score high marks for devolution awareness. Their UK manifesto is drafted so as to cover non-devolved policy areas for the whole UK, but only England for devolved ones. Separate manifestos for Scotland and Wales set out their policies with a clear understanding of what Westminster still can and cannot do.

The English Question

All the major parties' UK General Election manifestos address the 'English question'. The Tories propose to abolish regional development agencies (RDAs), and to ensure that only English (or English and Welsh) MPs vote at Westminster on legislation for England (or England and Wales).

Labour oppose this, saying 'English MPs make up 85 per cent of the UK Parliament, so there is no case for threatening the unity of the UK with an English Parliament or the denial of voting rights to Scottish, Welsh and Northern Ireland's MPs at Westminster'. Labour and the Lib Dems both support elected regional government in England, where there is demand tested in a regional referendum. In the interim they would strengthen RDAs and the existing regional chambers.

Devolution

Wales

As the UK general election approached, the electoral politics of the Westminster debate threatened to drown out the concerns of the National Assembly. Nowhere was this more so than in the mounting sense of crisis around the position of Deputy First Minister Mike German and the stability of the Coalition. Accused of impropriety in his former position as Head of the Welsh Joint Education Committee's European Unit, German became besieged by a media-led campaign demanding that he resign, or at least stand aside until he had cleared his name. First Minister Rhodri Morgan insisted throughout that his Deputy need not resign unless and until there was a formal police investigation. As of end of May this had not materialised, despite the WJEC handing a copy of an internal auditor's report on Mike German's activities to the South Wales Police.

The allegations had first appeared when the Coalition Administration was formed in October 2000, raising suspicions then about their timing. Their re-emergence in the middle of the general election campaign rekindled these questions. Despite divisions within the Labour Group the Administration's line has been held, at least until after the general election. The issue may re-emerge as a result of an investigation underway by the European Commission's anti-fraud unit into contracts between the EU and the WJEC, apparently signed by Mike German. This may result in the WJEC being forced to repay as much as £1m of EU grants. Rhodri Morgan insisted that no Minister subject to 'speculative allegations'

should be forced to stand aside and declared Mike German was being subjected to 'trial by media'. It was noteworthy, however, that the issue hardly penetrated the media beyond the border.

Neither did the Welsh Administration's record in handling the foot and mouth outbreak, but it proved a significant event in the Assembly's development. It consolidated devolution providing an opportunity for the Assembly to prove its credibility. In particular the Administration, led by an authoritative Agriculture Minister in Carwyn Jones, demonstrated that it was capable of handling complex problems involving multi-level governance in a period of crisis. In turn this reflected on the Assembly more generally, doing something to dispel a widespread view that it is little more than a talking shop. In the process there developed a sense that Cardiff is increasingly replacing London as the main location of political accountability in Wales.

Meanwhile the Assembly's Operational Review under the chairmanship of the Presiding Officer increasingly took on the character of a Constitutional Convention. Substantial submissions were made by each of the parties, in particular the Conservatives and Plaid Cymru. The

row over two vases of lilies sitting in the foyer during the Easter recess.

The foot-and-mouth crisis and new data on organised crime meanwhile lifted the lid on the underbelly of incivility and entrenched paramilitarism in 'post-agreement' Northern Ireland. And the still-fledgling Civic Forum was the subject of uncivil comment, in the assembly and the media.

Moderate Protestant opinion was growing increasingly restive, encouraging the Democratic

assemblies, and carrying out a survey in the North-East showing over 70% of respondents in favour of an assembly for the region.

Parliament has also debated regional assemblies, with a debate in the House of Lords following January's Commons debate. The Commons revived Standing Committee on Regional Affairs met for the first time; debate focused to a great extent on regional finance. Junior minister Beverley Hughes was present.

Press comment has picked up on the prominence of the issue, with the Financial Times running a series on the English regions in April, and several commentators lending their voices both for and against regional government. The Greater London Authority has issued its first challenge (after only a year) to London's 'devolution settlement'; both Trevor Phillips and Sally Hamwee (ex-chair and chair of the Assembly) have publicly called for more executive and co-ordination powers for the Assembly.

At the same time, some policy developments indicate the Government to be far from whole-hearted about regionalism. The Arts Council has proposed abolition of its regional bodies in favour of a national organisation with regional divisions. The regional boards have not acceded (yet) to their own disbandment. And the Health Secretary Alan Milburn announced plans to merge regional and local health authorities into a structure of 'unitary' health authorities, with only a residual function at regional level. The latter will be relocated within Government Offices.

The Centre

The general election result included one gain for

Parliamentary Reform

Hansard Society: Parliamentary Scrutiny

The Hansard Society Commission's Report, *The Challenge for Parliament: Making Government Accountable*, will be published in June 2001, priced £35. A conference, 'A Parliament with a Purpose', will take place on 12 July 2001 at the Church House Conference Centre, London SW1. The conference will bring together senior politicians, civil servants, parliamentary officials and academics; it will be the first opportunity of the new Parliament to debate the principles and prospects for parliamentary reform. To order the publication or book a conference place, please contact the Hansard Society, tel: 020 7955 7478 or e-mail hansard@hansard.lse.ac.uk.

New Peers Appointed

On 26 April the new Appointments Commission announced the first tranche of crossbench peers under the new appointments system. A larger than expected 15 members were chosen from amongst the 3,166 applicants to the Commission. The calibre of those appointed, who included seven knights, one lady and four professors, differed little from those selected under the old system. This led to wide criticism in the press for not providing the new type of 'people's peer' that the public had been led to expect (by government, though not by the Commission itself). Notably, only four of the 15 appointees were women, falling short of the 30% minimum which the Wakeham Commission had proposed should make up the reformed chamber. Four were from ethnic minorities.

Surprisingly, on the day of the Commission's announcement, government also announced the appointment of a sixteenth crossbench peer, General Sir Charles Guthrie, ex-Chief of the Defence Staff. This immediately breached Tony Blair's commitment that he would give all powers for crossbench appointments to the Commission.

On 2 June the dissolution honours list was published. It announced peerages for 24 retiring MPs; twelve Labour, five Conservative, five Lib Dem and two Ulster Unionists. Only two are women. The list attracted critical comment because two of the MPs honoured had stood down to create last minute vacancies for Blairite candidates. *The Times* (2 June) commented 'one factor links all their names: they have been appointed by party leaders... If Labour is even remotely serious on this subject then the list issued yesterday should be the last of its kind.' It was suggested that the

independent Appointments Commission would investigate this practice after the general election.

Another new Labour peerage was announced on 11 June when it was stated that Sally Morgan, previously head of Tony Blair's political office from 1997-2001 would become a Baroness and immediately resume office as a Cabinet Office minister.

Calls to Strengthen Select Committees

The House of Commons Liaison Committee (made up of all select committee chairs) has published a third report calling for reform of the select committee system. This follows the publication in March 2000 of its report *Shifting the Balance* and its later response to the government's dismissive reply. The new report, *Shifting the Balance: Unfinished Business*, reiterates some of the previous proposals, including removing the power of committee appointments from the whips and more opportunity to debate select committee reports. It also acknowledges some changes that have been

Select Committee on Public Administration

The Public Administration Committee published a wide ranging report *Making Government Work* (HC 94, April 2001). The committee criticised the growing centralism caused by the proliferation of central government initiatives. Ministerial pressure for quick wins risked worsening 'already considerable problems of co-ordination at local and regional level'. With dissent from the

question of a Human Rights Commission for the UK inviting submissions of written evidence by 2 July.

Manifestos

Of the three main political parties, only the Liberal Democrats expressed support for the establishment of a Human Rights Commission. Labour proposed to introduce a victims' bill of rights. The Conservatives stated that they would exempt the armed forces from the ambit of the ECHR (without indicating the manner in which this could be done).

European Convention on Human Rights

In February, following the replacement of the Prevention of Terrorism Act (Temporary Provisions) Act 1989 by the Terrorism Act 2000, the government withdrew its longstanding derogation from Article 5 (3) of the ECHR which had been used to allow the police to detain persons for seven days under the former Act.

The European Court found against the UK over its failure to provide children with appropriate protection against serious long-term neglect and abuse (*Z and others v the UK*) deeming this to be a breach of Article 3 (inhuman and degrading treatment) and awarded substantial damages (for Strasbourg) exceeding £100,000. The Court also considered the failure to properly investigate killings by the security forces in Northern Ireland to constitute a breach of Article 2 (the right to life).

Human Rights Act

The Act is beginning to show its teeth. New 'declarations of incompatibility' have been made in respect of the Mental Health Act 1983 and Consumer Credit Act 1974 as well as the 'reading down' of the rape shield law (see courts below). In a potentially far reaching judgement, the Court of Appeal (Civil Division) has interpreted the Children's Act 1989 to give the courts the power to check whether social workers are properly carrying out plans for children in care. But the traffic is not all one way, the Law Lords overturned the earlier declaration of incompatibility made concerning the impartiality of aspects of the planning system (*Alconbury*) and an attempt in the *Shayler* trial to use the new Act to champion a public interest defence under the Official Secrets Act failed at the first hurdle.

Human Rights in the Courts

***R v A* (House of Lords)**

On 17th May 2001 the Appellate Committee of the House of Lords held that a prior consensual sexual relationship between complainant and defendant may, in some circumstances, be relevant to the issue of consent in rape proceedings. Where exclusion of such information would prejudice the proceedings against the law lords read into s.41(3)(c) of the Youth Justice and Criminal Evidence Act 1999 a requirement to allow admissibility of such evidence.

The so-called 'rape shield' law had prevented cross-examination of rape victims over their sexual history and in doing so had removed judicial discretion to allow such questioning where relevant. By invoking s.3 of the Human Rights Act 1998 (which requires a court to interpret legislative clauses so as to be, as far as possible, compatible with the Convention rights), the Law Lords interpreted the clause to allow such questioning where its omission would breach the defendant's right to a fair trial under Article 6(1) of the ECHR.

Section 3 of the Human Rights Act has previously been used by the Court of Appeal to read the 'two strikes and you're out' rule in the Crime (Sentences) Act 1997 in a way that was compatible with Convention rights.

Freedom of Information

FOI Act timetable

The Home Office proposed timetable for implementation of the FOI Act, starting with central government in summer 2002, had not been approved collectively by Ministers before the election was called. It will have to go back before the new Home Secretary. This will delay

advisory NDPBs on food safety, drugs, GM crops etc. was low.

Amsterdam Treaty

After years of negotiations the EU has agreed the new openness regime promised in the Amsterdam Treaty. The Access to Documents Regulation was

People on the Move

Sir Colin Campbell, Vice Chancellor of the University of Nottingham, has been appointed first Commissioner for Judicial Appointments. **Lord Justice Brooke**

system is postponed until after a review of the next PR elections in Scotland and Wales in 2003.

The final part of the briefing draws together the timelines for the individual reforms into a composite timetable, and sets out the main options for implementing Labour's constitutional reform commitments in their second term.

The briefing is now available (see publications list for details). Contact: *Robert Hazell*, 020 7679 4971, r.hazell@ucl.ac.uk.

Guide to Human Rights and Health

This guide examines the manner in which the new Human Rights Act 1998 may impact upon decisions concerning access to NHS treatment and services in England and Wales. It identifies areas of health care provision where Convention rights may be brought into play illustrated by real life examples and relevant case studies. The guide includes checklists through which health care professionals will be able to base treatment decisions with proper regard to human rights considerations and the new human rights legislation. It will provide a valuable introduction and tool for all health care professionals in making the Human Rights Act a positive influence in the provision of health care.

The briefing will be available in July (see publications list for details). Contact: *Jeremy Croft*, 020 7679 4979, jeremy.croft@ucl.ac.uk

Devolution and Health

As differences between the four UK health systems in health policy and health politics increase, the Devolution and Health project is starting new activities. The questions we are asking are: what do differences in health policies tell us about the politics of England, Northern Ireland, Scotland and Wales? How are politics changed by devolution? How do politicians and practitioners manage the transition to a devolved system, and what can we learn from the experience of devolved health policy so far?

The established monitoring teams in Northern Ireland, Scotland and Wales continue to produce their reports, and the annual report will be available online within weeks. This and news and documents links (updated weekly) can be found in the Devolution and Health section of the Constitution Unit website.

Meanwhile, a comprehensive survey of health policy makers and practitioners in the three devolved administrations is underway. In

addition, the project is starting a study of health care in the English regional agenda through interviews and a projected survey and background analyses of the politics of health care in the new UK state structure. The reports, web site, surveys and analyses should allow the project to produce solid analysis, contribute to debates, and be a resource to policy makers.

Monitoring reports are available online, see: <http://www.ucl.ac.uk/constitution-unit/d&h/>. Contact: *Scott Greer*, 020 7679 4922, s.greer@ucl.ac.uk.

Concordats and Intergovernmental Agreements

The Unit is publishing a comparative study of how concordats and similar intergovernmental agreements work. It is written by Johanne Poirier, a Canadian lawyer researching at the Free University of Brussels and the Law Faculty at the University of Cambridge. The paper looks at how intergovernmental agreements work and the functions they serve in a variety of devolved and federal systems, including Canada, Australia, Belgium and Spain. It then assesses the Memorandum of Understanding and various overarching and departmental concordats between the UK Government and the devolved administrations against these comparisons.

Even though the concordats are not intended to be legally binding, the report concludes that they act as 'soft law' and guide the conduct of officials and ministers. They therefore work in a similar way to agreements in other devolved or federal systems. The report commends the foresight of the UK Civil Service for establishing effective tools for ensuring collaboration between levels of government, but notes that they will not automatically prevent disputes arising. The concordats' true effect will only be seen when they are tested in a dispute.

The briefing will be available in late June (see

Executive; and in representing the different communities in Northern Ireland?

The authors give the Assembly a mixed scorecard. It is more proportional in party terms than Westminster, thanks to the STV voting system; but has an even lower proportion of women (13%). Its committees have focused on scrutiny, with none so far initiating legislation. The committees have found it hard effectively to challenge the Executive, because of its inclusive nature, with all four main parties represented on it. Positive innovations have been the Business Committee, chaired by the Presiding Officer; and the Civic Forum, which involves the social partners. By comparison with Scotland the Assembly has been conservative in finding new ways of reaching out to the wider community, and in developing an effective petitions procedure.

The briefing is now available (see publications list for details). Contact: *Robert Hazell, 020 7679 4971, r.hazell@ucl.ac.uk*.

The Future of the UK's Highest Courts

Richard Cornes (Essex) and Andrew LeSueur (Birmingham) started this project when both were at UCL, Richard in the Constitution Unit, Andrew in the Law Faculty. Their aim was to analyse the possible options for future reform of the two top courts in the UK, in the House of Lords and the Privy Council. With research grants from the ESRC and the British Academy, they have visited the top courts in Australia, Canada, the USA, Spain and Germany to learn the lessons from different models overseas.

They identify four main options for the future structure of the UK's top level courts: continuation of the status quo; a supreme court, amalgamating the current jurisdiction of the House of Lords and Privy Council; a constitutional court, specialising in devolution issues, human rights and judicial review appeals; and a 'court of justice' hearing

- *Building the [New Zealand] Constitution*, ed. by Colin James, Institute of Policy Studies, Wellington NZ, 2000. ISBN 0-908935-48-X
- *Law, Politics and Local Democracy*, by Ian Leigh, O.U.P, 2001. ISBN 0-19-825698-1.

Useful Websites

Bulletin Board

Forthcoming Unit Events

